

JOINT DECLARATION OF JUDGES BHANDARI AND CLEVELAND

Climate change treaties and customary international law require all States to phase out fossil fuel production and use and transition to clean energy — Court recognizes that obligations to protect the climate system encompass fossil fuel production, licensing and subsidies — Environmental risk assessments must account for fossil fuel production, licensing and subsidies, including cumulative and downstream GHG impacts — Nationally determined contributions (NDCs) must address fossil fuel production, licensing and subsidies in a manner consistent with achieving the 1.5°C temperature goal — Principle of common but differentiated responsibilities and respective capabilities — States with greater resources and technical capabilities obliged to transition faster and to assist other States.

1. Fossil fuel emissions contribute overwhelmingly to climate change, and measures to phase out fossil fuel dependence and transition to clean energy necessarily form key components of States' obligations both to limit global warming to the 1.5°C Paris Agreement temperature target and to fulfil their customary obligations. Indeed, in light of the scientific consensus underscoring the impact of fossil fuels on both historical and projected global warming, it is unimaginable that States can achieve their obligations under climate change treaties and their obligation to prevent significant harm to the environment under customary international law without a rapid and drastic reduction in — and the phasing out of — fossil fuel production and dependency.

2. In considering the material scope of the General Assembly's request, the Court unanimously emphasizes that

“the relevant conduct for the purposes of these advisory proceedings is not limited to conduct that, itself, directly results in GHG emissions, but rather comprises all actions or omissions of States which result in the climate system and other parts of the environment being adversely affected by anthropogenic GHG emissions. The Court considers that the material scope of its inquiry encompasses the full range of human activities that contribute to climate change as a result of the emission of GHGs, *including both consumption and production activities*. This interpretation is confirmed by the understanding of most of the participants that replied to the question posed by a Member of the Court concerning ‘the specific obligations under international law of States within whose jurisdiction fossil fuels are produced’. These participants submitted that obligations pertaining to the protection of the climate system do not rest exclusively with consumers and end users, but also include activities such as ongoing production, licensing and subsidizing of fossil fuels.”¹

The Court thus recognizes that the international obligations of States with respect to the protection of the climate system and other parts of the environment fully encompass activities relating to the production and licensing of, and subsidies for, fossil fuels.

3. With respect to the determination of legal consequences, the Court likewise underscores that “the internationally wrongful act in question is not the emission of GHGs per se, but the breach of conventional and customary obligations . . . pertaining to the protection of the climate system from significant harm resulting from anthropogenic emissions of such gases”. Thus, the “[f]ailure of a State to take appropriate action to protect the climate system from GHG emissions — including through fossil fuel production, . . . the granting of fossil fuel exploration licences or the provision of

¹ Advisory Opinion, para. 94 (emphasis added).

fossil fuel subsidies — may constitute an internationally wrongful act which is attributable to that State”².

4. We firmly agree with these conclusions. The obligations of States with respect to the protection of the climate system, and the legal consequences that flow therefrom, necessarily include activities such as fossil fuel production, the granting of fossil fuel exploration licences and the provision of fossil fuel subsidies within the State’s jurisdiction or control. We feel, however, that given the outsized influence of fossil fuels in the fight against anthropogenic emissions, the Court could have been more forceful in addressing these specific issues. We therefore write separately to further elaborate on these obligations of States to protect the climate system and other parts of the environment with respect to fossil fuel production, licensing and subsidies.

I. PRODUCTION, LICENSING, SUBSIDIES AND THE 1.5°C TEMPERATURE GOAL

5. The Court’s reliance on the work of the Intergovernmental Panel on Climate Change (IPCC), particularly its Synthesis Reports, as the embodiment of the “best available science” is both prudent and necessary. As the Court rightly acknowledges, it does not possess technical expertise in climate science. Notably, no participant in these proceedings challenged the IPCC’s authority or credibility. However, we believe the IPCC’s findings on fossil fuels warrant even greater prominence in the Court’s legal analysis.

