INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE (REQUEST FOR AN ADVISORY OPINION)

WRITTEN COMMENTS OF AUSTRALIA

15 AUGUST 2024

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CHAPTER 1. INTRODUCTION AND PRELIMINARY OBSERVATIONS

1.1 Australia wishes to avail itself of the opportunity afforded by the International Court of Justice ('**ICJ**' or '**the Court**') to submit written comments on the written statements filed in the first round of these proceedings by States and international organisations. The following observations are submitted in accordance with the Orders of the Court of 20 April 2023, 4 August 2023, 15 December 2023 and 30 May 2024.

1.2 Australia welcomes the participation of an unprecedented number of States and relevant international organisations in this proceeding. The 91 statements submitted underline the global recognition of the challenge of climate change and the complexity of the legal issues involved.

1.3 As emphasised in its Written Statement of 22 March 2024 ('**Written Statement of Australia**'), Australia reiterates here its ongoing commitment to addressing the grave challenges resulting from the effects of anthropogenic emissions of greenhouse gases on the climate system (which hereafter, for convenience, is referred to as '**climate change**'). Australia acknowledges the importance of taking urgent action to address such effects.

1.4 Like many of the other participants in this proceeding, Australia considers the United Nations Framework Convention on Climate Change[1] ('**UNFCCC**') and the Paris Agreement[2] to be the primary source of obligations under international law concerning the protection of the climate system from anthropogenic emissions of greenhouse gases.[3] Collective action under these instruments has

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1 *United Nations Framework Convention on Climate Change*, opened for signature 20 June 1992, 1771 UNTS 107 (entered into force 21 March 1994) (UN Dossier No. 4) ('*UNFCCC*').

2 *Paris Agreement*, opened for signature 22 April 2016, 3156 UNTS (entered into force 4 November 2016) (UN Dossier No. 16) ('*Paris Agreement*').

3 See, eg, Written Statement of Canada, para. 11; Joint Written Statement of Denmark, Finland, Iceland, Norway and Sweden paras. 46, 48; Written Statement of the Republic of Korea para. 17; Written Statement of the United Kingdom of Great Britain and Northern Ireland paras. 4.3, 29; Written Statement of the United States of America paras. 1.3, 3.1; Written Statement of the European Union, para. 90.

resulted in a reduction over time of projected future levels of greenhouse gas emissions.[4] Australia remains resolutely committed to the UNFCCC and the Paris Agreement as the most effective framework to address the challenges posed by climate change. However, Australia also emphasises that there is a need for significant effort and ambition at both the individual and collective levels to ensure that the goals of the UNFCCC and Paris regime are met, particularly by those States whose emissions account for the majority of global emissions past, present and future, and by major emitters whose emissions have not yet peaked.[5]

1.5 Australia's further comments proceed as follows.

Addressing paragraph (a) of the question:

- **Chapter 2** addresses issues relating to the UNFCCC and Paris Agreement, (otherwise referred to as the '**specialised climate treaty regime**'), including differentiation, the status and scope of key provisions in, and effectiveness of, the Paris Agreement and the relationship between the UNFCCC and the Paris Agreement and other areas of law.

- **Chapter 3** addresses the application of customary international environmental law, particularly the principle of prevention (including the standard of due diligence) and the duty to cooperate.

- **Chapter 4** addresses the nature and scope of States' obligations under international human rights law in the context of climate change, including the jurisdictional reach of those obligations, and the right to a clean, healthy and sustainable environment.

- **Chapter 5** addresses obligations relevant to climate change under United Nations Convention on the Law of the Sea ('**UNCLOS**'),[6] with a particular

[4] UNFCCC, *NDC Synthesis Report*, UN Doc FCCC/PA/CMA/2023/12 (2023).

[5] Written Statement of Australia, para. 1.37.

[6] *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) (UN Dossier No. 45).

focus on matters arising from the recent advisory opinion handed down by the International Tribunal on the Law of the Sea ('**ITLOS**').

Addressing paragraph (b) of the question:

- **Chapter 6** addresses specific issues with respect to determining the legal consequences that flow from any failure by States to comply with their obligations with respect to climate change, including observations on the scope of the question, invocation of State responsibility and causation.

1.6 As in the Written Statement of Australia, having regard to the definition of 'climate system' in Article 1(3) of the UNFCCC, being 'the totality of the atmosphere, hydrosphere, biosphere and the geosphere and their interactions', Australia refers to 'climate system' in these submissions as encapsulating both the 'climate system' as well as 'other parts of the environment'.

CHAPTER 2. THE UNFCCC AND THE PARIS AGREEMENT

2.1 The written statements of a broad range of participants in these proceedings recognise the importance of the UNFCCC and the Paris Agreement to the questions upon which the Court has been asked to advise.[7] Australia considers that these treaties provide the central cooperative framework for the collective action that is needed to address both the causes and the impacts of climate change.

2.2 Australia recognises the importance of taking urgent action to address climate change and to achieve stabilisation of greenhouse gas concentrations in the atmosphere at a level that prevents dangerous anthropogenic interference with the climate system[8] and holds the increase in average global temperatures to well below 2 degrees celsius above pre-industrial levels. It likewise recognises the need to pursue efforts to limit the temperature increase to 1.5 degrees above pre-industrial levels, which would significantly reduce the risks and impacts of climate change.[9] Australia reiterates the position taken in its Written Statement, which is supported by many other States,[10] regarding the primary role of the UNFCCC and the Paris Agreement in responding to climate change.[11] These two treaties are the principal source of States' obligations under international law concerning the protection of the climate system from anthropogenic emissions of greenhouse gases.

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7 See, eg, Written Statement of Canada, para. 11; Joint Written Statement of Denmark, Finland, Iceland, Norway and Sweden paras. 46, 48; Written Statement of Germany para. 42; Written Statement of Japan para. 13; Written Statement of the Kingdom of Saudi Arabia para. 1.7; Written Statement of the State of Kuwait para. 7; Written Statement of New Zealand para. 15; Written Statement of the Republic of Korea para. 17; Written Statement of the Republic of Singapore para. 3.27; Written Statement of the United Arab Emirates para. 17; Written Statement of the United Kingdom of Great Britain and Northern Ireland paras. 4.3, 29; Written Statement of the United States of America paras. 1.3, 3.1; Written Statement of the European Union, para. 90.

8 The 'stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system' is the 'ultimate objective' of the UNFCCC: *UNFCCC* (n 2) Article 2.

9 *Paris Agreement* (n 2) Article 2(1)(a).

10 See references in footnote (n 3) above.

11 Written Statement of Australia, paras. 2.2, 2.61-2.62.

2.3 Australia recognises and shares the concern expressed in many statements regarding the continued growth in absolute emission levels notwithstanding the UNFCCC and the Paris Agreement.[12] However, Australia also emphasises that, as a result of collective climate action, particularly under the auspices of the Paris Agreement, there has been a sizeable reduction over time of projected future levels of greenhouse gas emissions. This reflects the significant impact of the mitigation actions of Parties under the UNFCCC and the Paris Agreement so far. Australia also recognises that greater collective action is needed to meet the ultimate objective of the UNFCCC and the temperature goal of the Paris Agreement, and notes accordingly that these instruments are designed to ensure progressively more ambitious action over time, informed by monitoring mechanisms that measure progress towards the collective goals (in particular the global stocktake, which is addressed in more detail in paragraphs 2.35-2.37 below). In these ways, Australia submits that the specialised climate change treaty regime is operating effectively to address the specific challenge of climate change.

2.4 The Paris Agreement emphasises the 'intrinsic relationship that climate change actions, responses and impacts have with equitable access to sustainable development and eradication of poverty'.[13] In this regard, Australia recognises that, in addition to the processes and mechanisms under the Paris Agreement to address the adverse impacts of climate change, international cooperation and instruments related to sustainable development and humanitarian action are also essential to building resilience to, and reducing risks of, climate change.

2.5 In this Chapter, and further to its Written Statement,[14] Australia addresses: differentiation (**Section A**); key provisions of the Paris Agreement (**Section B**); and the relationship between the UNFCCC and the Paris Agreement, and other areas of law (**Section C**).

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[12] Intergovernmental Panel on Climate Change (IPCC), *Synthesis Report of the IPCC Sixth Assessment Report (AR6), Longer Report* (2023) p. 42, para. 2.1 (UN Dossier No. 78).

[13] *Paris Agreement* (n 2) Preamble para. 8.

[14] Written Statement of Australia, Chapter II.

A. DIFFERENTIATION

2.8 The written statements reflect a range of views on how differentiation informs Parties' obligations concerning the protection of the climate system and on the status and scope of common but differentiated responsibilities and respective capabilities ('**CBDR-RC**').[15] In this section, Australia *first* addresses the evolving approach to differentiation in the specialised climate treaties, and *second* whether CBDR-RC is a principle or rule of customary international law.

1. Evolution of the concept of differentiation from the UNFCCC to the Paris Agreement

2.7 As noted in the Written Statement of Australia, the UNFCCC and the Paris Agreement reflect the understanding that different Parties may have different roles to play in responding to climate change, and further that Parties' expectations regarding the basis for any such differentiation have evolved over time.[16] This is reflected in the changing approach to differentiation and CBDR-RC, as negotiated by Parties to the specialised climate change treaties, and the abandonment of categorical Annexes.

2.8 The Rio Declaration on the Environment and Development, adopted in 1992, was the first international instrument to refer to common but differentiated responsibilities ('**CBDR**').[17] Since then, references to CBDR (in its different forms) in operative provisions have only been made in three treaties: the UNFCCC, the Kyoto Protocol[18] and the Paris Agreement, and its specific formulation has evolved. As such, CBDR should be understood as a concept

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[15] See, eg, Written Statement of the Federative Republic of Brazil, Part II; Written Statement of the Republic of India, Chapter V; Written Statement of the United States of America, paras. 3.23-3.30.

[16] Written Statement of Australia, paras. 2.14-2.15.

[17] *Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF.151/26/Rev.1 (Vol. I) (3-14 June 1992) p. 3, Principle 7 (UN Dossier No. 137).

[18] *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 2303 UNTS 162 (entered into force 16 February 2005) Article 3 (UN Dossier No. 11) ('*Kyoto Protocol*').

which has developed within the context of the specialised climate treaties and which applies in a specific way in these treaties.

2.9 Article 3(1) of the UNFCCC, which was also adopted in 1992, provides that Parties 'should protect the climate system for the benefit of present and future generations' in accordance with their 'common but differentiated responsibilities and *respective capabilities*'.[19] The reference to 'respective capabilities' in the UNFCCC introduces the capabilities of different States as relevant, recognising a spectrum of capacity among States to protect the climate system. Article 3(2) also recognises the 'specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change'. Article 4(1) of the UNFCCC sets out commitments applicable to all Parties 'taking into account their common but differentiated responsibilities and their *specific national and regional development priorities*'. The reference to development priorities here acknowledges that the applicable commitments should be implemented in a manner that supports, and does not undermine, development. This language is mirrored in Article 10 of the Kyoto Protocol, which sets out commitments for all Parties.

2.10 Article 2(2) of the Paris Agreement, adopted in 2015, provides that '[t]his Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, *in the light of different national circumstances*' ('**CBDR-RC-NC**').[20] The introduction of the phrase 'in the light of different national circumstances' to the formulation of CBDR-RC in the Paris Agreement reflects a further evolution of the concept and, as others have noted in their written statements, a more dynamic approach to differentiation.[21] In particular, the CBDR-RC-NC formulation in the Paris Agreement places emphasis on Parties' national circumstances, which will

[19] Emphasis added. The preamble to the UNFCCC also refers to CBDR-RC. See *UNFCCC* (n 2) Preamble para. 6.

[20] Emphasis added. See also *Paris Agreement* (n 2) Preamble para. 3, Article 4(3), Article 4(19).

[21] Written Statement of the Republic of Vanuatu, para. 415(b); Written Statement of United Kingdom of Great Britain and Northern Ireland para. 142.

change over time. It reflects the fact that there is a broad diversity in national circumstances which are determinative of a Party's capability and capacity, and therefore responsibility, to take climate action.

2.11 The evolving approach to differentiation in the specialised climate change treaty regime is also reflected in the move away from the UNFCCC's categorical Annexes.

2.12 Under the UNFCCC, certain categories of commitments apply to specific Parties, as specified in Annex I, which includes developed country Parties and other Parties, and Annex II, which is a subset of Annex I.[22] The UNFCCC Annexes make no reference to CBDR-RC and are not linked to this form of differentiation. Under the Kyoto Protocol, UNFCCC Annex I Parties had binding emission reduction or limitation targets as prescribed in Annex B to the Protocol.[23] The prescriptive nature of the relevant provisions of the Kyoto Protocol related to target-setting, accounting and compliance ultimately curtailed the number of Parties willing to adopt the Protocol. In recognition of the fact that too few Parties were willing to take on second commitment period targets under the Protocol, and that the Parties that were willing to do so were not responsible for a high enough proportion of global emissions to achieve the objective of the UNFCCC, Parties sought to identify approaches that would extend mitigation obligations more broadly, as was necessary to reduce global emissions. As evidenced by the Copenhagen Accord, the Cancun Agreements and the Durban Ad Hoc Working Group on Long-term Cooperative Action under the Convention, this included a shift from prescriptive target-setting provisions to self-determined commitments, accompanied by transparency in the implementation and impact of these commitments. However, these Agreements still included Annex-based differentiation with regard to target type, ambition and transparency standards.[24]

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22 See *UNFCCC* (n 2) Articles 4(2)-4(6), Articles 12(2)-12(3), Article 12(5).

23 *Kyoto Protocol* (n 18) Article 3.

24 See *Copenhagen Accord*, Draft decision -/CP.15, UN Doc FCCC/CP/2009/L.7 (18 December 2009) paras. 4-5; *The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*, Decision 1/CP.16, UN Doc FCCC/CP/2010/7/Add.1

2.13 Subsequently, the Paris Agreement abandoned categorical differentiation based on Annexes altogether. In their place, the Paris Agreement takes a more dynamic and nuanced approach to differentiation. A number of the provisions of the Paris Agreement apply to all Parties, with no differentiation.[25] Others reflect differentiation based on Parties' CBDR-RC in light of different national circumstances.[26] Certain provisions differentiate between Parties based on whether they are 'developed' or 'developing countries'[27] and other provisions recognise the special circumstances of least developed countries ('**LDCs**') and small island developing States ('**SIDS**').[28] However, these provisions do not refer to the UNFCCC Annexes or correspond to them, and they therefore should not be interpreted with reference to the UNFCCC Annexes. This range of approaches to differentiation is further evidence that CBDR-RC-NC is a different approach to bifurcated differentiation between developed and developing countries. The climate treaties do not draw a link between CBDR-RC and developing countries in a categorical sense. That is, while CBDR-RC operates to recognise that different countries have different responsibilities and capabilities, it does not apply this recognition uniformly to developing countries as a category, but rather operates to recognise a full spectrum of responsibilities and capabilities across countries.

