

Corrigé
Corrected

CR 2024/36

International Court
of Justice

THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 2024

Public sitting

held on Monday 2 December 2024, at 3 p.m., at the Peace Palace,

President Salam presiding,

*on the Obligations of States in respect of Climate Change
(Request for advisory opinion submitted by the General Assembly of the United Nations)*

VERBATIM RECORD

ANNÉE 2024

Audience publique

tenue le lundi 2 décembre 2024, à 15 heures, au Palais de la Paix,

sous la présidence de M. Salam, président,

*sur les Obligations des États en matière de changement climatique
(Demande d'avis consultatif soumise par l'Assemblée générale des Nations Unies)*

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The PRESIDENT: Good afternoon. Please be seated. The sitting is now open.

The Court meets this afternoon to hear Antigua and Barbuda, Saudi Arabia, Australia, the Bahamas, Bangladesh and Barbados on the questions submitted by the United Nations General Assembly. Each of the delegations has been allocated 30 minutes for its presentation. The Court will observe a short break after Australia's presentation.

I shall now give the floor to the delegation of Antigua and Barbuda. I call His Excellency Gaston Browne to the podium. Your Excellency, you have the floor.

Mr BROWNE:

I. INTRODUCTION

1. Mr President, Members of the Court, I appear before you to speak on behalf of the people of Antigua and Barbuda, a small island State on the frontline of a global climate emergency.

2. We come to you because existing action has not adequately addressed the crisis that is devastating our lives and our future.

3. For decades, Antigua and Barbuda has experienced the grave consequences of climate change. Rising sea levels, driven by the unchecked emissions of greenhouse gases, have eroded our coastlines, swallowing land that is vital to our country.

4. Ocean temperatures have risen, disrupting the delicate ecosystems that sustain our fisheries — an essential source of food and livelihoods.

5. More frequent and intense weather events have destroyed homes, decimated infrastructure, and left scars on the lives of our people that no amount of financial aid can truly heal.

6. Hurricane Irma in 2017 was a turning point for our nation. The island of Barbuda is 62 square miles. Irma — the largest recorded storm in the Atlantic at that time — was 375 miles wide when it thundered over the island with ferocious winds of 220 miles per hour. Barbuda clearly did not stand a chance. If we were not a single State, the people of Barbuda would have had to literally seek refuge elsewhere. We would become climate refugees.

7. My Government for years sustained the livelihood of the people and rebuilt Barbuda at an immense cost, adding significantly to our debt burden.

8. While large, wealthy countries can borrow on their capital markets at three percent per annum, the so called “high income” SIDS, like Antigua and Barbuda, must borrow commercially at 10 percent to finance repeated rebuilding of infrastructure damaged by hurricanes caused by the failure of other States to mitigate emissions.

9. Mr President, the principle of prevention, a cornerstone of international environmental law, demands that States take action to avoid causing significant harm to others. Yet, global emissions continue to rise.

10. As the threshold of 1.5 C is being crossed, the very existence of our small island States is threatened by this failure of polluting countries to act.

11. No Participant has disputed that greenhouse gas emissions, emanating from human activity, are causing and will continue to cause significant harm to the climate system, to populations globally and to the environment¹.

12. Nor does any Participant dispute the conclusion of the global stocktake that current efforts are insufficient².

¹ Written Statement of the African Union, paras. 6-15; Written Statement of Albania, paras. 48-58; Written Statement of Argentina, para. 9; Written Statement of Australia, para. 1.6; Written Statement of the Bahamas, paras. 14-22; Written Statement of Bangladesh, para. 16; Written Statement of Barbados, paras. 83-92; Written Statement of Belize, paras. 5-11; Written Statement of Bolivia, para. 13; Written Statement of Brazil, paras. 59-61; Written Statement of Burkina Faso, para. 6; Written Comments of Cameroon, para. 104; Written Statement of Canada, para. 5; Written Statement of Chile, paras. 27-32; Written Statement of China, para. 3; Written Statement of Colombia, paras. 2.4-2.13; Written Statement of the Commission of Small Islands States, paras. 20-43; Written Statement of the Cook Islands, para. 39; Written Statement of Costa Rica, para. 3; Written Statement of the Democratic Republic of the Congo, para. 43; Written Statement of Denmark, Finland, Iceland, Norway and Sweden, paras. 3-4; Written Statement of the Dominican Republic, paras. 2.2-2.9; Written Statement of Ecuador, paras. 1.8-1.13; Written Statement of Egypt, paras. 30-41; Written Statement of El Salvador, para. 11; Written Statement of the European Union, paras. 48-49; Written Statement of the Republic of France, para. 15; Written Statement of the Gambia, para. 1.2; Written Statement of Germany, para. 21; Written Statement of Ghana, para. 30; Written Statement of Grenada, para. 7; Written Statement of the Islamic Republic of Iran, paras. 2-4; Written Statement of Kenya, paras. 3.1-3.17; Written Statement of the Kingdom of Saudi Arabia, para. 1.4; Written Statement of the Kingdom of Tonga, paras. 46-52; Written Statement of Kiribati, paras. 15-23; Written Statement of the Republic of Korea, para. 8; Written Statement of Latvia, para. 2; Written Statement of Liechtenstein, paras. 21-22; Written Statement of Madagascar, paras. 24-32; Written Statement of Mauritius, para. 3; Written Statement of Mexico, paras. 26-30; Written Statement of Micronesia, paras. 23-35; Written Statement of Namibia, paras. 4-5; Written Statement of Nauru, paras. 7-8; Written Statement of Nepal, paras. 9-16; Written Statement of the Netherlands, paras. 2.1-2.8; Written Statement of New Zealand, paras. 3-6; Written Statement of Pakistan, paras. 4-11; Written Statement of Palau, paras. 6-11; Written Statement of Peru, paras. 9-19; Written Statement of the Philippines, paras. 27-29; Written Statement of Portugal, paras. 14-22; Written Statement of Romania, paras. 16-29; Written Statement of Saint Lucia, paras. 18-26; Written Statement of Saint Vincent and the Grenadine, paras. 38-53; Written Statement of Samoa, paras. 3-6; Written Statement of the Seychelles, paras. 22-38; Written Statement of Sierra Leone, para. 1.4; Written Statement of Singapore, para. 1.6; Written Statement of the Socialist Republic of Viet Nam, para. 1; Written Statement of the Solomon Islands, paras. 25-51; Written Statement of South Africa, paras. 24-26; Written Statement of Spain, paras. 3-4; Written Statement of Sri Lanka, paras. 26-29; Written Statement of Switzerland, para. 5; Written Statement of Thailand, para. 10; Written Statement of Timor-Leste, paras. 34-35; Written Statement of Tuvalu, para. 26; Written Statement of the United Arab Emirates, paras. 9-13; Written Statement of the United Kingdom, para. 13; Written Statement of the United States, paras. 2.16-2.17; Written Statement of Uruguay, paras. 12-25; Written Statement of Vanuatu, para. 67.

² UNFCCC COP, “Outcome of the first global stocktake”, Draft decision -/CMA.5, Proposal by the President, UN doc. FCCC/PA/CMA/2023/L.17, 13 December 2023 (available here).

13. Even now the Loss and Damage Fund, which was recently established, has received only US\$700 million in pledges — I emphasize pledges, not contributions. This pledged amount is wholly inadequate compared to the scale of climate-related losses our small countries are suffering.

14. Antigua and Barbuda has worked tirelessly to address this crisis. At every Conference of the Parties (COP), from Paris to Baku, we have joined with other vulnerable nations to demand action — to demand financing and to demand justice. That advocacy has taken us to fora outside of the UNFCCC, to the UNGA, to the ITLOS — and to creating the Commission of Small Island States on Climate Change and International Law (COSIS).

15. We seek this advisory opinion not to point fingers, but to clarify the obligations of States under international law before the clock on our survival runs out.

16. We ask: what must small States, or States generally, do, under international law, to protect the climate system for present and future generations? What is the responsibility of those whose actions have contributed disproportionately to this crisis?

17. Antigua and Barbuda stands in solidarity with other vulnerable nations, particularly our fellow small islands States. Together, we endure the worst of a crisis that we did not create.

18. But today, we also stand with the millions across the globe who are looking to this Court for a path forward — for clarity, justice and certainly hope. We believe in the power of international law to bring about change.

19. This Court's voice can inspire the urgent action that has eluded the political arena. It can remind the world that the rights of small nations, of vulnerable peoples and of future generations are not secondary but fundamental.

20. The people of Antigua and Barbuda are counting on you. The world is counting on you. This is not just a legal question; it is a matter of survival.

21. Mr President, I ask that you now call on Mr Phillips, who will address the legal points. Thank you.

The PRESIDENT: I thank His Excellency Gaston Browne. I now give the floor to Mr Phillips. You have the floor, Sir.

Mr PHILLIPS:

1. Mr President, Members of the Court.
2. In order to assist the Court, Antigua and Barbuda will address a select number of points.

II. THE PARIS AGREEMENT

3. I begin with the Paris Agreement.

4. The scale of the climate crisis was known as long ago as the 1960s³. In a collective effort to combat climate change, States agreed on the climate treaties, most recently the Paris Agreement in 2015.

5. Today, however, many high-emitting States attempt to rely on the climate treaties as a shield to escape accountability. Their approach to the Paris Agreement would deprive the most vulnerable of any redress.

6. *First*, these States argue, in effect, that the obligations in the Paris Agreement are merely procedural⁴. In other words, so long as a State “ticks the box” to identify a “nationally determined contribution” (or “NDC”), it has complied with Article 4 of the Agreement. For these States, this is so *even if* both the ambition and the implementation of the NDC fall manifestly short of a meaningful contribution to ensuring that temperatures do not rise above 1.5°C.

7. *Second*, certain of these States simultaneously argue that *either* the Paris Agreement displaces all other relevant rules of international law, including the customary obligation of prevention;⁵ *or*, that compliance with Paris translates automatically to compliance with those other rules.

8. These two arguments together would lead to a surprising conclusion that the climate change treaties leave the world – and the most vulnerable States therein– less well protected than if these

³ See Written Statement of Vanuatu, para. 178, citing to Expert Report of Professor Naomi Oreskes on Historical Knowledge and Awareness, in Government Circles, of the Effects of Fossil Fuel Combustion as the Cause of Climate Change (29 January 2024), Vanuatu, Exhibit D.

⁴ See for example Written Statement of Saudi Arabia, para. 4.26 (“the Paris Agreement encourages the undertaking of mitigation measures in Article 4, though it does not impose obligations on States in that regard” and para. 4.65 (“Parties are not legally bound to achieve their NDCs”, only to “outline clearly their pledges and to report on their progress”); see also Written Statement of Australia, paras. 2.16-2.23; Written Statement of the United States, paras. 3.14-3.22; Written Statement of the United Kingdom, paras. 62-71; Written Statement of the United Arab Emirates, para. 111; Written Statement of the Russian Federation, p. 8; Written Statement of the Organisation of Petroleum Exporting States, para. 66.

⁵ See for example Written Statement of Kuwait, para. 137(7); Written Statement of South Africa, paras. 14-18; Written Statement of Timor-Leste, paras. 88-93.

treaties had never been concluded. This is a dangerously regressive approach. It is also erroneous, for the following reasons.

9. *First*, NDCs are not empty declarations. Under Article 4, each State must set its proposed contribution to a level corresponding to a fair share of the remaining carbon budget to meet the 1.5°C temperature goal; and they must take all measures at their disposal to achieve their proposed contribution⁶. This understanding is further corroborated by a COP decision obliging parties to explain, in writing, how their NDC is both fair and ambitious in light of national circumstances, and how it contributes to the Paris temperature goal⁷.

10. *Second*, the customary obligation of prevention remains, in any event, applicable, along with other treaty-related obligations. As a Chamber of the ICJ recognized in the *ELSI* case, the Court must not “accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so”⁸.

11. There is no evidence that the States, in the climate treaties themselves or in their contemporaneous or subsequent practice, intended to dispense with the existing legal protections. To the contrary, the UNFCCC confirms the continued relevance of both custom and treaty-based régimes⁹. The climate change treaties, and other sources of law, mutually reinforce and shed light on one another. Compliance with the Paris Agreement is necessary, but may not be sufficient, for compliance with States’ obligations under custom, UNCLOS and human rights instruments.

⁶ See Written Statement of Antigua and Barbuda, paras. 231-297.

⁷ UNFCCC COP, Decision 1/CP.21, “Adoption of the Paris Agreement”, para 27 (2015) (available here).

⁸ *Elektronika Sicula S.P.A. (ELSI) (United States of America v. Italy)*, Judgment, *I.C.J. Reports 1989*, p. 42, para. 50.

⁹ UNFCCC, Art. 2 (“The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”).

12. Antigua and Barbuda¹⁰, therefore, agrees with the dozens of other Participants in these proceedings¹¹, and the European Court of Human Rights and ITLOS, that the Paris Agreement does not displace, and instead operates harmoniously with, the customary obligation of prevention and other relevant rules of international law.

III. THE CUSTOMARY OBLIGATION OF PREVENTION

13. I turn now to the obligation of prevention.

A. Applicability of the obligation

14. The attempt by a handful of Participants to render this customary rule inapplicable is unconvincing.

15. *First*, high-emitting States consistently attempt to distinguish between “conventional” transboundary harm (to which the obligation of prevention applies) and harm occasioned by the climate crisis (to which it allegedly does not)¹². This contrived distinction has no basis in law or in fact. The large-scale nature of the transboundary environmental crisis does not carry it beyond the scope of international law. To the contrary, the protections of international law apply with added rigour.

¹⁰ See Written Comments of Antigua and Barbuda, paras. 59-81.

¹¹ See, for example, Written Comments of COSIS, paras. 92-93; Written Comments of Bahamas, paras. 15-24; Written Comments of Barbados, Section IV; Written Comments of Belize, paras. 35-36; Written Comments of Cook Islands, paras. 40-51; Written Comments of Dominican Republic, para 1.11; Written Comments of Federated States of Micronesia, paras. 3-6; Written Statement of Grenada, para. 37; Written Comments of Kiribati, paras. 52-61; Written Comments of Marshall Islands, para. 18; Written Comments of Mauritius, paras. 94-96; Written Comments of Melanesian Spearhead Group, paras. 40-49; Written Comments of Nauru, paras. 4-33; Written Comments of OACPS, paras. 28-40; Written Comments of Palau, paras. 8-22; Written Comments of PNAO, para. 13; Written Comments of Saint Lucia, paras. 21-30; Written Comments of Saint Vincent and the Grenadines, para. 40; Written Comments of Samoa, paras. 7-37; Written Comments of Seychelles, paras. 28-31; Written Comments of Solomon Islands, para. 12; Written Comments of Tuvalu, para. 21; Written Comments of Vanuatu; paras. 76-147; Written Comments of EU, para. 37; Written Comments of the Netherlands, para. 2.3; Written Comments of New Zealand, para. 14; Written Comments of Bangladesh, paras. 28-34; Written Comments of Gambia, paras. 3.6-3.9; Written Comments of Sierra Leone, paras. 3.36-3.40; Written Comments of African Union, paras. 17-26; Written Comments of Albania, paras. 5-15; Written Comments of Cameroon, para 2; Written Comments of Chile, paras. 67-77; Written Comments of Colombia, para. 3.62; Written Comments of Costa Rica, paras. 11-25; Written Comments of Ecuador, paras. 8-25; Written Comments of Egypt, paras. 42-51; Written Comments of IUCN, paras. 27-29; Written Comments of Kenya, paras. 2.2-2.9; Written Comments of Mexico, paras. 7-17; Written Comments of Namibia, paras. 11-15; Written Comments of Pakistan, paras. 10-22; Written Comments of Philippines, paras. 27-31; Written Comments of Sri Lanka, paras. 8-15; Written Comments of Uruguay, paras. 19-20; observations écrites de la République française, paras. 17-19; observations écrites de la Confédération suisse, paras. 9, 12-13, 18; observations écrites du Burkina Faso, paras. 23-24; observations présentées par la République démocratique du Congo, paras. 7-8, 42-43.

¹² See, for example, Written Statement of Australia, paras. 3.4, 4.10, 5.9; Written Statement of the United States, paras. 4.15; Written Statement of India, para. 17.

16. *Second*, some States attempt to argue that applying the obligation of prevention to climate change would require the emergence of new customary rules¹³. This is wrong as a matter of law; it confuses the *existence* of a norm with its *application* to a given set of facts. There is no doubt that the general obligation to prevent significant transboundary harm exists in custom¹⁴. International courts and tribunals can, and must, apply that norm when presented with specific facts. States have not excluded the application of existing customary norm to climate change; to the contrary, climate treaties explicitly affirm the ongoing applicability of customary obligations¹⁵.

B. Content of the obligation of prevention

17. As to the content of the obligation, it is breached because high-emitting States have not acted, and are not acting, with the appropriate diligence in light of the nature of the risk, and their capabilities and responsibilities. I will touch briefly on these elements.

18. The severity of the risk cannot be overstated. With each successive IPCC report, our understanding of the magnitude of the risk has increased. We also know, with scientific precision, the remaining carbon budget available to keep global warming under 1.5°C, and the harms that will occur failing that. There is, in the IPCC's words, a "rapidly closing window of opportunity" to avoid catastrophic damage¹⁶. The standard of diligence applicable to high-emitting States in this context is, in the words of ITLOS, "stringent"¹⁷.

19. Allocating a greater burden of emissions reductions to high-emitting developed States is inherent in the notion of a "due diligence" obligation. The Court has already accepted that the level

¹³ *See, for example*, Written Comments of Australia, para. 3.4 ("it is necessary to establish widespread and consistent State practice, and evidence of *opinion juris*, to confirm the existence and content of any customary law principle of prevention applicable to environmental harm caused by anthropogenic greenhouse gas emissions"); Written Comments of New Zealand, para. 23 ("there is no widespread and reasonably consistent state practice with *opinio juris* on the application, or the scope, of the [customary international law] duty [to prevent significant transboundary harm] in the climate change context.")

¹⁴ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 241-242, para. 29. *See also, Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment, I.C.J. Reports 1997*, pp. 77-78, para. 140; *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, pp. 55-56, paras. 101-102; pp. 75-77, paras. 181-189; pp. 82-83, para. 204; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), I.C.J. Reports 2015 (II)*, p. 706, para. 104; pp. 711-712, para. 118.

¹⁵ The objective of the UNFCCC includes "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system".

¹⁶ IPCC, Sixth Assessment Report, 2023, Synthesis Report (Working Groups I, II and III), Summary for Policymakers (available at: https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf), para. C.1.

¹⁷ *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, (hereinafter "ITLOS Climate Advisory Opinion"), para. 241.

of required diligence is premised on each State's capabilities. In the context of climate change, the level of required diligence is also differentiated based on each State's responsibilities. This follows from the principle of CBDR-RC.

20. The argument of certain high-emitting States that CBDR-RC has no role outside the climate treaties is plainly wrong. The UNFCCC requires its parties to be guided by the principle of CBDR-RC in "their actions" both "to achieve [the Convention's] objective" as well as "to implement" the provisions of the Convention¹⁸. As a result, when States take action to achieve climate objectives, they must respect the principle of CBDR-RC, including when they are acting under the prevention obligation and human rights obligations.

21. The European Court of Human Rights recently confirmed this interpretation. Seeking a harmonious interpretation across legal régimes, the European Court relied on the principle of CBDR-RC outside the climate treaties, specifically in the context of States' due diligence obligations to mitigate greenhouse gas emissions flowing from their international human rights obligations¹⁹.

22. Taking these elements together, the obligations of States are clear. To act with diligence, States must make rapid, deep and sustained cuts to national greenhouse gas emissions in light of the remaining carbon budget. They must do so taking into account the evolving level of risk and their respective capabilities and responsibilities.

23. The IPCC, which produces "the best available science"²⁰, also "stressed the importance of the carbon budgets"²¹ and identified the remaining budget for keeping within the 1.5°C limit. As each State must use not more than an equitable share thereof, with developed States "taking the lead"²², it necessarily follows that:

(a) A developed State must do its utmost, using all the means at its disposal, to reduce its emissions by considerably more than 43 per cent by 2030; 60 per cent by 2035; 69 per cent by 2040; and

¹⁸ UNFCCC, Article 3.5.

¹⁹ *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, ECtHR App. No. 53600/20, 9 May 2024 (hereinafter "*KlimaSeniorinnen v. Switzerland*"), paras. 571-572.

²⁰ ITLOS Climate Advisory Opinion, para. 208; *KlimaSeniorinnen v. Switzerland*, paras. 107-120.

²¹ *KlimaSeniorinnen v. Switzerland*, para. 116.

²² Paris Agreement, Article 4.4.

84 per cent by 2050, compared with 2019 levels; and, to achieve net-zero CO₂ emissions *well before* 2050 and net-zero greenhouse gas emissions *well before* early 2070²³.

(b) A developing country must still contribute; but its equitable share may be less demanding, depending on its past and present emissions, and the level of development and capabilities.

24. Some States emphasize that there is yet no internationally agreed “equitable share” of the carbon budget, but we say this is not an excuse. The absence of an agreed methodology for apportioning shares simply means that there is a corresponding obligation to co-operate to reach that agreement. In the absence of an agreement, a diligent State must develop its own methodology to determine its equitable share, using the best available science, in good faith recognition of its own capabilities and responsibilities.

IV. STATE RESPONSIBILITY

25. Moving to the second question: State responsibility. All Participants accept two principles²⁴:

(a) *First*, a breach of an international obligation automatically gives rise to State responsibility.

(b) *Second*, the content of that responsibility, namely the State’s duty to make reparation, depends on the existence of harm and a causal nexus between the breach and the harm.

26. The *application* of the second principle in the case of climate change, however, is where some Participants differ.

27. While the *harm* caused by climate change is well established²⁵, some Participants argue that the necessary *causal link* cannot be proved. They contend that causal complexity makes it impossible for an obligation to make reparation to arise in respect of a wrongful emission²⁶. In other

²³ UN, “New Analysis of National Climate Plans: Insufficient Progress Made, COP28 Must Set Stage for Immediate Action”, 14 November 2023 (available at: <https://unfccc.int/news/new-analysis-of-national-climate-plans-insufficient-progress-made-cop28-must-set-stage-for-immediate#:~:text=The%20latest%20science%20from%20the,2030%2C%20compared%20to%202019%20levels>); *see also*, IPCC, Sixth Assessment Report, 2023, Synthesis Report (Working Groups I, II and III), Full Report (available at: https://unfccc.int/sites/default/files/resource/cma2022_10a01_adv.pdf), para. B.6.1, Table SPM.1, Figure 2.5 Panel b and Table 3.1.

²⁴ ILC, Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, *YILC* 2001, Vol. II, Part Two (hereinafter “ILC Articles on State Responsibility”), Articles 1-2 and 31.

²⁵ Written Comments of Antigua and Barbuda, para. 109; Written Statement of Antigua and Barbuda, Section II.

²⁶ *See, for example*, Written Statement of the United Kingdom, para. 137.4.3; Written Statement of Russia, p. 17; Written Statement of China, para. 136; Written Statement of Singapore, paras. 4.11, 4.14; Written Statement of the United States, paras. 2.20, 5.7-5.10; Written Statement of Australia, para. 5.9.

words, they ask the Court to sanction a situation of breach with no responsibility to make reparation for it. That would be, in language of the *Trail Smelter* award, a “perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts”²⁷.

