

Response on behalf of the People's Republic of Bangladesh to the questions posed by Judges Cleveland, Tladi, Aurescu and Charlesworth on Friday, 13 December 2024

Question put by Judge Cleveland: During these proceedings, a number of participants have referred to the production of fossil fuels in the context of climate change, including with respect to subsidies. In your view, what are the specific obligations under international law of States within whose jurisdiction fossil fuels are produced to ensure protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases, if any?

1. As Bangladesh has explained in its written and oral submissions, all States are obligated under international law to take the measures necessary to deeply and rapidly mitigate anthropogenic greenhouse gas (GHG) emissions to avoid significant harm to the climate system and other parts of the environment, including, at a minimum, to avoid breaching the 1.5°C threshold¹. This obligation is based upon the best available science, as reflected in the reports of the IPCC². It is premised upon distinct but mutually reinforcing regimes of customary and conventional international law, including the core obligation of all States to exercise due diligence to prevent transboundary environmental harm; the obligations of States Parties to the United Nations Convention on the Law of the Sea to protect and preserve, and prevent pollution of, the marine environment; the “UN Climate Change Regime”, comprised primarily of the UNFCCC and Paris Agreement; and fundamental international human rights norms³.

2. With respect to fossil fuels in particular, the obligations of States under international law necessarily must take account of the fact that burning fossil fuels significantly increases the concentration of GHGs in the atmosphere, thereby “*unequivocally*” causing global warming

¹ See Written Statement of Bangladesh, paras. 127–139; Written Comments of Bangladesh, para. 16; CR 2024/36, p. 67, para. 3 (Akhavan).

² Intergovernmental Panel on Climate Change (“IPCC”), 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 [Core Writing Team, H. Lee and J. Romero (eds.)], Geneva, Switzerland, https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_FullVolume.pdf (hereinafter, “*IPCC Sixth Assessment Report*”), p. 71. See also IPCC Special Report, Global Warming of 1.5C (2018), <https://www.ipcc.ch/sr15/>, p. 18; Written Statement of Bangladesh, paras. 31–33; CR 2024/36, p. 67, para. 3 (Akhavan).

³ See Written Statement of Bangladesh, Section IV; Written Comments of Bangladesh, para. 22; CR 2024/36, pp. 67–68, paras. 4–5 (Akhavan); *id.* at p. 73, para. 7 (Amirfar).

and severe climate impacts⁴. Consistent with the best available science, at COP28, the States Parties to the Paris Agreement recognized “*the need for deep, rapid and sustained reductions in greenhouse gas emissions in line with 1.5 °C pathways*”, which in turn requires a “*transition[] away from fossil fuels in energy systems, in a just, orderly and equitable manner, accelerating action in this critical decade, so as to achieve net zero by 2050 in keeping with the science*”⁵. Bangladesh echoed this consensus at COP29, calling for a new approach “*based on zero carbon. No fossil fuel. Only renewables*”.⁶

3. In order to meet this obligation to transition away from fossil fuels, States within whose jurisdiction or control fossil fuels are produced must ensure—whether by policy, regulatory, legislative, and/or other action—that GHG emissions associated with such production, considered on a cumulative basis (including scope 1, 2, and 3 emissions), do not cause significant harm to the climate system or other parts of the environment. This includes phasing out “*inefficient*” fossil fuel subsidies, which the World Trade Organization has identified as an “*important contribution ... to the objectives of the Paris Agreement on Climate Change, as well as to continued efforts to limit the temperature increase to 1.5 degrees above pre-industrial levels and lower global climate-related risks*”⁷.

Question put by Judge Tladi: In their written and oral pleadings, participants have generally engaged in an interpretation of the various paragraphs of Article 4 of the Paris Agreement. Many participants have, on the basis of this interpretation, come to the conclusion that, to the extent that Article 4 imposes any obligations in respect of Nationally Determined Contributions, these are procedural obligations. Participants coming to this conclusion have, in general, relied on the ordinary meaning of the words, context and sometimes some elements in Article 31(3) of the Vienna Convention on the Law of Treaties. I would like to know from the participants whether, according to them, “the object and purpose” of the Paris Agreement, and the object and purpose of

⁴ See Written Statement of Bangladesh, paras. 19–21; IPCC Sixth Assessment Report, pp. 42, 46; CR 2024/36, p. 73, 75–76 paras. 6, 15 (Amirfar).

