H.E. Mr Philippe Gautier
Registrar
International Court of Justice

Dear Registrar,

1. Pakistan has the honour, with reference to the oral proceedings in *Obligations of States in respect of Climate Change*, to submit its written reply to the questions posed by Judge Charlesworth (*A*) and Judge Tladi (*B*).

A. Judge Charlesworth's question

2. The declarations provide that becoming a party to the UNFCCC and the Paris Agreement should "in no way constitute a renunciation of any rights under international law concerning State responsibility for the adverse effects of climate change"; and that no provision in the UNFCCC or the Paris Agreement could "be interpreted as derogating from the principles of general international law".[1] As Pakistan has submitted, the declarations attracted, over a long period of time, no objections from other States parties, whether in the context of the UNFCCC or the Paris Agreement.[2]

3. The States that made the declarations are "specially affected States" in the sense that the General Assembly referred to that category in its request for an advisory opinion. They are, "due to their geographical circumstances and level of development, … specially affected by … the adverse effects of climate change".[3] The declaring States are among the States that, by virtue of the suffering their people endure as a result of the adverse effects of climate change, have special reasons for concern as regards climate change.[4]

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[1] Written Comments of Pakistan, para. 20(b); *cf.* Cook Islands (3156 *U.N.T.S.* 87); Fiji (1771 *U.N.T.S.* 317); Kiribati (1771 *U.N.T.S.* 317–318); Marshall Islands (3156 *U.N.T.S.* 92); the Federated States of Micronesia (3156 *U.N.T.S.* 94); Nauru (1771 *U.N.T.S.* 318; 3156 *U.N.T.S.* 95); Niue (https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en); Papua New Guinea (1771 *U.N.T.S.* 321); Philippines (https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en); Solomon Islands (3156 *U.N.T.S.* 96); Tuvalu (1771 *U.N.T.S.* 318; 3156 *U.N.T.S.* 97); and Vanuatu (3156 *U.N.T.S.* 98).
[2] Written Comments of Pakistan, para. 20(b).
[3] General Assembly resolution 77/276, 29 March 2023, Question (*b*)(i).
[4] O. Sender and M. Wood, *Identification of Customary International Law* (2024), pp. 145–146.

4. In its interpretation of the declarations, the Court cannot base itself on "a purely grammatical interpretation"; instead, it must "seek the interpretation which is in harmony with a natural and reasonable way of reading" them.[5] It should not hesitate "to place a certain emphasis on the intention" of the declaring States;[6] this intention "may be deduced not only from the text of the relevant clause, but also from the context".[7]

5. As is well-documented,[8] the relevant context of the UNFCCC negotiations is to be viewed against the background of the draft texts which specially affected States in the Global South put forward. This included, at an early stage, text for inclusion in the convention to the effect that:

> "This convention, and participation in the negotiations leading to its conclusion, is without prejudice to the existing rights under international law, including rules governing international liability for damage to people, property and the environment."[9]

6. At a later stage in the negotiations, the principle of prevention in general international law and a provision as regards to State responsibility for the adverse effects of climate change appeared in the operative provisions of the draft text being negotiated.[10] This included an operative provision which set forth the responsibility of States "to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction"[11] and another which provided that: "This Convention shall be without prejudice to the application of the rules of international law governing the liability of States."[12] On account of "the heavy resistance of industrialised country delegations",[13] however, such

[5] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction, Judgment, I.C.J. Reports 1998*, p. 454, para. 47.
[6] *Ibid.*, p. 454, para. 48.
[7] *Ibid*., p. 545, para. 49.
[8] See e.g. the course of events explained in R. Verheyen *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (2012), pp. 52–53.
[9] Elements for a framework convention on climate change (sent with letter of 5 June 1991), in Set of informal papers provided by delegations, related to the preparation of a framework convention on climate change, A/AC.237/Misc.1./Add.3, p. 22.
[10] Consolidated text based on proposals regarding principles and commitments, presented by delegations, submitted by the Bureau of Working Group I, A/AC.237/Misc.9, 27 August 1991.
[11] *Ibid.*, p. 4.
[12] *Ibid.*, p. 7.
[13] R. Verheyen *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (2012), p. 53.

operative provisions were not included in the final text of the UNFCCC (although the obligation of prevention was included in a preambular provision).[14]

7. The declarations sought to place on record the position, of a number of States specially affected by climate change, that the UNFCCC, and later the Paris Agreement adopted under it, does not detract from, condition, or otherwise vary, the principles of general international law, notably the obligation in general international law of prevention of transboundary harm,[15] or the principles of State responsibility.[16] These principles of general international law were, according to the declarations, to continue to apply separately to the climate change treaties. No provision of either instrument could be interpreted as in any way detracting from, conditioning, or varying those principles of general international law.