28. When the Court has been faced with similar arguments, it has consistently rejected them. It has, first, reaffirmed that even though “the state of science regarding the causal link between the wrongful act and the damage may be uncertain”, that will *not* automatically preclude the existence of a duty to make reparation²⁸. *Second*, it has identified principles to accommodate uncertainties in assessing the existence, extent and cause of harm²⁹. The Court should affirm this approach in the present case.

29. It is useful to examine how causation is accommodated in the rules governing the existence, content and extent of State responsibility.

A. The relevance of causation to establish a wrongful act (*Step 1*)

30. As a first step, determining the existence of an internationally wrongful act requires that conduct constitutes a *breach* of an international obligation which is *attributable* to the State³⁰. For the obligation of prevention, a State must have failed to use all means at its disposal to prevent emissions emanating from within its territory or subject to its jurisdiction from resulting in significant harm to the environment.

31. The Court has confirmed that causation does *not* play a key role in determining a breach of this type of obligation. States are under “a duty to act which is *not dependent* on the certainty that the action to be taken will succeed in preventing” the relevant harm or even have a likelihood of

²⁷ *Trail smelter case (United States, Canada), Awards of 16 April 1938 and 11 March 1941, United Nations, Reports of International Arbitral Awards, Vol. III, p. 1920; See Written Comments of Antigua and Barbuda, para. 118.*

²⁸ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment, I.C.J. Reports 2018* (hereinafter “*Certain Activities (Compensation)*”), p. 26, para. 34; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations, Judgment, I.C.J. Reports 2022* (hereinafter “*Armed Activities (Reparations)*”), pp. 122-123, para. 349.

²⁹ *Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949*, pp. 19 and 22-23 (reliance on circumstantial evidence); *Certain Activities (Compensation)*, pp. 26-27, para. 35 (reliance on reasonable estimates and ranges of possibilities in the extent of damage); *Armed Activities (Reparations)*, pp. 48-49, paras. 93-98 and pp. 51-52, paras. 106-107 (variations in causal nexus depending on the primary rule and the nature and extent of injury; accommodating multiple concurrent causes and indirectly caused harm; lower evidential standards).

³⁰ ILC Articles on States Responsibility, Article 2.

doing so³¹. On this basis, both the ITLOS and the European Court of Human Rights have rejected the so-called “drop in the ocean” argument: that no State can have breached due diligence obligations in the context of climate change, because no single State’s emissions reduction measures could make a meaningful difference in this crisis.

B. The relevance of causation to establish whether the wrongful act triggers an obligation to make reparation (*Step 2*)

32. The second step is to identify the *content* of State responsibility: there will be a duty to make reparation where there is, first, injury, and, second, a causal relationship between the wrongful act and the injury. Both conditions are capable of being fulfilled in the context of climate change.

33. *First*, the existence of the injury is axiomatic: in these proceedings alone, scores of States will describe the injury that they have, and continue to be suffering. For some small island States, injury rises to the level of compromising their continued existence.

34. *Second*, the causal link between the wrongful conduct and harm is capable of being satisfied in individual cases. This is because it is scientifically possible to determine a State’s contribution to global warming³² and because principles exist to address remaining areas of causal uncertainty³³.

35. This includes the flexibility of the applicable causal standard. The Court has affirmed that causation must be “sufficiently direct and certain”³⁴, with “sufficiently” being a relative concept that takes into account the particular circumstances. Indeed, in the *Armed Activities* case, the Court confirmed that “the causal nexus required may vary depending on the primary rule violated and the nature and extent of the injury”³⁵. The Court should confirm that approach in this present case.

36. As an illustration of this flexible standard, in *Armed Activities*, the Court adopted a *presumption* of causation. It held that it was for the breaching State to establish that a particular injury

³¹ *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 (I), p. 233, para. 461; Written Comments of Antigua and Barbuda, paras. 87-88 (emphasis added).

³² See Written Comments of Vanuatu, paras. 68-71.

³³ See para. 0.

³⁴ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Reparations, Judgment, I.C.J. Reports 2022 (I), p. 48, para. 93 (and cases cited therein).

³⁵ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Reparations, Judgment, I.C.J. Reports 2022 (I), p. 48, para. 93 (and cases cited therein).

was *not* caused by its failure to act with diligence to prevent certain conduct of individuals within its territorial control. The same presumption applies by analogy in respect of wrongful emissions from a State's territory that are clearly contributing to climate change harm³⁶. This would be complementary to the scientific proof of causal connections between specific States' emissions and harm, and could be one way to redress remaining causal uncertainties.

37. A number of participants argue, to the contrary, that it is not scientifically possible to satisfy the causal link between a State's wrongful emissions and harm sustained so that a duty to make reparation would arise³⁷. These States are wrong, but they are also asking the Court to find, as I have already noted, that States may be *responsible* for breaches of international law, but that there will be *no obligation to make reparation*. This would pre-judge or even prevent the commencement of future cases. To ask the Court to go to such lengths is remarkable.

38. What these States are primarily concerned about is being held responsible for more than their fair share in a situation where there are concurrent causes of harm. But that concerns the *extent* of the duty to make reparations, not whether that duty exists at all. As the Court has held, "the fact that . . . damage was the result of concurrent causes is *not* sufficient to exempt [a responsible State] from any obligation to make reparation"³⁸.

C. The relevance of causation to determine the extent of the liability of the State (Step 3)

39. The third step concerns the *extent* of responsibility. International law has mechanisms that deal with *apportionment* of the duty to make reparations across multiple States³⁹. The *Armed Activities* case again is instructive: the Court confirmed that in certain cases where multiple causes result in an injury, "responsibility for part of such injury should instead be allocated among those

³⁶ See Written Comments of Antigua and Barbuda, paras. 110-115.

³⁷ See, for example, Written Statement of the United Kingdom, para. 137.4.3; Written Statement of Russia, p. 17; Written Statement of China, para. 136; Written Statement of Singapore, paras. 4.11, 4.14; Written Statement of the United States, paras. 2.20, 5.7-5.10; Written Statement of Australia, para. 5.9.

³⁸ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)*, p. 49, para. 97.

³⁹ See Written Statement of Antigua and Barbuda, paras. 548-549.

actors” or causes⁴⁰. These principles, supported by scientific techniques, allow the Court to best approximate the relevant States’ share of responsibility, in light of contributing factors.

40. In sum, causal complexity in the context of climate change is no bar to the existence, content or extent of State responsibility, including a duty to make reparations.

41. Antigua and Barbuda respectfully urges the Court to give particular credence to the views of SIDS — as specially affected States — on the applicability of the duty to make reparations in the context of the climate change crisis.

42. Mr President, Members of the Court, Antigua and Barbuda thanks you for your time.

The PRESIDENT: I thank the representatives of Antigua and Barbuda for their presentation. I now invite the next participating delegation, Saudi Arabia, to address the Court and I call upon His Highness Prince Jalawi Turki Al Saud to take the floor.

HH Prince Jalawi Turki AL SAUD:

I. THE KINGDOM’S APPROACH TO CLIMATE CHANGE

1. Mr President, Members of the Courtt is a great honour to appear before you in these important proceedings, and to do so on behalf of the Kingdom of Saudi Arabia.

As a country particularly vulnerable to extreme heat, water scarcity, desertification and other adverse effects of climate change, the Kingdom acknowledges the urgency of taking action to mitigate the harmful effects of climate change. As a State with a resource-dependent economy, economic diversification objectives and historically low greenhouse gas emissions, the Kingdom emphasizes the importance of international co-operation to advance global efforts to protect the climate system by addressing anthropogenic greenhouse gas emissions.

3. At the same time, efforts to address greenhouse gas emissions must occur alongside efforts to ensure the fulfilment of objectives such as energy security, energy affordability, poverty eradication, food security and economic development, among other goals, in order to achieve sustainable development. Peoples around the world have historically had unequal access to energy and have made unequal contributions to atmospheric greenhouse gas concentrations. Those States

⁴⁰ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)*, p. 50, para. 98.

that participated in the Industrial Revolution early on enjoyed advantages in welfare, infrastructure, and economic development. Having regard to States' differentiated responsibilities and capacities requires recognition of different starting points, development needs, and the social context — the response will not be uniform across countries and regions.

4. The specialized treaty régime on climate change, comprised of the United Nations Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement, addresses these complexities.

5. Under the specialized treaty régime, the Kingdom actively participated in negotiations and contributes to the response to climate change. The Kingdom's response includes its nationally determined contributions as well as several ambitious initiatives such as the Saudi Green Initiative and the Middle East Green Initiative. Additional details on the Kingdom's efforts and initiatives are in our Written Statement⁴¹.

6. Mr President, allow me to highlight three important points:

7. First, the specialized treaty régime on climate change provides a complete answer to the questions on obligations and consequences.

8. Second, the specialized treaty régime on climate change is a remarkable achievement; it is specifically designed to address the complex, global phenomenon of climate change. It was reached through determined and rigorous negotiations and guided by multilaterally agreed principles. The treaty régime reflects the good faith efforts of all participating States to reach pragmatic and effective agreement on what are immensely complex policy matters for every State.

9. Third, seeking to impose any obligations or consequences that go beyond or conflict with those contained in the specialized treaty régime on climate change would risk undermining the integrity of this régime and impair future progress in international efforts to protect the climate system.

10. Mr President, our next speaker will be Sir Michael Wood, who will address you on the role of the Court and the applicable law.

⁴¹ Written Statement of the Kingdom of Saudi Arabia, 21 March 2024 ("KSA-WS"), Chapter 2.

11. He will be followed by Ms Ghaida Bajbaa, from the Saudi Ministry of Energy, who will speak to the application of the two questions put by the General Assembly.

12. Mr President, Members of the Court, I thank you for your attention.

13. I request that you invite Sir Michael Wood to the podium.

The PRESIDENT: I thank His Highness Prince Jalawi Turki Al Saud. I now give the floor to Sir Michael Wood.

Sir Michael WOOD:

II. THE COURT'S ROLE AND THE APPLICABLE LAW

1. Mr President, Members of the Court, it is an honour to appear before you and to do so on behalf of the Kingdom of Saudi Arabia.

2. In the time available, I must be selective. We maintain and attach importance to all the points in our Written Statement⁴² and Written Comments⁴³. The fact that we do not cover certain points made by others does not mean that the Kingdom agrees with all that they say.

3. Mr President, I shall address the Court's role in these proceedings as well as the applicable law.

4. We urge the Court to adopt a cautious approach when answering the two questions posed by the General Assembly. The need for caution was addressed in the General Assembly debate upon the adoption of resolution 77/276, when many States emphasized that it was not for the Court to impose additional obligations or responsibilities on States⁴⁴. The consensus among States at the General Assembly was based on a clear understanding of the role of the Court, and the scope of the questions.

5. Mr President, Members of the Court, the Court's role in advisory proceedings, as in all of its work, is to apply the *lex lata*⁴⁵. This is particularly so given ongoing negotiations among States, pursuant to the specialized treaty régime on climate change, to further advance global efforts to

⁴² Written Statement of the Kingdom of Saudi Arabia, 21 March 2024 ("KSA-WS").

⁴³ Written Comments of the Kingdom of Saudi Arabia, 15 August 2024 ("KSA-WC").

⁴⁴ KSA-WS, paras. 1.16-1.19, 3.2-3.3, 3.7.

⁴⁵ KSA-WS, paras. 3.9-3.16; KSA-WC, para. 2.2.

protect the climate system by addressing anthropogenic greenhouse gas emissions — negotiations which are based on State sovereignty and on consent. Despite some calls that seem to be urging the Court to impose new obligations, advisory proceedings cannot be a substitute for negotiation⁴⁶.

6. An effective and progressive response to the threat of climate change requires active and good-faith negotiation, and co-operation among States, based on States' own policy choices and on their consent. Such choices are not matters that courts can impose from above.

7. The specialized treaty régime on climate change contains a well-established framework that governs States' negotiation and co-operation, providing the Court with the basis for addressing the questions before the Court. This régime establishes a legitimate mechanism for stabilizing greenhouse gas concentrations in the atmosphere precisely because it is based on the clear consent of States. A judicial response that departs from the *lex lata* and alters the specialized treaty régime on climate change would undermine the credibility and effectiveness of the existing legal régime, and the framework for negotiation, co-operation and consent that the treaties establish.

8. Mr President, Members of the Court, the “*chapeau*” added by the General Assembly to the questions in resolution 77/276 lists a series of instruments, duties, rights and principles, some applicable, some not. In any event, it is not for the General Assembly to determine what law is applicable to answering the questions put to the Court. The *chapeau* cannot have an effect on the Court's function of determining the applicable law. In the recent *Occupied Palestinian Territory* Opinion, after setting out a rather similar *chapeau*, the Court went on to make clear that “the Court will determine which rules of international law are relevant for answering the questions posed . . . by the General Assembly”⁴⁷. *Jura novit curia*. It is for the Court to determine the applicable law.

9. I now turn to the applicable law that is relevant to the questions put by the General Assembly.

10. All participants accept that, under international law, States' climate change obligations are primarily governed by the specialized treaty régime on climate change⁴⁸. It is fundamental that the Court reaffirms the primacy of this specialized treaty régime, since it reflects the consensus of States on how to address the global threat of climate change. Some, however, seem to be suggesting that it

⁴⁶ KSA-WS, para. 3.10; KSA-WC, para. 2.2.

⁴⁷ *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024*, paras. 84, 85.

⁴⁸ KSA-WS, paras. 1.7, 3.5; *ibid.*, Chapter 4; KSA-WC, paras. 1.2, 2.4-2.10.

is the scientists that determine States' legal obligations. That is not so. It is the treaties, not scientists, that set out legal obligation.

11. One other important point that I should make is the coherence of the specialized treaty régime. Contrary to certain suggestions, the Kyoto Protocol, the Paris Agreement and other instruments and measures developed exclusively under the UNFCCC enhance the implementation of the UNFCCC and build upon the principles and provisions established in the UNFCCC.

12. Mr President, Members of the Court, that concludes my short statement. I request that you now invite Ms Ghaida Bajbaa who will describe the legal position in more detail to the podium. I thank you, Mr President.

The PRESIDENT: I thank Sir Michael Wood. I now give the floor to Ms Ghaida Bajbaa. Madam, you have the floor.

Ms BAJBAA:

III. QUESTIONS (A) AND (B): PRIMACY OF THE SPECIALIZED TREATY RÉGIME ON CLIMATE CHANGE

Introduction

1. Mr President, Members of the Court, my name is Ghaida Bajbaa, from the Ministry of Energy. It is a great honour to address you, and to do so on behalf of the Kingdom of Saudi Arabia.

2. In response to question (a), I shall first address certain aspects of the specialized treaty régime on climate change: the importance of nationally determined contributions (NDCs), certain fundamental principles of the treaty régime, and its primacy. I shall then say a word about the interpretation of the specialized treaty régime, which cannot be expanded by reference to other instruments. And, finally, I shall offer some thoughts on question (b).

Legal obligations (question (a))

3. Mr President, Members of the Court, the Kingdom and other participants have described in detail in the written pleadings the specialized treaty régime on climate change⁴⁹. Among other things, all States have a binding obligation to prepare, communicate and maintain their NDCs, taking into

⁴⁹ KSA-WS, Chapter 4; KSA-WC, Chapter 3.

account common but differentiated responsibilities and respective capabilities and national circumstances⁵⁰.

4. While the NDC process is mandatory, the content, implementation and achievement of the NDCs themselves are not legally binding. States have full discretion to determine their NDCs. That is intentional. That deliberate choice for voluntary contributions by States is central to a proper understanding of States' obligations referred to in the questions before the Court. NDCs concern an obligation of best efforts, not of result.

5. The specialized treaty régime on climate change is based upon certain fundamental principles. I only have time to mention two and refer you to the Kingdom's written pleadings for further details⁵¹.

(a) First, the principle of common, but differentiated, responsibilities and respective capabilities⁵².

As is universally recognized, the atmospheric concentrations of greenhouse gases contributing to climate change date back to emissions from the industrial revolution. This historic responsibility is recognized in the treaty régime⁵³.

(b) Second, the treaty régime emphasizes stabilizing atmospheric greenhouse gas concentrations in a timeframe that expressly enables "economic development to proceed in a sustainable manner"⁵⁴ and on the basis of equity and "in the context of sustainable development and efforts to eradicate poverty"⁵⁵.

These principles are the bedrock of the treaty régime, essential for many States to be able to join the negotiating consensus. It is important that they are clearly affirmed in the Court's opinion.

6. The Kingdom believes there is no room to play down the primacy of the specialized treaty régime on climate change and overlook the crucial importance of the worldwide acceptance of the régime. The Paris Agreement's requirement for the parties to identify and maintain NDCs is a

⁵⁰ KSA-WC, paras. 1.5-1.7, 5.11-5.18.

⁵¹ KSA-WS, paras. 4.10-4.28, 4.37-4.43, 4.48-4.75; KSA-WC, paras. 2.7, 3.3-3.12, 4.22-4.38.

⁵² KSA-WC, paras. 1.5-1.7.

⁵³ KSA-WC, paras. 3.3-3.6.

⁵⁴ UNFCCC, Article 2.

⁵⁵ Paris Agreement, Articles 2 (1) and 2 (2).

carefully designed mechanism for advancing progress towards the Paris goals⁵⁶. Almost every State has submitted an NDC; this is a significant achievement.

7. The specialized treaty régime on climate change provides no basis for the Court to recommend limits on fossil fuel extraction and production — no basis whatsoever. The specialized treaty régime requires parties to consider actions necessary to meet the specific needs and concerns of States not listed in Annex I to the UNFCCC and affected by response measures to climate change, including those with economies highly dependent on fossil fuel production and export. Failure to respect these provisions would undermine the carefully negotiated balance under the specialized treaty régime that accommodates the diverse economic circumstances of all parties.

8. Perhaps most critically, the Court should not interpret the treaties in a way that goes beyond what was agreed by the negotiating States. This is particularly so with respect to aspirational provisions, such as the temperature goals in Article 2 of the Paris Agreement, which do not impose legally binding obligations⁵⁷. Some participants argue that scientists should determine States' obligations. That, with respect, cannot be the case. As stated previously, it is the treaties that set the obligations. Nothing would threaten future progress in international efforts to protect the climate system more than distorting and misrepresenting agreed language.

9. Apart from the specialized treaty régime, none of the treaties or instruments mentioned in the chapeau to the questions was intended to address climate change. These instruments were not designed to address the unique challenges presented by the climate change.

10. This is the case in the Law of the Sea Convention, which has been considered by States in the context of the advisory proceedings in Hamburg. We set out at some length our considered positions on the ITLOS Advisory Opinion in our Written Comments⁵⁸. In short, the law of the sea cannot be interpreted as imposing obligations that are inconsistent with, or go beyond, those agreed in the specialized treaty régime.

11. Mr President, Members of the Court, the principles of international environmental law and international human rights law referenced in the chapeau were not developed in the context of climate

⁵⁶ KSA-WS, paras. 1.8, 4.64-4.65; KSA-WC, para. 4.12.

⁵⁷ KSA-WS, paras. 4.56-4.63.

⁵⁸ KSA-WC, paras. 2.11-2.17.

change or agreed by States in the specialized treaty régime; they are not applicable to the questions before the Court. Nor can the application of notions such as harmonization or systematic integration serve as bases for imposing wholly new or inconsistent obligations on States with respect to climate change.

12. The “no-harm” principle was not designed to apply to the protection of the climate system from greenhouse gas emissions, nor does it do so. It concerns transboundary environmental damage caused directly by activities in the territory of one State to the territory of a neighbouring State. As several participants have observed in their written pleadings the “no-harm” principle applies in a bilateral context, where there is a clear link between the source of harm and the affected State. The principle does not apply where, as here, anthropogenic climate change results from a whole range of varied and diffuse activities and events that emit greenhouse gases accumulating over a long period of time.

13. Some participants have referred to a right to a safe, clean, healthy and sustainable environment. But as we and others have explained, such a right has not entered the corpus of international law, and the implications flowing from any such right have not been spelled out and agreed⁵⁹.

14. The obligations under human rights treaties also do not address the protection of the climate system from anthropogenic greenhouse gas emissions. It is important to note that international human rights obligations apply only to the States parties to the particular treaty, and then only in respect to individuals, in their territory or under their jurisdiction. The statements of human rights bodies and special rapporteurs do not affect this position. As the Court recalled in the *Qatar v. United Arab Emirates* case, in connection with a human rights convention, “the interpretation must be based above all on the text of the treaty”⁶⁰.

15. Decisions of regional or domestic courts and tribunals are not a source of general international law. There are many reasons for this — primarily, of course, because national or regional courts are usually applying national or regional law, including domestic constitutional law

⁵⁹ KSA-WC, para. 4.46.

⁶⁰ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 98, para. 81.

or regional human rights law. Even when they seek to apply public international law, they may do so through a domestic or regional lens.

Legal consequences (question (b))

16. Mr President, Members of the Court, I now turn to question (b).

17. Like question (a), question (b) does not ask the Court to seek to qualify the activities that resulted in emissions. It was clear when the questions were asked that there was no intention for the Court to consider the responsibility or liability of individual States⁶¹.

18. As we and others have explained in our written pleadings, the climate change treaty régime contains its own compliance mechanisms to deal with the legal consequences where significant harm is caused.

19. In addition to mitigation and adaptation requirements, the treaty régime contains a loss and damage mechanism, which seeks to deal with cases of harm.

20. Mr President, Members of the Court, as you are aware, a loss and damage fund has already been established.

21. Where a party considers that another party has breached its obligations, it may invoke the relevant compliance and dispute settlement mechanisms, including under Article 15 of the Paris Agreement. This provision establishes a mechanism to facilitate implementation of and promote compliance with the Paris Agreement.

22. Some argue for the application of the residual rules of customary international law on State responsibility, as proposed by the International Law Commission. However, as many participants have recognized in their written pleadings, there are significant problems with applying these residual rules in the present context. Above all, there are highly problematic questions of causation.

23. In any event, Article 55 of the Articles on State Responsibility provides that they “do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law”. The specialized treaty régime on climate change itself determines the legal consequences of significant harm to the climate system.

⁶¹ See KSA-WS, para. 5.4 and footnote 223.

24. Finally, with respect to point (ii) in question (b), the specialized treaty régime does not confer rights upon individuals. Moreover, as others have also made clear, the concept of “peoples and individuals of . . . future generations” is too indeterminate for them to have legal status or standing, or for claims to be made on their behalf.

Concluding remarks

25. Mr President, I would like to conclude with three points:

26. First, the Kingdom of Saudi Arabia respectfully requests the Court to answer questions (a) and (b) by confirming that:

- State obligations to protect the climate system and other parts of the environment from anthropogenic greenhouse gas emissions are those set out in the specialized treaty régime on climate change; and
- the legal consequences under the obligations are to be determined by reference to the specialized treaty régime on climate change.

27. Second, determining obligations that are inconsistent with, or go beyond, those agreed in the specialized treaty régime would undermine the ongoing, and future progress in international efforts to protect the climate system.

28. Third, to strengthen the global response to the threat of climate change, the Kingdom is committed to the full implementation of the principles and obligations embodied in the specialized treaty régime (the UNFCCC, the Kyoto Protocol and the Paris Agreement).

29. Mr President, Members of the Court, that concludes the oral presentation of the Kingdom of Saudi Arabia. We thank you for your attention. I thank you, Mr President.

The PRESIDENT: I thank the representatives of Saudi Arabia for their presentation. I now invite the delegation of Australia to address the Court and I give the floor to Mr Jesse Clarke.

Mr CLARKE:

I. INTRODUCTION

1. Mr President, Madam Vice-President, distinguished Members of the Court, it is a great honour to appear before you on behalf of Australia.