(10 December 2010) paras. 36, 49 (UN Dossier No. 156); *Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*, Draft decision 2/CP.17, UN Doc FCCC/CP/2011/9/Add.1 (28 November 2011) para. 5, para. 32.

25 See, eg, *Paris Agreement* (n 2) Article 4(8), Article 4(9). Article 7(9).

26 See, eg, *Paris Agreement* (n 2) Article 4(3), Article 4(19).

27 See, eg, *Paris Agreement* (n 2) Article 4(4) and Article 9(7), which differentiate between Parties depending on whether they are 'developed' or 'developing' countries. However, the terms 'developed' and 'developing' are not defined in the Paris Agreement, nor are the countries falling into either of these categories specified. As such, Parties are left to determine whether they are a 'developed' or 'developing' country in accordance with the relevant principles of treaty interpretation.

28 See, eg, *Paris Agreement* (n 2) Article 4(6).

2.14 Two conclusions follow from the analysis set out above.

(a) *First*, the concepts of CBDR, CBDR-RC and CBDR-RC-NC have been developed within the context of the specialised climate change treaties, and they have no more general role.

(b) *Second*, those concepts in the specialised climate change treaties have significantly evolved over time, and now reflect a spectrum of differentiation based on a broad range of considerations including responsibility, capabilities and national circumstances. The formulation of CBDR-RC-NC in the Paris Agreement reflects Parties' current expectations and understanding of this concept, as it applies within the specialised climate change treaty regime.

2. CBDR-RC is not a principle or rule of customary international law

2.15 A few participants refer to CBDR-RC as a principle or rule of customary international law that exists outside of the specialised climate change treaties.[29] Others submit that the principle of CBDR-RC informs States' obligations under other areas of law or is relevant to the determination of legal consequences.[30]

2.16 Australia acknowledges that a number of international environmental law treaties differentiate between Parties in varying ways.[31] This differentiation operates in a manner specific to each treaty and does not reflect the specific concept of CBDR-RC as it now exists in the specialised climate change treaties (which, as noted above, is itself a concept that has evolved and changed significantly over time).

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[29] See, eg, Written Statement of the Federative Republic of Brazil, para. 27; Written Statement of Antigua and Barbuda, paras. 143-150; Written Statement of the Republic of Kenya, para. 5.25.

[30] See, eg, Written Statement of the People's Republic of Bangladesh, paras. 127-131; Written Statement of the Republic of Seychelles, para. 151; Written Statement of the Republic of Kenya, paras. 5.51-5.52.

[31] For example, Article 5(1) of *Montreal Protocol on Substances that Deplete the Ozone Layer*, opened for signature 16 September 1987, 1522 UNTS 3 (entered into force 1 January 1989) (UN Dossier No. 26) ('*Montreal Protocol*') allows for delayed compliance by certain developing country Parties.

2.17 These treaties do not support the conclusion that CBDR-RC is a principle or rule of customary international law. As the International Law Commission ('**ILC**') has recognised, 'in and of themselves, treaties cannot create a rule of customary international law or conclusively attest to its existence or content.'[32] The existence of a rule of customary international law requires general and 'settled practice' together with *opinio juris*.[33] The Court has held that a rule of customary international law does not exist where 'fluctuation and discrepancy' result in a situation where there is no 'constant and uniform usage, accepted as law'.[34] Further, the relevant practice must be general, meaning that it is sufficiently widespread and representative, and that it must be consistent.[35]

2.18 These requirements are not satisfied with respect to CBDR-RC. The specific concepts of differentiation have been developed and applied solely in the context of the specialised climate change treaties. Even in those treaties, the concept has significantly evolved over time to encompass different factors that have been given effect in different ways. Further, there is significant divergence in the views expressed by participants in these proceedings as to the status of those concepts. In light of all these factors, Australia submits that CBDR-RC is not a rule or principle of customary international law.

2.19 While the concepts of differentiation as expressed in the specialised climate change treaties are not reflective of customary international law, they are clearly relevant to the interpretation of the obligations of Parties to those treaties.

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[32] *ILC Draft Conclusions on Identification of Customary International Law*, Commentary to Conclusion 11, para. 2.

[33] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), I.C.J. Reports 1969*, p. 44, para. 77 ('*North Sea Continental Shelf*'). See also *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, pp. 122-123, para. 55; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, pp. 29-30, para. 27.

[34] See *Asylum (Colombia v Peru), Judgment, I.C.J. Reports 1950,* p. 277.

[35] *North Sea Continental Shelf* (n 33), p 43, para. 74; see also *ILC Draft Conclusions on Identification of Customary International Law*, Conclusion 8(1).

B. KEY PROVISIONS OF THE PARIS AGREEMENT

2.20 The written statements reflect the particular importance of the Paris Agreement, as the most recently-negotiated treaty which sets out Parties' obligations with respect to climate change. However, different views are expressed in the written statements regarding the scope and nature of key provisions of the Paris Agreement. In this section, Australia addresses two matters that are the subject of those divergent views: *first*, the temperature goal; and *second*, nationally determined contributions ('**NDC**s'), being the core mitigation obligation under the Paris Agreement. It then outlines the evolving adaptation and loss and damage mechanisms under the Paris Agreement and the role they play in addressing the adverse impacts of climate change.

1. The temperature goal

2.21 The Paris Agreement affirms the ultimate objective of the UNFCCC 'to achieve…stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system' and clarifies this objective by introducing a long-term temperature goal. In this regard, Article 2(1) of the Paris Agreement provides (in part):

> This Agreement…aims to strengthen the global response to the threat of climate change… including by:
>
> > (a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels. …

2.22 Article 2(1)(a) reflects the Parties' understanding, based on scientific consensus at the time, of the global temperature increases that would reduce the risk of anthropogenic interference with the climate system.[36] Article 2(1) also recognises that pursuing efforts to limit the temperature increase to 1.5 degrees would significantly reduce these risks. The first global stocktake under the Paris

[36] See IPCC, *Second Assessment Report* (1995); IPCC, *Third Assessment Report* (2001); IPCC, *AR4 Climate Change 2007: Synthesis Report* (2007).

Agreement confirms that there is consensus amongst the Parties to the Paris Agreement on the fact that the impacts of climate change will be much lower at a temperature increase of 1.5 degrees compared with 2 degrees.[37] This aligns with the most recent scientific consensus.[38]

2.23 The terms of Article 2(1), including its framing as a provision that 'aims to strengthen the global response to the threat of climate change', reflects its collective character. This is consistent with the fact that achievement of the long-term goals of the Paris Agreement, including the temperature goal, requires collective action. It is also consistent with the terms of Article 3 of the Paris Agreement, which provides that '*all Parties* are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 *with the view to* achieving the purpose of the Agreement as set out in Article 2'.[39] Thus, Parties actions are to be directed towards collectively achieving the ultimate objective of the UNFCCC and the goals of the Paris Agreement, including the temperature goal. The collective nature of the action required is further confirmed by the express terms of Article 14(1), which requires the Conference of the Parties ('**COP**') to 'periodically take stock of the implementation of this Agreement to assess the *collective progress* towards achieving the purpose of this Agreement and its long-term goals'.

2.24 A few written statements argue that the long-term temperature goal is a legally binding obligation on each Party to the Paris Agreement.[40] That submission finds no support in the terms of the Paris Agreement. In particular, Article 2(1) does not use language of the kind that would be necessary to create a legally binding obligation on each Party to achieve the temperature goal. Additionally,

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[37] *Outcome of the first global stocktake*, Decision -/CMA.5 (revised advance version), UN Doc FCCC/PA/CMA/2023/L.17 (13 December 2023) para. 4 ('*Outcome of the first global stocktake*').

[38] The IPCC has confirmed that: 'The avoided climate change impacts on sustainable development, eradication of poverty and reducing inequalities would be greater if global warming were limited to 1.5 degrees rather than 2 degrees, if mitigation and adaptation synergies are maximized while trade-offs are minimized'. See Intergovernmental Panel on Climate Change (IPCC), *Special Report: Global Warming of 1.5ºC, Summary for Policymakers* (2018) p. 18, para. D.2 (UN Dossier No. 72).

[39] *Paris Agreement* (n 2) Article 3 (emphasis added).

[40] See, eg, Written statement of Germany, para. 44; Written Statement of the Republic of the Marshall Islands, paras. 64-65. Written Statement of the Portuguese Republic, para. 53.

it would be difficult to measure compliance with that obligation, as it would involve an assessment of the conduct of individual Parties towards achievement of the *collective* temperature goal.[41]

2. Nationally Determined Contributions

2.25 One of the defining characteristics of the Paris Agreement is its dynamic 'bottom-up' approach, which combines NDCs with the imposition of mitigation and transparency obligations on all Parties. Significantly, the Paris Agreement requires Parties to make more ambitious mitigation commitments over time, informed by a five-yearly assessment of collective progress towards the goals of the Agreement.[42]

2.26 The core mitigation obligation is set out in Article 4(2) of the Paris Agreement, which provides:

> [e]ach Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.

2.27 As has been noted in various written statements, Parties have two obligations under Article 4(2), each of which is introduced by the use of the mandatory 'shall'.[43] The first is a procedural obligation to 'prepare, communicate and maintain successive [NDCs] that it intends to achieve'. The second is an obligation to pursue domestic mitigation measures with the aim of achieving the objectives of their NDCs. The terms of Article 4(2) plainly do not prescribe any particular domestic measures which are to be taken. However, the Court's jurisprudence is clear that '[a]n obligation to adopt regulatory or administrative measures…is an obligation of conduct', which requires the exercise of 'due

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41 As is acknowledged in the Written Statement of the Portuguese Republic, para. 53.

42 *Paris Agreement* (n 2) Article 4(3) and Article 4(9).

43 See, eg, Written Statement of the Republic of Singapore, para. 4.45; Written Statement of the Republic of Vanuatu, para. 409.

diligence…for the necessary measures'.[44] Australia therefore agrees with the views of a number of participants in these proceedings[45] that the effect of the phrases 'intends to achieve' and 'with the aim of achieving the objectives of such contributions' in Article 4(2) is to create an obligation of conduct – an obligation to pursue domestic mitigation measures necessary to achieve the Parties' NDCs – to which the standard of due diligence applies.

2.28 As explained by ITLOS, the standard of due diligence requires a Party 'to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain [the] result'.[46] It does not require a Party to achieve the result in every instance. In the context of Article 4(2) of the Paris Agreement, the mere publication of an NDC, without taking any steps towards the achievement of the NDC, would not discharge a Party's obligations. Rather, a Party must pursue with due diligence the achievement of its NDC. Provided that is done, the obligation is not breached if the Party, despite its best efforts, does not achieve the result. Further, ITLOS has also observed that due diligence is a 'variable concept' that 'may change over time' and 'in relation to the risks involved in the activity'.[47] In regards to Parties' NDCs under Article 4(2), this standard is informed by Parties' obligations and commitments under the Paris Agreement (including the temperature goal).

a. Highest possible ambition and CBDR-RC-NC

2.29 The Paris Agreement includes other obligations and commitments relating to NDCs, including that each successive NDC will represent a progression beyond the last, and that it will represent the Party's highest possible ambition,

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[44] See *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment*, I.C.J. Reports 2010, p. 77, para. 187 ('*Pulp Mills*').

[45] See, eg, Written Statement of the Republic of Vanuatu, para 409; Written Statement of the Republic of Korea, paras. 20, 22; Written Statement of the Kingdom of Tonga, paras. 147-148; Written Statement of the Independent State of Samoa, paras. 167-168.

[46] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion)* (International Tribunal for the Law of the Sea, Seabed Disputes Chamber, Case No 17, 1 February 2011) p. 41, para. 110.

[47] Ibid p. 43, para. 117.

reflecting CBDR-RC-NC.[48] This acknowledges that achievement of the goals of the Paris Agreement requires progressively more ambitious efforts by Parties over time. Under Article 4(4), more stringent obligations apply to developed countries specifically regarding the type of emissions targets to be included in an NDC. That is, while developed country Parties should continue to take the lead by undertaking economy-wide absolute emission reduction targets, developing country Parties should continue enhancing their mitigation efforts and are encouraged to move over time towards economy-wide emission reduction or limitation targets, in the light of different national circumstances. Development status in this context is informed by a particular Party's national circumstances, which may evolve over time.

b. The temperature goal and best available science

2.30 As noted above, by virtue of Article 3 of the Paris Agreement, the temperature goal informs the performance of Parties' obligations under the Paris Agreement, including their obligation in Article 4(2). Further, Article 4(1) provides that:

> In order to achieve the long-term temperature goal, set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognising that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of the century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.

2.31 Article 4(1) informs Parties' NDCs under Article 4(2). In particular, the reference to 'best available science' in Article 4(1) has the effect that 'best available science' must inform Parties' NDCs under Article 4(2) and that it also informs the exercise of due diligence. Australia considers that the assessments of the Intergovernmental Panel on Climate Change ('**IPCC**') are the most authoritative source of information on the science of climate change and that the most recent IPCC assessments reflect 'best available science'.

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[48] *Paris Agreement* (n 2) Article 4(3).

2.32 'Best available science' has an important role in informing Parties' NDCs and the exercise of due diligence. However, it is not the singular metric for the due diligence standard because that standard must also account for a range of factors that may inform the means that Parties are able to deploy in an effort to achieve their NDCs. This is consistent with the Paris Agreement, which refers to 'best available science' as one of a range of factors that informs action under Article 4(2).[49]

2.33 Under Article 4(8) of the Paris Agreement, in communicating their NDCs, Parties are also required to 'provide the information necessary for clarity, transparency and understanding', in accordance with the relevant decisions of the COP. In this regard, COP Decision 4/CMA.1 provides that this includes, among other things, the following information:

- how the Party considers its NDC is fair and ambitious in light of its national circumstances;[50]
- how the NDC contributes towards achieving the objective of the UNFCCC as set out in its Article 2;[51] and
- how the NDC contributes towards Article 2(1)(a) and Article 4(1) of the Paris Agreement.[52]

2.34 The enhanced transparency framework under Article 13 of the Paris Agreement provides a mechanism to track progress towards the achievement of Parties' individual NDCs under Article 4.[53] Under Article 13(7), Parties are required to provide regular national inventory reports on anthropogenic greenhouse gas

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[49] *Paris Agreement* (n 2) Article 4(1). Article 14(1) of the *Paris Agreement* also refers to the consideration of 'best available science' as part of the global stocktake. Article 7(5) of the *Paris Agreement* also refers to 'best available science' in relation to adaptation action.