⁵ UNFCCC, Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on its fifth session, held in the United Arab Emirates from 30 November to 13 December 2023, FCCC/PA/CMA/2023/16/Add.1, Decision 1/CMA.5, *Outcome of the first global stocktake* (15 March 2024), para. 28 (emphasis added)..

⁶ Conference of Parties to the UNFCCC, National Statement of Bangladesh (15 November 2024), *available at* <https://unfccc.int/documents/643698>, p. 1.

⁷ See World Trade Organization, Ministerial Statement on Fossil Fuel Subsidies (26 February 2024), *available at* <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN24/19.pdf&Open=True>, para. 5.

the climate change treaty framework in general, has any effect on this interpretation and if so, what effect does it have?

1. As described in Bangladesh’s written and oral submissions, States’ mitigation-related obligations under Article 4 of the Paris Agreement are largely procedural in nature, requiring that States communicate and maintain NDCs that reflect their highest possible ambition⁸. Each successive NDC must “*represent a progression*” of the State’s efforts over time, which requires States to ensure that each NDC is more ambitious than the last⁹. Interpreting the text of Article 4 in light of the object and purpose of the Paris Agreement does not change the procedural nature of these obligations.

2. At the same time, however, the obligations contained in Article 4 of the Paris Agreement are inseparable from substantive obligations arising from the UN Climate Change Regime and other sources of international law. The Paris Agreement’s object and purpose reflects the international and scientific consensus that States should “*pursu[e] efforts to limit the temperature increase to 1.5 °C above pre-industrial levels*”¹⁰. This consensus informs States’ obligation under customary international law to “*use all the means at [a State’s] disposal in order to avoid activities which take place in its territory . . . causing significant damage to the environment of another State*”¹¹, which includes a “*stringent*” standard of due diligence in the climate change context¹² and requires States to take into account the best available science and relevant international rules and standards¹³—“*in particular the global temperature goal of limiting the temperature increase to 1.5°C above pre-industrial levels and the timeline for emission pathways to achieve that goal*”¹⁴. As the IPCC and the majority of States that participated in the oral proceedings recognize, current national commitments to

⁸ See Written Statement of Bangladesh, para. 37; Written Comments of Bangladesh, 29; CR 2024/36, p. 68, para. 7 (Akhavan).

⁹ Written Comments of Bangladesh, para. 29; CR 2024/36, p. 68, para. 7 (Akhavan).

¹⁰ Paris Agreement, Articles 2(1)(a), 4(2), 4(3).

¹¹ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, pp. 55–56, para. 101.

¹² *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) (hereinafter “**ITLOS COSIS Advisory Opinion**”), paras. 241, 243, 399; CR 2024/36, p. 68, para. 6 (Akhavan); *id.* at pp. 73, 75, paras. 7, 15 (Amirfar).

¹³ ITLOS COSIS Advisory Opinion, paras. 206–208.

¹⁴ ITLOS COSIS Advisory Opinion, para. 243.

reduce GHG emissions set out in respective NDCs are insufficient to stay within the 1.5 °C threshold in accordance with best available science¹⁵, and thus cannot fulfill the obligations of States under customary and conventional international law.

3. Accordingly, while the Paris Agreement alone does not embody the full extent of applicable obligations under international law, it is entirely consistent with, and certainly does not displace, States' core mitigation-related obligations under the regimes of customary and conventional international law noted above to take the measures necessary to deeply and rapidly mitigate anthropogenic GHG emissions to avoid significant harm to the climate system and other parts of the environment.

Question put by Judge Aurescu: Some participants have argued, during the written and / or oral stages of the proceedings, that there exists the right to a clean, healthy and sustainable environment in international law. Could you please develop what is, in your view, the legal content of this right and its relation with the other human rights which you consider relevant for this advisory opinion?