2. Climate change is one of the defining challenges of our time. Australia is resolutely committed to taking urgent action to address the effects of anthropogenic greenhouse gas emissions on the climate system. In that context, Australia was proud to co-sponsor the United Nations General Assembly resolution requesting an advisory opinion from this Court⁶².

3. Climate change is the greatest shared threat to all countries. It is having significant impacts, in particular on small island States, and these impacts will only increase as the temperature of the planet rises. Indeed, climate change poses the single greatest threat to the livelihoods, security and well-being of the peoples of small island States, including Pacific Island States.

4. Australia commends the long-standing leadership of our Pacific neighbours in shaping global responses to climate change and, in particular, Vanuatu's leadership in driving forward the request for this advisory opinion, together with the core group⁶³. Australia is committed to working with the Pacific to strengthen the global responses to climate change.

5. Global co-operation is critical to delivering an effective response to climate change. Australia acknowledges the extent of the challenge posed by climate change and recognizes that ambitious individual and collective action must be undertaken urgently. In this regard, the UNFCCC⁶⁴ and the Paris Agreement⁶⁵ are the central instruments that provide the framework for international co-operation and commitments to tackle the grave challenge of climate change. Collective action under these treaties has resulted in a reduction over time of projected future levels of greenhouse gas emissions. However, parties are not yet on track to ensure the objective of the UNFCCC and the goals of the Paris Agreement are met⁶⁶. Australia recognizes there is an urgent need for States to take stronger individual action now, to achieve our collective goals, which is even more pronounced today than it was in 1992. Unless greenhouse gas emissions peak and rapidly reduce in the near term, we will experience rapid warming and more pronounced changes to sea

⁶² UN GAOR, 77th Session, 64th Plenary Meeting, Agenda Item 70, UN doc. A/77/PV.64 (29 March 2023) (UN Dossier No. 3), p. 4.

⁶³ UN GAOR, 77th Session, 64th Plenary Meeting, Agenda Item 70, UN doc. A/77/PV.64 (29 March 2023) (Republic of Vanuatu), p. 2.

⁶⁴ *United Nations Framework Convention on Climate Change*, opened for signature 20 June 1992 (entered into force 21 March 1994), *UNTS*, Vol. 1771, p. 107 (UN Dossier No. 4).

⁶⁵ *Paris Agreement*, opened for signature on 2 April 2016 (entered into force 4 November 2016), *UNTS*, Vol. 3156 (UN Dossier No. 16).

⁶⁶ "Outcome of the first global stocktake", Decision 1/CMA.5, UN doc. FCCC/PA/CMA/2023/16/Add.1 (13 December 2023), paras. 2, 21 and 24.

levels, river flow, water temperature and precipitation. To maximize the chance of meeting the temperature goals of the Paris Agreement, the world's largest emitters which have not yet peaked and begun to reduce their emissions must rapidly do so.

6. Australia is taking urgent and ambitious climate action to reduce greenhouse gas emissions, decarbonize its economy, strengthen national and regional adaptation, and increase resilience to the impacts of climate change⁶⁷. Australia is resolutely committed to achieving the objective of the UNFCCC and the goals of the Paris Agreement, including by strengthening its emission-reduction targets, legislating a commitment to achieve net zero by 2050 and delivering on its climate finance commitments⁶⁸.

7. The questions before you provide an important opportunity for the Court to clarify the existing legal obligations of all States, and the particular legal consequences for all States, with respect to climate change. The Court has not been asked to opine on the international responsibility of, or consequences for, any specific State or group of States. In particular, question (b) does not require or invite the Court to determine whether breaches of any such obligations have occurred or will occur, nor whether particular States are specially affected or injured.

8. Australia observes that there are many areas of consensus among the Participants to these proceedings. In particular, there is broad agreement on: the competence of the Court to render an advisory opinion in this matter⁶⁹; the central role played by the UNFCCC and the Paris Agreement

⁶⁷ Written Statement of Australia, paras. 1.10-1.20.

⁶⁸ *Climate Change Act 2022* (Cth) section 10 (1) (b), available at <https://www.legislation.gov.au/C2022A00037/latest/text>; Written Statement of Australia, paras. 1.10, 1.13-1.14.

⁶⁹ See e.g. Written Statement of the Republic of Albania, paras. 23-45; Written Statement of the Argentine Republic, para. 30; Written Statement of the Commonwealth of the Bahamas, para. 77; Written Statement of the People's Republic of Bangladesh, para. 79; Written Statement of Barbados, paras. 20-21, 36; Written Statement of Belize, para. 4; Written Statement of the Plurinational State of Bolivia, paras. 3-11; Written Statement of the Federative Republic of Brazil, paras. 6, 8; Written Statement of the Republic of Cameroon, para. 9; Written Statement of the Republic of Chile, paras. 16, 19; Written Statement of the People's Republic of China, paras. 5-10; Written Statement of the Republic of Colombia, para. 1.22; Written Statement of the Cook Islands, paras. 6-22; Written Statement of the Republic of Costa Rica, paras. 8-20; Joint Written Statement of Denmark, Finland, Iceland, Norway and Sweden, paras. 31, 33; Written Statement of the Dominican Republic, paras. 3.1-3.8; Written Statement of the Republic of Ecuador, para. 2.2; Written Statement of the Arab Republic of Egypt, paras. 20, 29; Written Statement of the Republic of El Salvador, paras. 6, 8; Written Statement of the Republic of the Gambia, paras. 1.5-1.10; Written Statement of Germany, paras. 9-11; Written Statement of Ghana, paras. 20-22; Written Statement of Grenada, paras. 9-10; Written Statement of the Republic of India, paras. 4-7; Written Statement of the Republic of Indonesia, para. 24; Written Statement of the Republic of Kenya, paras. 4.1-4.16; Written Statement of the Republic of Kiribati, paras. 5-17; Written Statement of the Republic of Korea, para. 5; Written Statement of the Republic of Latvia, paras. 6-11; Written Statement of the Principality of Liechtenstein, paras. 14-20; Written Statement of the Republic of the Marshall Islands, paras. 8-14; Written Statement of the Republic of Mauritius, paras. 17, 19; Written Statement of Mexico, paras. 7-20; Written Statement of the Federated States of Micronesia, paras. 8-22; Written Statement of the Republic of Namibia, paras. 19-20, 25; Written Statement of Nepal, paras. 2-8; Written Statement of the

in setting out States' obligations to address climate change⁷⁰; and the need to address the complex challenges of climate change on the basis of best available science (as most recently reflected in the Sixth Report of the Intergovernmental Panel on Climate Change)⁷¹. Australia was also pleased to see

Republic of Peru, paras. 4-8; Written Statement of the Republic of the Philippines, paras. 12-16; Written Statement of the Portuguese Republic, paras. 29, 38; Written Statement of Saint Lucia, paras. 10-17; Written Statement of Saint Vincent and the Grenadines, paras. 16-24; Written Statement of the Independent State of Samoa, para. 10; Written Statement of the Republic of Seychelles, paras. 4-13; Written Statement of the Republic of Sierra Leone, paras. 2.1-2.12; Written Statement of the Republic of Singapore, paras. 2.1-2.6; Written Statement of the Republic of Slovenia, para. 7; Written Statement of Solomon Islands, para. 11; Written Statement of the Democratic Socialist Republic of Sri Lanka, paras. 7-15; Written Statement of the Swiss Confederation, paras. 9-12; Written Statement of the Democratic Republic of Timor-Leste, paras. 13-14; Written Statement of the Kingdom of Tonga, paras. 9-13; Written Statement of the United Arab Emirates, paras. 5-8; Written Statement of the Oriental Republic of Uruguay, paras. 61-76; Written Statement of the Republic of Vanuatu, para. 66; Written Statement of the Socialist Republic of Viet Nam, paras. 6-14; Written Statement of the African Union, paras. 20-38; Written Statement of the Alliance of Small Island States, paras. 7-14; Written Statement of the European Union, para. 23; Written Statement of the Organization of Caribbean, African and Pacific States, paras. 10-17; Written Statement of the Parties to the Nauru Agreement Office, paras. 32-36; Written Comments of the International Union for the Conservation of Nature, para. 9; Written Comments of Japan, para. 6.

⁷⁰ See e.g. Written Statement of Antigua and Barbuda, paras. 151-170; Written Statement of the Argentine Republic, para. 34; Written Statement of the Commonwealth of the Bahamas, para. 87; Written Statement of the Plurinational State of Bolivia, paras. 23-33; Written Statement of the Federative Republic of Brazil, para. 10; Written Statement of Canada, para. 11; Written Statement of the Republic of Chile, para. 54; Written Statement of the People's Republic of China, para. 20; Written Statement of the Republic of Costa Rica, para. 32; Joint Written Statement of Denmark, Norway, Iceland, Finland and Sweden, paras. 45-48; Written Statement of the Dominican Republic, para. 4.21; Written Statement of the Republic of Ecuador, paras. 3.66-3.67; Written Statement of the Republic of El Salvador, para. 29; Written Statement of Germany, para. 42; Written Statement of Grenada, paras. 23-37; Written Statement of the Republic of India, para. 19; Written Statement of the Republic of Indonesia, paras. 50-51; Written Statement of Japan, para. 13; Written Statement of the Republic of Korea, para. 17; Written Statement of the State of Kuwait, paras. 7, 10-11; Written Statement of the Republic of Latvia, para. 16; Written Statement of the Republic of the Marshall Islands, paras. 39-42; Written Statement of the Republic of Mauritius, para. 86; Written Statement of the Federated States of Micronesia, para. 89; Written Statement of the Kingdom of the Netherlands, paras. 2.3-2.6; Written Statement of New Zealand, para. 21; Written Statement of the Islamic Republic of Pakistan, para. 47; Written Statement of the Republic of Peru, paras. 76-82; Written Statement of the Republic of the Philippines, para. 102; Written Statement of the Portuguese Republic, para. 41; Written Statement of the Russian Federation, p. 5; Written Statement of Saint Lucia, paras. 39(iii), 49-68; Written Statement of Saint Vincent and the Grenadines, para. 131; Written Statement of the Independent State of Samoa, paras. 140-141; Written Statement of the Republic of Seychelles, paras. 64-65; Written Statement of the Republic of Singapore para. 3.27; Written Statement of the Republic of South Africa, para. 17; Written Statement of the Democratic Socialist Republic of Sri Lanka, para. 90; Written Statement of the Swiss Confederation, paras. 13, 48-58; Written Statement of the Democratic Republic of Timor-Leste, para. 94; Written Statement of the Kingdom of Tonga, para. 124; Written Statement of the United Arab Emirates, para. 12; Written Statement of the United Kingdom of Great Britain and Northern Ireland, para. 4.3; Written Statement of the United States of America, para. 3.1; Written Statement of the Republic of Vanuatu, paras. 397-435; Written Statement of the European Union, para. 90; Written Statement of the International Union for the Conservation of Nature, paras. 92, 96; Written Statement of the Organization of the Petroleum Exporting Countries, para. 62; Written Comments of the Republic of Cameroon, para. 11; Written Comments of the Republic of the Gambia, para. 3.10; Written Comments of the African Union, para. 18.

⁷¹ See e.g. Written Statement of the Republic of Albania, para. 50; Written Statement of Antigua and Barbuda, para. 252; Written Statement of the Commonwealth of the Bahamas, para. 13; Written Statement of the People's Republic of Bangladesh, paras. 17-18; Written Statement of Barbados, para. 83; Written Statement of Belize, para. 51 (a); Written Statement of the Republic of Cameroon, para. 12; Written Statement of the Republic of Chile, para. 31; Written Statement of Cook Islands, paras. 16, 39-40; Written Statement of the Dominican Republic, paras. 2.3, 2.8-2.9, 4.10; Written Statement of the Republic of Ecuador, para. 3.48; Written Statement of the Republic of El Salvador, paras. 11-12, 16; Written Statement of Ghana, para. 30; Written Statement of Grenada, para. 27; Written Statement of the Republic of Kenya, para. 3.1; Written Statement of the Republic of Kiribati, paras. 22, 23(5); Written Statement of the Republic of Korea, para. 8; Written Statement of the Principality of Liechtenstein, paras. 19, 21 (see also fn. 21); Written Statement of the Republic of Mauritius, para. 221 (a); Written Statement of Mexico, paras. 61-62; Written Statement of the Kingdom of the Netherlands, paras. 2.2-2.7; Written Statement of New Zealand, para. 5; Written Statement of the Republic of Peru, para. 107; Written Statement of the Republic of the Philippines, paras. 28-29; Written Statement of Saint Lucia, paras. 19, 54; Written Statement of Saint Vincent and Grenadines, paras. 38, 43-44; Written Statement of the Republic of Seychelles, para. 80; Written Statement of the Republic of Sierra Leone, paras. 3.21-3.22; Written Statement of the Republic of Singapore, para. 1.6; Written Statement of the Kingdom of Thailand, para. 14; Written Statement of the Democratic Republic of Timor-Leste, paras. 98-99; Written Statement of Tuvalu, paras. 26, 68, 70; Written Statement of the United

strong consensus on the need for international co-operation⁷² and increased ambition⁷³ in collective responses to climate change.

9. By way of outline:

(a) The Solicitor-General of Australia will address the UNFCCC and the Paris Agreement, and the relevance of customary international law and the United Nations Convention on the Law of the Sea⁷⁴.

(b) Dr Parlett will address you on question (b) as regards legal consequences.

I thank the Court and, Mr President, request that you now pass the floor to the Solicitor-General.

Arab Emirates, paras. 9, 12; Written Statement of the United Kingdom of Great Britain and Northern Ireland, paras. 4.1-4.2, 13; Written Statement of the United States of America, paras. 2.15-2.17; Written Statement of the Oriental Republic of Uruguay, para. 16; Written Statement of the Republic of Vanuatu, para. 70; Written Statement of the African Union, paras. 81-83; Written Statement of the Alliance of Small Island States, para. 13; Written Statement of the Commission of Small Island States on Climate Change and International Law, para. 13; Written Statement of the European Union, paras. 138-139; Written Statement of the International Union for the Conservation of Nature, para. 117; Written Statement of the Organization of African, Caribbean and Pacific States, para. 26; Written Comments of the Republic of the Gambia, para. 2.5; Written Comments of Japan, para. 2; Written Comments of New Zealand, para. 6.

⁷² See e.g. Written Statement of the People's Republic of Bangladesh, para. 85; Written Statement of Barbados, paras. 208-226; Written Statement of Canada, para. 36; Written Statement of the Republic of Colombia, paras. 3.60-3.65; Joint Written Statement of Denmark, Finland, Iceland, Norway and Sweden, para. 4; Written Statement of the Republic of Ecuador, para. 1.8; Written Statement of the Republic of El Salvador, para. 16; Written Statement of Germany, paras. 13, 77; Written Statement of Ghana, para. 10; Written Statement of the Islamic Republic of Iran, paras. 84-87; Written Statement of Japan, para. 1; Written Statement of the Republic of Kenya, para. 5.21; Written Statement of the Republic of Kiribati, para. 23(6); Written Statement of the State of Kuwait, para. 126; Written Statement of the Republic of Mauritius, paras. 206-207; Written Statement of Mexico, paras. 74-79; Written Statement of New Zealand, para. 146; Written Statement of the Portuguese Republic, para. 165; Written Statement of Saint Lucia, paras. 75-78; Written Statement of the Independent State of Samoa, para. 214; Written Statement of the Republic of Sierra Leone, paras. 3.26-3.32; Written Statement of the Swiss Confederation, para. 7; Written Statement of the Commonwealth of the Bahamas, paras. 105-111; Written Statement of the Republic of the Marshall Islands, paras. 31-38; Written Statement of the Kingdom of the Netherlands, para. 3.13; Written Statement of the Republic of Korea, para. 16; Written Statement of the Solomon Islands, para. 117; Written Statement of the United Arab Emirates, para. 76; Written Statement of the United Kingdom of Great Britain and Northern Ireland, para. 4.7; Written Statement of the United States of America, paras. 6.1-6.4; Written Statement of the Democratic Republic of Timor-Leste, paras. 179-198; Written Statement of the Kingdom of Tonga, para. 203; Written Statement of the Oriental Republic of Uruguay, paras. 114-124; Written Statement of the Socialist Republic of Viet Nam, paras. 30-36; Written Statement of the African Union, paras. 125-129; Written Comments of the Federative Republic of Brazil, para. 25; Written Comments of Ghana, paras. 3.29-3.30; Written Comments of the European Union, paras. 48-63.

⁷³ See e.g. Written Statement of the People's Republic of Bangladesh, para. 17; Written Statement of Canada, para. 38; Written Statement of the Republic of Colombia, paras. 1.2, 3.38-3.39, 5.6; Joint Written Statement of Denmark, Finland, Iceland, Norway and Sweden, para. 110; Written Statement of the Republic of Kiribati, para. 23 (6); Written Statement of the Republic of Mauritius, para. 221 (b); Written Statement of New Zealand, para. 18; Written Statement of Saint Vincent and the Grenadines, para. 45 (f); Written Statement of the Republic of Seychelles, para. 43; Written Statement of the Commonwealth of the Bahamas, para. 7; Written Statement of the Cook Islands, para. 43; Written Statement of the Republic of the Marshall Islands, para. 123; Written Statement of the Kingdom of the Netherlands, paras. 3.8, 3.12; Written Statement of the United Kingdom of Great Britain and Northern Ireland, para. 4.4; Written Statement of the United States of America, para. 6.4; Written Statement of the Republic of Vanuatu, para. 101; Written Statement of the African Union, paras. 108, 148; Written Statement of the International Union for the Conservation of Nature, paras. 124-151; Written Comments of the European Union, paras. 4-5.

⁷⁴ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982 (entered into force 16 November 1994), *UNTS*, Vol. 1833, p. 397 (UN Dossier No. 45).

The PRESIDENT: I thank Mr Clarke. I now give the floor to Mr Stephen Donaghue. Sir, you have the floor.

Mr DONAGHUE:

II. OBLIGATIONS OF STATES UNDER INTERNATIONAL LAW TO ENSURE PROTECTION OF THE CLIMATE SYSTEM AND OTHER PARTS OF THE ENVIRONMENT FROM ANTHROPOGENIC GREENHOUSE GAS EMISSIONS

1. The UNFCCC and the Paris Agreement

1. Mr President, Madam Vice-President, distinguished Members of the Court, it is a great honour to appear before you again on behalf of Australia.

2. There is broad consensus amongst the Participants in these proceedings on the central role of the UNFCCC and the Paris Agreement to the questions before the Court⁷⁵. The preambular language to both treaties describes climate change as “a common concern of humankind”⁷⁶, and consistently with that statement, these two treaties have near-universal participation⁷⁷. They are the primary source of States’ obligations under international law in respect of climate change, setting out both collective goals and aims alongside individual obligations and commitments. They create the central co-operative framework for the collective action that is needed to address both the causes and the impacts of climate change⁷⁸.

3. The first global stocktake under the Paris Agreement showed that parties have made significant progress, but are not currently on track to achieve the goals of the Paris Agreement⁷⁹.

⁷⁵ See e.g. 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 Republic of Korea, para. 17; Written Statement of the State of Kuwait, para. 7; Written Statement of New Zealand, para. 15; Written Statement of the Kingdom of Saudi Arabia, para. 1.7; 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.

⁷⁶ *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), Preamble para. 1; *Paris Agreement*, opened for signature on 2 April 2016, 3156 UNTS (entered into force 4 November 2016) (UN Dossier No. 16), Preamble para. 11.

⁷⁷ UNFCCC, United Nations Treaty Collection (Web Page, 28 July 2023) https://treaties.un.org/pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXVII7&chapter=27&Temp=mtdsg3&clang=_en; United Nations Climate Change, Status of Ratification of the Treaty (Web Page) <https://unfccc.int/process-and-meetings/the-convention/status-of-ratification-of-the-convention>; United Nations Treaty Collection (Web Page, 28 July 2023) https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=_en.

⁷⁸ See Written Statement of Australia, Chapter II, and Written Comments of Australia, Chapter II.

⁷⁹ *Outcome of the first global stocktake*, Decision 1/CMA.5, UN Doc FCCC/PA/CMA/2023/16/Add.1 (13 December 2023), para. 18.

Importantly, however, the Paris Agreement has built-in mechanisms to address this, because each party must set an NDC every five years which represents a progression beyond its last NDC, is informed by the outcome of the global stocktake, and which reflects the State's "highest possible ambition"⁸⁰. The global stocktake sets out clear next steps to address the gaps in climate ambition and implementation, including:

- (a) *First*, encouraging parties to set ambitious next NDCs that are economy-wide, cover all gases and sectors, and are aligned with limiting global warming to 1.5°C, as informed by the latest science⁸¹.
- (b) *Second*, setting new collective energy efforts to triple renewable energy capacity and double the annual rate of energy efficiency improvements by 2030, and to transition away from fossil fuels in our energy systems⁸².

4. The outcomes of the global stocktake demonstrate the dynamic process the climate change treaty régime creates for assessing progress and for adjusting action over time. The differentiated obligations of parties to the UNFCCC and the Paris Agreement, and the capacity of those obligations to adjust, in light of parties' evolving national circumstances, and as best available science continues to inform the steps required to respond to climate change, underlies their status as the primary source of relevant legal obligations⁸³.

5. Australia recognizes that other treaties contain obligations that are relevant to the protection of the climate system, or that play an important complementary role alongside the climate change treaties⁸⁴. These include UNCLOS; international environmental treaties; sector-specific agreements that address specific types of anthropogenic greenhouse gas emissions; and international human rights treaties. Australia also recognizes that the duty to co-operate under customary international environmental law is applicable to States' actions to address climate change⁸⁵.

⁸⁰ *Paris Agreement*, opened for signature on 2 April 2016, 3156 UNTS (entered into force 4 November 2016) (UN Dossier No. 16), Articles 4 (3), 4 (9).

⁸¹ *Outcome of the first global stocktake*, Decision 1/CMA.5, UN Doc FCCC/PA/CMA/2023/16/Add.1 (13 December 2023), para. 39.

⁸² *Ibid.*, paras. 28 (a), 28 (d).

⁸³ See Written Comments of Australia, paras. 2.8-2.18, 2.32.

⁸⁴ Written Statement of Australia, Chapter III.

⁸⁵ Written Statement of Australia, paras. 4.2-4.6; Written Comments of Australia, paras. 3.16-3.18.

6. In respect of the relationship between the climate change treaties and other areas of law, Australia makes two observations:

- (a) *First*, contrary to the submissions of some Participants⁸⁶, it is not necessary for the Court to have regard to the rule of *lex specialis*, which is primarily focused on the resolution of normative conflicts⁸⁷, in relation to the complementary obligations that exist under international law for the protection of the climate system.
- (b) *Second*, this Court should promote a harmonious interpretation of States' obligations to protect the climate system from greenhouse gas emissions⁸⁸. As such, where other treaties and customary international law 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 the vast majority of States under the UNFCCC and the Paris Agreement. In this context, Australia emphasizes that the rule reflected in Article 31 (3) (c) of the Vienna Convention on the Law of Treaties⁸⁹ addresses a situation where rules of international law external to a treaty are relevant to its interpretation, but does not operate to incorporate obligations from one treaty, or from customary international law, into another treaty⁹⁰.

2. Customary international law

7. I turn next to the relevance of customary international law.

8. The vast majority of Participants, including Australia, recognize that the principle of prevention is a rule of customary international law that applies to significant transboundary harm⁹¹. There is, however, divergence in relation to whether this principle applies to environmental harm caused by anthropogenic greenhouse gas emissions.