[50] *Further guidance in relation to the mitigation section of decision 1/CP.21*, Decision 4/CMA.1, UN Doc FCCC/PA/CMA/2018/3/Add.1, 15 December 2018) Annex I, para. 6 ('*Further guidance in relation to the mitigation section of decision 1/CP.21*').

[51] *Further guidance in relation to the mitigation section of decision 1/CP.21* (n 50) 7(a).

[52] Ibid para. 7(b).

[53] *Paris Agreement* (n 2) Article 13(5).

emissions by sources and removals, and information necessary to track progress made in implementing and achieving their NDCs. This information is subject to technical expert review, which includes consideration of each Party's implementation and achievement of its NDC.[54] Additionally, the enhanced transparency framework under the Paris Agreement includes a facilitative multilateral consideration of progress with respect to a Party's implementation and achievement of its NDC.[55] The information provided under the enhanced transparency framework is also central to inform the global stocktake under Article 14,[56] which in turn must then inform NDCs.[57]

c. Outcomes of the global stocktake

2.35 The global stocktake is an important and effective mechanism under the Paris Agreement to measure progress towards the collective goals of the Agreement. The first global stocktake concluded:

- that significant collective progress has been made towards the Paris Agreement temperature goal;[58]
- that Parties are not yet collectively on track towards achieving the purpose of the Paris Agreement and its long-term goals;[59]
- that significantly greater emission reductions are required to align with global greenhouse gas emission trajectories in line with the temperature goal of the Paris Agreement;[60] and

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54 *Paris Agreement* (n 2) Article 13(11), Article 13(12).

55 United Nations Framework Convention on Climate Change, 'Facilitative Multilateral Consideration of Progress' (Web Page) <https://unfccc.int/facilitative-multilateral-consideration-of-progress>.

56 *Paris Agreement* (n 2) Article 13(6).

57 Ibid Article 4(9).

58 *Outcome of the first global stocktake* (n 37) para. 18.

59 Ibid para. 2.

60 Ibid para. 21.

- the need for deep, rapid and sustained reductions in greenhouse gas emissions in line with 1.5 degree pathways.[61]

2.36 Australia emphasises the importance of these conclusions to informing Parties' next NDCs under the Paris Agreement. The outcome of the first global stocktake reflects the need, in the upcoming 2025 NDC submission process, to rapidly raise ambition and accelerate action to place global greenhouse gas emissions on a trajectory in line with achieving the Paris Agreement's long-term goals.[62] Under the Paris Agreement, Parties have committed to submit ambitious NDCs and each successive NDC will be a progression in ambition on the last. It is only through ambitious action that the international community will be able, collectively, to ensure that global efforts to combat climate change succeed.

2.37 The outcomes of the first global stocktake demonstrate the rigour and strength of the implementation mechanisms of the Paris Agreement.[63] This mechanism creates a dynamic process for assessing the effectiveness of collective action over time, and for adjusting such action as necessary in order to protect the climate system from anthropogenic greenhouse gas emissions. This dynamic process is currently resulting in scaled-up action and ambition at both the individual and collective levels.[64] There is no comparable mechanism for assessing progress in addressing the adverse impacts of climate change, and for informing more ambitious action in response to those impacts, outside the specialised climate change treaty regime. That underlines the extent to which the UNFCCC and the Paris Agreement should be recognised as the primary source of legal obligations with respect to climate change.

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61 *Outcome of the first global stocktake* (n 37) para. 28.

62 Ibid paras. 37 and 39.

63 The implementation mechanisms in the *Paris Agreement* (n 2) are set out in detail in Chapter II of the Written Statement of Australia, in particular Section F.

64 See UNFCCC, *Technical dialogue of the first global stocktake: Synthesis report by the co-facilitators on the technical dialogue*, UN Doc FCCC/SB/2023/9 (2023); UNFCCC, *NDC Synthesis Report*, UN Doc FCCC/PA/CMA/2023/12 (2023); United Nations Environment Programme (UNEP), *Emissions Gap Report* (2023) (UN Dossier No. 80); Intergovernmental Panel on Climate Change (IPCC), *Synthesis Report of the IPCC Sixth Assessment Report (AR6), Longer Report* (2023) (UN Dossier No. 78).

3. Evolving adaptation and loss and damage mechanisms under the Paris Agreement

2.38 While enhanced mitigation action is vital to reducing the ongoing impacts of climate change, Australia recognises the serious impacts of the adverse effects of climate change, and related loss and damage, that are already being experienced across the world. As set out in many written statements, SIDS are particularly vulnerable to the adverse impacts of climate change and face, and will continue to face, some of its most severe impacts.[65] These include 'tropical cyclones, storm surges, droughts, changing precipitation patterns, sea level rise, coral bleaching and invasive species, all of which are already detectable across both natural and human systems'.[66]

2.39 The specialised climate change treaty regime has been designed to facilitate effective collective action to address these impacts, including through collaboration towards achieving the global goal on adaptation and to avert, minimise and address loss and damage. In particular, the provisions in the Paris Agreement concerning adaptation and loss and damage account for the special circumstances of SIDS and LDCs.[67] In respect of support for and international cooperation on adaptation, the Paris Agreement recognises 'the importance of taking into account the needs of ... those that are particularly vulnerable to the adverse effects of climate change'.[68] Additionally, Article 9(4) of the Paris Agreement recognises that the provision of scaled-up financial resources:

> …should aim to achieve a balance between adaptation and mitigation, taking into account country-driven strategies, and the priorities and needs of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change and have

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65 See, eg, Written Statement of the Republic of Vanuatu, paras. 89-91; Written Statement of the Federated States of Micronesia, Chapter III; Written Statement of the Kingdom of Tonga, paras. 53-56; Written Statement of the Solomon Islands, para. 16; Written Statement of the Republic of Seychelles, para. 22; Written Statement of the Democratic Republic of Timor-Leste, para. 12; Written Statement of the Republic of Kiribati, para. 28.

66 IPCC, 'Chapter 15: Small Islands' in *Climate Change 2022: Impacts, Adaptation and Vulnerability.* Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Full Report (2022), p. 2045 (UN Dossier No. 76).

67 See references in (n 28) above.

68 *Paris Agreement* (n 2) Article 7(6).

> significant capacity constraints, such as the least developed countries and small island developing States, considering the need for public and grant-based resources for adaptation.

2.40 Parties' ongoing efforts to enhance approaches to averting, minimising and addressing loss and damage under the Paris Agreement also account for those States which are particularly vulnerable to the adverse effects of climate change.

2.41 Like mitigation, the mechanisms and processes designed to accelerate progress on adaptation and avert, minimise and address loss and damage under the Paris Agreement are dynamic and able to evolve in response to the changing circumstances of Parties and the challenges they face, especially those particularly vulnerable to the adverse effects of climate change. This includes advancement on progress towards the global goal on adaptation and the development of new technical bodies and funding arrangements for loss and damage associated with the adverse effects of climate change.[69] We reiterate Australia's view that there is nothing comparable addressing these matters outside the specialised climate change treaty regime, which reinforces both the importance and the primacy of that regime.

C. RELATIONSHIP BETWEEN THE UNFCCC AND THE PARIS AGREEMENT AND OTHER AREAS OF LAW

2.42 A number of participants in these proceedings submit that the interpretation and application of obligations under the UNFCCC and the Paris Agreement should be informed by, and should themselves inform, obligations under other bodies of law, such as international human rights law.[70] Others argue that the general rules of international law in relation to the environment should be interpreted so as to give rise to a single set of compatible obligations.[71] These arguments are

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[69] See Written Statement of Australia, paras. 2.31, 2.42-2.46.

[70] See, eg, Written Statement of the Republic of Mauritius, paras. 162-165; Written Statement of Singapore, paras. 3.74, 3.87; Written Statement of the African Union, para. 195.

[71] See, eg, Written Statement of the Arab Republic of Egypt, para. 74, quoting International Law Commission, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, UN Doc A/61/10 (2006) para. 88 ('*ILC Conclusions on Fragmentation*').

often made with reference Article 31(3)(c) of the *Vienna Convention on the Law of Treaties* ('**VCLT**').[72] Australia makes three observations regarding Article 31(3)(c) of the VCLT.

2.43 *First,* Article 31(3)(c) of the VCLT is focused on the question of interpretation of a treaty (i.e. the process of determining the meaning of a treaty or treaty provision), rather than upon the application of a treaty (i.e. the 'consequences, which according to a rule, should follow a fact').[73] As the ILC has noted, in many cases the issue of interpretation will be capable of resolution within the framework of the treaty.[74] Article 31(3)(c) is designed to address situations where materials external to a treaty are relevant to its interpretation, rather than incorporating whole bodies of law from one treaty into another.[75]

2.44 *Second,* the term 'relevant' in Article 31(3)(c) of the VCLT refers to those rules of international law which regulate the same subject matter as the treaty provisions that are being interpreted.[76] Therefore, in considering the application of Article 31(3)(c), the Court should have regard to the subject matter and the nature of the relevant provisions of the two (or more) treaties. In this regard, the European Court of Human Rights ('**ECtHR**'), in the context of considering the extent to which the UNFCCC and other environmental treaties may inform the interpretation of the European Convention on Human Rights, recently correctly held that human rights instruments (which are not designed to provide general protection of the environment) are of a fundamentally different nature to

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[72] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

[73] See *Factory at Chorzów (Jurisdiction)* (1927) PCIJ Series A No 9, p. 39 (Dissenting Opinion of Judge Ehrlich). Australia notes that in practice it may be difficult to draw a distinction between interpretation and application. See also *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 59 (Separate Opinion of Judge Shahabuddeen).

[74] *ILC Conclusions on Fragmentation* (n 71) conclusion 18.

[75] *ILC Conclusions on Fragmentation* (n 71) conclusion 18; Oliver Corten and Pierre Klein, *Vienna Convention on the Law of Treaties: A Commentary* (Oxford University Press, 2011) vol 1, p. 825.

[76] Richard Gardiner, *Treaty Interpretation* (Oxford University Press 2nd edition, 2015) p. 299.

instruments related to climate change.[77] Following that reasoning, Article 31(3)(c) provides no support for interpreting the UNFCCC and the Paris Agreement by reference to international human rights treaties.

2.45 *Third,* Article 31(3)(c) of the VCLT is restricted to relevant rules of international law 'applicable in the relations between the Parties'. However, the Parties to the specialised climate change treaties and other treaties of potential relevance to the question before the Court (for example, UNCLOS, *International Covenant on Civil and Political Rights* ('**ICCPR**')[78] and the *International Covenant on Economic, Social and Cultural Rights* ('**ICESCR**')[79]) vary. Given the divergence of Parties to the UNFCCC and the Paris Agreement and these other treaties, and given the terms of the question before the Court, Australia submits that Article 31(3)(c) of the VCLT is of little assistance in opining on the obligations of all States in respect of climate change.

[77] *Duarte Agostinho and Others v Portugal and 32 Others* (European Court of Human Rights, Grand Chamber, Application no. 39371/20, 9 April 2024) para. 212 ('*Duarte Agostinho and Others v Portugal and 32 Others*'). See further paras. 4.14-4.16 below.

[78] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (UN Dossier No. 49).

[79] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (UN Dossier No. 52).

CHAPTER 3. CUSTOMARY INTERNATIONAL ENVIRONMENTAL LAW

3.1 A wide range of views have been expressed in written statements regarding the relevance of obligations under customary international environmental law in responding to climate change. Australia wishes to build upon the submissions in Chapter 4 of its Written Statement with respect to customary international environmental law by further addressing:

(a) the relevance of the principle of prevention to climate change (**Section A(1)**);

(b) the relationship between the due diligence standard of compliance and the specialised climate change treaties (**Section A(2)**); and

(c) the status and content of the duty to cooperate in the context of climate change (**Section B**).

A. PRINCIPLE OF PREVENTION

3.2 The vast majority of participants in this proceeding have submitted that:

(a) the principle of prevention is a rule of customary international environmental law which applies to significant transboundary environmental harm;[80] and

[80] See, eg, Written Statement of Australia, para. 4.8; Written Statement of the Republic of Vanuatu, para. 261; Written Statement of the Federated States of Micronesia, para. 53; Written Statement of the Independent State of Samoa, paras. 86-87, 98; Written Statement of the Republic of Palau, para. 14; Written Statement of the Republic of Kiribati, paras. 143-144; Written Statement of Solomon Islands, paras. 146, 148; Written Statement of the Cook Islands, para. 166; Written Statement of the Republic of the Marshall Islands, paras. 22-23; Written Statement of the United States of America, para. 4.5; Joint Written Statement of Denmark, Finland, Iceland, Norway and Sweden, para. 65; Written Statement of the Republic of Korea, para. 37; Written Statement of the Swiss Confederation, para. 14; Written Statement of the Kingdom of Spain, para. 8; Written Statement of Republic of Latvia para. 59; Written Statement of the Russian Federation, p. 8; Written Statement of the Republic of Albania, paras. 65-66; Written Statement of Belize, para. 31; Written Statement of the Federative Republic of Brazil, para. 70; Written Statement of the Republic of Chile, paras. 35-36; Written Statement of the Republic of Costa Rica, paras. 40, 43-45; Written Statement of Grenada, paras. 39-41; Written Statement of Saint Vincent and the Grenadines, para. 100; Written Statement of Saint Lucia, para. 66; Written Statement of Antigua and Barbuda, para. 126; Written Statement of Barbados, paras. 133-134; Written Statement of the Dominican Republic, para. 4.31; Written Statement of the Commonwealth of the Bahamas, para. 92; Written Statement of the Republic of

(b) climate change extends beyond national borders and its impacts are global in nature.[81]

3.3 Different views have been expressed as to how to those two propositions interact, specifically the applicability and content of the principle of prevention in the context of States' efforts to combat the adverse effects of climate change. In light of the submissions made on this matter in written statements, Australia addresses the following issues:

(a) the extent to which the customary international law principle of prevention applies to environmental harm caused by anthropogenic greenhouse gas emissions, including *when* it could be said that any such customary rule crystallised; and

(b) the content of the due diligence standard.