8. It is in this particular context — whether the UNFCCC and the Paris Agreement have come to condition the prevention obligation in general international law — that the declarations have their significance. The Court observed in the *North Sea* case that if specially affected States do not assent to the formation of a new rule of general international law on the basis of a purely conventional rule, then that negative position taken by specially affected States will act as a "bar to the formation of a new rule" of general international law.[17] For conventional rules to become part of (or otherwise to condition) general international law, it is an indispensable requirement that there is sufficient "State practice, *including that of States whose interests are specially affected*".[18] By making their declarations, the declaring States acted, as specially affected States, "for the protection of their voice and their interests in the formation of customary international law".[19]

9. As Sir Michael Wood, in his capacity as the International Law Commission's Special Rapporteur on the identification of customary international law, has observed:

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[14] See CR 2024/46, Pakistan, p. 61, para. 24 (Awan).
[15] CR 2024/46, Pakistan, p. 60, para. 17 (Awan); *cf. Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Judgment, I.C.J. Reports 2022*, p. 648, para. 99, citing *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22.
[16] CR 2024/46, Pakistan, p. 64, para. 35 (Awan).
[17] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 43, para. 74.
[18] *Ibidem* (emphasis added).
[19] *Cf.* G. Nolte, "How to Identify Customary International Law: On the Outcome of the Work of the International Law Commission" (2018), vol. 62, Japanese Yearbook of International Law, p. 269.

> "[A]ny assessment of international practice ought to take into account the practice of those States that are 'affected or interested to a higher degree than other states' with regard to the rule in question, and such practice should weigh heavily (to the extent that, in appropriate circumstances, it may prevent a rule from emerging)."[20]

10. For the avoidance of doubt, Pakistan submits that the doctrine of "specially affected States" does not refer — whether in the first instance or at all — to powerful States, or to the States of the Global North, in particular. As the People's Republic of China has emphasized, the importance of the role of "specially affected States" applies with respect to the identification of customary international law, irrespective of whether the States in question should be "big or small, rich or poor, or strong or weak".[21] An example from State practice is the position of the African Union in the *Chagos Archipelago* advisory proceedings to the effect that, on the basis of the Court's statement in the *North Sea* case, it was essential to look to the State practice of "the African States and then those States that have been victims of colonialism", as they were, in that particular context, the "concerned States".[22]

11. Thus, Dire Tladi observed, in the context of the work of the International Law Commission on the identification of customary international law, that the doctrine of specially affected States, on the occasions when it does apply, "does not relate to the relative power of states."[23] Similarly, Georg Nolte observed in the same context that:

> "The concept of 'specially affected States' does not and should not privilege great powers, or stronger States in general. To the contrary. A great power that claims to be affected by everything because it involves itself in everything cannot claim to be 'specially affected' by everything, but only that it is, so to speak, 'generally affected'. A smaller or weaker State which has recognizable specific interests, on the other hand, can often more plausibly invoke the concept. Smaller States need the concept of 'specially affected States' more than

[20] Second Report, para. 54 (underlined here); see also O. Sender and M. Wood, *Identification of Customary International Law* (2024), p. 147.
[21] International Law Commission, Seventieth session, Identification of customary international law, Comments and observations received from Governments, A/CN.4/716, 14 February 2018, p. 30.
[22] Written Comments of the African Union in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, 15 May 2018, paras. 23–29.
[23] D. Tladi, "The International Law Commission is 70 … Staying with the Old and Playing with the New? Reflections on the Work of the Commission during its Commemorative Year" (2018), vol. 43, South African Yearbook of International Law, p. 108.

larger States for the protection of their voice and their interests in the formation of customary international law."[24]

12. In conclusion, the significance of the declarations in Pakistan's submission is that they set forth the position of the declaring States that: as a matter of their State practice, the provisions of the UNFCCC and the Paris Agreement adopted under it cannot be held in any way to detract from, to condition, or to vary "the principles of general international law" or otherwise to lead to the loss of "any rights under international law concerning State responsibility for the adverse effects of climate change". The significance of the declarations is that they have the effect of acting as a "bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule",[25] for which it would be necessary that there was an extensive and virtually uniform "State practice, including that of States whose interests are specially affected".[26]

[24] G. Nolte, "How to Identify Customary International Law: On the Outcome of the Work of the International Law Commission" (2018), vol. 62, Japanese Yearbook of International Law, p. 269.
[25] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 43, para. 74.
[26] *Ibidem*.