⁸⁶ Written Statement of the Democratic Republic of Timor-Leste, paras. 86-93; Written Statement of the Organization of Petroleum Exporting Countries, para. 9; Written Comments of the Kingdom of Saudi Arabia, para. 1.2.

⁸⁷ 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), p. 408 (Conclusion Five).

⁸⁸ *Ibid.*, p. 408 (Conclusion 4).

⁸⁹ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1968, 1155 UNTS 331 (entered into force 27 January 1980).

⁹⁰ Written Comments of Australia, paras. 2.42-2.45.

⁹¹ Written Comments of Australia, para. 3.2 (see also fn. 80).

9. Some Participants suggest that the principle of prevention is of general application, and therefore applies to harm caused by greenhouse gas emissions⁹². Australia respectfully submits that the principle of prevention does not apply to harm of that kind, for two reasons.

10. The *first* reason is that greenhouse gas emissions are materially different from the conventional case of transboundary harm. Yet it is only in the context of those conventional cases that the Court has applied the principle of prevention. Those conventional cases involve a direct and temporally proximate cause of environmental harm from an identifiable source spreading from one State to a neighbouring State (such as discharge of pollution into a river, or discharges of noxious gases near the border between States). That was the context in *Pulp Mills*, where the Court held that a State is obliged “to use all the means at its disposal in order to avoid activities which take place in its territory, or any area under its jurisdiction, causing significant harm to the environment of another State”⁹³. More recently, the Court again applied the principle of prevention to claims of significant harm to the environment of an adjacent State in *Construction of a Road*⁹⁴.

11. In Australia’s submission, the unique nature of the mechanism by which greenhouse gas emissions cause harm to the environment provides an important point of distinction from cases of ordinary transboundary harm. Specifically, harm from greenhouse gas emissions arises by reason of the cumulative build-up of greenhouse gases in the atmosphere over a long period of time, being emissions which many different States and countless private actors are responsible. Furthermore, the harm that results is widespread rather than localized, and may be experienced in places far removed from the source of emissions that contributed to its occurrence (rather than simply in neighbouring States). That combination of circumstances means that greenhouse gas emissions give rise to novel challenges in applying the requirement of causation of significant harm, and in the determination of responsibility for specific impacts.

⁹² See e.g. Written Statement of the People’s Republic of Bangladesh, para. 88; Written Statement of Belize, para. 36; Written Statement of the Arab Republic of Egypt, paras. 89-90; Written Statement of the Republic of El Salvador, para. 35; Written Statement of the Democratic Socialist Republic of Sri Lanka, para. 95.

⁹³ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), p. 56, para. 101. See also *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015 (II), pp. 711-712, para. 118.

⁹⁴ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015 (II), pp. 726-737, paras. 174-217.

12. The *second* reason that the principle of prevention does not apply to harm caused by greenhouse gas emissions is that there is no consistent or widespread State practice, or *opinio juris*, to confirm the existence and content of obligations deriving from the principle of prevention in that context. The divergence in views is clear from the views expressed by States participating in this very proceeding.

13. This point is confirmed by the fact that, when the international community addressed the obligations of States concerning greenhouse gas emissions through the UNFCCC and the Paris Agreement, it did not incorporate either the substantive or the procedural obligations that the Court has found to be derived from the principle of prevention in conventional cases of transboundary harm. Instead, it developed more tailored and adjustable mechanisms to address the greater complexity of greenhouse gas emissions.

14. For these reasons, to extend the principle of prevention to greenhouse gas emissions would not account for the unique features of the global challenge that such emissions pose. Such an extension would also be unsupported by the requisite State practice and *opinio juris*. Given the widespread adoption of the specialized climate change treaties, customary international law should not be held to have developed in a way that imposes obligations with a different content.

15. If, contrary to our primary submission, the Court concludes that the substantive aspect of the principle of prevention *does* apply to greenhouse gas emissions, compliance would be assessed against a standard of due diligence. That being so, Australia's view, which it shares with several Participants in this proceeding⁹⁵, is that the UNFCCC and the Paris Agreement specify what that standard requires for States party to those treaties⁹⁶. Equally, compliance with those treaties will also satisfy the procedural aspect of the principle, such as obligations regarding co-operation and information sharing. As the very purpose of the UNFCCC and the Paris Agreement is to embody the agreements of States as to the measures that are appropriate and necessary to address greenhouse gas emissions and their environmental impacts, compliance with those agreed measures entails

⁹⁵ See e.g. Joint Written Statement of Denmark, Finland, Iceland, Norway and Sweden, paras. 72-74; Written Statement of New Zealand, paras. 104-106; Written Statement of the Republic of Singapore, para. 3.20; Written Statement of the United Arab Emirates, para. 99; Written Statement of the United States of America, paras. 4.24-4.28; Written Statement of the International Union for the Conservation of Nature, paras. 358-359; Written Comments of Japan, paras. 40-44; Written Comments of Mexico, paras. 25-62; Written Comments of the United Kingdom of Great Britain and Northern Ireland, para. 35.

⁹⁶ Written Comments of Australia, paras. 3.14-3.15.

compliance with any customary international law obligations arising from the principle of prevention.

3. The law of the sea

16. Finally I turn to UNCLOS.

17. The vast majority of Participants, including Australia, recognize the relevance of obligations arising under UNCLOS for the protection of the climate system⁹⁷. There is broad consensus 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 Part⁹⁸.

18. As a framework agreement, UNCLOS in many instances leaves the development of specific rules and standards to competent international organizations and specific sectoral

⁹⁷ See e.g. 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 Republic of Cameroon, para. 12; Written Statement of Canada, para. 19; Written Statement of the Republic of Chile, paras. 33, 40-50; Written Statement of the Cook Islands, paras. 150-165; Written Statement of the Republic of Costa Rica, paras. 68-69; Written Statement of Grenada, para. 21; Written Statement of the Republic of Kenya, paras. 5.42-5.50; Written Statement of the Republic of Korea, paras. 26-27; Written Statement of the Republic of Latvia, paras. 40-50; Written Statement of the Republic of the Marshall Islands, paras. 45-46; Written Statement of the Republic of Mauritius, paras. 144-154; Written Statement of the Federated States of Micronesia, paras. 93-113; Written Statement of the Kingdom of the Netherlands, para. 3.21; Written Statement of New Zealand, para. 90; Written Statement of the Portuguese Republic, paras. 57-58, 60-68; Written Statement of Saint Lucia, paras. 39 (iv), 69-74; Written Statement of the Republic of Sierra Leone, paras. 3.119-3.132; Written Statement of the Republic of Singapore, paras. 3.44-3.72; Written Statement of Solomon Islands, para. 205; Written Statement of the Democratic Republic of Timor-Leste, para. 213; Written Statement of the Kingdom of Tonga, paras. 216-225; Written Statement of the United Kingdom of Great Britain and Northern Ireland, paras. 108, 110-120; Written Statement of the Republic of Vanuatu, paras. 442-467; Written Statement of the Socialist Republic of Viet Nam, para. 15; Written Statement of the African Union, paras. 167-172; 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; Written Statement of the European Union, paras. 93, 286-296; Written Statement of the Organization of African, Caribbean and Pacific States, paras. 105-108; Written Statement of the Parties to the Nauru Agreement Office, paras. 26-31.

⁹⁸ See e.g. Written Statement of Antigua and Barbuda, paras. 199-202; Written Statement of the Argentine Republic, p. 26; Written Statement of the Commonwealth of the Bahamas, paras. 112-114; Written Statement of the Republic of Chile, paras. 43-50; Written Statement of the Republic of Costa Rica, paras. 68-70; Written Statement of the Republic of Ecuador, paras. 3.88-3.90; Written Statement of the Arab Republic of Egypt, paras. 272-282; Written Statement of the Republic of Kenya, paras. 5.43-5.44; Written Statement of the Republic of Korea, paras. 24-27; Written Statement of the Republic of Latvia, paras. 40-41; Written Statement of the Republic of the Marshall Islands, paras. 45-46; Written Statement of the Republic of Mauritius, paras. 144-146 (see also footnote 215); Written Statement of the Federated States of Micronesia, para. 106; Written Statement of the Kingdom of the Netherlands, para. 3.21; Written Statement of New Zealand, paras. 88-90; Written Statement of the Portuguese Republic, paras. 64, 66; Written Statement of the Republic of Sierra Leone, para. 3.126; Written Statement of the Republic of Singapore, paras. 3.44-3.51; Written Statement of Solomon Islands, para. 206; Written Statement of the Kingdom of Tonga, paras. 221-223; Written Statement of the United Kingdom of Great Britain and Northern Ireland, para. 31; Written Statement of the Republic of Vanuatu, para. 442; Written Statement of Commission of Small Island States on Climate Change and International Law, paras. 97-105; Written Statement of the European Union, paras. 286-292; Written Statement of the International Union for the Conservation of Nature, paras. 204-205; Written Statement of the Parties to the Nauru Agreement Office, paras. 26-31; Written Comments of the Republic of Albania, para. 45; Written Comments of the Republic of Colombia, para. 3.42; Written Comments of the Dominican Republic, paras. 4.7, 4.9.

agreements⁹⁹. In the context of climate change, those standards and rules are found in the UNFCCC and the Paris Agreement, to which the vast majority of States that are party to UNCLOS are also party. In those circumstances, Australia submits that Part XII of UNCLOS should not be interpreted as imposing obligations with respect to greenhouse gas emissions that are inconsistent with, or that go beyond, the obligations agreed in the specific climate change treaties. Otherwise, the agreements of States to very general obligations in Part XII of UNCLOS would cut across the more specific agreements of those same States as to how they should individually and collectively address the harm caused to the whole environment (including the marine environment) by greenhouse gas emissions.

19. Australia welcomes the recent ITLOS advisory opinion¹⁰⁰ and the contribution it has made to clarifying the obligations of States to protect and preserve the marine environment from the impacts of climate change. Australia fully participated in those proceedings, and it recognizes and respects the important role of small island States, including Pacific island States, in requesting and obtaining that opinion.

20. Australia wishes to highlight five key observations of ITLOS, which are consistent with the views of a number of Participants in these proceedings and with the submissions that I have just made concerning UNCLOS:

(a) *First*, that greenhouse gas emissions constitute pollution of the marine environment within the meaning of Article 1 (1) (4) of UNCLOS¹⁰¹.

⁹⁹ See *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, *UNTS*, Vol. 1833 p. 397 (entered into force 16 November 1994) (UN Dossier No. 45), Article 197.

¹⁰⁰ *Request for an Advisory Opinion Submitted by The Commission of Small Island States on Climate Change and International Law, Advisory Opinion of 21 May 2024* (International Tribunal for the Law of the Sea, Case No. 31), para. 252.

¹⁰¹ *Ibid.*, para. 179; Written Statement of Antigua and Barbuda, para. 388; Written Statement of the Argentine Republic, pp. 22-23; Written Statement of the Commonwealth of the Bahamas, paras. 118-119; Written Statement of the Cook Islands, paras. 172-173; Written Statement of the People's Republic of Bangladesh, para. 99; Written Statement of Canada, para. 19; Written Statement of the Republic of Costa Rica, para. 69; Written Statement of the Republic of Ecuador, paras. 3.88-3.89; Written Statement of the Republic of Kenya, para. 5.43; Written Statement of the Republic of Korea, para. 25; Written Statement of the Republic of Latvia, para. 40; Written Statement of the Republic of the Marshall Islands, para. 46; Written Statement of the Republic of Mauritius, para. 144; Written Statement of the Federated States of Micronesia, paras. 94-95; Written Statement of Saint Lucia, para. 70; Written Statement of the Republic of Singapore, para. 3.46; Written Statement of the Democratic Republic of Timor-Leste, para. 222; Written Statement of the Kingdom of Tonga, paras. 222-223; Written Statement of the United Kingdom of Great Britain and Northern Ireland, paras. 111-116; Written Statement of the United States of America, para. 4.29 (see also fn. 330); Written Statement of the Republic of Vanuatu, paras. 446, 448; Written Statement of the Commission of Small Island States on Climate Change and International Law, paras. 99-100; Written Statement of the International Union for the Conservation of Nature, paras. 183-184; Written Comments of the Oriental Republic of Uruguay, para. 60; Written Comments of the Republic of the Gambia, para. 3.54; Written Comments of the Republic of El Salvador, para. 32; Written Comments of the Dominican Republic, paras. 4.2-4.6; Written Comments of the African Union, para. 46; Written Comments of the Organization of African, Caribbean and Pacific States, para. 43; Written Comments of the Parties to the Nauru Agreement Office, para. 15.

- (b) *Second*, that as the “primary legal instruments addressing the global problem of climate change”¹⁰², the UNFCCC and the Paris Agreement are relevant to the interpretation and application of Part XII of UNCLOS¹⁰³.
- (c) *Third*, that the obligation to protect and preserve the marine environment under Article 192 of UNCLOS applies to the adverse impacts of climate change, and that the UNFCCC and the Paris Agreement are relevant to the measures to be taken to give effect to that obligation¹⁰⁴.
- (d) *Fourth*, that the obligation to prevent, reduce and control pollution of the marine environment under Article 194 (1) of UNCLOS imposes a due diligence obligation of conduct, requiring “best efforts”¹⁰⁵, the content of which is variable and context-specific, and may evolve over time¹⁰⁶.

¹⁰² *Request for an Advisory Opinion Submitted by The Commission of Small Island States on Climate Change and International Law, Advisory Opinion of 21 May 2024* (International Tribunal for the Law of the Sea, Case No. 31), para. 222.

¹⁰³ *Ibid.*; see also Written Statement of the Republic of Latvia, para. 44; Written Statement of the Republic of Sierra Leone, para. 3.130; Written Statement of the Republic of Singapore, para. 3.56 (c); Written Statement of the United Kingdom of Great Britain and Northern Ireland, para. 3.128; Written Statement of the United States of America, para. 4.29; Written Statement of the International Union for the Conservation of Nature, para. 166; Written Comments of New Zealand, paras. 20-21.

¹⁰⁴ *Request for an Advisory Opinion Submitted by The Commission of Small Island States on Climate Change and International Law, Advisory Opinion of 21 May 2024* (International Tribunal for the Law of the Sea, Case No. 31), para. 388; Written Statement of Antigua and Barbuda, paras. 199-200; Written Statement of the Commonwealth of the Bahamas, para. 115; Written Statement of the People’s Republic of Bangladesh, para. 97; Written Statement of the Republic of Chile, paras. 45-50; Written Statement of Cook Islands, paras. 150-152; Written Statement of the Republic of Costa Rica, paras. 68, 111; Written Statement of the Republic of Ecuador, para. 3.90; Written Statement of the Arab Republic of Egypt, para. 278; Written Statement of the Republic of Kenya, para. 5.44; Written Statement of the Republic of Korea, para. 27; Written Statement of the Republic of Latvia, paras. 41, 44; Written Statement of the Republic of Mauritius, paras. 148-149; Written Statement of the Federated States of Micronesia, paras. 99, 110-111; Written Statement of the Kingdom of the Netherlands, para. 3.21; Written Statement of New Zealand, para. 91; Written Statement of Saint Lucia, para. 73; Written Statement of the Republic of Sierra Leone, paras. 3.123, 3.126, 3.128; Written Statement of the Democratic Republic of Timor-Leste, paras. 226, 228-235; Written Statement of the Kingdom of Tonga, para. 224; Written Statement of the United Kingdom of Great Britain and Northern Ireland, paras. 119-121; Written Statement of the United States of America, para. 4.29; Written Statement of the Republic of Vanuatu, paras. 442-444; Written Statement of the Socialist Republic of Viet Nam, para. 20; Written Statement of the African Union, para. 169; Written Statement of the Commission of Small Island States on Climate Change and International Law, paras. 97-98; Written Statement of the European Union, paras. 293-294, 296; Written Statement of the International Union for the Conservation of Nature, para. 158 (b); Written Statement of Organization of African, Caribbean and Pacific States, para. 105; Written Comments of the Dominican Republic, para. 4.7; Written Comments of the Kingdom of the Netherlands, para. 2.4; Written Comments of the Oriental Republic of Uruguay, paras. 64-65.

¹⁰⁵ *Request for an Advisory Opinion Submitted by The Commission of Small Island States on Climate Change and International Law, Advisory Opinion of 21 May 2024* (International Tribunal for the Law of the Sea, Case No. 31), paras. 199, 233.

¹⁰⁶ *Ibid.*, para. 239; Written Statement of Antigua and Barbuda, paras. 207, 396; Written Statement of the Argentine Republic, p. 23; Written Statement of the People’s Republic of Bangladesh, paras. 98-99; Written Statement of Cook Islands, para. 248; Written Statement of the Republic of Kenya, para. 5.45; Written Statement of the Republic of Korea, paras. 26-27; Written Statement of the Republic of Latvia, paras. 45-46; Written Statement of the Republic of Mauritius, para. 154 (d); Written Statement of the Federated States of Micronesia, paras. 106-107; Written Statement of the Republic of Sierra Leone, paras. 3.126, 3.128; Written Statement of the Republic of Singapore, para. 3.55; Written Statement of the Democratic Republic of Timor-Leste, para. 231; Written Statement of the United States of America, para. 4.37; Written Statement of the Republic of Vanuatu, para. 450; Written Statement of the African Union, paras. 170-171; Written Statement of the Commission of Small Island States on Climate Change and International Law, para. 101; Written Statement of International Union for the Conservation of Nature, para. 158(a); Written Comments of Antigua and Barbuda,

(e) *Fifth*, ITLOS held that, “given the diffused and cumulative causes and global effects of climate change, it would be difficult to specify how greenhouse gas emissions from activities under the jurisdiction or control of one State cause damage to other States”¹⁰⁷.

21. Australia makes two final points with respect to UNCLOS:

(a) With respect to Article 194 (1), Australia contends that the UNFCCC and the Paris Agreement are the standards that the international community has agreed to prevent, reduce and control damage to the environment from greenhouse gas emissions and keep a 1.5°C future within reach¹⁰⁸.

(b) In respect of Article 194 (2), the same points that Australia made in relation to the unique nature of the harm caused by greenhouse gas emissions, which I have just addressed in the context of the inapplicability of the principle of prevention to such emissions, also apply in relation to Article 194 (2). If accepted, those points have the consequence that the effects of greenhouse gas emissions are not within the scope of Article 194 (2) of UNCLOS¹⁰⁹.

22. Thank you for your attention. Mr President, I ask you to invite Dr Parlett to conclude Australia’s submissions.

The PRESIDENT: I thank Mr Stephen Donaghue. I now give the floor to Ms Kate Parlett. Madam, you have the floor.

paras. 42-43; Written Comments of the Republic of Ecuador, paras. 64-65; Written Comments of the Kingdom of the Netherlands, paras. 3.9-3.10; Written Comments of New Zealand, para. 20; Written Comments of the United Kingdom of Great Britain and Northern Ireland, paras. 44.6-44.7; Written Comments of the United States of America, para. 3.44; Written Comments of the Oriental Republic of Uruguay, paras. 60-61.

¹⁰⁷ *Request for an Advisory Opinion Submitted by The Commission of Small Island States on Climate Change and International Law, Advisory Opinion of 21 May 2024* (International Tribunal for the Law of the Sea, Case No. 31), para. 252. See also Written Statement of the People’s Republic of China, paras. 137-138; Joint Written Statement of Denmark, Finland, Iceland, Norway and Sweden, paras. 71-72; Written Statement of the Republic of Korea, paras. 46-47; Written Statement of the State of Kuwait, paras. 120-122, 124; Written Statement of the Kingdom of the Netherlands, para. 3.64; Written Statement of New Zealand, para. 140 (c); Written Statement of the Russian Federation, pp. 16-17; Written Statement of the Kingdom of Saudi Arabia, para. 6.7; Written Statement of the Republic of Singapore, para. 3.15; Written Statement of the United Kingdom of Great Britain and Northern Ireland, paras. 137.4.1, 137.4.3; Written Statement of the United States of America, paras. 4.15, 4.17-4.19, 5.10; Written Statement of the Organization of Petroleum Exporting Countries, para. 93; Written Comments of Japan, paras. 94, 96; Written Comments of the Democratic Republic of Timor-Leste, paras. 76, 94-95; Written Comments of the United Kingdom of Great Britain and Northern Ireland, paras. 34.1-34.2.

¹⁰⁸ Written Statement of Australia, paras. 3.5-3.6. Cf *Request for an Advisory Opinion Submitted by The Commission of Small Island States on Climate Change and International Law, Advisory Opinion of 21 May 2024* (International Tribunal for the Law of the Sea, Case No. 31), para. 223.

¹⁰⁹ Written Statement of Australia, paras. 3.20-3.21. Cf *Request for an Advisory Opinion Submitted by The Commission of Small Island States on Climate Change and International Law, Advisory Opinion of 21 May 2024* (International Tribunal for the Law of the Sea, Case No. 31), para. 252.

Ms PARLETT:

**III. LEGAL CONSEQUENCES UNDER THESE OBLIGATIONS FOR STATES WHERE THEY,
BY THEIR ACTS AND OMISSIONS, HAVE CAUSED SIGNIFICANT
HARM TO THE CLIMATE SYSTEM AND OTHER PARTS
OF THE ENVIRONMENT**

1. Question (b) asks the Court to consider the legal consequences in relation to a hypothetical situation in which a State has caused significant harm to the climate system. This invites consideration of two questions: has an internationally wrongful act been committed; and, if so, what are the legal consequences of that wrongful act.

2. These questions refer to issues that are governed by customary international law, as reflected in the International Law Commission's Articles on State Responsibility¹¹⁰. However, as numerous Participants have recognized, whether a breach of international law has occurred, and its legal consequences, are both context-specific questions¹¹¹. They are not amenable to resolution in the abstract. The answers will necessarily depend on the particular obligation that a State is alleged to have breached and the particular factual circumstances. Australia therefore submits that the United Nations General Assembly and States would be best assisted by an opinion in which the Court identifies the issues that would need to be considered and assessed in order to determine, in a specific context, whether a breach has occurred and, if so, its legal consequences¹¹². Such clarification would provide valuable guidance to Participants, given the divergent views that have been expressed in these proceedings.

3. A large number of Participants have recognized that causation poses particular challenges in relation to climate change¹¹³. As the Court noted in *Certain Activities*, issues of causation “must be addressed as and when they arise *in light of the facts of the case at hand* and the evidence

¹¹⁰ *Responsibility of States for Internationally Wrongful Acts*, UNGA res 56/83, UN doc. A/RES/56/83 (28 January 2002, adopted 12 December 2001), Articles 2 and 28.

¹¹¹ See e.g. Written Statement of the Republic of Slovenia, paras. 14-15; Written Comments of the Commonwealth of the Bahamas, paras. 102, 120; Joint Written Statement of Denmark, Finland, Iceland, Norway and Sweden, para. 105; Written Comments of the French Republic, para. 57.

¹¹² See e.g. Written Statement of Australia, paras. 5.4, 5.7-5.8.