6. The IPCC has been unequivocal: fossil fuels — coal, oil and gas — are the principal drivers of anthropogenic greenhouse gas (GHG) emissions: of “the total anthropogenic CO₂ emissions, the combustion of fossil fuels was responsible for 81-91%”³. As the Court notes, the IPCC has recognized global “patterns of . . . production” as “unequivocally” contributing to global warming⁴. The IPCC concluded in 2018 that even “[w]arming of 1.5°C is not considered ‘safe’ for most nations, communities, ecosystems and sectors and poses significant risks to natural and human systems”⁵ and that immediate “[d]eep, rapid, and sustained reductions in greenhouse gas emissions” are essential to keep global warming within the Paris Agreement’s 1.5°C temperature goal⁶.

7. Yet global production of fossil fuels is on a collision course with the scientific consensus path forward for combating climate change.

8. The IPCC has underscored that projected emissions from existing fossil fuel infrastructures alone, absent additional abatement, already exceed the carbon budget for limiting warming to 1.5°C⁷. The International Energy Agency has concluded that in order to stay below 1.5°C, no new fossil fuel extraction projects can be developed⁸, while the United Nations Environment Programme has concluded that “committed emissions” from producing and under-construction coal, oil and gas

² *Ibid.*, para. 427; see also *ibid.*, para. 426.

³ IPCC, *The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, 2021, p. 676.

⁴ Advisory Opinion, para. 79.

⁵ *Ibid.*, para. 83.

⁶ *Ibid.*, para. 82.

⁷ IPCC, 2023 Summary for Policymakers, *Climate Change 2023: Synthesis Report*, Statement B.5.3.

⁸ International Energy Agency, *Net Zero by 2050. A Roadmap for the Global Energy Sector (Summary for Policymakers)*, 2021, p. 21 (“Beyond projects already committed as of 2021, there are no new oil and gas fields approved for development in our pathway, and no new coal mines or mine extensions are required”).

mines and fields as of 2018 “would emit more than 3.5 times the carbon budget available to limit warming to 1.5°C”⁹. Despite this, States “plan to produce more than double the amount of fossil fuels in 2030 than would be consistent with limiting warming to 1.5°C”¹⁰. Many governments continue to support, finance and expand fossil fuel production, even though such policies are “irreconcilable with global climate commitments”¹¹. In this regard, a coalition of States at COP 29 called for “both the supply and the demand of fossil fuels” to be aligned with 1.5°C¹².

9. Fossil fuel subsidies undermine efforts to reduce fossil fuel production and consumption by suppressing prices and making fossil fuels artificially competitive. Participants note that estimates of State subsidies for fossil fuel exploration, extraction and use range from approximately US\$600 billion to over US\$1.4 trillion per year or more¹³, and that market distortion generated by fossil fuel subsidies is a major obstacle to developing low-carbon or carbon-free technologies.

10. In our view, the Court should have given greater emphasis to these facts and addressed directly the reality that irreversible harm to the environment is inevitable if the current pace of fossil fuel production, licensing and subsidization continues unchecked. Below we discuss the specific obligations of States regarding production, licensing and subsidies with respect to, *inter alia*, environmental risk assessments and the preparation and implementation of nationally determined contributions (NDCs), while taking into account States’ common but differentiated responsibilities and respective capabilities.

II. RISK ASSESSMENTS: CUMULATIVE AND DOWNSTREAM EFFECTS

11. Given the central role of fossil fuels in driving climate change, the customary international law obligations to take substantive and procedural measures to prevent significant harm to the climate system necessarily include State conduct related to fossil fuel production, consumption and infrastructure.

12. With respect to procedural obligations, the Court recalls that due diligence includes the duty to conduct environmental impact assessments (EIAs) for activities undertaken within a State’s jurisdiction or control¹⁴. In this regard, it observes that “possible specific climate-related effects must be assessed . . . at the level of proposed individual activities, e.g. *for the purpose of assessing their possible downstream effects*”¹⁵. The Court further recognizes that “the cumulative and diffuse nature

⁹ United Nations Environment Programme, *Emissions Gap Report 2023: Broken Record. Temperatures Hit New Highs, yet World Fails to Cut Emissions (again)*, 2023, p. XXIII.