Mauritius, para. 193; Written Statement of the African Union, para. 56; Written Statement of the Republic of Seychelles, para. 105; Written Statement of the Republic of Sierra Leone, paras. 3.10-3.11; Written Statement of Republic of Kenya, para. 5.3; Written Statement of the Arab Republic of Egypt, para. 97; Written Statement of Ghana, para. 25; Written Statement of the Republic of Namibia, paras. 49-50; Written Statement of the People's Republic of Bangladesh, para. 88; Written Statement of the Republic of the Philippines, paras. 56-58; Written Statement of the People's Republic of China, para. 127; Written Statement of the Republic of India, para. 9; Written Statement of the Republic of Indonesia, para. 60; Written Statement of the Democratic Socialist Republic of Sri Lanka, paras. 95-96; Written Statement of the Islamic Republic of Pakistan, para. 29; Written Statement of the United Arab Emirates, paras. 90, 92; Written Statement of the Organization of African, Caribbean and Pacific States, para. 101; Written Statement of the International Union for the Conservation of Nature, para. 308. No statement to the Court has contested the customary international law status of this rule.

[81] See, eg, Written Statement of Australia, para. 2.1; Written Statement of the Republic of Vanuatu, para. 264; Written Statement of the Federated States of Micronesia, para. 62; Written Statement of the Independent State of Samoa, para. 105; Written Statement of the Republic of Palau, para. 16; Written Statement of the Kingdom of Tonga, para. 161; Written Statement of the Solomon Islands, para. 158; Written Statement of the United States of America, para. 4.18; Written Statement of the Swiss Confederation, para. 7; Written Statement of the Republic of Singapore, para. 3.15; Written Statement of the European Union, para. 48; Written Statement of the Kingdom of Spain, para. 4; Written Statement of the Russian Federation, p. 17; Written Statement of the Republic of Albania, para. 69; Written Statement of the Republic of Costa Rica, para. 99, quoting Intergovernmental Panel on Climate Change (IPCC), *Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers* (2023) p. 5, statement A.2; Written Statement of Grenada, para. 46; Written Statement of Saint Vincent and the Grenadines, para. 45(e); Written Statement of Barbados, paras. 10, 13; Written Statement of the Dominican Republic, para. 2.10; Written Statement of the Commonwealth of the Bahamas, para. 111; Written Statement of the African Union, para. 92(b); Written Statement of the Republic of Seychelles, para. 122; Written Statement of the Republic of Kenya, para. 5.6; Written Statement of the People's Republic of Bangladesh, para. 9; Written Statement of the People's Republic of China, para. 3; Written Statement of the Republic of India, para. 16; Written Statement of the Republic of Indonesia, para. 47; Written Statement of the International Union for the Conservation of Nature, para. 316.

3.4 As a preliminary matter, Australia notes that – as with any rule of customary international law – it is necessary to establish widespread and consistent State practice, and evidence of *opinio juris*, to confirm the existence and content of any customary law principle of prevention applicable to environmental harm caused by anthropogenic greenhouse gas emissions. This is necessary because, as identified in the Written Statement of Australia, climate change differs in important respects from the conventional case of transboundary harm in which the principle of prevention has been formulated and applied, including by this Court.[82] As the ECtHR has recently recognised, 'there are important differences between the legal questions raised by climate change and those addressed until now'.[83] One such example relating specifically to the principle of prevention, which ITLOS recently acknowledged as 'difficult',[84] concerns the issue of causation when applying the conventional transboundary harm rule to anthropogenic greenhouse gas emissions. As is discussed further in subsection 1 below, the principle of prevention cannot be directly or automatically transposed from the conventional transboundary harm context to that of the diffuse and incremental harm caused by anthropogenic greenhouse gas emissions.

3.5 Australia respectfully invites the Court to identify any relevant customary international law principles only after careful examination of the practice of States, including the practice of States constituted by the negotiation and agreement of the specialised climate change treaty regime, that being the earliest, clearest and most direct articulation of States' obligations concerning climate change.[85]

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[82] Written Statement of Australia, para. 4.10.

[83] *Schweiz and Others v Switzerland* (European Court of Human Rights, Grand Chamber, Application No 53600/20, 9 April 2024) para. 414.

[84] *Request for an Advisory Opinion Submitted by The Commission of Small Island States on Climate Change and International Law (Advisory Opinion)* (International Tribunal for the Law of the Sea, Case No. 31, 21 May 2024) para. 252 ('*ITLOS Advisory Opinion*').

[85] See also Written Statement of Canada, para. 32; Written Statement of Japan, paras. 11, 13.

1. Relevance of the principle of prevention to climate change

3.6 In its Written Statement, Australia submitted that specific rules have been agreed by States to address climate change through the UNFCCC and the Paris Agreement, which are tailored to address the unique nature of this global challenge.[86] Thus, the preamble to the UNFCCC recalls that:

> … States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, *and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction*.[87]

3.7 This preambular reference implies the States' acknowledgment of the relevance of the foundational 'no-harm' rule to climate change as part of the context in which States negotiated the UNFCCC. This is consistent with the widespread acknowledgment in written statements, as identified in paragraph 3.2(b) above, that environmental harm caused by climate change necessarily has global consequences.

3.8 When formulating the UNFCCC, negotiating States elected to address the challenge of climate change in a clear and specific way that involved collective action through a range of particular means. In doing so, they did not directly incorporate the specific aspects of the principle of prevention that the Court and other tribunals have found to apply in the context of conventional cases of transboundary harm. Indeed, that principle is noticeably absent from the UNFCCC and the Paris Agreement, notwithstanding its express incorporation into treaty frameworks addressing conventional forms of transboundary harm.[88]

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86 Written Statement of Australia, para. 4.11.

87 *UNFCCC* (n 2) Preamble para. 8 (emphasis added).

88 See, eg, *UNCLOS* (n 6) Article 194(2) (see further Chapter IV of these Written Comments); *Convention on Environmental Impact Assessment in a Transboundary Context*, opened for signature 25 February 1991, 1989 UNTS 309 (entered into force 10 September 1997) Article 2(1); *Convention on the Protection of the Mediterranean Sea against Pollution*, opened for signature 16 February 1976, 1102 UNTS 27 (entered into force 12 February 1978) Article 8; *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, opened for signature 17 March 1992, 1936 UNTS 269 (entered into force 6 October 1996) Article 3(1).

3.9 One example of the difference concerns environmental impact assessments ('**EIA**s'). While EIAs are an established procedural aspect of the principle of prevention,[89] and must be undertaken where a proposed activity 'may have a significant adverse impact in a transboundary context',[90] the UNFCCC and the Paris Agreement do not include any obligation to carry out EIAs with respect to greenhouse gas-emitting activities.[91] While Article 4(1)(f) of the UNFCCC references impact assessments as an example of an appropriate method that may be undertaken to minimise 'the adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by [Parties] to mitigate or adapt to climate change', it affords Parties discretion with respect to how to assess the impacts of such projects and measures. The UNFCCC and Paris Agreement do not make EIAs mandatory, as they are in the context of conventional transboundary harm.

3.10 Similarly, neither the UNFCCC nor the Paris Agreement mandate a consultation process with affected States for specific greenhouse gas-emitting activities, unlike the position when the principle of prevention applies with respect to conventional transboundary projects. Instead, as is appropriate in light of the global nature of the impacts of climate change, the specialised climate change treaty regime provides for different forms of cooperation, which are tailored to addressing the specific characteristics of climate change.[92]

3.11 Against this context, and again noting the divergent views expressed on the application of the principle of prevention to climate change in participants' written statements, it is important to emphasise that the Court has found that the principle of prevention applies as a rule of customary international environmental law to conventional cases of transboundary harm in only two

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89 As submitted in the Written Statement of Australia, para. 4.8.

90 *Pulp Mills* (n 44) pp. 82-83, para. 204; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2015 (I)* pp. 706-707, para. 104 ('*Certain Activities*').

91 Negotiating States in fact omitted proposals to require EIA in the UNFCCC: Daniel Bodansky, Jutta Brunée and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press, 2017) p. 131.

92 Written Statement of Australia, para. 4.11.

contexts: where it was reflected in specific treaty obligations between the disputing parties,[93] or where its application to the factual circumstances at issue in the proceedings was not contested by the parties involved.[94]

3.12 This Court should not treat climate change as if it involves an ordinary case of transboundary harm – especially in circumstances where States have agreed tailored treaty obligations that specifically account for its complex, global features in a way that does not incorporate the principle of prevention. As noted in the Written Statement of Australia, given the widespread adoption of the specialised climate change treaties by the vast majority of States in the international community, customary international law should not be held to have developed in a way that approaches the same problem by imposing obligations of a different kind.[95]

3.13 Accordingly, Australia submits that:

a) The 'no-harm' rule has informed internationally agreed standards for States' action on climate change, as is confirmed by the reference to it in the preamble of the UNFCCC.

b) However, the principle of prevention does *not* apply to anthropogenic greenhouse gas emissions. An approach that transposes that principle to climate change would, *firstly*, be inconsistent with the established approach to determining the existence and content of rules of customary international law, and *secondly*, fail properly to account for the unique features of this global environmental challenge, which have been addressed in the clear obligations agreed between States through the specialised climate change treaty regime.[96]

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93 See, eg, *Pulp Mills* (n 44) pp. 55-56, paras. 101-102; pp. 65-66, para. 139.

94 See, eg, *Certain Activities* (n 90) p. 705, para. 101.

95 Written Statement of Australia, para. 4.11.

96 See, eg, Written Statement of Australia, para. 4.11. See also elaboration of the obligations agreed through the specialised climate change treaties at Chapter II of the Written Statement of Australia and Chapter II of these Written Comments.

2. An obligation of due diligence informed by the UNFCCC and the Paris Agreement

3.14 Notwithstanding different views among written statements as to the relevance and application of the principle of prevention to climate change, there is widespread acceptance that, in circumstances where the principle does apply, due diligence is the applicable standard of compliance.[97]

3.15 If the principle of prevention is held to be applicable to anthropogenic greenhouse gas emissions, then Australia supports the position expressed in written statements to the effect that the UNFCCC and the Paris Agreement specify what due diligence requires for States that are party to those treaties.[98] That follows because the very purpose of those treaties is to embody the agreement of States on the measures necessary to address anthropogenic greenhouse gas emissions and their environmental impacts. In those circumstances, compliance with the measures that States have agreed are necessary, as set out in the detailed provisions of the UNFCCC and the Paris

[97] See Written Statement of New Zealand, para. 98; Written Statement of the United States of America, para. 4.5; Joint Written Statement of Finland, Iceland, Norway and Sweden, para. 65; Written Statement of the Republic of Korea, para. 34; Written Statement of the Swiss Confederation, para. 37; Written Statement of the Republic of Singapore, para 3.4; Written Statement of the European Union, paras. 297-298; Written Statement of the Federated States of Micronesia, para. 57; Written Statement of the Independent State of Samoa, para. 98; Written Statement of the Republic of Kiribati, para. 144; Written Statement of the Republic of Nauru, para. 28; Written Statement of Solomon Islands, para. 153; Written Statement of the Republic of the Marshall Islands, para. 23; Written Statement of the Democratic Republic of Timor-Leste, para. 197; Written Statement of the Parties to the Nauru Agreement Office, para. 37; Written Statement of the Republic of Albania, para. 70; Written Statement of Belize, para. 35; Written Statement of the Republic of Chile, para. 39; Written Statement of Grenada, para. 41; Written Statement of Saint Vincent and the Grenadines, para. 101; Written Statement of Saint Lucia, para. 66; Written Statement of Antigua and Barbuda, para. 134; Written Statement of the Commonwealth of the Bahamas, para. 94; Written Statement of the United Arab Emirates paras. 93-94; Written Statement of the People's Republic of Bangladesh, para. 90; Written Statement of the Kingdom of Thailand, para. 11; Written Statement of the People's Republic of China, para. 127; Written Statement of the Republic of India, para. 15; Written Statement of the Islamic Republic of Pakistan, para. 39; Written Statement of the Republic of Sierra Leone, para. 3.11; Written Statement of the Arab Republic of Egypt, para. 100; Written Statement of Ghana, para. 25; Written Statement of the International Union for Conservation of Nature, para. 305(c).

[98] See Written Statement of the United States of America, paras. 4.24-4.28; Written Statement of New Zealand, paras. 104-106; Joint Written Statement of Denmark, Finland, Iceland, Norway and Sweden, paras. 72-74; Written Statement of the Republic of Singapore, para. 3.20; Written Statement of the United Arab Emirates, para. 99.

Agreement, entails compliance with any applicable due diligence standard under any applicable obligations of customary international law.

B. DUTY TO COOPERATE

3.16 Numerous written statements affirm the application of the duty to cooperate to address climate change.[99]

3.17 That is consistent with the Written Statement of Australia,[100] which acknowledges that the general duty to cooperate in respect of the environment has been recognised as a 'fundamental principle' in international environmental law.[101] The duty to cooperate is also given specific expression and content through provisions of the UNFCCC and the Paris Agreement, which recognise that cooperation is key to meeting the challenge of climate change.[102] Taking account of the practice of States, including in cooperating both in respect of the conclusion of the specific climate change treaties and their ongoing cooperative mechanisms and institutional frameworks, Australia agrees with numerous other States that there is a core duty to cooperate under customary international environmental law that is applicable to States' actions to address climate change. That duty is one of conduct, compliance with which is assessed by reference to

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[99] See, eg, Written Statement of the Republic of Singapore, para. 3.26; Written Statement of the Democratic Republic of Timor-Leste, para. 179; Written Statement of the Federated States of Micronesia, paras. 65-66; Written Statement of the Solomon Islands, paras. 116-122; Written Statement of the Republic of the Marshall Islands, paras. 31-38; Written Statement of the Republic of Mauritius, paras. 206-207; Written Statement of the African Union, paras. 125-129; Written Statement of the Republic of Sierra Leone, paras. 3.26-3.28; Written Statement of the Republic of Kenya, paras. 5.17-5.18; Written Statement of the Republic of the Philippines, paras. 71-79; Written Statement of the Socialist Republic of Viet Nam, paras. 30-36; Written Statement of the Republic of Chile, para. 129; Written Statement of Grenada, paras. 43-46; Written Statement of Saint Lucia, paras. 75-77; Written Statement of Barbados, para. 208; Written Statement of the Commonwealth of the Bahamas, paras. 105-111; Written Statement of the Republic of Albania, paras. 83-92; Written Statement of the Republic of Korea, paras. 38-40; Written Statement of the Portuguese Republic, para. 128.