¹¹³ See e.g. Written Comments of the Democratic Republic of Timor-Leste, paras. 108-109; Written Comments of the United Kingdom of Great Britain and Northern Ireland, para. 68; Written Comments of Japan, para. 94; Written Comments of the French Republic, paras. 60-61. See also *Request for an Advisory Opinion Submitted by The Commission of Small Island States on Climate Change and International Law, Advisory Opinion of 21 May 2024* (International Tribunal for the Law of the Sea, Case No. 31), para. 252.

presented”¹¹⁴. Some Participants have, however, asked the Court to make *generalized* findings as to how difficulties relating to causation could be avoided. Australia submits that these general propositions should not be adopted by the Court in its opinion. I will mention four by way of example:

(a) The *first* proposition is that a State can obtain reparation on the basis that injury has been caused to the climate system generally¹¹⁵. However, for an obligation to make reparation to arise under customary international law, there must be a causal nexus between the wrongful act and an injury suffered by the claimant State specifically¹¹⁶. In the absence of that causal nexus to an injury to a claimant State, there can be no basis for reparation.

(b) The *second* proposition is that the test for factual causation of injury in the context of reparation should be something “lower” than a but-for test¹¹⁷. There is no sound basis for the application of a lower threshold in relation to all breaches of obligations relating to climate change¹¹⁸. The Court has applied the but-for test in relation to due diligence obligations of prevention¹¹⁹. The authorities that are said to support a lower threshold in fact address different issues: they relate to causation in the different context of breach¹²⁰; they relate to legal causation (that is, remoteness

¹¹⁴ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)*, p. 26, para. 34, emphasis added.

¹¹⁵ See e.g. Written Comments of the Republic of Vanuatu, paras. 35 and 206. See also Written Comments of the Republic of Sierra Leone, paras. 4.17, 4.21; Written Comments of the Republic of Kenya, para. 5.16.

¹¹⁶ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, pp. 331-332, para. 14; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)*, p. 26, para. 32; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)*, p. 48, para. 93. See also *Responsibility of States for Internationally Wrongful Acts*, UNGA res 56/83, UN doc. A/RES/56/83 (28 January 2002, adopted 12 December 2001), Articles 31 (1), 47 (2) (a) and commentary, Article 46, para. 2; Written Comments of Australia, para. 6.23. See also Written Comments of the French Republic, para. 62.

¹¹⁷ See e.g. Written Comments of the Republic of Albania, paras. 74-77; Written Comments of Antigua and Barbuda, para. 110; Written Comments of the Commonwealth of the Bahamas, paras. 117, 121.

¹¹⁸ See also Written Comments of the French Republic, para. 64.

¹¹⁹ *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 (I)*, pp. 233-234, paras. 461-462.

¹²⁰ *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (European Court of Human Rights, Chamber, Application No. 53600/20, 9 May 2024), paras. 424, 444. Cf e.g. Written Comments of the Republic of Albania, paras. 75 and 77; Written Comments of the Commonwealth of the Bahamas, para. 121 (see also fn. 304).

and proximity), rather than factual causation¹²¹; or they relate to proof of the *extent* of the injury, rather than proof of *causation* of injury¹²².

- (c) The *third* proposition is that there should be a presumption of causation in relation to climate change¹²³. However, in this context, there is no basis for reversing the general rule that a State seeking reparation must prove causation of injury¹²⁴. The onus of proof was reversed in the *Armed Activities* case because the respondent State was the occupying Power of the relevant territory, and therefore it was in a better position to establish the relevant facts¹²⁵. The Court emphasized the limited nature of that reversal, affirming that for damage alleged to have occurred outside the occupied territory, the burden of proof remained with the applicant State¹²⁶. The circumstances in which the onus was reversed in that case are not analogous.
- (d) *Fourth*, as regards the potential application of Article 47 of the Articles on State Responsibility¹²⁷, that Article does not apply to the conduct of States that contribute to climate change, such that the responsibility of an individual State could be invoked in relation to the wrongful conduct of States as a whole¹²⁸. The conduct of each State would be a *separate* internationally wrongful act and, based on current scientific understanding, those separate acts contribute to the same, indivisible injury. Whether and how any responsibility to make reparation

¹²¹ *Responsibility of States for Internationally Wrongful Acts*, UNGA res. 56/83, UN doc. A/RES/56/83 (28 January 2002, adopted 12 December 2001), Article 31, para. 10. Cf. e.g. Written Comments of the Commonwealth of the Bahamas, para. 118.

¹²² *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Compensation, Judgment*, *I.C.J. Reports 2018 (I)*, pp. 26-27, para. 35; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Reparations, Judgment*, *I.C.J. Reports 2022 (I)*, p. 48, para. 93, pp. 51-52, para. 106; see also Written Comments of Australia, para. 6.30. Cf. e.g. Written Comments of the Republic of Albania, paras. 76, 78; Written Comments of the Commonwealth of the Bahamas, para. 119 (see also fns. 297, 302-303).

¹²³ See e.g. Written Comments of the Republic of Albania, para. 78; Written Comments of Antigua and Barbuda, paras. 110-113; Written Comments of the Commonwealth of the Bahamas, para. 119.

¹²⁴ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Reparations, Judgment*, *I.C.J. Reports 2022 (I)*, p. 48, para. 93; p. 54, para. 115.

¹²⁵ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Reparations, Judgment*, *I.C.J. Reports 2022 (I)*, p. 54, paras. 116 and 118; *ibid.*, declaration of Judge Salam, p. 189, para. 16). See also *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Compensation, Judgment*, *I.C.J. Reports 2012 (I)*, p. 332, para. 15; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Compensation, Judgment*, *I.C.J. Reports 2018 (I)*, p. 26, para. 33.

¹²⁶ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Reparations, Judgment*, *I.C.J. Reports 2022 (I)* p. 54, para. 118.

¹²⁷ See e.g. Written Comments of the Republic of Albania, para. 71; Written Comments of the Oriental Republic of Uruguay, para. 173; Written Comments of the Commission of Small Island States on Climate Change and International Law, paras. 99-101.

¹²⁸ See Written Comments of Australia, paras. 6.14-6.16.

for that injury is to be apportioned is not addressed in the Articles on State Responsibility¹²⁹ and, in these proceedings, the Court does not have before it sufficient material to determine the existence, scope and content of any rule of customary international law, or general principle of law, that governs such a situation¹³⁰.

4. Of course, this is not to suggest that the rules reflected in the Articles on State Responsibility have limited utility in relation to climate change. Rather, it is to acknowledge that the challenges raised by causation are complex and cannot be resolved in the abstract, and for all possible cases, in these advisory proceedings.

5. To conclude, Australia reiterates its commitment to addressing the significant threat posed by climate change at home and globally, and urges all States to accelerate global climate action to keep 1.5°C of warming within reach. The Court has an important contribution to make in clarifying the obligations of all States to address climate change. Mr President, Madam Vice-President, Members of the Court, I thank you for your kind attention.

The PRESIDENT: I thank the representatives of Australia for their presentation. Before I invite the next delegation to take the floor, the Court will observe a break of 15 minutes. The hearing is suspended.

The Court adjourned from 4.30 p.m. to 4.40 p.m.

The PRESIDENT: Please be seated. The sitting is resumed. I now invite the next participating delegation, the Bahamas, to address the Court and I call Mr Leo Ryan Pinder to the podium. You have the floor, Sir.

¹²⁹ See e.g. André Noelkaemper et al., “Guiding Principles on Shared Responsibility in International Law” (2020) 31 (1) *European Journal of International Law*, p. 15; Jacqueline Peel, “Climate Change” in A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2017) pp. 1041-1042, and 1046.

¹³⁰ See also Written Comments of the French Republic, para. 62. Cf. e.g. Written Comments of Barbados, para. 105; Written Comments of the Oriental Republic of Uruguay, para. 174.

Mr PINDER:

I. INTRODUCTORY STATEMENT

1. Mr President, honourable Members of the Court, as the Attorney General, it is a privilege to appear before you on behalf of the people of the Commonwealth of the Bahamas in these historic proceedings.

2. Present and future generations of Bahamians face an existential threat from climate change. It is “virtually certain” that 2024 will be the hottest year in history and it is likely to be the first year when global warming exceeds the critical 1.5°C threshold¹³¹. This heat has tangible and significant impacts on my people. More than 75 per cent of all coral patches experienced some level of bleaching in 2023. This year, we had the earliest category five hurricane ever recorded in the Atlantic. Our people and our economy are still reeling from the devastating effects of Hurricane Dorian, a category five plus storm that could have only been formed because of the climate crisis.

3. We have more than 50 years of IPCC data that concludes that climate change is a threat — an eminent threat for small island developing States like my country. The IPCC tells us that extreme weather will only increase in frequency, intensity, and scale. International law plays a pivotal role in directing States’ conduct to help save countries like mine. The Court has a historic opportunity to shape this conduct through its advisory opinion.

4. The Bahamas is disproportionately affected by climate change. We are one of the world’s largest archipelagos with more than 700 coral islands and 2,400 cays¹³². To give you some context our archipelago’s exclusive economic zone is approximately the size of France. Eighty per cent of our land lies less than 1.5 m above sea level¹³³ — *80 per cent* — a sea level that is rising at an alarming rate, forcing us to recalibrate and adapt. Hurricanes and storm surges rip through our communities, bringing death and destruction. Rising sea levels and warming oceans decimate our

¹³¹ Copernicus, *2024 virtually certain to be the warmest year and first year above 1.5°C* (7 Nov. 2024), available at <https://climate.copernicus.eu/copernicus-2024-virtually-certain-be-warmest-year-and-first-year-above-15degc>.

¹³² See Government of the Commonwealth of The Bahamas, *The Bahamas 2022 Updated NDC* (Nov. 2022) (hereinafter “The Bahamas 2022 Updated NDC”), p. 9; The Commonwealth of The Bahamas, *Overview of The Bahamas*, available at <https://tinyurl.com/The-Bahamas-Overview>.

¹³³ The Commonwealth of The Bahamas, *First Biennial Update Report (BURI) of The Commonwealth of The Bahamas to the United Nations Framework Convention on Climate Change (UNFCCC)* (Dec. 2022) (hereinafter “The Bahamas First Biennial Update Report”), pp. 25 and 61.

coastal ecosystems — such as mangroves and seagrass — which used to provide a natural climate defence for our islands. Allow me to give you a few examples of how climate change affects the Bahamas.

5. *First*, climate change has significantly altered weather in our region, making hurricanes more frequent and destructive¹³⁴. As a small island State in the Atlantic hurricane basin, we are particularly vulnerable¹³⁵. In 2021, the Climate Risk Index ranked the Bahamas *third* in the world for the most affected by weather-related events¹³⁶. All of our islands and all of my people are at risk.

6. Still fresh in our memory is Hurricane Dorian, which devastated the Bahamas in 2019: more than 200 people died; nearly 10,000 people were displaced; and over 9,000 homes were destroyed. Our more populated islands, Abaco and Grand Bahama, were both particularly hard hit. Seventy-five per cent of dwellings in Abaco alone were damaged, and nearly one third was completely destroyed. You could easily mistake this photograph for a pile of rubbish. However, what you are looking at are lost homes and lost livelihoods.

7. A 20-foot storm surge rushed through the streets of these islands, contributing to approximately US\$3 billion in economic damage¹³⁷, that is about 25 per cent of our annual GDP in just two days.

8. The results of such a storm are real. They include displaced people, learning loss, livelihoods lost, and missing loved ones. All because some countries have ignored the warning signs of the climate crisis.

9. *Secondly*, the Bahamas is a “big ocean” State who relies heavily on the resources of the sea, which have been under acute threat from climate change. The Blue Economy alone accounts for over 40 per cent of our economy. Oceans are absorbing a large amount of GHG emissions from the atmosphere, making them warmer and more acidic. This leads to the destruction of critical ecosystems including our coral reefs, our mangrove forests, our seagrass, and our fish stock. That, in

¹³⁴ Intergovernmental Panel on Climate Change, *The Ocean and Cryosphere in a Changing Climate* (2019), p. 11; The Bahamas 2022 Updated NDC, pp. 10–11.

¹³⁵ See e.g. J. M. Shultz et al., “Double Environmental Injustice – Climate Change, Hurricane Dorian, and the Bahamas”, 382, *New England Journal of Medicine* (2020) 1, p. 1.

¹³⁶ Germanwatch, *Global Climate Risk Index 2021* (Jan. 2021), p. 8; The Bahamas First Biennial Update Report, p. 25.

¹³⁷ Inter-American Development Bank, *Assessment of the Effects and Impacts of Hurricane Dorian in the Bahamas* (Aug. 2020), pp. 57, 65, 71, 81, 93.

turn, affects our peoples' livelihoods; it reduces our biodiversity and has ripple effects through the ecosystems, which lose their protective properties.

10. I ask you, who is going to retrain our fishermen when the fish are gone? And what is going to replace our tourism industry when the reefs and the beaches are gone?

11. The Bahamas' seagrass and mangroves are critical carbon sinks, mitigating the impacts of a warming planet. The Bahamas has 40 per cent of the world's seagrasses. These vital climate mitigation assets are being destroyed at an alarming rate: seagrass in the Bahamas has declined 1-2 per cent each and every year¹³⁸, and extreme weather events have destroyed over 90 per cent of viable mangroves in the Bahamas¹³⁹, all because industrial countries have ignored their obligations.

12. We are currently witnessing the largest ever recorded mass coral bleaching event¹⁴⁰. The Bahamas is home to 5 per cent of the world's coral reefs and the world's third-longest barrier reef¹⁴¹.

13. *Third*, sea levels are rising and they will continue to rise, presenting an unprecedented challenge to the very survival of our nation. We are experiencing the effects due to decades of neglect by industrial countries. But long before our territory is submerged, we will feel the impact. We will feel coastal erosion; we will feel the flooding impact, salinization of our freshwater resources and displacement of our vulnerable communities. By 2050, the Bahamas is projected to lose nearly 60 per cent of its shoreline, the largest loss of land projected in the entire Caribbean region¹⁴². By 2100, we will lose all of our sandy beaches in the Bahamas¹⁴³. All because warning signs have been ignored for generations.

14. Excellencies, we experience the threat of storm surges coupled with the rise in sea-level resulting in catastrophic flooding. The slides above show a grave impact of flooding that would occur,

¹³⁸ A. Blume et al., "Bahamian seagrass extent and blue carbon accounting using Earth Observation", 10 *Frontiers in Marine Science* (2023) 1, p. 2.

¹³⁹ Perry Institute for Marine Science, *Mangrove Report Card for The Bahamas*, 2022, p. 12. See also R. Wilson, "Impacts of Climate Change on Mangrove Ecosystems in the Coastal and Marine Environments of Caribbean Small Island Developing States (SIDS)", *Caribbean Marine Climate Report Card: Science Review* (2017) 60, pp. 62–66.

¹⁴⁰ "Global Coral Bleaching Event Now Largest on Record, NOAA Says", *Earth.org* (23 October 2024), available at <https://earth.org/global-coral-bleaching-event-now-largest-on-record-noaa-says/>.

¹⁴¹ The Bahamas 2022 Updated NDC, p. 9.

¹⁴² N. Spencer, E. Strobl & A. Campbell, "Sea level rise under climate change: Implications for beach tourism in the Caribbean", 225 *Ocean & Coastal Management* (2022) 1, p. 7.

¹⁴³ A. Pathak et al., "Impacts of climate change on the tourism sector of a Small Island Developing State: A case study for the Bahamas", *Environmental Development* Vol. 37 (2021), p. 10.

caused by a storm surge with 1 metre — *just one metre* — of sea level rise because of a hurricane impact. In a category three storm, which is the middle slide, more than 50 per cent of the island will be flooded. This is the capital of Nassau, where two thirds of our population live. A category five hurricane, which is the one on the far right, will result in nearly the entire island of Nassau being under water. This is the reality in which we live. This is why we need action, *and we need it now*.

15. The Bahamas is at risk of being uninhabitable due to the severe impacts caused by the historical and present neglect of regulatory enforcement.

16. Mr President, honourable Members of the Court, the world knows exactly what needs to be done and the industrial countries have neglected it for decades in the interest of profits. It is time for these polluters to pay. The IPCC has been telling us for years that the only way to stop a warming planet is to make deep, rapid and sustained cuts in the global GHG emissions. The world needs to reach net zero emissions by 2050, which requires a cut in the GHG emissions by at least 43 per cent in the next five years. Industrial States need to take urgent action now and provide reparations for their decades of neglect.

17. International law imposes robust *individual* obligations on States to mitigate *their* GHG emissions. Climate change is not some unstoppable force that individual States have no control upon. We must cut through the noise and accept that those whose activities have led to the current state of global affairs must offer a response that is commensurate with the destruction that has been caused. There is no parity, there is no fairness, there is no equity if those responsible continue to pass the buck. We insist on liability, and we demand reparations.

18. As I conclude, allow me to introduce two important principles.

19. The principle of “common but differentiated responsibilities” recognizes the differing responsibilities of States to address climate change.

20. Although we endorse this principle¹⁴⁴, it is *not* a get-out-of-jail card¹⁴⁵. Major emitters who self-identify as “developing States” cannot continue their current trajectory of GHG emissions. Each

¹⁴⁴ See *Obligations of States in respect of Climate Change (Request for Advisory Opinion)*, Written Statement of the Commonwealth of The Bahamas, 22 March 2024 (hereinafter “Bahamas I”), paras. 88, 138.

¹⁴⁵ See, e.g., *Obligations of States in respect of Climate Change (Request for Advisory Opinion)*, 22 March 2024, Written Statements of China, paras. 34, 37, 63–64; India, para. 37; OPEC, paras. 11, 46, 77, 87; Saudi Arabia, para. 4.19; Russia, pp. 5–6.

State is required to do everything possible to stabilize our climate system. All major emitters must effect deep, rapid, and sustained reduction of *their* GHG emissions¹⁴⁶ otherwise my people's suffering is only going to continue to increase.

21. Equitable climate action must account for the disparity of impact on small island and low-lying States such as the Bahamas¹⁴⁷. Our climate systems do not recognize man-made boundaries, only the destruction. In the Bahamas we see it in the mental health of our citizens, we see it in the repairing of roads, utilities, vital infrastructure, we see it in the lost workdays of our people, we see it in the learning loss of our children when they cannot go to school, we see it as a revolving door of preparation, impact and recovery — and then we reset that cycle, we prepare again, we have an impact, and then we recover again. Despite the hijacking that we witnessed at COP29, climate treaties such as the Paris Agreement make clear that developed States have obligations to provide financial and technical assistance to vulnerable States such as the Bahamas¹⁴⁸.

22. I make one observation on the principle of sustainable development, which the Court has endorsed as early as 1997 in the *Gabčíkovo-Nagymaros Judgment*¹⁴⁹. I have been struck by the statements of States which invoke the so-called “right to development” as a justification to pursue unconstrained energy policies. The Bahamas also invokes the right to development. However, our development is and has been *hindered* by States who refuse to act against climate change. International law does not stand for that. One person's “development” cannot be another person's destruction. Instead, international law aims at the full realization of human rights for *all people* and that includes my people in the Bahamas.

¹⁴⁶ See Bahamas I, paras. 100–102.

¹⁴⁷ See, e.g., *Obligations of States in respect of Climate Change (Request for Advisory Opinion)*, 22 March 2024, Written Statements of Australia, para. 1.8; Barbados, paras. 13, 309; Dominican Republic, paras. 2.10–2.18; Grenada, paras. 7, 29–30, 72–73; Mauritius, paras. 210(d), 211(a); Palau, para. 10; Seychelles, paras. 22, 25, 27–29, 44; Solomon Islands, paras. 246–248; Singapore, paras. 1.1, 3.50; Timor-Leste, paras. 159–160, 321; Tonga, paras. 304–312; Vanuatu, paras. 89–91, 170, 174–175, 554.

¹⁴⁸ Paris Agreement to the United Nations Framework Convention on Climate Change, 12 December 2015, 3156 UNTS 219, preamble; United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107, arts. 4 (3), 9 (1).

¹⁴⁹ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, separate opinion of Vice-President Weeramantry, p. 91.

23. Excellencies, I call on you not only to reaffirm the principles set out in the International Tribunal for the Law of the Sea advisory opinion but to go further. We must extend these principles to enable real, enforceable action and reparations, not just a continuation of false promises.

24. The devastation is undeniable. If we continue on our current path, my country will cease to exist. Then, your Excellencies, I ask the question: Who then will take my people when their country does not exist anymore?

25. We are not just speaking about numbers or projections; we are speaking about lives, cultures, and histories at risk of being erased completely. Let us act boldly and let us act decisively — let us act for my people in the Commonwealth of the Bahamas, and frankly let us act for all people around the globe.

26. I want to thank you, Mr President, and honourable Members of the Court, for this esteemed privilege of appearing before you today on this very important issue. I now ask the Court that you kindly invite Dr Conway Blake to address you. Thank you very much.

The PRESIDENT: I thank Mr Pinder. I now give the floor to Mr Conway Blake.

Mr BLAKE:

II. STATES HAVE ROBUST INDIVIDUAL MITIGATION OBLIGATIONS UNDER INTERNATIONAL LAW

1. Mr President, honourable Members of the Court, it is a privilege to be before you on behalf of the Commonwealth of the Bahamas.

2. The Bahamas has submitted two rounds of written submissions, and I refer you to those for a full account of our pleadings. Today, in the interest of time, I will focus on one issue — the binding nature of States' individual obligations to mitigate climate change. You have heard already, and will hear time and again, that these obligations are limited, that they do not have teeth, that they are impossible to establish as a matter of law, and that they reflect political aspiration rather than firm commitment.

3. That is, with respect, wrong.

4. Yes, climate change raises difficult legal and evidentiary issues. And yes, it may well be impossible at this stage to prevent fully the environmental harm from greenhouse gas emissions that

are already accumulating in the atmosphere. As the Agent for the Bahamas has already explained, we are witnesses to growing catastrophic harm every day. But international law does not allow States to avoid responsibility for their actions just because legal compliance is difficult. It requires the opposite. It requires that States do their utmost to minimize future harm, to adapt to harm that we know is coming, and to co-operate in pursuit of those aims.

5. In the time available to me, I will briefly address States' individual obligations to effect deep, rapid and sustained reduction of GHG emissions, both under customary international law and under the climate treaties.

A. Customary international law obligation to prevent transboundary harm requires States to effect deep, rapid and sustained reduction in GHG emissions

6. I first turn to customary international law.

7. The applicable rule of law here is straightforward. As the Court wrote in 1949 in the *Corfu Channel* case, it is “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”¹⁵⁰. This remains the law today.

8. In international environmental law, this principle has evolved to require States to prevent activities in their territory that cause significant damage to the environment of other States¹⁵¹. Historically, this duty was most visible in the context of harm that can be traced back to one, often neighbouring, State — like pollution that travels down a river, or fumes from a factory that float across a national border¹⁵².

9. But GHG emissions, which the climate scientists tell us are the key drivers of climate change, falls squarely within the scope of that duty too.

¹⁵⁰ *Obligations of States in respect of Climate Change (Request for Advisory Opinion)*, Written Statement of the Commonwealth of the Bahamas, 22 March 2024 (hereinafter “Bahamas I”), para. 92 (*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I) (hereinafter “Pulp Mills Judgment”), p. 14, para. 101, quoting *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment, I.C.J. Reports 1949, p. 22).

¹⁵¹ Bahamas I, para. 92 (citing *Pulp Mills Judgment*, p. 14, para. 101; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015 (II), p. 665, para. 104; *Activities in the Area Advisory Opinion*, p. 41, para. 110; Convention on Biological Diversity, 5 June 1992, 1760 UNTS 79, art. 3).

¹⁵² Bahamas I, para. 98 (citing *Pulp Mills Judgment*, pp. 74, 76-77, paras. 177, 183, 185; Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, *Yearbook of the International Law Commission*, 2001, Vol. II (Part Two), document A/56/10 (hereinafter “ILC Draft Articles on Transboundary Harm”), general commentary, para. 5; *Trail Smelter Case (United States of America, Canada)*, Award of 11 March 1941, *Report of the International Arbitral Awards, Volume III*, pp. 1960, 1966, 1968; see also ILC Draft Articles on Transboundary Harm, general commentary, commentary to art. 7, para. 2).