4. The right of all persons to a clean, healthy and sustainable environment is now well accepted under international law. In its Resolution 76/300—adopted in 2022 with 161 votes in favor and zero votes against—the United Nations General Assembly expressly “recognize[d] the right to clean, healthy and sustainable environment as a human right”¹⁶ and further noted that “a vast majority of States have recognized some form of the right to a clean, healthy and sustainable environment through international agreements, their national constitutions, legislation, laws or policies”¹⁷. In addition, the vast majority of States participating in this proceeding recognize the right to a clean, healthy and sustainable

¹⁵ See, e.g., CR 2024/36, pp. 15, paras. 10–12 (Antigua and Barbuda); *id.* at p. 17, para. 6 (Antigua and Barbuda); CR 2024/36, p. 53, para. 2 (Bahamas); CR 2024/36, pp. 66, 71, paras. 10–11, 16 (Bangladesh); CR 2024/36, p. 80, para. 4 (Barbados); CR 2024/37, p. 62, para. 1–2 (Philippines); CR 2024/38, pp. 27–28, paras. 12, 19 (Chile); CR 2024/40, p. 67, para. 21 (Fiji); CR 2024/41, p. 19, para. 11 (Sierra Leone); CR 2024/41, p. 32, para. 5 (Ghana); CR 2024/42, p. 50, para. 27 (India); CR 2024/46, p. 42, para. 6 (Palestine); *id.* at p. 50, para. 7 (Palestine); CR 2024/46, pp. 34–35, paras. 14–16 (New Zealand); CR 2024/47, pp. 27–28, para. 6 (Netherlands); CR 2024/48, p. 58, para. 6 (Saint Lucia); CR 2024/49, p. 54, para. 7 (Seychelles); CR 2024/50, p. 31, para. 8 (Sudan); CR 2024/52, p. 22, para. 3 (Viet Nam). See also IPCC Sixth Assessment Report, p. 57.

¹⁶ United Nations General Assembly, Resolution 76/300, *The human right to a clean, healthy and sustainable environment*, U.N. Doc. A/RES/76/300 (1 August 2022), Article 1.

¹⁷ United Nations General Assembly, Resolution 76/300, *The human right to a clean, healthy and sustainable environment*, U.N. Doc. A/RES/76/300 (1 August 2022), Preamble. See also United Nations, “With 161 Votes in Favour, 8 Abstentions, General Assembly Adopts Landmark Resolution Recognizing Clean, Healthy, Sustainable Environment as Human Right” (28 July 2022), available at <https://press.un.org/en/2022/ga12437.doc.htm>.

environment; indeed, only nine States argue there is no right to a healthy environment under customary international law¹⁸.

5. The right to a healthy environment includes ensuring clean air and access to clean and safe water, sustainable food, and adequate sanitation. It also encompasses the rights to a safe climate and to healthy ecosystems and biodiversity, and the rights to access information about the environment and to seek redress for environmental harms¹⁹. As such, the right to a healthy environment is inextricably linked with other fundamental rights recognized, for example, in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, such as the rights to life²⁰ and to health²¹, including associated rights to water and food²², the right to sustainable development,²³ and the right to self-determination, the full realization of which includes the right to full sovereignty over natural wealth and resources²⁴. Indeed, maintenance of a healthy environment—which, as the Court has recognized, “*represents the living space, the quality of life and the very health*

¹⁸ See Written Statement of Canada, para. 24; CR 2024/38, p. 17, para. 33 (Canada); Written Statement of Germany, para. 104; CR 2024/36, p. 152, para. 29 (Germany); Written Statement of Indonesia, paras. 41–44; CR 2024/42, p. 67, paras. 33–34 (Indonesia); Written Statement of New Zealand, para. 114; Written Comments of New Zealand, para. 32; Written Comments of Saudi Arabia, para. 4.46; CR 2024/36, p. 33, para. 13 (Saudi Arabia); CR 2024/50, p. 69, para. 43 (Serbia); Written Statement of Switzerland, paras. 60–62; Written Statement of Tonga, para. 244; Written Statement of the United States of America, paras. 4.54–4.58; CR 2024/40, p. 47, para. 32 (United States of America).

¹⁹ United Nations General Assembly, Resolution 76/300, *The human right to a clean, healthy and sustainable environment*, U.N. Doc. A/RES/76/300 (1 August 2022), Preamble, Articles 1, 3; United Nations Human Rights Committee, *Resolution on the human right to a clean, healthy and sustainable environment*, U.N. Doc. A/HRC/RES/48/13 (18 October 2021), Preamble, Articles 1, 4(c); UN Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the Covenant)*, U.N. Doc. E/C.12/2000/4 (11 August 2000), paras. 4, 11, 15–16, 33, 36; UN General Assembly, Resolution 45/94, *The Need to Ensure a Healthy Environment for the Well-being of Individuals*, U.N. Doc. A/RES/45/94 (14 December 1990), Preamble, Article 1; CR 2024/36, p. 70, para. 13 (Akhavan).