[100] See Written Statement of Australia, paras. 4.2-4.6.

[101] See, eg, *MOX Plant (Ireland v. United Kingdom) (Provisional Measures)* Order of 3 December 2001, International Tribunal for the Law of the Sea Reports 2001, p. 110, para. 82 ('*MOX Plant Case*'), quoted in *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore) (Provisional Measures)* Order of 8 October 2003, International Tribunal for the Law of the Sea Reports 2003, p. 25, para. 92.

[102] Written Statement of Australia, para. 4.6.

a context-specific due diligence standard. For Parties to the UNFCCC and the Paris Agreement, compliance with the specific obligations of cooperation that they contain, including through the development of new instruments and mechanisms for achieving the goals of those specific treaties, would satisfy the customary international law duty to cooperate.

CHAPTER 4. INTERNATIONAL HUMAN RIGHTS LAW

4.1 It is widely acknowledged across written statements that climate change impacts the enjoyment of a range of human rights.[103] It follows that, by ensuring the success of the specialised climate change treaty regime, States also advance the enjoyment of human rights by present and future generations. Although there is no express or direct obligation to 'ensure the protection of the climate system from anthropogenic emissions of greenhouse gases' in the ICCPR or the ICESCR, those treaties play an important complementary role to the UNFCCC and the Paris Agreement in respect of States' actions to address climate change and its impacts on human rights.

4.2 In this Chapter, Australia will address:

(a) the content and scope of obligations under international human rights law as they apply in the context of climate change, including the extent to which they may require the taking of positive measures to address climate change;

[103] See, eg, Written Statement of Australia, para. 3.56; Written Statement of the Republic of Vanuatu, para. 342; Written Statement of the Federated States of Micronesia, para. 80; Written Statement of the Independent State of Samoa, para. 185; Written Statement of the Democratic Republic of Timor-Leste, para. 298; Written Statement of New Zealand, para. 112; Written Statement of the United States of America, paras. 4.38-4.39; Joint Written Statement of Denmark, Finland, Iceland, Norway and Sweden, para. 78; Written Statement of the Republic of Korea, para. 29; Written Statement of the Swiss Confederation, para. 59; Written Statement of the Republic of Singapore, para. 3.76; Written Statement of the European Union, para. 231; Written Statement of the Republic of Portugal, paras. 73, 75; Written Statement of the African Union, para. 62; Written Statement of the Republic of Seychelles, para. 134; Written Statement of the Republic of Sierra Leone, para. 3.17; Written Statement of the Arab Republic of Egypt, para. 201; Written Statement of the Republic of Namibia, paras. 78-79; Written Statement of the Republic of Latvia, para. 67; Written Statement of the Republic of Albania, paras. 95-97; Written Statement of the Republic of Chile, para. 64; Written Statement of the Republic of Costa Rica, paras. 66-67; Written Statement of Antigua and Barbuda, para. 186; Written Statement of the Dominican Republic, paras. 4.43, 4.47; Written Statement of the Commonwealth of the Bahamas, para. 144; Written Statement of the Islamic Republic of Iran, para. 136; Written Statement of the People's Republic of Bangladesh, para. 85; Written Statement of the Commission of Small Island States on Climate Change and International Law, paras. 131-132; Written Statement of the Organization of African, Caribbean and Pacific States, para. 119; Written Statement of the International Union for the Conservation of Nature, para. 466.

(b) the jurisdictional scope of obligations under the ICCPR and the ICESCR;[104] and

(c) the right to a clean, healthy and sustainable environment.

A. ADDRESSING THE IMPACTS OF CLIMATE CHANGE ON THE ENJOYMENT OF HUMAN RIGHTS

4.3 Written statements have addressed the scope of international human rights law with respect to the adverse impacts of climate change, including whether it extends to obligations to mitigate or adapt to climate change, and the extent to which it is informed by obligations under international environmental law. In doing so, statements have drawn from the views of UN human rights treaty bodies, including the UN Human Rights Committee in *Billy et al v Australia*.[105]

4.4 This Court, the UN Human Rights Committee and the UN Committee on Economic, Social and Cultural Rights have all acknowledged the link between the environment and individuals' enjoyment of human rights.[106] Specifically, this Court has recognised that 'the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn'.[107] The clearest example of the link between the environment and human rights is where a State's acts or omissions

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[104] *ICESCR* (n 79).

[105] Human Rights Committee, *Views: Communication No 3624/2019*, 135th sess, UN Doc CCPR/C/135/D/3624/2019 (22 September 2022) ('*Billy et al v Australia*').

[106] See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, pp. 241-242, para. 29, quoted in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 41, para. 53; Human Rights Committee, *Views: Communication No 2751/2016*, 126th sess, UN Doc CCPR/C/126/D/2751/2016 (20 September 2019) ('*Cáceres v Paraguay*') para. 7.4; Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002) on The Right to Water (Articles II and 12 of the International Covenant on Economic, Social and Cultural Rights) (20 January 2003), 29th sess, UN Doc E/C. 12/2002/11 p. 2, para. 3 (UN Dossier No. 294); Human Rights Committee, *General Comment No. 36: Right to Life*, 124th sess, UN Doc CCPR/C/GC/36 (3 September 2019) p. 13, para. 62 (UN Dossier No. 299); Committee on Economic, Social and Cultural Rights, *Statement: Climate change and the International Covenant on Economic, Social and Cultural Rights*, 64th sess, UN Doc E/C.12/2018/1* (31 October 2018) para. 1 (UN Dossier No. 298).

[107] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* I.C.J Reports 1996, p. 241, para. 29, quoted in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment,* I.C.J. Reports 1997 pp. 241-242, para. 53.

in respect of environmental matters directly and specifically affect the enjoyment of human rights for individuals within its jurisdiction or under its control. For example:

(a) in *Cáceres et al v Paraguay*, the UN Human Rights Committee considered that Paraguay's inaction and lack of enforcement and oversight of its domestic laws regulating the large-scale use of toxic agrochemicals (which caused the pollution of well water in the Authors' homes and contamination of their food sources, and led to the Authors' hospitalisation due to poisoning), and its failure to investigate or explain the death of Mr. Portillo Cáceres linked to the fumigation, breached the Authors' rights under Articles 6 and 17 of the ICCPR.[108]

(b) in *Poma Poma v Peru*, the UN Human Rights Committee considered that Peru's water diversion operations caused environmental degradation affecting the Author's family's ability to raise llamas in accordance with traditional customs. No consultation was undertaken by Peru with the Author or her community in respect of its policy. Accordingly, the Committee found that Peru's actions violated the Author's rights under Article 27 of the ICCPR.[109]

(c) in *Haraldsson and Sveinsson v Iceland*, the UN Human Rights Committee found that differentiations in Iceland's fisheries regime on the basis of property rights breached the Authors' rights under Article 26 of the ICCPR.[110]

4.5 Different views have been expressed in written statements on the question of whether international human rights law requires positive measures to address climate change, including through States' mitigation or adaptation measures.

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[108] *Cáceres v Paraguay* (n 106) paras. 7.1-7.9.

[109] Human Rights Committee, *Views: Communication No 1457/2006*, 95th sess, UN Doc CCPR/C/95/D/1457/2006 (24 April 2009) ('*Poma v Peru'*) para. 7.7.

[110] Human Rights Committee, *Views: Communication No 1306/*2004, 91st sess, UN Doc CCPR/C/91/D/1306/2004 (24 October 2007) ('*Haraldsson and Sveinsson v Iceland*') paras. 10.3-10.4, 11.

4.6 Australia's view is that rights under the ICCPR and the ICESCR do not extend to obligations to mitigate climate change. Mitigation measures can be distinguished from the kind of environmental action that might ordinarily be required in order to comply with international human rights law (such as action of the kind summarised at paragraph 4.4 above) because no meaningful causal relationship can be established between a State's failure to take any particular mitigation measures and the specific impacts of climate change on the human rights of individuals within the State's territory or jurisdiction.[111] That human rights obligations do *not* extend to mitigation measures is consistent with the views of the UN Human Rights Committee, who in *Billy et al v Australia* did not make any findings in respect of the need for mitigation measures under Articles 2, 6, 17, 24 and 27 of the ICCPR, despite submissions by the Authors' representatives that the Committee should find that those rights require mitigation action.[112] In Australia's view, this outcome is consistent with the view that mitigation action is most appropriately regulated through the UNFCCC and the Paris Agreement, which specifically provide for the collective action necessary to mitigate climate change.

4.7 Conversely, adaptation measures undertaken (or not undertaken) by States to address the *impacts* of climate change can have a direct and specific impact on the enjoyment of human rights for individuals within a State's jurisdiction or control (such as, for example, the construction of sea walls to protect homes and cultural life). For that reason, Australia submits that adaptation measures of this kind may be within the scope of international human rights law. This is

[111] See also Written Statement of New Zealand, paras. 115, 116(b)(ii); Written Statement of the United Kingdom of Great Britain and Northern Ireland, para. 126; Written Statement of Germany, paras. 97-99; Joint Written Statement of Denmark, Finland, Iceland, Norway and Sweden, paras. 84-86.

[112] Riccardo Luporini, 'Climate Change Litigation before International Human Rights Bodies: Insights from *Daniel Billy et al v Australia* (Torres Strait Islanders Case)' (2023) 3 *The Italian Review of International and Comparative Law*, pp. 242, 251; Australian Government Attorney-General's Department, *Australian Government response to Billy et al* (30 March 2023) para. 16 ('*Australian Government response to Billy et al*'). See also Written Statement of New Zealand, para. 117; Written Statement of the United Kingdom of Great Britain and Northern Ireland, para. 127. In respect of the characterisation of the findings of the Committee in *Billy et al v Australia* (n 105) in the Declaration of Judge Pawlak in the *ITLOS Advisory Opinion* (n 84) para. 3, Australia respectfully submits that this was not the position adopted by the Committee in its Views, but rather reflects the individual opinion of only one Committee Member (Mr Duncan Laki Muhumuza).

consistent with the views of the UN Human Rights Committee in *Billy et al v Australia*, in respect of Articles 17 and 27 of the ICCPR.

4.8 The extent to which adaptation measures are required under international human rights law ultimately depends on the specific requirements of the right in question and the effects of climate change for a particular individual.[113] There is therefore a need for careful consideration of the content and scope of the obligation that is applicable to the situation in issue.[114] Some rights commonly cited as relevant to the impacts of climate change are rights generally considered to be negative obligations of non-interference (for example, Articles 6 (right to life) and 17 (right to privacy) of the ICCPR), but which may, in certain circumstances, also require the taking of positive measures (for example, the protection of those rights by law). Given the generally negative nature of these obligations, the conclusion that positive measures may be required to protect individuals from the impacts of climate change should be reached only in exceptional circumstances. Australia submits that the following features are relevant when ascertaining the threshold for enlivening any obligations under international human rights law to take positive measures in the context of climate change.

4.9 *First*, in determining whether a State has complied with any obligations to take positive measures to protect rights, it is essential to take account of that State's good faith efforts to address a range of adverse human rights impacts through reasonable and appropriate measures, and to afford States discretion in addressing and balancing those impacts. For example, in respect of the right to life, States need to grapple not only with threats posed by climate change, but also, *inter alia*, pandemics, other diseases, poverty, terrorism, natural disasters, workplace hazards and violent crime, including domestic and family violence.

4.10 *Second*, any threshold concerning the severity of the effect on rights that is necessary to enliven international human rights law must be appropriately high,

[113] See Written Statement of Australia, para. 3.61.

[114] Ibid.

in order to reflect the gravity of the potential impact on the right in question that is necessary before an obligation to undertake particular positive measures will arise. An example in respect of Article 17 of the ICCPR is where environmental degradation will have 'direct repercussions' on the right to one's home, or where 'adverse consequences of those impacts are serious because of their intensity or duration and the physical or mental harm they cause', warranting the adoption of positive measures through adaptation action.[115] Another example is 'extreme risk[s]' threatening conditions of life in respect of Article 6 of the ICCPR.[116] Consistently with this submission, in *Billy et al v Australia*, the Committee considered that there was not sufficient 'physical endangerment or extreme precarity' to the Authors' lives to find a breach of the right to life under Article 6 of the ICCPR.[117]

4.11 *Third,* the relevant threshold for any duty to take positive measures must be directed at imminent risks to the enjoyment of human rights, so as to account for the choice that States may reasonably exercise as to the timing of steps to respond to a risk in the period before that risk materialises. For example, the UN Human Rights Committee recognised in *Billy et al v Australia* and *Teitiota v New Zealand* that a timeframe of 10-15 years before projected climate change risks would materialise 'could allow for intervening acts' by the State to take 'affirmative measures' to protect human rights.[118]

4.12 Other human rights that are commonly referred to in the context of climate change include various economic, social and cultural rights under the ICESCR. Those rights are progressively realisable, meaning that States are required to take steps, subject to available resources, towards the full realisation of such rights, acknowledging that such full realisation will generally not be achieved

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[115] See *Australian Government response to Billy et al* (n 112) para. 55, citing *Billy et al v Australia* (n 105) para. 8.12.

[116] See *Australian Government response to Billy et al* (n 112) para. 47, citing *Billy et al v Australia* (n 105) para. 8.7.

[117] See *Billy et al v Australia* (n 105) para. 8.6.

[118] Ibid para. 8.7. See also similar comments in Human Rights Committee, *Views: Communication No 2728/2016*, 127th sess, UN Doc CCPR/C/127/D/2728/2016 (23 September 2020) para. 9.12 ('*Teitiota v New Zealand*').

in a short period of time. States also have a reasonable margin of discretion in choosing methods to implement those rights.

4.13 In light of the complementary role and scope of international human rights law in respect of climate change measures as outlined above, it remains Australia's view that the ambitious national and collective action necessary to ensure the protection of the climate system from anthropogenic emissions of greenhouse gases, in particular through States' mitigation action, is properly, and more appropriately, a matter for the UNFCCC and the Paris Agreement.