10. GHG emissions are obviously not wastewater or smoke. But they behave like them in that their release by one State worsens the environmental and human conditions in another State. And the damage, as explained by the Agent for the Bahamas, is not simply “significant” — for States, like the Bahamas, it is existential.

11. You will hear others say that the prevention obligation does not apply to GHG emissions. But there is no principled reason for such limitation. As the Court noted in *Pulp Mills*, the prevention obligation “has its origins in the due diligence that is required of a State in its territory”¹⁵³. The obligation applies generally and is not limited to specific activities¹⁵⁴, or to the activities of neighbouring States¹⁵⁵, and rightly so. Our understanding of environmental harm and sources of pollution evolves as society evolves. And the science today is clear — the factual link between GHG emissions and serious harm to the environment is well established¹⁵⁶. Thus, when a State emits excessive GHG emissions, it is damaging the environment of other States. That is sufficient to trigger an obligation to prevent such harm.

12. Now, it may be difficult to link a specific portion of GHG to specific harm. There is no question that that presents a challenge for courts, particularly when addressing consequential issues such as reparations. But those evidentiary issues do not negate the existence of the obligation in the first place, and neither do they negate a finding of breach when a State fails to fulfil its due diligence obligations. Evidentiary difficulties also do not negate State responsibility or the duty to provide reparations. On this important issue, I refer the Court to the Bahamas’ written statements¹⁵⁷.

13. Coming back to the prevention obligation under customary international law, the Bahamas submits that it has three essential characteristics.

¹⁵³ *Pulp Mills* Judgment, p. 55, para. 101.

¹⁵⁴ ILC Draft Articles on Transboundary Harm, commentary to art. 1, paras. 3-4, art. 2 (c).

¹⁵⁵ ILC Draft Articles on Transboundary Harm, commentary to art. 2 (c), para. 9. *See also Obligations of States in respect of Climate Change (Request for Advisory Opinion)*, Written Comments of the Commonwealth of the Bahamas, 14 August 2024 (hereinafter “Bahamas II”), para. 61 (citing *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 19-20, para. 29.)

¹⁵⁶ Intergovernmental Panel on Climate Change, *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (March 2023), pp. 42, 68.

¹⁵⁷ *See* Bahamas II, Section III.

14. *First*, it requires States to act¹⁵⁸. The Bahamas accepts that the obligation does not require States to succeed in eliminating all harm — which may not be possible. But it does require States to act with due diligence, which in turn calls for ambitious action informed by the best available science¹⁵⁹. In the context of harm caused by GHG emissions, the IPCC has made it clear what needs to be done. States need to reach net zero emissions by the middle of the century, and to do so they need to effect a deep, rapid and sustained reduction in GHG emissions starting now. Science must inform States’ actions and policies in this regard.

15. *Second*, the prevention obligation is onerous. It requires each State to “use all means at its disposal” to prevent transboundary harm from occurring¹⁶⁰. As the Court explained in *Pulp Mills*, the measures can (and should) include adopting and enforcing legislation; regulating the conduct of private actors; and promoting transparency and broad public participation in environmental matters¹⁶¹. What is key is that the State’s action is ambitious and effective to have a real chance of preventing harm to the environment.

16. *Third*, the required standard of care reflects the principle of proportionality¹⁶². As such, each State’s mitigation action should be broadly proportionate to its share of global GHG emissions. When over 60 per cent of emissions come from only five States, their mitigation obligations are particularly onerous. Of course, that does not release other States from their own obligations, but the scale of the required effort pales in comparison. In addition, as the Agent for the Bahamas has already discussed, the proportional allocation of mitigation duties must reflect the principle of “common but differentiated responsibilities” which is well recognized in international law. But CBDR does not eclipse the proportionality rule itself. It rather informs our assessment of what legal burden a State can reasonably bear given its developmental capacity.

17. That is all I wish to say today on the prevention obligation.

¹⁵⁸ ILC Draft Articles on Transboundary Harm, art. 3, and commentary to art. 3, paras. 3-4.

¹⁵⁹ ILC Draft Articles on Transboundary Harm, commentary to art. 3, para. 7; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, *I.C.J. Reports 1997*, separate opinion of Vice-President Weeramantry, p. 78, para. 140.

¹⁶⁰ Bahamas I, para. 95 (citing *Pulp Mills* Judgment, p. 45, para. 101).

¹⁶¹ *Pulp Mills* Judgment, pp. 79-80, para. 197. See also Bahamas I, paras. 100-101; Bahamas II, paras. 98-101.

¹⁶² ILC Draft Articles on Transboundary Harm, commentary to art. 3, paras. 11, 18.

B. Climate treaties impose obligations on States to effect deep, rapid and sustained reduction in GHG emissions

18. I now want to turn briefly to the role of the climate treaties. They also impose individual obligations on States to mitigate, and, unsurprisingly, such obligations are consistent with the States' obligations under customary international law.

19. I will touch upon two obligations under the Paris Agreement.

20. *First*, Article 4 (2) of the Paris Agreement requires States to “prepare, communicate and maintain successive” nationally determined contributions, or NDCs. These NDCs are not an aspirational wish list, or a purely discretionary decision, or an unguided exercise. Their setting is a matter of concrete, binding obligations.

21. Let us go back to first principles. Treaty obligations must be interpreted in light of the treaty's object and purpose. In the Paris Agreement, that is expressly stated in Article 2 (*a*) — that is, to limit the increase in global average temperatures to “well below 2°C above pre-industrial levels” and to “pursu[e] efforts to limit the temperature increase to 1.5°C”.

22. The Paris Agreement, like all other treaties, must also be performed in good faith. So while States are not obliged to achieve the temperature goal, they *are* required to set their NDCs in a way that makes it possible to achieve the aim. To that end, NDCs must reflect a State's “highest possible ambition”, and “represent a progression over time”¹⁶³, and be informed by the decisions of the Conference of Parties and the outcomes of the global stocktake¹⁶⁴.

23. Just a brief note here on the global stocktake, because the Paris Agreement expressly requires States to take it into account in their NDCs. The 2023 stocktake makes clear that States are *not* on track to achieve the temperature goal. States must therefore urgently take steps to set (and meet) NDCs that can in fact result in deep, rapid and sustained reductions in global emissions in line with the 1.5°C goal¹⁶⁵. That is what good faith requires.

24. States' obligations under the Paris Agreement do not, however, end there.

25. Article 4 (2) also requires that States “pursue domestic mitigation measures” with a view to meeting their NDCs. This is not an obligation to actually meet the NDCs in all circumstances, but

¹⁶³ Bahamas II, para. 46 (citing Paris Agreement, arts. 3, 4 (3)).

¹⁶⁴ *Ibid.* (citing Paris Agreement, arts. 4 (9), 14 (3)).

¹⁶⁵ Bahamas II, para. 47 (*c*) (citing UNFCCC Decision 1/CMA.5, paras. 2, 4, 28).

it requires that States act with diligence and pursue domestic policies which are reasonably aligned with their NDCs. One critical tool in the State's arsenal is the regulation of private actors, who generate a considerable portion of GHG emissions¹⁶⁶. I refer the Court to the Bahamas' written submissions, which discuss this obligation in more detail¹⁶⁷.

26. In sum, States must diligently pursue mitigation measures in line with their NDCs, which in turn must reflect States' progress (or indeed, their lack of progress) towards the temperature goal. There is no other way of interpreting the Paris Agreement without doing grave violence to the fundamental principles of treaty interpretation under international law.

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27. At this juncture, it is worth noting that other rules of international law also give rise to mitigation obligations. These include the law of the sea and human rights, both of which enshrine binding norms on the protection of the environment. Earlier this year, ITLOS affirmed States' obligations to prevent and reduce marine pollution in the form of GHG emissions¹⁶⁸. In the human rights sphere, there is no shortage of judicial decisions affirming States' obligations under international law¹⁶⁹. I commend those decisions to the Court, and refer the Court also to the Bahamas' written submissions on these matters¹⁷⁰.

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28. Mr President, Excellencies, before I conclude, there is one final point I will mention briefly, and that is the interrelation of these various bodies of law applicable to climate change. It should be clear by now that they do not stand in opposition to each other. They are complementary, and they reinforce each other.

¹⁶⁶ Carbon Disclosure Project ("CDP"), CDP Carbon Majors Report 2017 (July 2017), pp. 5-7.

¹⁶⁷ Bahamas I, paras. 191-203; Bahamas II, paras. 98-101.

¹⁶⁸ *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Case No. 31, Advisory Opinion, ITLOS (21 May 2024), para. 321.

¹⁶⁹ See Bahamas I, paras. 145-175; Bahamas II, paras. 78-82.

¹⁷⁰ See Bahamas I, paras. 145-175; Bahamas II, paras. 63, 65-70, 78-82, 85-86, 100 (b), 101.

29. The idea, for instance, that the climate treaties alone are exhaustive of States' climate obligations has no support in the text of those treaties, in the history of their negotiations, or in their very purpose¹⁷¹. The climate treaties refer to both human rights and the prevention obligation¹⁷². They did not erase existing public international law, and those who claim otherwise provide no credible support for their proposition. The Court should resist such harmful attempts to dilute and distort international law.

C. Concluding remarks

30. Mr President, honourable Members of the Court, you have the heavy burden of carrying out the Court's mission of upholding international law. That mission is urgent and necessary, as we all face the existential threat of climate change. On behalf of the Bahamas, and the present and future generations of people who share this planet, I implore you to be bold as you pen and deliver your opinion.

31. It has been an honour to appear before you, and I thank you for your kind attention.

The PRESIDENT: I thank the representatives of the Bahamas for their presentation. I now invite the next participating delegation, Bangladesh, to address the Court and I call upon His Excellency Mr Tareque Muhammad to take the floor.

Mr MUHAMMAD:

I. INTRODUCTORY STATEMENT

1. Mr President, honourable Members of the Court, *assalamu alaikum* and good afternoon. It is an honour for me to appear before you today as the Agent of the People's Republic of Bangladesh.

2. I start by expressing our solidarity with other specially affected States, including small island developing States, as our fates are linked in the face of increasingly devastating impacts of climate change.

¹⁷¹ Bahamas II, paras. 15-24.

¹⁷² Paris Agreement to the United Nations Framework Convention on Climate Change, 12 December 2015, 3156 *UNTS* 219, preamble; United Nations Framework Convention on Climate Change, 9 May 1992, 1771 *UNTS* 107, arts. 2, 3 (3), 4 (1) (c).

3. For Bangladesh, the consequences of climate change are more than an existential threat: they are our lived reality. We have been ranked the seventh most climate-affected country based on number of fatalities, climate events and economic losses¹⁷³.

4. Bangladesh's unique geography and low-lying delta topography have shaped its cities and towns and influenced its culture for nearly 4,000 years. But today, they leave us especially vulnerable to climate hazards. As you can see on the slide, Bangladesh is situated between the Himalayas to the north and the Bay of Bengal to the south. More than half of our 170 million residents live in the Ganges Delta — the world's largest river delta, which lies no more than 5 m above sea level at its highest points — and around 29 per cent of the population lives in coastal areas with an average elevation of less than 1.5 m.

5. As a result, as depicted in this map, Bangladesh and its people face unprecedented catastrophe. Almost every part of my country is vulnerable to climate change impacts, including increasing salinity due to sea level rise, floods, cyclones and storm surges, severe weather and drought¹⁷⁴.

6. The human impact of the climate crisis in Bangladesh is devastating. People are dying, as a direct result of climate change impacts such as severe storms and floods, and because these impacts increase the prevalence of disease and other health issues¹⁷⁵. Millions of people have *already* suffered the loss of their homes, businesses, schools and, in some cases, their entire communities¹⁷⁶. Millions more are at risk¹⁷⁷.

7. These impacts are driving an unprecedented displacement crisis in Bangladesh: by 2050, the number of internal climate migrants could reach almost *20 million*, if temperatures continue to rise¹⁷⁸. Around 2,000 people are moving to Dhaka, the capital of Bangladesh, every day — which, as you can see from the slide, is also susceptible to severe flooding¹⁷⁹.

¹⁷³ Germanwatch, Global Climate Risk Index 2021: Who Suffers Most from Extreme Weather Events? Weather-related Loss Events in 2019 and 2000 to 2019 (Jan. 2021), p. 13, available at https://www.germanwatch.org/sites/default/files/Global%20Climate%20Risk%20Index%202021_2.pdf.

¹⁷⁴ Written Statement of Bangladesh, p. 30.

¹⁷⁵ Written Statement of Bangladesh, paras. 61–62.

¹⁷⁶ Written Statement of Bangladesh, paras. 63–69.

¹⁷⁷ Written Statement of Bangladesh, para. 68.

¹⁷⁸ Written Statement of Bangladesh, para. 68.

¹⁷⁹ Written Statement of Bangladesh, para. 69.

8. The financial impact of climate change reflects the scale of the human tragedy. The *annual* cost of climate-related disasters in Bangladesh is US\$3 billion a year¹⁸⁰. On top of that, it is estimated that investments of more than US\$400 billion are needed to meet Bangladesh’s mitigation goals and adaptation needs¹⁸¹. The adaptation finance gap is “very large”, according to the Adaptation Gap Report of 2024¹⁸².

9. The reality is that my beautiful country and its people are victims of a grave injustice and fundamental inequity. Our contributions to historic global emissions are negligible — barely half a per cent¹⁸³ — yet we suffer the worst impacts. We, therefore, require climate justice — *now*.

10. We have been resilient in the face of this devastation, but we cannot address these issues alone. Climate-vulnerable States require a fundamental shift in the conduct of high-emitter States, who are not doing enough to address climate change or its impacts. Recent reports from the World Meteorological Organization indicate that global average temperature *exceeded* 1.5°C for much of 2024¹⁸⁴. In the face of repeated disasters, it has become impossible to cope without compromising basic human rights and meeting the SDG obligations.

11. We have witnessed with frustration the lack of progress in the recently held COP 29. The New Collective Quantified Goal of US\$300 billion a year in climate finance falls woefully short of the amount needed. The countries which are victims of climate change manifested their frustration by staging a walkout. Even if NDCs are implemented, global temperature is set to rise to 2.8°C by 2100¹⁸⁵ — which is a death warrant for Mother Earth. The Court has an essential role in redressing this injustice and clarifying the obligations of *all* States — especially the major polluters — in the face of this global crisis. Bangladesh has confidence in the Court delivering a strong advisory opinion commensurate with the immense scale and gravity of the climate crisis. It *cannot* be the case that

¹⁸⁰ Written Statement of Bangladesh, para. 63.

¹⁸¹ Written Statement of Bangladesh, para. 71.

¹⁸² UN Environment Programme, *Adaptation Gap Report 2024* (2024), p. 42, available at <https://www.unep.org/resources/adaptation-gap-report-2024>.

¹⁸³ Emissions Database for Global Atmospheric Research, “GHG Emissions of All World Countries” (2023), available at https://edgar.jrc.ec.europa.eu/report_2023.

¹⁸⁴ World Meteorological Organization, “State of the Climate 2024 Update for COP29” (11 November 2024), available at <https://wmo.int/publication-series/state-of-climate-2024-update-cop29>.

¹⁸⁵ IPCC, *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the IPCC* (2023), pp. 11, 57, available at https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_FullVolume.pdf.

international law has nothing to say in the face of this existential threat to specifically affected States such as Bangladesh — and to the whole of humanity.

12. I turn now to Bangladesh’s distinguished counsel, Professor Payam Akhavan and Ms Catherine Amirfar, who will present the legal arguments on mitigation and adaptation, respectively. Thank you all.

The PRESIDENT: I thank His Excellency Mr Tareque Muhammad. I now give the floor to Professor Payam Akhavan. You have the floor, Sir.

Mr AKHAVAN :

II. STATES’ OBLIGATIONS IN RESPECT OF MITIGATION OF ANTHROPOGENIC GREENHOUSE GAS EMISSIONS

1. Mr President, distinguished Members of the Court, I am honoured to appear in this historic proceeding on behalf of the People’s Republic of Bangladesh.

2. I will be addressing the harmonization of the multiple régimes of international law referred to in the first question before the Court.

3. These different branches of international law are all from the same tree, and they all lead to a single overriding obligation; namely that *all States must take the necessary measures to deeply and rapidly mitigate anthropogenic greenhouse gas emissions to avoid breaching the 1.5°C threshold*, with the greatest burden falling on the developed and high-emitting States. As recognized in the reports of the IPCC and the Paris Agreement, holding the increase in global temperature to 1.5°C “would significantly reduce the risks and impacts of climate change”¹⁸⁶.

4. This pivotal obligation arises from distinct but interrelated and mutually reinforcing legal régimes, including: principles of customary international law on transboundary harm to the environment; the “UN climate change regime”, comprised primarily of the UNFCCC and Paris Agreement; and fundamental norms of international human rights law, including the right to development; and all are to be applied in conjunction with the principle of common but differentiated responsibilities. I will speak to each in turn.

¹⁸⁶ Paris Agreement, *UNTS*, Vol. 3156 79 (12 December 2015) (hereinafter “Paris Agreement”), Article 2 (1) (a).

5. *First*, as the Court recognized in *Pulp Mills*, under customary international law, each State is under a core obligation “to use all the means at its disposal . . . to [prevent] activities [taking place] in its territory . . . [that cause] significant damage to the environment of another State”¹⁸⁷. There is no doubt that greenhouse gas emissions cause significant — indeed catastrophic — transboundary harm. Their long-term and global impact in no way diminishes application of this fundamental principle.

6. Moreover, as confirmed in the unanimous ITLOS advisory opinion on climate change, a “stringent” standard of due diligence applies in preventing harm to the marine environment¹⁸⁸. The core obligations under UNCLOS Part XII reflect customary international law¹⁸⁹. There is no reason why a less exacting standard should apply to the environment as a whole.

7. *Second*, while the UN climate change regime is critical to mitigation, it is not the last word on States’ obligations. The obligations under those treaties are largely procedural. They simply require States to formulate and communicate nationally determined contributions reflecting their highest possible ambition, and to ensure that successive contributions “represent a progression” of efforts over time.

8. Some have argued in these proceedings that this specialized régime is somehow self-contained, or even *lex specialis*, with the consequence that international law cannot impose obligations that go beyond the Paris Agreement¹⁹⁰. That position is manifestly inconsistent with the strong presumption against normative conflict and fragmentation. As the Court noted in the *Right of Passage Over Indian Territory* case, treaties should “be interpreted as producing and as intended to

¹⁸⁷ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), pp. 55–56, para. 101.

¹⁸⁸ *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, ITLOS, Advisory Opinion of 21 May 2024 (hereinafter “ITLOS Advisory Opinion”), paras. 241, 243, 399.

¹⁸⁹ See, e.g., Convention for the Protection of the Marine Environment of the North-East Atlantic, 2354 UNTS 67 (22 September 1992), Preamble; United Nations General Assembly, Protection and Preservation of the Marine Environment: Report of the Secretary General, UN doc. A/44/461 (18 September 1989), para. 29. See generally Detlef Czybulka, *Article 192*, in UNCLOS Commentary (Dr Alexander Proelss, ed., 2017) pp. 1284–85; Article 194: Measures to Prevent, Reduce, and Control Pollution of the Marine Environment, Virginia Commentary, Vol. IV, para. 194.10 (c); Birnie, Boyle, and Redgwell’s *International Law and the Environment* 510–11 (Alan Boyle and Catherine Redgwell eds., 4th ed. 2021). See also ITLOS Advisory Opinion, paras. 353–355.

¹⁹⁰ See, Written Statement of India, para. 17; Written Statement of Indonesia, para. 61; Written Statement of Iran, para. 23; Written Statement of Japan, paras. 14–15; Written Statement of Kuwait, paras. 3.1, 60; Written Statement of the Organization of Petroleum Exporting Countries, paras. 79–81; Written Statement of Russian Federation, p. 8; Written Statement of Saudi Arabia, para. 5.5.

produce effects in accordance with existing law and not in violation of it”¹⁹¹. It cannot be that the Paris Agreement is intended to violate pre-existing obligations to protect the environment.

9. It is notable that in 1993, the Court had created a Chamber for Environmental Matters. It was discontinued in 2006 because, as President Higgins explained at the time, “States understandably saw environmental law as part of international law as a whole”¹⁹².

10. It cannot be that the intention of the Paris Agreement is to protect the planetary climate system by excluding international law as a whole, not least when our common survival is at stake. In the words of the ILC Report on Fragmentation: “Without the principle of ‘systemic integration’ it would be impossible to give expression to and keep alive any sense of the common good of humankind.”¹⁹³

11. Bangladesh notes further that for *lex specialis* to apply, “there must be some actual inconsistency” between norms¹⁹⁴. But there is no such conflict between the Paris Agreement and general international law. Simply put, the *lex specialis* argument is missing the *lex*. It was squarely rejected by ITLOS¹⁹⁵, and it should similarly be rejected by this Court.

12. Mr President, invoking the Paris Agreement to avoid pre-existing obligations is particularly troubling because the Earth has already reached a year-long temperature exceeding 1.5°C¹⁹⁶. There is obviously a “substantial ‘emissions gap’”¹⁹⁷. It cannot be that grossly inadequate NDCs somehow satisfy the obligation to protect the environment¹⁹⁸. It is high time for the faltering

¹⁹¹ *Right of Passage over Indian Territory (Portugal v. India), Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 142.

¹⁹² Press Release, International Court of Justice, “‘Our aim is to increase further our throughput’ in 2006-2007, the President of the International Court of Justice, Judge Rosalyn Higgins, tells the United Nations General Assembly” (26 October 2006), available at <https://www.icj-cij.org/sites/default/files/press-releases/0/000-20061026-PRE-01-00-EN.pdf>.

¹⁹³ ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (13 April 2006), available at: https://legal.un.org/ilc/documentation/english/a_cn4_1682.pdf.

¹⁹⁴ ILC, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), reproduced in *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, Article 55, commentary (4).

¹⁹⁵ ITLOS Advisory Opinion, para. 223.

¹⁹⁶ Copernicus Climate Change Service, “Warmest January on record, 12-month average over 1.5°C above preindustrial” (9 February 2024), available at <https://climate.copernicus.eu/warmest-january-record-12-month-average-over-15degc-above-preindustrial>.

¹⁹⁷ IPCC, *Sixth Assessment Report: Summary for Policymakers* (2023), p. 11, para. A.4.3.

¹⁹⁸ IPCC, “FAQ 3: How will climate change affect the lives of today’s children tomorrow, if no immediate action is taken?”, available at <https://www.ipcc.ch/report/ar6/wg2/about/frequently-asked-questions/keyfaq3/>.

COP process to be reinvigorated by a robust opinion from this Court. The time for empty promises has passed.

13. I now turn to the *third* point, namely that climate change poses an immediate, if not the greatest, threat to human rights. In its resolution 56/8 of 10 July 2024, the UN Human Rights Council expressed “extreme concern that climate change poses an existential threat to some countries, and has already had an adverse impact on the full and effective enjoyment of” human rights¹⁹⁹. This places climate-vulnerable States such as Bangladesh in an untenable position where human rights on their territory are adversely impacted by the conduct of other States. This implicates the *inter-State* dimension of human rights obligations, including Article 2 (1) of the Covenant on Economic, Social, and Cultural Rights²⁰⁰, requiring States parties “to take steps, individually and through international assistance and co-operation, especially economic and technical” to achieve progressively the full realization of rights²⁰¹. It is reinforced by the UN Declaration on the Right to Development²⁰², recognizing the duty of co-operation “in ensuring development and eliminating obstacles to development”. At a minimum, States must not impede another State’s ability to protect and ensure the rights of its population.