¹⁰ Stockholm Environment Institute, Climate Analytics, E3G, International Institute for Sustainable Development and United Nations Environment Programme, *The Production Gap: Phasing down or phasing up? Top fossil fuel producers plan even more extraction despite climate promises*, 2023, p. 4.

¹¹ *Ibid.*, p. 11.

¹² Beyond Oil and Gas Alliance, COP 29 Statement, 21 Nov. 2024 (emphasis added), available at: https://beyondoilandgasalliance.org/wp-content/uploads/2024/11/COP29_Statement_final.pdf.

¹³ CR 2024/54, p. 11, para. 20 (World Health Organization), citing P. Wooders, *The WTO Can Help Reform Subsidies to Fossil Fuels That Propel the Climate Crisis, Forum on Trade, Environment, & the SDGs* (TESS), 22 May 2024, available at: <https://tessforum.org/latest/the-wto-can-help-reform-subsidies-to-fossil-fuels-that-propel-the-climate-crisis>; The Organization for Economic Co-operation and Development (OECD) estimated fossil fuel subsidies at US\$ 1.4 trillion in 2022 for OECD members and 48 other countries. OECD, *OECD Inventory of Support Measures for Fossil Fuels 2023* (2023), p. 2.

¹⁴ Advisory Opinion, para. 297.

¹⁵ *Ibid.*, para. 298 (emphasis added).

of GHG emissions” must be taken into account in assessing risk to the climate and other parts of the environment¹⁶.

13. The Advisory Opinion accordingly acknowledges that assessments of potential risk of significant harm to the climate system must take into account the cumulative effect of all relevant activities occurring within a State’s jurisdiction or control, including risks resulting from fossil fuel production, licensing and subsidies and the foreseeable “downstream” consequences of such activities in other jurisdictions.

14. Fossil fuels are produced in order to be burned. Numerous participants emphasize that States within whose jurisdiction fossil fuels are produced know the destination and intended final use of the coal, oil and gas that they export, and must therefore factor these consequences into their assessment of the harms that such production contributes to the climate system.

15. We agree. In order to fulfil their obligations under Articles 2 and 4 of the Paris Agreement, as well as their stringent due diligence obligations under customary international law, States are required to account, in their assessments of environmental risk, for the increased concentration of GHGs in the atmosphere that will foreseeably result from, *inter alia*, production, licensing and subsidy activities.

16. National and regional courts have confirmed this principle. The United Kingdom Supreme Court recently recognized that EIAs for commercial petroleum and natural gas extraction must include such “scope 3” or “indirect” emissions from the downstream burning of exported fossil fuels¹⁷. The Supreme Court explained:

“[t]he whole purpose of extracting fossil fuels is to make hydrocarbons available for combustion. It can therefore be said with virtual certainty that, once oil has been extracted from the ground, the carbon contained within it will sooner or later be released into the atmosphere as carbon dioxide and so will contribute to global warming.”¹⁸

The Court reasoned that under the relevant law,

“[i]n principle, all likely significant effects of the project must be assessed, irrespective of where (or when) those effects will be generated or felt . . . The fact that an environmental impact will occur or have its immediate source at a location away from the project site is not a reason to exclude it from assessment. There is no principle that, if environmental harm is exported, it may be ignored”¹⁹.

Indeed, accounting for such extraterritorial risk is central to the concept of “transboundary” harm²⁰.

¹⁶ *Ibid.* ITLOS also recognized the importance of taking into account cumulative effects. ITLOS, 2024 *Advisory Opinion*, para. 367 (“Any planned activity, either public or private, which may cause substantial pollution to the marine environment or significant and harmful changes thereto through anthropogenic GHG emissions, including cumulative effects, shall be subjected to an environmental impact assessment”).

¹⁷ *R (on the application of Finch on behalf of the Weald Action Group) v. Surrey County Council and others* (2024) UKSC 20.