B. Judge Tladi's question

13. The Court has on many occasions made the statement that "[i]nterpretation must be based above all upon the text of the treaty".[27] As the arbitral tribunal in *Rhine Chlorides (Netherlands/France)* case observed in regard to this statement:

> "[T]he Tribunal emphasises that the 'text of the treaty' is a notion distinct from, and broader than, the notion of 'terms'. Relying on the text does not mean relying solely, or mainly, on the ordinary meaning of the terms. Such a notion would effectively ignore the references to good faith, the context, and the object and purpose of the treaty. The ordinary meaning of the terms is even itself determined as a function of the context, object and purpose of the treaty. Lastly, as paragraph 2 of Article 31 of the Vienna Convention provides, the text of the treaty (including the preamble and annexes) is itself part of the context for the purposes of interpretation."[28]

14. This is why the general rule of interpretation has been given the expression it has in Article 31(1) of the Vienna Convention on the Law of Treaties:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

15. The ordinary meaning is "*to be given* to the terms of the treaty"[29] and it is so to be given "in the light of its object and purpose". In other words, the ordinary meaning of the terms is itself a function of the object and purpose of the treaty. This is why the Court observed in *Gabčikovo-Nagymaros* case that: "it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application."[30] Similarly, this is why the arbitral tribunal in *Iron Rhine* observed that: "[t]he object and purpose of a treaty, taken together with the intentions of the parties,

[27] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 22, para. 41; *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.
[28] *Rhine Chlorides (Netherlands/France)* (2004), vol. 144, *ILR*, pp. 293–294, para. 63 (Skubiszewski, P.; Judge Kooijmans; Judge Guillaume); see also A. Miron, M. Forteau and A. Pellet, *Droit international public* (9th edn., 2022), p. 340.
[29] Emphasis added.
[30] *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 79, para. 142.

are the prevailing elements of interpretation."[31] As Reuter observed of the Vienna Convention and the object and purpose:

> "*[l]a Convention retient comme un élément déterminant, ou au moins important, de solution des problèmes qu'elle considère, l'objet et le but du traité ; ce n'est pas une dérogation au principe de l'autonomie de la volonté, mais bien au contraire sa consolidation objective : l'objet et le but du traité sont les éléments essentiels qui sont pris en considération par la volonté des parties, on doit donc toujours supposer que les parties se sont mutuellement refusé d'admettre toutes les libertés qui porteraient atteinte à ce but et à cet objet qu'elles ont librement choisi comme leur bien commun. … Bien entendu, l'interprétation devant se faire essentiellement par la recherche de l'intention des parties telle qu'elle apparaît dans ces éléments objectifs que constituent le texte, le contexte et l'attitude des parties, l'objet et le but constituent un élément fondamental de l'interprétation*."[32]

16. As Pakistan has submitted in its written statement,[33] the UNFCCC lays down, together with the Paris Agreement, certain very important obligations that States have undertaken in the context of combating climate change, which the preamble of the UNFCCC describes as a "common concern of humankind". To use the Court's words in *Reservations to the Convention on Genocide* case, this means that, as with the high ideals inspiring conventions adopted for a purely humanitarian and civilizing purpose, "[t]he high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions."[34]

17. Similarly, the high ideals which inspired the Paris Agreement provide, by virtue of the common will of all its parties, the foundation and measure of all its provisions. The object and purpose of the UNFCCC and the Paris Agreement is to prevent, in accordance with the common but differentiated responsibilities and respective capabilities of States, dangerous anthropogenic interference with the climate system.[35] The ordinary meaning to be given to the terms of Article 4 of the Paris Agreement is

[31] *Iron Rhine (Belgium* v. *Netherlands)* (2005), vol. 140, *ILR*, p. 163, para. 53 (Judge Higgins, P.; Schrans; Judge Simma; Soons; Judge Tomka).
[32] P. Reuter, *La Convention de Vienne sur le droit des traités* (1970), p. 17 (underlined here).
[33] Written Statement of Pakistan, para. 53.
[34] *Reservations to the Genocide Convention, Advisory Opinion, I.C.J. Reports 1951*, p. 23.
[35] See Written Statement of Pakistan, para. 53.

"determined as a function" of the object and purpose of the Agreement.[36] In relation to Article 4, as in relation to the other provisions of the Paris Agreement, the object and purpose of the Agreement, taken together with the intentions of the parties, are "the prevailing elements of interpretation".[37] In conclusion, the object and purpose of the climate change treaty framework in general necessarily has a considerable effect on the interpretation of Article 4 of the Paris Agreement.

[36] *Rhine Chlorides (Netherlands/France)* (2004), vol. 144, *ILR*, pp. 293–294, para. 63 (Skubiszewski, P.; Judge Kooijmans; Judge Guillaume).
[37] *Iron Rhine (Belgium* v. *Netherlands)* (2005), vol. 140, *ILR*, p. 163, para. 53 (Judge Higgins, P.; Schrans; Judge Simma; Soons; Judge Tomka).