14. The *fourth* point is that these norms must be applied in conjunction with the principle of common, but differentiated, responsibilities. This requires developed States to mitigate emissions consistent with their greater financial and technical capabilities, even if “[a]ll States must make mitigation efforts”²⁰³. This is a fundamental aspect of the equity that international law requires.

¹⁹⁹ UN Human Rights Council, resolution 56/8: Human rights and climate change, UN doc. A/HRC/RES/56/8 (16 July 2024), available at: <https://documents.un.org/doc/undoc/gen/g24/123/55/pdf/g2412355.pdf>.

²⁰⁰ International Covenant on Economic, Social and Cultural Rights, 993 *UNTS* 3 (16 December 1966).

²⁰¹ See, e.g., International Covenant on Economic, Social and Cultural Rights, 993 *UNTS* 3 (16 December 1966), Article 2 (1); see also, e.g., International Covenant on Civil and Political Rights, 999 *UNTS* 171 (16 December 1966), Articles 1, 4 (2), 6 (1), 27; UN Committee on Economic, Social and Cultural Rights, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), UN doc. E/C.12/2002/11 (20 January 2003), para. 31; UN Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties’ Obligations, UN doc. E/1991/23 (14 December 1990), paras. 13–14; UN General Assembly, Resolution 76/300, The human right to a clean, healthy and sustainable environment, UN doc. A/RES/76/300 (1 August 2022), paras. 16, 19; UN Human Rights Council, Resolution on the human right to a clean, healthy and sustainable environment, UN doc. A/HRC/RES/48/13 (18 October 2021), Preamble, para. 4 (a).

²⁰² United Nations, Declaration on the Right to Development, Resolution No. 41/128 (4 December 1986).

²⁰³ ITLOS Advisory Opinion, para. 229 (emphasis added). See also Written Comments of Bangladesh, para. 23.

15. I return to where I started: each of these legal régimes leads to one over-arching obligation to mitigate emissions to avoid breaching the 1.5°C threshold. This is the *key* obligation, as it is the only way to *prevent* the catastrophic harms predicted by the IPCC in a 2°C or 3°C scenario.

16. But it is not enough. We are already at the 1.5°C threshold. Even if all States immediately reduced emissions to meet their obligations, it would not undo the impacts *already* being suffered in Bangladesh, let alone stop future irreversible harms.

17. This takes me to my *fifth* and final point. It is deeply unfair that countries like Bangladesh that have contributed the least to global emissions are paying the highest price, forced to make enormous investments to adapt to the catastrophes caused by high-emitting States.

18. Mr President, distinguished Members of the Court, behind the abstract legal questions that are before you, beyond the walls of this Great Hall of Justice, is a world of immense suffering. The momentous words that you weave in this historic opinion should guide States away from the precipice; and it should give hope to those who despair from this injustice. It calls to mind the words of the legendary Bengali poet Rabindranath Tagore: “I shall weave a chain of pearls . . . with my tears of sorrow.”

19. This concludes my remarks. I thank you for your kind attention and I ask that you please invite Ms Amirfar to address you.

The PRESIDENT: I thank Professor Akhavan. I now give the floor to Ms Catherine Amirfar. Madam, you have the floor.

Ms AMIRFAR:

III. STATES' OBLIGATIONS IN RESPECT OF ADAPTATION TO CLIMATE CHANGE

1. Mr President, honourable Members of the Court, it is a true privilege to appear before you on behalf of the People's Republic of Bangladesh.

2. I will address the set of specific obligations in respect of climate adaptation, in light of what has already been said about harmonization.

3. I turn first to the relationship between mitigation and adaptation. Adaptation has received less attention from participating States and international organizations in their written submissions.

But even as mitigation remains central to preventing harm, for climate-vulnerable States like Bangladesh, ensuring that the necessary steps are taken to *adapt* to current and unavoidable future climate impacts is equally important²⁰⁴.

4. As we begin these historic proceedings, we face a stark reality. Negative climate impacts are already devastating Bangladesh and climate-vulnerable States. The international consensus on the best available science demonstrates that, given where we stand today, *even effective* mitigation of GHG emissions is not enough to remedy these impacts or prevent further negative impacts, which the IPCC concludes will continue to worsen even under a 1.5°C scenario, and reach catastrophic levels at a 2°C or 3°C scenario²⁰⁵. In addition, according to the IPCC, in many instances the extent of the climate crisis means that “limits to adaptation have been reached”, so that even with adaptation measures in place, not all loss and damage will be prevented²⁰⁶.

5. Accordingly, the best available science tells us that climate *adaptation* measures are an equally essential part of the response to existing and unavoidable future harms²⁰⁷. As multiple States acknowledge, adaptation-related obligations are *primary* obligations. They are not alternatives to mitigation, but are required in parallel²⁰⁸, and in some circumstances, the same measures may be required in relation to both. For example, measures supporting ecosystem resilience as a means of adaptation, such as restoring wetlands to provide a barrier to sea-level rise, also create carbon sinks in support of States’ mitigation obligations. ITLOS confirmed this point in the context of States’ customary obligation to protect and preserve the marine environment²⁰⁹.

²⁰⁴ See Intergovernmental Panel on Climate Change (“IPCC”), Annex VII: Glossary, in *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the IPCC (2021)*, https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_AnnexVII.pdf, p. 2216. See also Paris Agreement, 3156 UNTS 79 (12 December 2015) (“Paris Agreement”), Article 7 (1).

²⁰⁵ IPCC, *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the IPCC (2023)* https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_Full_Volume.pdf (“IPCC Sixth Assessment Report”), p. 71. See also Written Statement of Bangladesh, Section II.B.

²⁰⁶ IPCC, 2022: Summary for Policymakers, in *Climate Change 2022: Impacts, Adaptation and Vulnerability* (2022), https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf (“IPCC Summary for Policymakers”), p. 26.

²⁰⁷ See IPCC Sixth Assessment Report, pp. 78–79.

²⁰⁸ Written Statement of Bangladesh, Section IV.B. See also e.g. Written Comment of Australia, paras. 2.38–2.41; Written Statement of Canada, para. 17; Written Statement of China, para. 68–70; Written Statement of Egypt, para. 153; Written Comment of the Netherlands, para. 2.10; Written Statement of New Zealand, para. 28(d); Written Statement of Saudi Arabia, para. 4.16; Written Comment of Tuvalu, para. 43.

²⁰⁹ See e.g. *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, ITLOS, Advisory Opinion (21 May 2024) (“ITLOS Advisory Opinion”), p. 130, para. 390.

6. At the same time, adaptation measures are also *secondary* obligations, that can arise when States violate their obligations to mitigate GHG emissions in line with the best available science. Where unmitigated GHG emissions cause harm — for example, by increasing the frequency and strength of devastating weather events²¹⁰ — then responsible States must assist injured States with the adaptation measures necessary to remedy that harm as a form of restitution or compensation²¹¹. As such, States’ adaptation-related obligations are preventative *and* responsive in nature, and relevant to both questions (a) and (b)²¹².

7. Turning to my second point, the *same* legal framework underpins States’ mitigation *and* adaptation obligations. This includes: the core obligation under customary international environmental law to prevent and reduce significant transboundary harms related to GHG emissions²¹³; the duty of due diligence, measured on an objective and stringent basis²¹⁴; the duty to co-operate to “jointly manage the risks of damage to the environment”²¹⁵; territorial sovereignty and self-determination; international human rights obligations²¹⁶; and express requirements in respect of adaptation under the United Nations climate change regime²¹⁷ and UNCLOS²¹⁸.

8. As in the mitigation context, adaptation obligations are informed by the best available science and subject to the principle of common but differentiated responsibilities²¹⁹. Accordingly,

²¹⁰ Written Statement of Bangladesh, para. 26.

²¹¹ See e.g. Bangladesh’s Written Statement, paras. 146–147. See also e.g. Written Statement of the African Union, para. 278; Written Statement of Albania, paras. 136, 138; Written Statement of Burkina Faso, para. 374; Written Statement of the Commission of Small Island States, paras. 182–184; Written Comment of the Cook Islands, para. 32; Written Statement of Kenya, paras. 6.94–6.95; Written Statement of Kiribati, para. 188; Written Statement of the Melanesian Spearhead Group, paras. 318–319; Written Statement of Saint Lucia, para. 92; Written Statement of Saint Vincent and the Grenadines, para. 134; Written Statement of the Solomon Islands, para. 239; Written Comment Solomon Islands, para. 35; Written Statement of Timor-Leste, para. 371; Written Statement of Tuvalu, paras. 137–139; Written Comment of Tuvalu, paras. 43–45; Written Statement of Vanuatu, paras. 583–584; Written Comment of Vanuatu, para. 200.

²¹² Request for Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change (12 April 2023).

²¹³ Written Statement of Bangladesh, Section IV.A.1; *see also* Written Comment of Bangladesh, para. 11.

²¹⁴ Written Statement of Bangladesh, para. 90; *see also* Written Comment of Bangladesh, para. 15.

²¹⁵ *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*, Judgment, I.C.J. Reports 2022 (II), p. 649, para. 100 (quoting *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I) (“*Pulp Mills*”), p. 49, para. 77). See also Written Statement of Bangladesh, Section IV.B.3; Written Comment of Bangladesh, para. 14.

²¹⁶ Bangladesh’s Written Statement, Section IV.B.1.

²¹⁷ Written Statement of Bangladesh, paras. 36–37, 41.

²¹⁸ Written Statement of Bangladesh, IV.A.2. See also Written Comment of Bangladesh, Section II; ITLOS Advisory Opinion, pp. 131–132, paras. 393–394.

²¹⁹ Written Statement of Bangladesh, Section IV.B.3.

States' specific adaptation obligations will be based on their technical and financial capabilities, and their historical contributions to climate change²²⁰.

9. At least four specific, concrete obligations in respect of adaptation flow from this normative framework.

10. *First*, developed States must take affirmative measures to ensure that the funds necessary to adapt to climate impacts are available and accessible²²¹. The IPCC has concluded that “gaps exist between current levels of adaptation and levels needed to respond to impacts and reduce climate risks”, and that at current rates of planning and implementation, these gaps will continue to grow²²². This is driven in part by the disparity between the costs of adaptation and currently available funds, particularly for developing States²²³.

11. At a minimum, then, *existing* financial commitments in support of climate-vulnerable States must be met. But that is not enough: in line with the best available science and the principle of CBDR, States must *increase* their financial contributions to levels necessary to meet global adaptation needs effectively.

12. Some States argue that there is no enforceable obligation to increase financing, citing to the use of the term “goals” in the United Nations climate change regime²²⁴. But any argument that the UN climate change regime covers the field or otherwise displaces obligations under international law must be rejected for the reasons Professor Akhavan discussed.

13. In addition, the undue emphasis placed on the term “goals” ignores the mandatory language used in other provisions of the UN climate change regime. Article 4 (4) of the UNFCCC provides that developed States “*shall* also assist” developing States in “meeting costs of adaptation”²²⁵. The Paris Agreement is likewise not aspirational. Under Article 7 (9), for example, all States “*shall*, as appropriate, engage in adaptation planning processes and the implementation of” adaptation

²²⁰ Written Statement of Bangladesh, paras. 129–131.

²²¹ Written Statement of Bangladesh, paras. 140–143.

²²² IPCC Summary for Policymakers, p. 20.

²²³ IPCC Summary for Policymakers, p. 20; see also UN Environment Programme, “The Adaptation Gap Report 2023: Underfinanced. Underprepared. Inadequate investment and planning on climate adaptation” (2 November 2023), <https://www.unep.org/resources/adaptation-gap-report-2023>.

²²⁴ See e.g. Written Comment of the European Union, para. 66.

²²⁵ United Nations Framework Convention on Climate Change, Decision 2/CP.14: Development and transfer of technologies, UN doc. FCCC/CP/2008/7/Add.1 (18 March 2009) (“UNFCCC”), emphasis added.

actions²²⁶. Article 9 (1) demands that developed States “*shall provide* financial resources to assist developing country Parties with respect to both mitigation and adaptation”²²⁷. And as confirmed by the ITLOS Advisory Opinion, Article 192 of UNCLOS “*requires* States to implement measures to protect and preserve the marine environment . . . that include resilience and adaptation actions as described in the climate change treaties”²²⁸. The Tribunal specifically noted that “measures of adaptation and resilience-building frequently require significant resources”, referring to Part XII of UNCLOS, especially Articles 202 and 203, which require assistance to developing States²²⁹.

14. *Second*, developed States must co-operate by contributing relevant scientific, technological, technical, socio-economic, and legal information to developing and climate vulnerable States, as required under the Paris Agreement²³⁰ and UNCLOS²³¹. The dissemination of clean and green technologies to climate vulnerable States at affordable costs is also required. This was originally contemplated under Agenda 21, adopted during the United Nations Conference on Environment and Development over 30 years ago²³². It has since been incorporated into decisions of the parties to the UNFCCC²³³, Article 10 of the Paris Agreement²³⁴, and is required by Articles 202 and 203 of UNCLOS²³⁵.

15. *Third*, States must take steps to preserve and restore climate-resilient ecosystems such as wetlands like mangrove forests²³⁶. States must also comply with stringent due diligence obligations such as environmental impact assessments of public and private activities within a State’s jurisdiction

²²⁶ Paris Agreement, Article 7(9), emphasis added.

²²⁷ Paris Agreement, Article 9(1), emphasis added.

²²⁸ ITLOS Advisory Opinion, p. 130, para. 391. See also UN Convention on the Law of the Sea, 1833 *UNTS* 397 (10 December 1982) (“UNCLOS”), Article 192; ITLOS Advisory Opinion, pp. 130–131, paras. 391–394.

²²⁹ ITLOS Advisory Opinion, p. 131, para. 394.

²³⁰ Paris Agreement, Articles 7–8.

²³¹ UNCLOS, Article 200; see also ITLOS Advisory Opinion, pp. 109–110, paras. 312–313.

²³² See United Nations Sustainable Development, “United Nations Conference on Environment & Development: Agenda 21” (3–14 June 1992), <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>.

²³³ See United Nations Framework Convention on Climate Change, Decision 2/CP.14: Development and transfer of technologies, UN Doc. FCCC/CP/2008/7/Add.1 (18 March 2009).

²³⁴ Paris Agreement, Article 10.

²³⁵ UNCLOS, Articles 202–203; see also ITLOS Advisory Opinion, pp. 113–115, paras. 326–330.

²³⁶ Paris Agreement, Articles 2 (1) (b)–(c), 5; UNFCCC, Article 4(1)(d); UNCLOS, Article 192; IPCC, Summary for Policymakers, pp. 9, 11, 21.

or control that may cause significant harm through GHG emissions, including cumulative effects²³⁷. This also encompasses continuously monitoring environmental impacts²³⁸ to protect and preserve such ecosystems.

16. *Finally*, States must take positive steps to fund or otherwise contribute to capacity-building measures in climate vulnerable States to protect and ensure fundamental human rights, given that mitigation alone is insufficient to undo existing and avoid all future adverse impacts. For example, the IPCC has stressed the need to “[i]ncreas[e] adaptive capacities [to] minimise[] the negative impacts of climate-related displacement”²³⁹, which is relevant to the nearly 20 million people at risk of displacement in Bangladesh. This might include, for example, measures to accommodate displaced communities and to build resilient structures to prevent future losses.

17. I close my remarks by stressing the urgent need for adaptation measures to address the catastrophic effects of climate change. As you heard from the Agent, millions of people in Bangladesh have already been affected; millions more are at imminent risk. The devastating consequences for global peace and stability and human dignity flowing from the displacement of *hundreds of millions* of climate change migrants and refugees worldwide by mid-century is staggering to contemplate²⁴⁰. The Court’s clarification of what States *must do now* as a matter of legally binding obligations to avert such a terrible future comes at a critical juncture for our world.

18. Thank you, Mr President, honourable Members of the Court, for your kind attention and your patience. This concludes the submissions of Bangladesh.

²³⁷ See *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, *I.C.J. Reports 2015 (II)*, pp. 45-46, para. 104; *Pulp Mills*, pp. 73-74, para. 205. See also UNCLOS, Articles 204-206; ITLOS Advisory Opinion, para. 441(3)(l).

²³⁸ *Pulp Mills*, pp. 73-74, para. 205. See also United Nations General Assembly, Report of the International Law Commission on Prevention of Transboundary Harm from Hazardous Activities, Yearbook of the International Law Commission, 2001, Vol. II (Part Two), UN doc. A/CN.4/SER.A/2011/Add.1, Commentary to Article 7.

²³⁹ IPCC, Climate Change 2022: Impacts, Adaptation and Vulnerability, https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_FullReport.pdf, C.2.12, p. 45

²⁴⁰ See e.g. World Health Organization, COP29 Special Report on Climate Change and Health: Health is the Argument for Climate Action (2024) <https://climahealth.info/resource-library/cop29-special-report-on-climate-and-health-health-is-the-argument-for-climate-action/>, p. 8.

The PRESIDENT: I thank the representatives of Bangladesh for their presentation. I now invite the next participating delegation, Barbados, to make its oral statement before the Court and I call upon His Excellency Kerrie Symmonds to take the floor.

Mr SYMMONDS:

1. Mr President, Madam Vice-President, honourable Members of the Court, I am Kerrie Symmonds, I am Barbados' Minister of Foreign Affairs and Foreign Trade.

2. Mr President, Barbados has taken this unprecedented step of making two sets of extensive written submissions and appearing before you today for one simple reason.

3. The climate crisis which lies at the heart of these proceedings is for us an imminent matter of life and death.

4. It is not, Mr President, a statistical matter, it is not a theoretical or speculative matter, but it is a matter of life and death simply because of the fact that for people of Small Island Developing States such as mine, there is nowhere to go when confronted with rising sea levels; there is no hinterland, there is no interior, there is no area of as yet unexplored territory. All that we have is 166 square miles of land for our 300,000 residents.

5. Small islands like ours, Mr President, are surrounded by coral reefs that play a key role in nurturing and protecting coastal communities and facilitating nearshore economic activities such as fishing and leisure. The sea is therefore not only the home to our biodiversity but it is also the source of our nation's livelihood. Carbon emissions from human activity are causing ocean warming and acidification which in turn places our coral reef and its entire ecosystem at extreme risk.

6. As a consequence, everything, everything, Mr President, that we have painstakingly constructed as a nation and as a people is now placed at risk because of the climate crisis:

(a) The tourism sector, for example, which has buoyed our economic fortunes for the better part of a century is now at risk;

(b) The fishing sector which has been a sustainable source of protein for generations of Barbadians, thousands of Barbadians, Mr President, is now at risk;

(c) The sugarcane industry, which we have grown for hundreds of years and from which we have distilled a world-famous rum, is also at risk.

7. Mr President, you and your honourable Members, you have heard and will, no doubt, hear more about the record-breaking Hurricane Beryl which passed through the Caribbean area earlier this year.

8. Hurricane Beryl moved from being a simple tropical storm to being a category five hurricane in approximately 24 hours. Hurricane Beryl impacted Barbados and destroyed 90 per cent of Barbados' fishing fleet. A fleet which had been hauled behind the protection of marinas and breakwaters which had existed for the past 35 years — 35 years! However, such was the unprecedented intensity of the waves Beryl sent our way, that those near 40 year old protections proved insufficient and marinas that had hitherto provided sanctuary became scenes of mass destruction — destruction which is now estimated to cost over US\$100 million to replace — US\$100 million, Mr President, of unplanned expenditure accruing to a micro-State, with a micro-economy, with one day's notice.

9. What you might not have heard about is another startling example of the effects of the climate crisis in the Caribbean: and I refer specifically to periods of prolonged drought. The first five months of the year 2023, for example, saw levels of rainfall which were 53 per cent below the preceding 30-year average — below the preceding 30-years average for Barbados — during the first five months of those years.

10. Storms like Beryl, periods of prolonged periods of drought, slow-onset phenomena such as sea-level rise and rising temperatures are the catastrophic “new normal” which has become our lived reality.

11. Mr President, the economic consequences are no less palpable than the environmental consequences to which I have just referred. Even as productive sectors are being affected, the ability of the State to provide support is undermined by rising costs of finance and, increasingly, the challenge of securing sustainable insurance. This challenge exists because insurance companies themselves are now becoming more risk averse in the face of more frequent, more powerful and more devastating storms. So that my country, therefore, like some regions in larger countries, is now in grave danger of becoming uninsurable and it follows logically, Mr President, that, without the ability to access or sustain insurance premia, a country's economy will also then become uninvestable.

12. Barbados contends, and science clearly demonstrates, that these are the consequences of this man-made climate crisis. A crisis towards which Barbados and Small Island Developing States have contributed almost *nothing*, but which may take away *everything* that we have.

13. Mr President, honourable Members of the Court, Barbados is a firm believer in the international legal order. That is why, 44 years ago, we accepted this Court's compulsory jurisdiction.

14. Today, we appear, for the first time, before this Court respectfully to request clear answers to clear questions posed, unanimously, by the UN General Assembly.

15. The serene picture of Barbados, Mr President, I leave with you the words of one of the Caribbean's most famous poets, Barbadian Kamau Brathwaite. In his poem "South" he says:

"Bright waves splash up from the rocks to refresh us,
blue sea-shells shift in their wake
and there is the thatch of the fishermen's houses, the path
made of pebbles, and look!
Small urchins combing the beaches
looking up from their traps to salute us:
...
The fisherman, hawking the surf on this side
of the reef, stands up in his boat
and halloos us".

16. That serene picture stands to be obliterated, if we do not cease forms of global conduct which will leave our island uninsurable, uninvestable and, ultimately, uninhabitable. Mr President, I request to be followed sequentially by Ambassador François Jackman, Barbados' Representative, Professor Robert Volterra, Co-Representative, and Mr Gunjan Sharma, external legal counsel for Barbados.

The PRESIDENT: I thank His Excellency Kerrie Symmonds. I now give the floor to His Excellency François Jackman. Sir, you have the floor.

Mr JACKMAN:

1. Mr President, honourable Members of the Court, I wish to speak briefly about the international context surrounding the climate crisis and to highlight a key initiative taken by the Government of Barbados to address these challenges.

2. You will be aware that many countries and advocates in the fight against the climate crisis were deeply disappointed by the recent outcomes of COP29 in Baku.

3. A target of US\$300 billion per annum for climate finance was agreed, whereas it is generally accepted that US\$1.3 trillion per annum is in fact required.

4. We agreed in the Paris COP21 almost a decade ago that as an international community we would seek to limit global warming to 1.5°C above pre-industrial levels. Today, we are headed well past this point with continued growth in greenhouse gas emissions.

5. Barbados, like many other countries, had put great faith in this negotiation process and in the undertakings of the States. To say that we Barbadians are disappointed is to measure the distance between what has, over the years, been promised against what has in fact been delivered.

6. The massive gaps between promise and delivery are at the heart of the climate crisis for developing countries in general and for Small Island Developing States like Barbados in particular.