B. JURISDICTIONAL SCOPE OF HUMAN RIGHTS OBLIGATIONS

4.14 Any individual State's contribution to the atmospheric concentrations of greenhouse gases that cause climate change, like the impact of any mitigation measures that an individual State may take, have effects that do not align with national boundaries. That disconformity has particular legal significance in the context of international human rights law, because States have obligations under international human rights law only with respect to individuals who are within their territory or otherwise under their jurisdiction (meaning that they are under its 'effective control').[119] For that reason, while anthropogenic greenhouse gas emissions that originate from within one State's territory may affect the interests of individuals within the territory or jurisdiction of other States, it does not follow that those emissions enliven obligations under international human rights law to people who are *not* within the jurisdiction or territory of the emitting State. That conclusion is supported by a number of other participants in their written statements.[120]

4.15 The correctness of the above submission was recently confirmed by the ECtHR in *Duarte Agostinho and Others v. Portugal and Others*, in respect of Article 1 of the European Convention on Human Rights. The ECtHR reiterated that the

[119] See Written Statement of Australia, para. 3.64.

[120] See, eg, Written Statement of New Zealand, para. 116(a); Written Statement of Germany, paras. 91-93; Joint Written Statement of Finland, Norway and Sweden, para. 86; Written Statement of Canada, para. 28.

scope of 'persons' within the 'jurisdiction' of Contracting Parties to that Convention is 'primarily territorial',[121] except where a State exerts effective control over territory or persons.[122] The unique features of climate change did not give rise to a novel ground for extraterritorial jurisdiction under that Convention.[123] The ECtHR specifically disagreed with the approaches of the Committee on the Rights of the Child and the Inter-American Court of Human Rights with respect to extraterritorial application of human rights obligations.[124] As it explained:

> … extending the Contracting Parties' extraterritorial jurisdiction on the basis of the proposed criterion of "control over the applicants' Convention interests" in the field of climate change … would lead to an untenable level of uncertainty for States … [and] would entail an unlimited expansion of States' extraterritorial jurisdiction under the Convention and responsibilities under the Convention towards people practically anywhere in the world. This would turn the Convention into a global climate-change treaty. An extension of its scope in the manner requested … finds no support in the Convention.[125]

4.16 The same reasoning is equally applicable to the jurisdictional reach of States' human rights obligations under the ICCPR and the ICESCR (as well as other international human rights treaties). The fact that climate change presents a challenge that transcends national boundaries does not mean that the territorial and jurisdictional limits of a State's human rights obligations can be ignored.

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[121] *Duarte Agostinho and Others v Portugal and 32 Others* (n 77) para. 168, quoting *M.N. and Others v Belgium* (European Court of Human Rights, Grand Chamber, Application No 3599/18, 5 May 2020), para. 98 ('*M.N. and Others v Belgium*').

[122] *Duarte Agostinho and Others v Portugal and 32 Others* (n 77) para. 168, quoting *M.N. and Others v Belgium* (n 121) paras. 101-104.

[123] *Duarte Agostinho and Others v Portugal and 32 Others* (n 77) para. 195.

[124] *Duarte Agostinho and Others v Portugal and 32 Others* (n 77) paras. 210-212. Cf *Sacchi and Others v Argentina*, UN Doc CRC/C/88/D/104/2019 (22 September 2021) paras. 10.4-10.7; *State Obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity: Interpretation and scope of Articles 4(1) and 5(1) in relation to Articles 1(1) and 2 (Advisory Opinion)* (Inter-American Court of Human Rights, OC-23/17 15 November 2017) paras. 2-6.

[125] *Duarte Agostinho and Others v Portugal and 32 Others* (n 77), para. 208.

C. THE RIGHT TO A CLEAN, HEALTHY AND SUSTAINABLE ENVIRONMENT

4.17 Australia acknowledges the wide range of views put forward by participants on the status and content of a right to a clean, healthy and sustainable environment. It recalls Resolution 76/300 of UN General Assembly ('**UNGA**'), which recognises the 'right to a clean, healthy and sustainable environment as a human right',[126] noting it is 'related to other rights and existing international law'.[127] It also provides that the promotion of a clean, healthy and sustainable environment requires the 'full implementation of the multilateral environmental agreements under the principles of international environmental law'.[128]

4.18 Australia recognises the importance of a clean, healthy and sustainable environment and the many developments occurring internationally in relation to the emergence of a standalone right to a clean, healthy and sustainable environment, including and since UNGA Resolution 76/300. However, consistently with a number of other participants,[129] Australia does not consider that such a right has crystallised as a matter of customary international law at this time. In this regard, Australia supports the following statement by the Kingdom of Tonga, submitted in its written statement in these proceedings, regarding the status of the right and the impact and significance of UNGA Resolution 76/300:

> The normative character and the precise content of the right to a clean, healthy and sustainable environment is not settled, however, the resolution serves to strengthen the connectedness of human rights and the Climate Change Treaties, without the creation of a new right or obligation.[130]

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[126] *The human right to a clean, healthy and sustainable environment*, GA Res 76/300, UN Doc A/76/PV.97 (28 July 2022) para. 1 (UN Dossier No. 260).

[127] Ibid para. 2.

[128] Ibid para. 3.

[129] See Written Statement of the European Union, para. 262; Written Statement of New Zealand, para. 114; Written Statement of the United States of America, para. 4.39; Written Statement of Germany, para. 104.

[130] Written statement of the Kingdom of Tonga, para. 244.

CHAPTER 5. UN CONVENTION ON THE LAW OF THE SEA

5.1 Like many other first round written statements,[131] the Written Statement of Australia recognised the relevance of obligations arising under UNCLOS for the protection of the climate system from anthropogenic emissions of greenhouse gases. In particular, Australia submitted that Part XII of UNCLOS applies to pollution of the marine environment by anthropogenic greenhouse gas emissions, with the consequence that such emissions may enliven a number of obligations under that Part including obligations to:

(a) protect and preserve the marine environment (Article 192);[132]

(b) take measures to prevent, reduce and control pollution of the marine environment (Article 194(1));[133]

(c) adopt laws and regulations at the national level to prevent, reduce and control pollution from land-based sources (Article 207(1)) and pollution

[131] See, eg, Written Statement of the Republic of Vanuatu, paras. 442-467; Written Statement of the Federated States of Micronesia, paras. 93-113; Written Statement of the Kingdom of Tonga, paras. 216-225; Written Statement of Solomon Islands, para. 205; Written Statement of the Cook Islands, paras. 150-165; Written Statement of the Republic of the Marshall Islands, paras. 45-46; Written Statement of the Democratic Republic of Timor-Leste, para. 213; Written Statement of New Zealand, para. 90; Written Statement of the United Kingdom of Great Britain and Northern Ireland, paras. 108, 110-120; Written Statement of Canada, para. 19; Written Statement of the Republic of Korea, paras. 26-27; Written Statement of the Kingdom of the Netherlands, para. 3.21; Written Statement of the Republic of Singapore, paras. 3.44-3.72; Written Statement of the European Union, paras. 93, 286-296; Written Statement of the Portuguese Republic, paras. 57-58, 60-68; Written Statement of the Republic of Latvia, paras. 40-50; Written Statement of the Republic of Chile, paras. 33, 40-50; Written Statement of the Republic of Costa Rica, paras. 68-69; Written Statement of Grenada, para. 21; Written Statement of Saint Lucia, paras. 39(iv), 69-74; Written Statement of Antigua and Barbuda, paras. 198-208; Written Statement of the Commonwealth of the Bahamas, paras. 112-140; Written Statement of the People's Republic of Bangladesh, paras. 96-99; Written Statement of the Socialist Republic of Viet Nam, para. 15; Written Statement of the Republic of Mauritius, paras. 144-154; Written Statement of the Republic of Sierra Leone, paras. 3.119-3.132; Written Statement of the Republic of Kenya, paras. 5.42-5.50; Written Statement of the Arab Republic of Egypt, paras. 272-282; Written Statement of the Republic of Cameroon, para. 12; Written Statement of the African Union, paras. 167-172; Written Statement of the Parties to the Nauru Agreement Office, paras. 26-31; Written Statement of the Organisation of African, Caribbean and Pacific States, paras. 105-108; Written Statement of the Commission of Small Island States on Climate Change and International Law, paras. 97-105; Written Statement of the International Union for Conservation of Nature, paras. 157-194.

[132] Written Statement of Australia, paras. 3.7-3.9.

[133] Ibid paras. 3.13-3.19.

from or through the atmosphere (Article 212(1));[134]

(d) endeavour to formulate and elaborate global and regional rules and standards to prevent, reduce and control pollution of the marine environment from land-based sources (Article 207(4)) and from or through the atmosphere (Article 212(3));[135]

(e) enforce laws and regulations adopted in accordance with Articles 207(1) and 212(1) (Articles 213 and 222);[136] and

(f) cooperate through meaningful and substantial efforts with a view to adopting effective measures in pursuit of the goal of protecting and preserving the marine environment (Article 197).[137]

5.2 Australia submitted that, consistent with the international community's adoption of the UNFCCC and the Paris Agreement as the primary means to give effect to the shared objective of protecting the environment from the adverse effects of climate change, Part XII of UNCLOS should not be interpreted as imposing obligations with respect to anthropogenic greenhouse gas emissions that are inconsistent with, or go beyond, those agreed by the international community in the specific context of those treaties.[138] This is also consistent with the nature of UNCLOS as a framework agreement.[139]

5.3 On 21 May 2024, ITLOS delivered its Advisory Opinion on the *Request submitted to the Tribunal by the Commission of Small Island States on Climate Change and International Law* ('**ITLOS Advisory Opinion**'). Australia was proud to participate in the proceedings that led to that Advisory Opinion, which aimed to clarify the obligations of State Parties to UNCLOS to protect and preserve the marine environment from the impacts of climate change,

[134] Written Statement of Australia, para. 3.22.

[135] Ibid para. 3.23.

[136] Ibid para. 3.25.

[137] Ibid paras. 3.27-3.29.

[138] Ibid para. 3.5.

[139] Ibid para. 3.6.

recognising the important leadership role of SIDS, including Pacific Island States, in shaping global responses to climate change.

5.4 In this Chapter, Australia addresses the observations made in the ITLOS Advisory Opinion concerning the role and content of Part XII of UNCLOS in its application to anthropogenic greenhouse gas emissions.[140]

A. THE ITLOS ADVISORY OPINION

5.5 Australia welcomes the following observations in the ITLOS Advisory Opinion, in relation to which Australia agrees with the reasoning and conclusions reached:

(a) anthropogenic greenhouse gas emissions constitute 'pollution of the marine environment' within the meaning of Article 1(1)(4) of UNCLOS;[141]

(b) the UNFCCC is at the 'core' of international agreements that have been negotiated and adopted to address the issue of climate change;[142]

(c) as the 'primary legal instruments addressing the global problem of climate change',[143] the UNFCCC and the Paris Agreement are relevant to the interpretation and application of Part XII of UNCLOS with respect to pollution of the marine environment from anthropogenic greenhouse gas emissions;[144]

(d) Article 192 of UNCLOS, which obliges State Parties to protect and preserve the marine environment, applies to the adverse impacts of

[140] In this Chapter, Australia has not addressed every single point made by ITLOS in the Advisory Opinion. Australia reserves its rights in respect of all points not addressed below.

[141] *ITLOS Advisory Opinion* (n 84) p. 66, para. 179.

[142] Ibid p. 35, para. 67.

[143] Ibid p. 80, para. 222.

[144] Ibid.

climate change, and the UNFCCC and the Paris Agreement are relevant to the measures that may be implemented pursuant to this obligation;[145]

(e) Article 194(1) of UNCLOS obliges State Parties to take all necessary measures with a view to reducing and controlling marine pollution from anthropogenic greenhouse gas emissions until that pollution is prevented.[146] '[R]eflecting the reality that prevention of pollution from all sources at all times is, in practice, not possible', Article 194(1) 'does not entail the immediate cessation of marine pollution from anthropogenic greenhouse gas emissions'; [147]

(f) Article 194(1) is a due diligence obligation of conduct requiring 'best efforts',[148] the content of which is variable and context-specific, and may evolve over time.[149] ITLOS' description of the standard imposed by Article 194(1) as 'stringent' should be understood in this context;[150]

(g) while it remains for State Parties to determine the particular measures that are to be taken under Article 194(1) to prevent, reduce and control marine pollution, those measures must be determined 'objectively'.[151] Specifically, ITLOS observed that 'there are various factors States [Parties] should consider in their objective assessment of necessary measures to prevent, reduce and control marine pollution from anthropogenic [greenhouse gas] emissions'.[152] Those factors include science, international rules and standards, and the available means and the capabilities of the State Party concerned.[153] These factors should be

[145] *ITLOS Advisory Opinion* (n 84) p.129, para. 388.

[146] Ibid p. 71, para. 197.

[147] Ibid p. 72, paras. 198-199.

[148] Ibid p. 84, paras. 233-234.

[149] Ibid p. 86, para. 239.

[150] Ibid pp. 86-87, para. 241.

[151] Ibid pp. 74-75, para. 206.

[152] Ibid pp. 75, 77, paras. 207, 212.

[153] Ibid p. 75, para. 207.

considered and weighed together, with no one factor being determinative;[154]

(h) the relevant international rules and standards for measures taken under Article 194(1) are climate-related treaties and instruments, and the UNFCCC and the Paris Agreement 'stand out in this regard';[155]

(i) Articles 207(1) and 212(1) oblige States Parties to adopt laws and regulations with respect to anthropogenic greenhouse gas emissions taking into account internationally agreed rules, standards and recommended practices and procedures contained, *inter alia*, in the UNFCCC and the Paris Agreement;[156]

(j) Articles 207(4) and 212(3) oblige State Parties, acting especially through competent international organisations or diplomatic conferences, to endeavour to establish global and regional rules and standards with respect to marine pollution from anthropogenic greenhouse gas emissions, for which the UNFCCC and the Paris Agreement are the 'relevant international agreements' for those States party to them;[157]

(k) the duty to cooperate is a 'fundamental principle' for the prevention of pollution to the marine environment,[158] and is an 'integral part' of State Parties' obligations under Articles 192 and 194 of UNCLOS, 'given that the global effects of [GHG] emissions necessarily require States' collective action';[159]

(l) the duty to cooperate is given 'concrete form' through specific obligations of State Parties,[160] including in the UNFCCC and the Paris

[154] *ITLOS Advisory Opinion* (n 84) p. 77, para. 212.

[155] Ibid pp. 77-78, para. 214.

[156] Ibid pp. 96-97, 99, paras. 270, 277.

[157] Ibid pp. 97, 99, paras. 273, 277.

[158] Ibid p. 105 para. 296, quoting *MOX Plant Case* (n 101), p. 95, para. 82.