²⁰ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (16 December 1966) (hereinafter, “*ICCPR*”), Article 6(1).

²¹ International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (16 December 1966) (hereinafter, “*ICESCR*”), Article 12(1).

²² ICESCR, Article 11(1); UN Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the Covenant)*, U.N. Doc. E/C.12/2000/4 (11 August 2000), paras. 4, 33.

²³ See UN General Assembly Resolution 41/128, *Declaration on the Right to Development*, U.N. Doc. A/Res/41/128 (4 December 1986), Articles 1(2), 8.

²⁴ ICESCR, Article 1(1); UN General Assembly Resolution 41/128, *Declaration on the Right to Development*, U.N. Doc. A/Res/41/128 (4 December 1986), Preamble, Article 1(2).

of human beings, including generations unborn”²⁵—is critical to ensuring the full exercise and enjoyment of each of these other fundamental rights.

6. Under international law, States are obligated to promote and encourage respect for human rights—including the right to a clean, healthy, and sustainable environment—on a global scale, and must refrain from conduct that would impede another State’s ability to protect and ensure the exercise of this right by its population²⁶. This includes obligations to prevent or minimize transboundary climate change impacts that could affect the exercise of the right to a healthy environment in another State’s territory²⁷—including by taking the measures necessary to mitigate GHG emissions to avoid significant harm to the climate system and other parts of the environment.

Question put by Judge Charlesworth: In your understanding, what is the significance of the declarations made by some States on becoming parties to the UNFCCC and Paris Agreement to the effect that no provision in these agreements may be interpreted as derogating from principles of general international law or any claims or rights concerning compensation or liability due to the adverse effects of climate change?

1. As described in Bangladesh’s written and oral submissions, the UN Climate Change Regime is consistent with—and therefore does not preclude, displace or limit—related customary, conventional and general international law norms, rendering the principle of *lex specialis* irrelevant²⁸. Those norms apply in parallel to the UN Climate Change Regime, and a State or group of States that fails to comply with their climate-related obligations under general international law will be liable for an internationally wrongful act, for which full reparation is due pursuant to the customary rules of State responsibility²⁹. This is reflected in the plain terms of the UNFCCC, which explicitly recognizes States’ obligations “*in accordance with the Charter of the United Nations and the principles of international law*” and recalls

²⁵ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 241, para. 29.

²⁶ See Written Statement of Bangladesh, para. 105, footnote 209.

²⁷ See Written Statement of Bangladesh, para. 105, footnote 210.

²⁸ See Written Comments of Bangladesh, paras. 28, 32–34; Written Statement of Bangladesh, Section IV; CR 2024/36, pp. 68–70, paras. 8–12 (Akhavan).

²⁹ International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission vol. II (2001) (hereinafter, “*ARSIWA*”), Articles 2, 31.

States’ “*responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States*”³⁰.

2. The fact that certain States made declarations to the effect that no provision in the UN Climate Change Regime treaties may be interpreted as derogating from principles of general international law or any claims or rights concerning compensation or liability due to the adverse effects of climate change merely confirms, out of an abundance of caution, that those States did not intend for the UN Climate Change Regime to constitute *lex specialis* to the exclusion of other rules of international law³¹.

3. Notably, no State has argued in these proceedings that the declarations referenced in the question were inconsistent with States’ general understanding of the UN Climate Change Regime at the time, and no contrary declarations were made by any States on becoming Parties to the UN Climate Change Regime treaties³². Thus, the fact that some States made such declarations, while others did not, does not have any significance with respect to the relationship between the UN Climate Change Regime and relevant principles of customary and general international law.

³⁰ UNFCCC, Preamble. *See also id.* at Article 3(3) (referring to the precautionary principle, stating that “*Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures*”).

³¹ *See* Bangladesh’s Written Comments, paras. 28-33.

³² *See* UN Treaty Collection, “Paris Agreement: Declarations”, https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=xxvii-7-d&chapter=27&clang=_en; UN Treaty Collection, “UNFCCC: Declarations”, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en.