¹⁸ *Ibid.*, para. 2.

¹⁹ *Ibid.*, para. 93.

²⁰ *Ibid.*, para. 94.

17. In its recent Advisory Opinion, the Court of the European Free Trade Association (EFTA) likewise affirmed that EIAs of a petroleum project's probable significant effects on the environment must include "a reasoned estimate of the greenhouse gas emissions that are likely to result from the subsequent combustion of petroleum and natural gas extracted in the course of a project"²¹. As the EFTA Court observed, the authorities assessing the project "are in full control of whether or not the environmental effects will occur"²².

III. NATIONALLY DETERMINED CONTRIBUTIONS

18. Articles 2 and 4 of the Paris Agreement require States parties to "prepare, communicate and maintain successive and progressive nationally determined contributions which, *inter alia*, when taken together, are capable of achieving the temperature goal of limiting global warming to 1.5°C above pre-industrial levels"²³, while Article 2, paragraph 1 (c), of the Agreement obligates States parties to "mak[e] finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development".

19. These obligations of the Paris Agreement, including the principles of progression and highest possible ambition under Article 4, require that States' NDCs address all fossil fuel production, licensing and subsidy activities in a manner consistent with achieving the 1.5°C temperature goal.

20. The Global Stocktake decision adopted at COP 28 in 2023 expressly recognized the need to "[t]ransition[] away from fossil fuels in energy systems, in a just, orderly and equitable manner" and "[p]hase[] out inefficient fossil fuel subsidies that do not address energy poverty or just transitions, as soon as possible"²⁴. As the Court recognizes, such COP decisions constitute a subsequent agreement between the parties regarding the interpretation and application of Articles 2 and 4 of the Paris Agreement²⁵. They must also be taken into account in the successive NDCs of States parties pursuant to Article 4, paragraph 9, and Article 14, paragraph 3, of the Paris Agreement²⁶. Actions by States that reinforce continuing dependence on fossil fuels run directly contrary to these obligations.

21. As France submits:

"both the 1.5°C objective and its precondition of carbon neutrality must, if they are to be achieved, necessarily entail a transition away from fossil fuels. This fact must be taken into account by the parties to the Paris Agreement, particularly those within whose jurisdiction fossil fuels are produced, when determining their national contribution and establishing the domestic measures to achieve it."²⁷

²¹ EFTA Court, *Norwegian State v. Greenpeace Nordic, Nature and Youth Norway*, Judgment of 21 May 2025, E-18-24, paras. 89, 99.

²² *Ibid.*, para. 81.

²³ Advisory Opinion, para. 457 (3) (A) (f).

²⁴ Decision 1/CMA.5, Outcome of the first global stocktake, UN doc. FCCC/PA/CMA/2023/16/Add.1 (13 Dec. 2023), para. 28 (d) and (h); see also para. 28 (b).

²⁵ Advisory Opinion, para. 224.

²⁶ *Ibid.*, para. 243.

²⁷ Replies of the French Republic to the questions put by Judges Cleveland, Tladi, Aurescu and Charlesworth, para. 11 [*translation by the Registry*].

22. The stringent due diligence obligations to implement such NDCs and to prevent significant transboundary harm further require States to adopt and enforce regulations consistent with reducing global dependence on fossil fuels. This includes phasing out the production and use of fossil fuels, transitioning away from fossil fuels and regulating fossil fuels in a manner that does not undermine global co-operation to achieve these goals, including with respect to subsidies²⁸.

23. The obligations of States to mitigate the potential harms arising within their jurisdiction or control under the climate change treaties and customary international law thus include phasing out of fossil fuel dependency, including by directly taking into account, and redressing, the downstream consequences of production, licensing and subsidy activities.