7. It is to address the climate financing crisis in particular that Barbados has piloted the Bridgetown Initiative.

8. Monsieur le président, Mesdames et Messieurs les juges, cette crise de financement relative à la crise climatique est intimement liée aux insuffisances chroniques du système financier mondial. Un système qui, au regard du Secrétaire général des Nations Unies lui-même, n'est pas à la hauteur : « Au lieu d'un filet de sécurité, les pays en développement sont confrontés à un système obsolète, dysfonctionnel et injuste, qui ne répond pas à leurs besoins. »²⁴¹

9. La Barbade a donc placé au cœur de sa diplomatie l'initiative de Bridgetown. Cette initiative vise à réformer, de fond en comble, le système financier mondial, en référence au changement climatique.

10. Les institutions financières internationales, tels la Banque mondiale et le Fonds monétaire international, seraient ainsi pleinement en mesure de remplir leurs fonctions en soutien des pays dans la mise en œuvre des objectifs du développement durable, tels qu'énoncés dans l'agenda 2030 des Nations Unies.

11. Ces institutions, accompagnées d'autres institutions et instruments financiers, tels les banques régionales de développement, le secteur privé — notamment le secteur des assurances —, des prélèvements sur certaines activités industrielles, économiques et financières, ainsi que le secteur

²⁴¹ António Guterres, Secrétaire général des Nations Unies, 15 avril 2024.

philanthropique, seraient ainsi à même de combler cet immense et périlleux déficit auquel j'ai fait référence.

12. Monsieur le président, Mesdames et Messieurs les juges, je souhaite, en guise de conclusion, souligner un principe qui a, pour mon pays, la plus grande importance.

13. Nous ne sommes pas devant vous aujourd'hui en quête de charité. Plutôt, comme nous l'avons indiqué dans notre exposé écrit, nous cherchons la justice. Les États responsables du changement climatique ont l'obligation, en vertu du droit international, comme l'expliqueront plus en détail mes collègues, d'accorder une réparation effective et complète à ces dommages. Un système financier international réformé et rénové, tel que le propose l'initiative de Bridgetown, et d'autres, est un des éléments de cette justice.

14. Mr President, I now ask the Court to call upon Professor Robert Volterra, Co-Representative of Barbados, to continue Barbados' submissions. I thank you.

The PRESIDENT: Je remercie l'ambassadeur François Jackman. I now give the floor to Mr Robert Volterra.

Mr VOLTERRA:

**STATEMENT ON (A) THE APPLICABLE LAW AND (B) STRICT LIABILITY
[LA RESPONSABILITÉ OBJECTIVE]**

I. Introduction

1. Mr President, Madam Vice-President, judges, it is an honour to appear once again before this Court. I make submissions today in my capacity as Co-Representative of Barbados.

2. Barbados has submitted two written pleadings in these proceedings. They are 332 pages long. They contain over 1,000 citations. These include 84 scientific papers, 54 academic citations and 505 legal authorities. Barbados reaffirms its written submissions, but of course it is not possible to summarize them today. Therefore in its remaining time, Barbados will focus on four submissions. They concern:

- (a) one, the applicable law;
- (b) two, the doctrine of strict liability;
- (c) three, causation and attribution; and

(d) four, foreseeability.

3. I will address topics one and two. My colleague, Gunjan Sharma, will address topics three and four.

**II. The United Nations Framework Convention on Climate Change, Kyoto Protocol
and the Paris Agreement are not a self-contained régime, *lex specialis*,
or displace other sources of international law**

4. I turn to my first submission, that is: the applicable international law. This is arguably the core issue before the Court in this advisory opinion proceeding. A number of States argue here before you that you should ignore every source of international law except three treaties. Barbados submits that the entire corpus of international law applies to climate change. All of the sources of international law identified in the Court's statute are relevant.

5. The UNFCCC, the Kyoto Protocol and the Paris Agreement are not exhaustive statements of relevant international law. They are not a *lex specialis*. And despite repetition of the words, they do not create an exclusive, self-contained legal régime. Nothing in the texts of these three treaties leads to such a conclusion.

6. Barbados's position is that these three treaties do not displace other international law. Now I invite the Court to consider the slide you see before you. It shows a map of the world. The States whose formal, official, binding pronouncements confirm Barbados' position on the applicable law are highlighted on this map. This map illustrates the evidence set out in Barbados' written pleadings.

7. For example, no less than 15 States declared during the negotiations leading to these three climate change treaties that they complemented — not that they superseded, not that they displaced, but that they complemented — existing international law²⁴². No State objected to those declarations.

8. As the Court is aware, in the submissions to this advisory opinion proceeding, numerous States have also confirmed that same view²⁴³.

²⁴² See Written Comments of Barbados, paragraph 34.

²⁴³ See e.g. Written Statement of the Republic of Chile, 22 March 2024, paragraphs 33-34; Written Comments of the Republic of Colombia, 14 August 2024, paragraphs 3.62-3.68; Second Written Statement of Mexico, August 2024, paragraphs 7-17; Written Comments of the Democratic Socialist Republic of Sri Lanka, August 2024, paragraphs 10-15; Written Comments of the People's Republic of Bangladesh on the Written Statements submitted to the Court, 15 August 2024, Part III; Written Comments of the Republic of Ecuador, 15 August 2024, paragraphs 17-18, 23-25; Written Comments of the Islamic Republic of Pakistan, 15 August 2024, paragraphs 10-22; Written Comments of the African Union, 15 August 2024, paragraphs 17-26. See also e.g. in the *Request for Advisory Opinion OC-32 on Climate Emergency and Human Rights presented by the Republic of Chile and the Republic of Colombia*, see Written Observations of the

9. And numerous States have made official pronouncements confirming that these three climate change treaties are only a starting point²⁴⁴. Japan is one such example²⁴⁵. Finland is another. Finland noted that the UNFCCC only “set the stage”²⁴⁶. Likewise, Australia elsewhere said the Kyoto Protocol only “lay a solid foundation” on which to build²⁴⁷.

10. In this proceeding, the European Union argues that these three treaties are the “principal” source of climate change law. The EU also asserts that they displace significant parts of international law, such as the international law obligation of redress²⁴⁸. Notably, however, individual Member States of the EU have disagreed with this position. They have historically and repeatedly expressed contradictory positions to the EU’s current position before you in this case. For example, in 2005, the Netherlands, the country in which we are now, speaking on behalf of the European Union, told the United Nations General Assembly that the Kyoto Protocol provides only an “additional legal basis for international efforts to address climate change”²⁴⁹.

11. Three climate change treaties may or may not have been a “starting point”. But there is no tenable legal or factual basis to conclude that they are the only or the “ending point”. This calls to mind the phrase: “Better hope deferred than none.” But that being so, I invite the Court to consider how much more compelling is the proposition: “Even better, hope fulfilled than deferred.” I turn now to my second submission, speaking in French.

Federative Republic of Brazil, December 2023, paragraph 18; Written Observations of the Republic of Paraguay, December 2023, paragraphs 28-29.

²⁴⁴ See Written Comments of Barbados, paragraphs 38-40; “Remarks by the President on the Paris Agreement”, *The White House*, 5 October 2016; Oral Statement by India at the twenty-second session of the Conference of the Parties (COP 22) to the United Nations Framework Convention on Climate Change (UNFCCC), 16 November 2016.

²⁴⁵ See Oral Statement by Japan at the twenty-first session of the Conference of the Parties (COP 21) to the United Nations Framework Convention on Climate Change (UNFCCC), undated, page 3, Annex 602 to the Written Comments of Barbados.

²⁴⁶ Oral Statement by Finland at the third session of the Conference of the Parties (COP 3) to the United Nations Framework Convention on Climate Change (UNFCCC), 9 December 1997, page 1, Annex 593 to the Written Comments of Barbados.

²⁴⁷ Oral Statement by Australia at the third session of the Conference of the Parties (COP 3) to the United Nations Framework Convention on Climate Change (UNFCCC), 8 December 1997, page 1, Annex 591 to the Written Comments of Barbados.

²⁴⁸ See Written Statement of the European Union, 22 March 2024, paragraphs 67, 90, 351-355.

²⁴⁹ Summary record of the 36th meeting of the General Assembly held on 24 November 2004, A/C.2/59/SR.36, paragraph 24, Annex 599 to the Written Comments of Barbados.

III. Les États ont une obligation de compensation envers d'autres États pour les dommages causés par le changement climatique en vertu du régime de la responsabilité objective

12. Dans mon deuxième exposé, la Barbade abordera les raisons pour lesquelles l'obligation de réparer les dommages causés par le changement climatique relève du régime de la responsabilité objective.

13. Dans cette procédure, certains États ont soutenu que l'obligation de ne pas causer de dommage transfrontière est une obligation de moyen²⁵⁰. Cette affirmation est erronée. Il s'agit plutôt d'une obligation de résultat. Le dommage seul fait naître l'obligation de réparation.

14. Le droit international ne permet pas d'envisager les résultats incohérents suivants :

- a) que les États émetteurs de gaz obtiennent tous les avantages économiques et matériels du changement climatique ; ou
- b) que les pays en développement et les petits États insulaires subissent les effets néfastes du changement climatique ; ou encore
- c) que les pays en développement et les petits États insulaires ne puissent compter que sur les paiements à titre gracieux des États émetteurs pour atténuer ces dommages.

15. Les lois les plus anciennes de l'humanité reconnaissent le concept de responsabilité objective. Par exemple, l'ancien code hindou Manusmṛiti établissait un régime de la responsabilité objective. Il imposait une obligation de compensation pour les dommages environnementaux transfrontières, qu'ils aient été causés « de manière intentionnelle ou non »²⁵¹. La charia et les paroles du prophète Mahomet (que la paix soit sur lui) abondent dans le même sens²⁵².

16. En vertu d'un principe général du droit, dans les législations nationales contemporaines, une entité voit sa responsabilité objective engagée pour les dommages résultant de ses activités

²⁵⁰ Voir, par exemple, observations écrites de l'Union européenne, par. 11 ; observations écrites du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, 12 août 2024, par. 35.1 ; observations écrites de la République fédérative du Brésil, 15 août 2024, par. 17. Voir également, observations écrites des États-Unis d'Amérique, 15 août 2024, par. 3.23 ; observations écrites de la Nouvelle-Zélande, 14 août 2024, par. 24 ; observations écrites de la Confédération suisse, 7 août 2024, par. 14 ; observations écrites de l'Australie, 15 août 2024, par. 3.15.

²⁵¹ J.L. Shastri, *Manusmṛiti of Kullūka Bhaṭṭa* (Motilal Banarsidass, 2000), p. 324, tel que traduit dans G. Bühler, « The Laws of Manu », *The Sacred Books of the East*, Oxford University Press, 1886, réimprimé par Motilal Banarsidass, 1964, vol. XXV, p. 305, par. 288, annexe 170 des observations écrites de la Barbade.

²⁵² Voir, par exemple, N. M. Nasir *et al.*, « Environmental Sustainability and Contemporary Islamic Society: A Shari'a Perspective », *Asian Academy of Management Journal*, 2022, p. 211-231, p. 221, annexe 192 des observations écrites de la Barbade, citant comme source primaire : Abu Dawood, Livre 19, Hadith 3635 ; M. H. Kamali, « Legal Maxims and Other Genres of Literature in Islamic Jurisprudence », *Arab Law Quarterly*, 2006, p. 77-102, p. 85, annexe 193 des observations écrites de la Barbade.

dangereuses²⁵³. Les projets de principes de la Commission du droit international, sur la répartition des pertes en cas de dommage transfrontière découlant d'activités dangereuses, entérinent également ce principe. Ils prévoient une indemnisation sur le fondement de la responsabilité sans faute, lorsqu'un acteur mène « des activités dangereuses »²⁵⁴.

17. Le changement climatique est causé par une activité dangereuse. Il est causé par les actes dangereux suivants, par exemple :

- a) creuser un trou, grand ou long, dans le sol ou le fond marin ;
- b) pomper ou extraire la nécromasse planctonique et certains arbres ;
- c) raffiner chimiquement ces corps ;
- d) placer ces corps raffinés dans un cylindre métallique ; puis
- e) faire exploser le mélange avec du feu ; et
- f) expulser des déchets qui flottent librement dans l'atmosphère.

Chacun de ces actes est dangereux.

18. Dès 1965, des juristes comme Wilfred Jenks ont expliqué que les activités dangereuses donnaient lieu à une responsabilité objective en droit international²⁵⁵. Cette déclaration intervient deux ans — que deux ans ! — après que l'Académie nationale des sciences des États-Unis a informé le président John F. Kennedy de l'existence du changement climatique dû à l'utilisation de combustibles fossiles²⁵⁶.

²⁵³ Voir les observations écrites de la Barbade, par. 89.

²⁵⁴ Voir « Projets de principes sur la répartition des pertes en cas de dommage transfrontière découlant d'activités dangereuses et commentaires y relatifs », rapport de la Commission du droit international, cinquante-huitième session, *Annuaire de la Commission du droit international*, A/CN.4/SER.A/2006/Add.1 (Part 2), *Commission du droit international*, 2006, principes 1 et 4 (1), p. 61 et 76, annexe 497 des observations écrites de la Barbade. Voir également, « Projets de principes sur la répartition des pertes en cas de dommage transfrontière découlant d'activités dangereuses et commentaires y relatifs », rapport de la Commission du droit international, cinquante-huitième session, *Annuaire de la Commission du droit international*, A/CN.4/SER.A/2006/Add.1 (Part 2), *Commission du droit international*, 2006, principe 2, p. 64, annexe 651 des observations écrites de la Barbade.

²⁵⁵ Voir C. W. Jenks, « Liability for ultra-hazardous activities in international law », *Recueil des cours de l'Académie de droit international de La Haye*, 1966, p. 99-200, p. 194, annexe 656 des observations écrites de la Barbade. Voir également, R. S. J. Martha, *The Financial Obligation in International Law* (Oxford University Press, 2015), p. 404, annexe 664 des observations écrites de la Barbade ; A. Boyle, « State responsibility and international liability for injurious consequences of acts not prohibited by international law: a necessary distinction? », *International and Comparative Law Quarterly*, 1990, p. 1-26, p. 7, annexe 657 des observations écrites de la Barbade ; *Demande d'avis consultatif soumise par la Commission des petits États insulaires sur le changement climatique et le droit international, avis consultatif du 21 mai 2024*, déclaration du juge Jesus, par. 15.

²⁵⁶ Voir « Energy Resources: A Report to the Committee on Natural Resources of the National Academy of Sciences », *United States National Academy of Sciences — National Research Council*, 1962, p. 96, annexe 14 des observations écrites de la Barbade.

19. Le caractère ubiquitaire de l'extraction et de l'utilisation des combustibles fossiles par certains États ne remet pas en cause le fait qu'il s'agisse d'une activité dangereuse.

20. En tout état de cause, comme l'a fait remarquer la Barbade dans ses observations écrites, pour certains États, la connaissance du phénomène du changement climatique est bien antérieure à 1990. Mon collègue Gunjan Sharma maintenant abordera davantage ce point. Mais ces éléments factuels démontrent, de manière concluante, que les États à l'origine du changement climatique ont manqué à toute obligation de diligence raisonnable qui pourrait s'appliquer.

21. Je vous remercie, Monsieur le président, Mesdames et Messieurs les Membres de la Cour.

Le PRÉSIDENT : Je remercie M. Volterra. I now give the floor to Mr Gunjan Sharma.

Mr SHARMA:

STATEMENT ON (A) CAUSATION AND ATTRIBUTION AND (B) FORESEEABILITY

I. Introduction

1. Mr President, judges, it is an honour to be before this Court again. This time, I appear on behalf of Barbados. I will be making two submissions today.

II. The obligation to provide redress for climate change harms applies notwithstanding the far-reaching harms of climate change nor that multiple States contributed to climate change

2. In my first submission, Barbados will respond to two related, yet incorrect, arguments that certain States have made in this proceeding:

(a) the first argument: that climate change is too far-reaching to be causally linked to any one State;

and

(b) the second argument: that too many States contributed to climate change so no one State is liable.

3. On the first argument: some States argue that the causes and impacts of climate change are too complex and too far-reaching to be attributed to any one State in a causal sense, i.e. they say: if climate change does so much harm, how can any one State be linked to it?

4. The fact that climate change causes global harm is a matter of scope, not causation. States exist on this one planet and their behaviour often impacts the whole planet. As the playwright Samuel Beckett once explained: “You’re on earth, there’s no cure for that!”²⁵⁷

5. As to cause, the cause of climate change is simple. It is direct; it is foreseeable; and it is not remote. Climate change is caused when expelled pollutants heat the atmosphere by trapping infrared radiation that would otherwise leave the planet. It is that simple.

6. On the second argument: each major emitting State individually cannot avoid its obligation to provide redress simply because all the major emitting States acted together to cause climate change. Under international law, States are liable for common wrongful acts and harms²⁵⁸. The obligation of redress is joint and several²⁵⁹.

7. Nor does international law require that redress is only due when it can be calculated with exacting precision. This Court and others have explained the opposite, on many occasions²⁶⁰.

8. Of course, the purpose of these proceedings is not to place blame on any State *in concreto*. But the General Assembly asked this Court to determine the legal consequences for States who “have [harmed] the climate system”²⁶¹.

9. This Court should clarify that one such consequence is the obligation of redress.

III. Major emitting States knew that the emission of anthropogenic greenhouse gases would cause harmful climate change decades before 1990

10. I turn now to my second submission concerning foreseeability. In 1990, the IPCC published its first report. Even earlier today, certain States have argued that climate change could not have been known by any State until that report was published in that year. Barbados will now show that that is factually inaccurate.

²⁵⁷ S. Beckett, *Endgame*.

²⁵⁸ See Written Statement of Barbados, Sections VI and VII.A; Written Comments of Barbados, paras. 95-97.

²⁵⁹ See e.g. Written Comments of Barbados, paras. 98-105; Written Statement of Antigua and Barbuda, 22 March 2024, paras. 572-576; Written Statement of the Commission of Small Island States on Climate Change and International Law, 22 March 2024, paras. 166-169; Written Comments of the People’s Republic of Bangladesh on the Written Statements Submitted to the Court, 15 August 2024, para. 60; Written Comments of the Republic of the Marshall Islands, 14 August 2024, para. 44.

²⁶⁰ See Written Statement of Barbados, paras. 248, 260-261.

²⁶¹ Request for Advisory Opinion by the Secretary-General of the United Nations dated 12 April 2023.

11. Barbados reiterates: the purpose of this proceeding is not to assign blame. However, this Court should act on correct historical information. Barbados seeks to correct the historical amnesia that often pervades climate change discussion.

12. In this respect, the year 1990 is legally irrelevant. The major emitting States — many of them — knew about climate change decades before that year.

13. For example, turning to the slides that will appear before you:

- (a) In 1962, the United States National Academy of Sciences confirmed to President John F. Kennedy that the extensive use of fossil fuels would disrupt “the weather and . . . ecological balances”²⁶².
- (b) As Vanuatu mentioned earlier today, in 1965, United States President Lyndon B. Johnson explained that to the US Congress²⁶³.
- (c) In 1968, senior French inter-ministerial officials — competent officials — were also briefed on climate change²⁶⁴.
- (d) In 1970, the UK Parliament discussed climate change²⁶⁵.
- (e) In 1974, the very first sentence of a US Central Intelligence Agency report said “[t]he western world’s leading climatologists have confirmed recent reports of a detrimental global climatic change”²⁶⁶. The Central Intelligence Agency (CIA) then predicted: climate change would cause “drought, famine, and political unrest”²⁶⁷.

²⁶² “Energy Resources: A Report to the Committee on Natural Resources of the National Academy of Sciences”, United States National Academy of Sciences – National Research Council, 1962, p. 96, Annex 14 to the Written Statement of Barbados. See also Written Comments of Barbados, para. 108.

²⁶³ See L. Johnson, “Special Message to the Congress on Conservation and Restoration of Natural Beauty”, The American Presidency Project, 8 February 1965, Annex 585 to the Written Comments of Barbados, as cited at para. 22 of the Expert Report of Professor Naomi Oreskes on Historical Knowledge and Awareness, in Government Circles, of the Effects of Fossil Fuel Combustion as the Cause of Climate Change, 29 January 2024 at p. 91 of the Exhibit Bundle to the Written Statement submitted by the Republic of Vanuatu, 21 March 2024. See also Written Comments of Barbados, para. 108.

²⁶⁴ See “1er Colloque International sur l’Aménagement du Territoire et les Techniques Avancées”, *Collège des techniques avancées et de l’aménagement du territoire*, March 1968, p. 52, Annex 557 to the Written Comments of Barbados. See also Written Comments of Barbados, para. 108.

²⁶⁵ See Statement by Mr C. Mather, Environmental Pollution, United Kingdom Parliament Hansard, Volume 804, 21 July 1970, Annex 278 to the Written Statement of Barbados. See also Written Comments of Barbados, para. 108.

²⁶⁶ “A Study of Climatological Research as it Pertains to Intelligence Problems”, The United States of America Central Intelligence Agency, August 1974, p. 1, Annex 21 to the Written Statement of Barbados. See also Written Comments of Barbados, para. 108.

²⁶⁷ “A Study of Climatological Research as it Pertains to Intelligence Problems”, Central Intelligence Agency, August 1974, p. 1, Annex 558 to the Written Comments of Barbados. See also Written Comments of Barbados, para. 108.

(f) In 1975, the Soviet Union and Americans confirmed climate change again²⁶⁸.

(g) In 1978, the West German Parliamentary State Secretary confirmed climate change to the Bundestag, noting also the responsibility — that is a translated word — *responsibility* of industrialized countries to shift away from fossil fuels to environmentally friendly energy sources²⁶⁹. That was 1978.

14. Our printed slides have more examples.

15. This incontrovertible evidence leads to an unfortunate conclusion. Many major emitting States knew what climate change would do for 60 years. They knew about all the consequences that have been described to this Court in these proceedings.

16. Worst of all: many major emitting States knew that all of our lives — the lives of every one of us on this planet — would become shorter, more brutish and poorer because of their decision to promote the use of fossil fuels.

17. Major emitting States knew that they were creating a global future of “drought, famine, and political unrest”²⁷⁰, as the CIA established as long ago as 1974. These States even knew that climate change would shorten the lifespans of their own future citizens. But, to make a few more dollars and roubles, or francs and deutschmarks, these States did it anyway. They chose to do it to all of us anyway. And now they are asking this Court to forget what really happened. They are asking this Court to forget what they really did and what they really knew — and when. Barbados thanks the Court for its kind patience and attention.

The PRESIDENT: I thank the representatives of Barbados for their presentation. This concludes this afternoon’s sitting. The oral proceedings will resume tomorrow at 10 a.m., in order for Belize, Bolivia, Brazil, Burkina Faso, Cameroon and the Philippines to be heard on the questions submitted to the Court.

²⁶⁸ V. D. Fedorov, The Problem of The Maximum Permissible Effects of the Anthropogenic Factor From The Ecologist’s Viewpoint, in Second Joint US/USSR Symposium on the Comprehensive Analysis of the Environment (US Environmental Protection Agency Washington, 21-26 October, 1975), p. 104, Annex 561 to the Written Comments of Barbados. See also Written Comments of Barbados, para. 108.

²⁶⁹ German Bundestag, Plenary Protocol 8/162 of the 162 Session, 22 June 1979, Annex 65, p. 12964, Annex 590 to the Written Comments of Barbados. See also Written Comments of Barbados, para. 108.

²⁷⁰ “A Study of Climatological Research as it Pertains to Intelligence Problems”, Central Intelligence Agency, August 1974, p. 1, Annex 558 to the Written Comments of Barbados. See also Written Comments of Barbados, para. 108.

The sitting is closed.

The Court rose at 6.10 p.m.