[159] Ibid p. 106, para. 299.

[160] Ibid p. 105, para. 297.

Agreement,[161] and the 'core obligation of cooperation' in Article 197 of UNCLOS;[162] and

(m) the obligation under Article 197 aims at the 'formulation and elaboration of rules, standards and practices' to protect and preserve the marine environment, and is 'characterised by a large degree of flexibility',[163] obliging State Parties to 'participate meaningfully' in doing so.[164]

5.6 Australia welcomes the clarity provided by ITLOS with respect to the matters listed above, and the guidance they provide to State Parties to UNCLOS on the important measures they must take to address the adverse effects of climate change. Australia further agrees with the observation of ITLOS that the specialised climate change treaties, principally the UNFCCC and the Paris Agreement, are the 'primary legal instruments addressing the global problem of climate change', and refers the Court to its position on the interaction between the UNFCCC, the Paris Agreement and other treaties (including UNCLOS).[165] On matters other than those listed above, Australia reserves its position.

[161] *ITLOS Advisory Opinion* (n 84) p. 105, para. 298.

[162] Ibid p. 106, para. 300.

[163] Ibid pp. 106-107, para. 302.

[164] Ibid p. 108, para. 307.

[165] Written Statement of Australia, see: Chapter 2 (paras. 2.1-2.2 and 2.61-2.62); Chapter 3 (para. 3.1 and Section A, including paras. 3.5-3.6, 3.9, 3.19, 3.22, 3.26, 3.29); and Conclusion (para. 6.1). See also: the Written Statement of Australia in the ITLOS Advisory Opinion proceedings, paras. 31-32, 39-41, 46, 50-52, 55, 61; and the Oral Statement of Australia in the ITLOS Advisory Opinion proceedings, p. 2, lines 31-36; p. 3, lines 22-28; p. 4, lines 12-28; p. 5, lines 13-33; p. 6, lines 10-16; p. 9, lines 20-23; p. 10, lines 1-47; p. 11, lines 39-47; p. 13, lines 1-4; p. 14, lines 10-22; p. 15, lines 35-37; p. 16, lines 1-8, 13-45.

CHAPTER 6. LEGAL CONSEQUENCES ARISING FROM ACTS OR OMISSIONS CAUSING SIGNIFICANT HARM

6.1 This Chapter further addresses issues relevant to paragraph (b) of the question put to the Court regarding legal consequences. Australia welcomes the views put forward by other participants in connection with paragraph (b), emphasising the need for the Court to approach the issue of legal consequences with a view to clarifying existing international law and offering a contribution to future compliance.[166]

6.2 Australia addressed paragraph (b) in its Written Statement, submitting the following:

(a) In paragraph (a), the Court has been asked to consider the *existing* obligations of *all* States.[167] In paragraph (b), which refers back to paragraph (a), the Court is then asked to consider the legal consequences that would arise for *all* States under *existing* international law.

(b) The Court has been asked to consider legal consequences in a *specific* and *limited* situation where States 'have caused significant harm'.[168]

(c) The threshold for significant harm is a high one, requiring 'serious' harm.[169]

(d) Factual difficulty may arise in establishing that a State has or States have caused significant harm, as it is the combined effect of all greenhouse gas emissions over time which leads to climate change.[170]

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[166] See, eg, Joint Written Statement of Denmark, Finland, Iceland, Norway and Sweden, paras. 23, 98; Written Statement of the European Union, paras. 20-21; Written Statement of New Zealand, para. 2.4; Written Statement of the United Kingdom of Great Britain and Northern Ireland, para. 4.7; Written Statement of the Republic of Korea, para. 4.

[167] Written Statement of Australia, paras. 1.29-1.31.

[168] Ibid para. 1.35.

[169] Ibid para. 5.9.

[170] Ibid para. 5.9.

(e) Before determining the legal consequences of a State's conduct, it is necessary to establish whether the conduct constitutes an internationally wrongful act.[171]

(f) Even if a State were to cause significant harm to the climate system, whether an internationally wrongful act has been committed would have to be determined on a case-by-case basis and will depend on the obligation and the conduct in question.[172]

(g) Where a State is in breach of an international obligation, the general rules of State responsibility reflected in the *Articles on Responsibility of States for Internationally Wrongful Acts* ('**ARSIWA**') apply.[173]

(h) If a State were to commit an internationally wrongful act, the specific conduct that would be required by the State by way of legal consequences would be context-specific and would depend upon the primary obligation breached and the wrongful act in question.[174]

6.3 In this Chapter, Australia makes further submissions on the following issues: the scope of paragraph (b) of the question (**Section A**); breach (**Section B**); invocation of State responsibility (**Section C**); causation (**Section D**); and cessation (**Section E**).

A. SCOPE

6.4 Australia supports the view put forward by several participants that the Court has not been asked to opine on the international responsibility of specific States, or a specific group of States, for significant harm to the climate system.[175] As

[171] Written Statement of Australia, para. 5.4.

[172] Ibid para. 5.4.

[173] Ibid paras. 5.4, 5.6; *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) ('*Articles on State Responsibility*').

[174] Ibid paras. 5.3, 5.6.

[175] See, eg, Written Statement of the European Union, paras. 65, 322-323; Written Statement of the United Kingdom of Great Britain and Northern Ireland, para. 137.2; Written Statement of the Republic of Korea, para. 42.

clarified by several participants, including the Nordic countries, Australia understands that:

> The Court is not asked to interpret and comment on specific acts by specific actors, but to approach the issue of "*legal consequences*" with a view to offering an abstract examination of the matter... the Court will examine question (b) without assessing the consequences in relation to specific factual situations.[176]

6.5 Australia reiterates that paragraph (b) does not prejudge whether breaches of States' obligations with respect to the climate system have occurred, are occurring or will occur. Paragraph (b) also does not prejudge whether any States have been specially affected or injured.[177] However, as recognised by a majority of participants, Australia acknowledges the particular vulnerability of SIDS, in particular Pacific Island States, and LDCs to the impacts of climate change.[178]

B. BREACH

6.6 In this Section, Australia addresses two issues: *first*, the need for a case-by-case approach to determine whether causing significant harm to the climate system constitutes an internationally wrongful act; *second*, States' obligations to ensure the protection of the climate system do not give rise to composite breaches.

1. Significant harm and breach

6.7 Several participants have suggested that, if a State were to cause significant harm to the climate system, that State would necessarily have committed an internationally wrongful act.[179] As discussed further in **Section D** below,

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[176] Joint Written Statement of Denmark, Finland, Iceland, Norway and Sweden, para. 99.

[177] Written Statement of Australia, para. 1.36.

[178] See, eg, Written Statement of the Republic of Vanuatu, paras. 89-90, 170; Written Statement of the Independent State of Samoa, para. 17; Written Statement of the Kingdom of Tonga, paras. 53-55, 65, 68, 73, 84-85, 91, 103; Written Statement of the Solomon Islands, paras. 25-27; Written Statement of the Democratic Republic of Timor-Leste, paras. 34.1, 36-38, 42, 56; Written Statement of the Pacific Islands Forum Secretariat, paras. 7, 21.

[179] See, eg, Written Statement of the Republic of Kenya, para. 6.87; Written Statement of the Republic of Chile, para. 92; Written Statement of the Federated States of Micronesia, para. 120(iii); Written Statement of the Republic of Costa Rica, paras. 104-107.

substantial obstacles would confront any attempt to establish that any particular State or States have caused significant harm to the climate system. But, even assuming for present purposes that it could be established that a State has caused significant harm, it does not necessarily follow that the State has committed an internationally wrongful act. If a State has caused significant harm to the climate system, whether it has committed an internationally wrongful act would depend on: the obligation that it is alleged the State has breached; the particular conduct prohibited or required by that obligation; and the particular conduct that the State has engaged in.[180] For example, where the relevant obligation is an obligation of conduct assessed against the standard of due diligence, proof that conduct for which the State is responsible has caused significant harm to the climate system would not of itself demonstrate that the State had failed to exercise due diligence in attempting to prevent such harm from occurring. Where the relevant international obligation is an obligation of conduct, whether the State had committed an internationally wrongful act would depend on whether it had exercised due diligence (having regard to all the relevant circumstances of the case), not solely on the fact that significant harm to the climate system had occurred (the result). For that reason, the causation of significant harm (even assuming it can be proved) does not necessarily equate with the commission of an internationally wrongful act.

2. Composite breaches

6.8 Several participants have argued that a State may be held individually responsible for causing significant harm to the climate system due to the cumulative effects of that individual State's emissions of anthropogenic greenhouse gases over time, on the basis of a composite breach within the meaning of Article 15 of ARSIWA.[181]

[180] Written Statement of Australia, para. 5.4.

[181] See, eg, Written Statement of the Republic of Vanuatu, paras. 530-535; Written Statement of the Dominican Republic, para. 4.61; Written Statement of the Republic of Albania, para. 130(d); Written Statement of the Commission of Small Island States, paras. 148-149; Written Statement of the Melanesian Spearhead Group, paras. 298-299; Written Statement of the African Union, para. 231.

6.9 Article 15 is concerned with 'more than a simple series of repeated actions'.[182] It provides that breach of an international obligation can occur through a series of actions or omissions by a State which are *defined in their aggregate* as constituting an internationally wrongful act.[183] Thus, Article 15 is limited to breaches of 'systematic' obligations which concern some aggregate of conduct evidenced by a systematic policy or practice of a State.[184] Examples include obligations concerning genocide, apartheid or crimes against humanity or systematic acts of discrimination.[185] Where a breach is comprised of a composite act within the scope of Article 15, the breach extends in time from the first of the acts or omissions in the series.[186]

6.10 It does not follow from the fact that climate change is caused by the accumulation of greenhouse gas emissions over time that States' emissions of such gases over time give rise to composite breaches within the scope of Article 15. Whether States have breached their obligations relating to climate change at all, and if so whether those breaches give rise to composite breaches, can only be answered by reference to the *specific obligation* in question, not the harm that may have been caused by such a breach.

6.11 Specifically, before Article 15 would be applicable, the Court would have to find that the primary obligations of States referred to in paragraph (a) of the question include one or more obligations that define the systematic aggregate conduct of a State as internationally wrongful. Australia submits that participants have not identified such an obligation.

6.12 Some participants have further argued that, in relation to composite breaches, the obligation breached need not have been in force for the whole period during which the series of acts said to give rise to the breach occurred (that is, for the whole period in which greenhouse gases were emitted) in order for a State to be

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[182] James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013) p. 266.

[183] *Articles on State Responsibility* (n 173), Article 15 para. 1.

[184] Ibid Commentary, Article 15 paras. 2, 3; Crawford (n 182) p. 266.

[185] Ibid Commentary, Article 15 para. 2.

[186] Ibid Commentary, Article 15 para. 11.

held responsible.[187] However, it is a fundamental principle of international law that an 'act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question *at the time the act occurs*'.[188] Thus, even if the obligations of States to protect the climate system were found by the Court to include an obligation that defines the systematic aggregate conduct of a State as internationally wrongful, whether the State has breached the obligation could only be assessed by reference to conduct of the State that occurred *after* that obligation came into existence.

C. INVOCATION OF STATE RESPONSIBILITY

6.13 As recognised by a majority of written statements, an injured State is able to invoke the responsibility of a State for an internationally wrongful act where the obligation in question is owed:

(a) to that State individually; or

(b) to a group of States including that State or to the entire international community, provided that breach specially affects that State.[189]

6.14 Several participants have relied on Article 47 of ARSIWA.[190] Article 47 provides that where several States are responsible for 'the same internationally wrongful act', the responsibility of each State may be invoked in relation to the wrongful conduct as a whole.[191] Participants have argued that, for example, because obligations of States to *cooperate* in relation to climate change 'by definition require the concerted conduct of two or more States', a breach of

[187] See, eg, Written Statement of the Republic of Vanuatu, para. 532.

[188] *Articles on State Responsibility* (n 173), Article 13 (emphasis added). See also *Island of Palmas case (Netherlands v USA) (Award)* (1928) 2 RIAA 829, p. 845.

[189] *Articles on State Responsibility* (n 173), Article 42.

[190] See, eg, Written Statement of the Commission of Small Island States on Climate Change, paras. 166-169; Written Statement of the Republic of Vanuatu, para. 535; Written Statement of Tuvalu, paras. 122-125; Written Statement of the Republic of the Marshall Islands, para. 61; Written Statement of Antigua and Barbuda, paras. 572(b)-573, 590; Written Statement of the People's Republic of Bangladesh, para. 145.

[191] *Articles on State Responsibility* (n 173), Article 47 and Commentary, Article 47 para. 2.

those obligations by two or more States is the 'same' act, such that each State can be held responsible on an individual basis for the wrongful conduct as a whole.[192]

6.15 Article 47 of ARSIWA concerns situations where multiple States are responsible for the *same act*. It does not concern situations where multiple States are each responsible for *separate acts* of a similar kind, even if those separate acts cause the same damage (discussed in Section D(2) below). Article 47 of ARSIWA deals with situations where, for example:

(a) States combine in carrying out together the conduct in question in circumstances where they may be regarded as acting jointly in respect of the entire operation;

(b) two States act through a common organ which carries out the conduct in question; or

(c) one State directs or controls another State in the commission of the conduct in question.[193]

6.16 However, the conduct that contributes to climate change is constituted by independent and cumulative acts and omissions over time. It is not the type of conduct to which Article 47 is directed because it does not constitute the 'same internationally wrongful act'. Therefore, the responsibility of an individual State cannot be invoked in relation to the wrongful conduct as a whole in relation to climate change.

6.17 Relying on both Article 47 and Article 15, some participants further argue that the greenhouse gas emissions of a group of States constitute a breach of international law, on the basis that the acts and omissions of those *different* States *together* amount to a composite breach.[194] Such an argument suffers from

[192] Written Statement of the Commission of Small Island States, paras. 167-169.

[193] *Articles on State Responsibility* (n 173), Commentary, Article 47 para. 2.

[194] See, eg, Written Statement of the Republic of Vanuatu, para. 535; Written Statement of Saint Lucia, para. 87; Written Statement of the Dominican Republic, para. 4.61.

both the problems identified earlier in relation to the inapplicability of Article 15 to States' obligations relating to climate change and those identified in this Section in relation to the inapplicability of Article 47 to the separate acts and omissions that constitute climate change.