IV. COMMON BUT DIFFERENTIATED RESPONSIBILITIES AND RESPECTIVE CAPABILITIES

24. The principle of common but differentiated responsibilities and respective capabilities and the corresponding principle of equity recognize that the different capabilities and national circumstances of States must be taken into account in implementing States' obligations under the climate change treaties and customary international law²⁹. Accordingly, while the obligation to transition away from fossil fuel dependence — including fossil fuel production, licensing and subsidies — applies to all States, States with greater resources and technical capabilities are obliged to transition away from fossil fuel production and dependency with deeper and faster targets than States with lesser capabilities³⁰.

25. The financial, technological and capacity-building obligations under the climate change treaties also require developed States with greater capabilities to provide financial and technological assistance to help developing States with lesser capabilities transition away from fossil fuel production and other forms of dependency on fossil fuels, and towards clean energy production.

26. In keeping with this approach, and as stated above, COP 28 called for the phasing out of fossil fuel subsidies “that do not address energy poverty or just transitions”³¹. The recently concluded Agreement on Climate Change, Trade and Sustainability similarly prescribes more than *de minimis* subsidies, with specific exceptions for subsidies aimed at “low-income, remote or vulnerable communities” for energy security³².

²⁸ The European Union has required Member States to “phas[e] out environmentally harmful subsidies, in particular fossil fuel subsidies, at Union, national, regional and local level” (Decision (EU) 2022/591 of the European Parliament and of the Council of 6 Apr. 2022 on a General Union Environment Action Programme to 2030, *Official Journal of the European Union*, L 114, 12 Apr. 2022, p. 22, Art. 3 (*h*)). It also requires annual reporting on “Member States’ progress towards phasing out energy subsidies, in particular for fossil fuels” (Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 Dec. 2018 on the Governance of the Energy Union and Climate Action, *Official Journal of the European Union*, L 328, 21 Dec. 2018, p. 1, Art. 35, para. 2, point (*n*)).

²⁹ Advisory Opinion, para. 148.

³⁰ Reply of Côte d’Ivoire to the question put by Judge Cleveland, para. 7.

³¹ Decision 1/CMA.5, Outcome of the first global stocktake, UN doc. FCCC/PA/CMA/2023/16/Add.1 (13 Dec. 2023), para. 28 (*h*). India notes that subsidies for consumption such as cooking fuel may be necessary in developing States to alleviate poverty and pursue sustainable domestic energy security. Reply of India to the question put by Judge Cleveland, para. 3.

³² Agreement on Climate Change, Trade and Sustainability, signed on 15 November 2024, Art. 4.6 (2) (*c*).

27. Nevertheless, the idea that States have differing responsibilities in addressing climate change “is not a get-out-of-jail card”³³. The obligations under the climate change treaties and customary international law apply to all States, and the principle of common but differentiated responsibilities and respective capabilities does not exempt any State from measures that are necessary, consistent with their capabilities and national circumstances, to fulfil the objectives of the climate change treaties and stringent due diligence obligations.

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28. In sum, as the Advisory Opinion recognizes, the legal obligations of States with respect to the protection of the climate system and other parts of the environment require States to take full responsibility for, and to aggressively redress, the contributions of production, licensing and subsidies of fossil fuels to the destruction of the climate system.

29. As the Court notes, addressing climate change requires a fundamental transformation of our habits, comforts and way of life to safeguard the future of humanity³⁴. Through this Advisory Opinion, the Court seeks to chart a principled legal path forward in addressing one of the most pressing challenges of our time. Climate change is a profoundly collective threat — no corner of the globe is immune, and no nation can stand alone in its response. While the Court’s role is to provide legal clarity, the primary responsibility to act rests with States, and the private actors subject to their jurisdiction, who must re-evaluate and reform their policies to achieve the transformative change essential for the preservation of our shared future. Given the gravity of the crisis, all three branches of government — executive, legislative and judicial — must take co-ordinated and decisive action, united in their mission to confront climate change. At the international level, States must likewise co-operate in a decisive manner that reflects the urgency of the moment and the need for collective global solutions.

(Signed) Dalveer BHANDARI.

(Signed) Sarah H. CLEVELAND.

³³ See CR 2024/36, p. 54, para. 20 (The Bahamas).

³⁴ Advisory Opinion, para. 456.