6.18 Of course, invocation of State responsibility with respect to climate change is not predicated on the application of Article 47. A State may individually bear responsibility, on the basis of its own conduct and by reference to its own international obligations, where an internationally wrongful act has been committed. However, as explained in the Written Statement of Australia and discussed further below, causation would need to be proved in any individual case.[195]

D. CAUSATION

6.19 Many written statements address the issue of causation, particularly with respect to the role it plays in assessing legal consequences.[196] Australia supports the view put forward by New Zealand that causation is likely to be very difficult in relation to climate change where:

> i) all States are injured to varying degrees; ii) all States are contributors to the injury to varying degrees; iii) some contributions to the injury are the result of internationally lawful acts; and iv) some contributions to the injury are the result of internationally wrongful acts.[197]

6.20 Given the difficulty of this topic, Australia welcomes the opportunity for the Court to clarify the scope and limits of causation under ARSIWA in relation to climate change. It reiterates that, consistently with the Court's jurisprudence, there is a distinction between causation in the context of breach of primary

[195] Written Statement of Australia, para. 5.9.

[196] See, eg, Written Statement of New Zealand, para. 140; Written Statement of the United States of America, paras. 5.7-5.10; Written Statement of the United Kingdom of Great Britain and Northern Ireland, para. 137.4.3; Joint Written Statement of Denmark, Finland, Norway and Sweden, para. 107; Written Statement of the Republic of Korea, paras. 46-47; Written Statement of the Republic of Singapore, paras. 4.11, 4.16.

[197] Written statement of New Zealand, para. 140(c).

obligations and causation in the context of reparation for damage or injury.[198] The role of causation in proving breach will depend on the particular primary obligation that a State is said to have breached. In the context of reparation, the role of causation depends on the secondary rules of State responsibility. Australia respectfully invites the Court to consider the causal links required, and the challenges present in the context of climate change, with respect to the legal consequences resulting from breach, including the nature, form and amount of reparation.

6.21 In this Section, Australia advances three propositions. *First*, the best available science does not presently, notwithstanding that it may in the future, enable attribution of specific climate change impacts experienced by any particular State to the specific conduct of any other particular State (**subsection 1**). *Second*, a State can be held responsible for all of the damage or injury concurrently caused by a number of States only where that State's wrongful conduct caused all of the resulting harm (**subsection 2**). *Third*, for compensation to be awarded, it must be established that an internationally wrongful act caused injury, but (for the reason addressed in subsection 1) it is likely to be difficult or impossible to establish the necessary causal nexus between the anthropogenic greenhouse gas emissions of one State and any damage experienced by another State (**subsection 3**).

1. Attribution science

6.22 Several participants have submitted that best available science demonstrates a causal link between anthropogenic greenhouse gas emissions, climate change and the damage or injury arising from climate change.[199] Some participants have further submitted that those general causal links are sufficient to establish causation for breach and the legal consequences resulting from breach,[200] or that

[198] Written Statement of Australia, para. 5.3.

[199] See, eg, Written Statement of the Dominican Republic, para. 5.1(i); Written Statement of the Federative Republic of Brazil, para. 84; Written Statement of the Republic of Chile, para. 38.

[200] See, eg, Written Statement of the Republic of Kenya, para. 6.102; Written Statement of the Republic of Costa Rica, paras. 98-103; Written Statement of Saint Lucia, para. 83; Written Statement of the Republic of Chile, paras. 94-98; Written Statement of the Independent State of Samoa, paras. 211-

compensation can be awarded irrespective of whether a causal link can be established between the particular conduct of the emitting State and the particular harm suffered by an injured State.[201]

6.23 Australia recognises that anthropogenic greenhouse gas emissions cause climate change and that the impacts of climate change, while experienced by all States, particularly affect SIDS and LDCs. However, those *scientific* causal connections are distinct from the causal connections that must be demonstrated in order to establish breach of an obligation, and the legal consequences resulting from breach, as a matter of *international law*. In relation to legal consequences, a State has an obligation to make full reparation for 'the injury *caused by its internationally wrongful act*' and an injured State is entitled to compensation 'limited to damage actually suffered *as a result of the internationally wrongful act*, and excludes damage which is indirect or remote'.[202] That is, as a matter of fundamental principle, it is necessary to establish causal links between the conduct of a State that has been found to be internationally wrongful and any injury or damage suffered by the injured State invoking responsibility. That requirement cannot simply be jettisoned because it is hard to satisfy in some contexts.

6.24 Some participants have submitted that the contribution of specific States to global greenhouse gas emissions is relevant for the purposes of apportioning liability for the damage or injury arising from climate change.[203] This assumes that it is possible to attribute the specific damage or harm experienced by a particular State to the specific emission of anthropogenic greenhouse gases by another particular State.

213; Written Statement of the Parties to the Nauru Agreement Office, para. 49; Written Statement of the Republic of Vanuatu, para. 562.

[201] See, eg, Written Statement of the Republic of Sierra Leone, para. 3.144; Written Statement of the Republic of Kenya, para. 6.103; Written Statement of the Republic of Namibia, para. 139.

[202] *Articles on State Responsibility* (n 173), Article 31(1) and Commentary, Article 34 para. 5 (emphasis added).

[203] See, eg, Written Statement of the Federative Republic of Brazil, paras. 85, 100(5); Written Statement of Antigua and Barbuda, para. 591; Written Statement of the Republic of Mauritius, para. 215.

6.25 Australia acknowledges that climate attribution science continues to evolve. However, while the importance of best available science is clear, at present there is no agreed scientific or legal methodology for attributing the specific damage or harm experienced by a particular State to the specific emission of anthropogenic greenhouse gases by another particular State. Australia recognises that the state of such science is evolving, both in relation to event attribution, which seeks to identify the role played by climate change with respect to specific climate or weather events, and source attribution, which seeks to estimate the contributions of greenhouse gas emissions from particular States to present-day climate change.[204] However, given the current state of science, it is not (presently) possible to attribute greenhouse gas emissions to specific States for the purposes of apportioning liability for the damage or injury arising from climate change. Unless that changes, that factual reality constitutes a major obstacle to holding any one particular State responsible for damage caused to another particular State by climate change.

2. Concurrent causes of the same damage

6.26 Some participants have argued that, where several States have independently breached their obligations to ensure the protection of the climate system (such as their obligation to protect and preserve the marine environment in Article 192 of UNCLOS), any one of those States may be required to make reparation for *all* the resulting damage or injury.[205]

6.27 That submission finds no support in the jurisprudence of the Court. Where States have committed separate internationally wrongful acts that contribute to causing the same damage, the Court has previously determined the

[204] See, eg, Written Statement of the United States of America, paras. 2.20-2.26.

[205] See, eg, Written Statement of the Independent State of Samoa, para. 211; Written Statement of the Commission of Small Island States, paras. 171. 185; Written Statement of Antigua and Barbuda, para. 548.

responsibility of each contributing State individually on the basis of its own conduct and by reference to its own international obligations.[206]

6.28 On that approach, in cases where there are such concurrent causes of harm, one of the States that caused that harm *might* be required to make reparation for all of the harm caused. But that will be the case only where *that State's wrongful conduct* caused *all* of the resulting harm. That was the position in *Corfu Channel*, where the Court found that the respondent State was individually required to make reparation for all the damage or injury suffered by the applicant State.[207] Critically, however, the Court made that finding on the basis that the respondent State's internationally wrongful act (its failure to warn the applicant State of the presence of the mines that caused the injury[208]) caused all of the injury under the ordinary rules of causation.[209]

6.29 It is most unlikely to be possible to establish that the internationally wrongful acts of one State by themselves caused all of the harm or injury that results from climate change.

3. Factual proof of damage

6.30 Several participants argue that compensation may be awarded where there is a lack of evidence.[210] However Australia respectfully submits that the relevant jurisprudence of this Court is concerned with situations in which it *can* be established that a particular State has caused damage, but there is a lack of evidence regarding the *extent* of the damage that has been caused. For example, the Court found in *Armed Activities* that the absence of adequate evidence of the *extent of* material damage will not, in all situations, preclude an award of

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[206] *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania) (Judgment, Merits) I.C.J. Reports 1949*, p. 4 ('*Corfu Channel*'); *Articles on State Responsibility* (n 173) Commentary, Article 47 para. 8.

[207] *Corfu Channel* (n 206) pp. 22-23.

[208] *Corfu Channel* (n 206) pp. 22-23; *Articles on State Responsibility* (n 173) Commentary, Article 47 para. 8.

[209] Crawford (n 182) p. 335.

[210] See, eg, Written Statement of the Republic of Kenya, para. 6.103; Written Statement of the Commission of Small Island States, para. 187; Written Statement of Antigua and Barbuda, para. 543.

compensation for that damage.[211] However, in the same case, the Court upheld the findings in *Bosnia Genocide* that compensation may only be awarded where there is a 'sufficiently direct and certain causal nexus between the wrongful act … and the injury suffered'.[212] Even in the absence of evidence enabling 'a precise evaluation of the *extent* or scale of injury', the Court found that the evidence should be such that it 'leaves no doubt that an internationally wrongful act *has caused* a substantiated injury'.[213] Even in cases concerning environmental damage, the Court has required the establishment of 'a direct and certain causal link' between the damage and the relevant internationally wrongful conduct.[214] As is apparent, all of these cases reaffirm the necessity to prove that damage was *caused* by an internationally wrongful act before any question of compensation can arise.

6.31 Where difficulties arise in establishing the necessary causal nexus between the anthropogenic greenhouse gas emissions of a responsible State and the damage experienced by an injured State, Australia considers that this may preclude an award of compensation for damage.

E. CESSATION

6.32 One of the legal consequences of an internationally wrongful act is that the responsible State is under an obligation to cease its wrongful act, if that act is continuing.[215] Participants have suggested that States may be required to cease a wide range of conduct.[216] However, where a State is in breach of an

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[211] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (Judgment, Reparations), I.C.J. Reports 2022*, pp. 51-52, paras. 106-108 ('*Armed Activities*'); *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Judgment (Compensation), I.C.J. Reports 2018* p. 26, para. 35.

[212] *Armed Activities* (n 211) p. 48, para. 93, quoting *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment), I.C.J. Reports 2007*, p. 234, para. 462.

[213] Ibid p. 52, paras. 105-106 (emphasis added).

[214] See, eg, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Judgment (Compensation), I.C.J. Reports 2018*, p. 35, para. 72. See also p. 52, para. 129.

[215] Written Statement of Australia, para. 5.7; *Articles on State Responsibility* (n 173) Article 30(a).

[216] See, eg, Written Statement of the Republic of Vanuatu, para. 487; Written Statement of the Republic of Chile, paras. 111-114; Written Statement of the Republic of Sierra Leone, para. 3.136; Written

international obligation, the conduct that it is required to cease is the specific conduct that is not in conformity with what is required by the relevant obligation.[217] For example, if a State were to commit an internationally wrongful act by failing to exercise due diligence, and its wrongful act were continuing, the State would be subject to the obligation of cessation which would require the State to cease *only* the conduct constituting the failure of due diligence. The State would not be required to cease *any* and *all* conduct related to the damage or injury. Cessation applies only to the internationally wrongful conduct.

Statement of the Melanesian Spearhead Group, paras. 313-314; Written Statement of the Commission of Small Island States, paras. 173-174.

[217] *Articles on State Responsibility* (n 173), Commentary, Article 30 paras. 1-2, 5; Crawford (n 182) pp. 467-468.

CHAPTER 7. CONCLUSION

7.1 The UNFCCC and Paris Agreement are the primary sources of States' obligations under international law concerning the protection of the climate system from the anthropogenic emission of greenhouse gases. Australia considers that these treaties provide the central cooperative framework for the collective action that is needed to deliver an effective global response to climate change. Where customary international law (**Chapter III**), international human rights law (**Chapter IV**) and other international environmental treaties, including UNCLOS (**Chapter V**), also impose obligations relevant to the protection of the climate system from climate change, those obligations must be interpreted consistently with those that have been carefully negotiated and agreed by almost the entire international community under the UNFCCC and the Paris Agreement.

7.2 Addressing climate change is a fundamental and pressing matter for all States, in particular SIDS, who are and will continue to face some of the most severe impacts of climate change. The special circumstances of SIDS, and LDCs, are acknowledged and addressed in the specialised climate treaty regime. The mechanisms and processes designed to accelerate progress on mitigation and adaptation, and to avert, minimise and address loss and damage under the Paris Agreement, are dynamic and evolving in response to the needs of Parties and the challenges being faced, especially by those countries that are particularly vulnerable to climate change.

7.3 Given the extent of the challenge posed by climate change, there is a need for significant effort and ambition at both the individual and collective levels to address climate change, particularly by those States whose emissions account for the majority of global emissions past, present and future, and including by those major emitters whose emissions have not yet peaked.

7.4 Australia recognises the importance of taking urgent action to achieve stabilisation of greenhouse gas concentrations in the atmosphere at a level that prevents dangerous anthropogenic interference with the climate system and

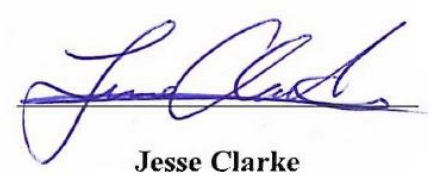
holding the increase in average global temperature to well below 2 degrees above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 degrees above pre-industrial levels, recognising that this would significantly reduce the risks and impacts of climate change. In pursuit of that commitment, Australia is cooperating internationally to accelerate climate action and taking ambitious domestic action to reduce its emissions and decarbonise its economy.

7.5 The outcomes of the first global stocktake demonstrate the rigour of the implementation mechanisms of the Paris Agreement. This tool creates a dynamic process for assessing the effectiveness of collective action over time, and for informing the adjustment of such action as necessary in order to protect the climate system from greenhouse gas emissions. This dynamic process is currently resulting in scaled-up action and ambition at both the individual and collective levels. Australia has made significant commitments under this framework and will continue to do its part. As reflected in the consensus decision of the 28th United Nations Climate Change Conference, the 2025 NDC submission process must place global emissions on a trajectory towards achieving the Paris Agreement goals as an indication of Parties' intention with regard to the ambition of these commitments.[218]

7.6 Australia's submission of these written comments reflects its ongoing commitment to addressing the grave challenges posed by anthropogenic greenhouse gases upon the climate system and its resolute commitment to the objective of the UNFCCC and the goals of the Paris Agreement.

[218] See generally, *Outcome of the first global stocktake* (n 37).

Respectfully submitted on behalf of Australia,



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Representative of Australia

15 August 2024