INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

(AN ADVISORY OPINION)

Written statement of Grenada

DATE 21ST MARCH 2024

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I Introduction

1. Pursuant to the Order of the President of the Court of 20 April 2023, Grenada hereby submits its written statement on the request for an advisory opinion contained in UN General Assembly Resolution 77/276, adopted by consensus on 29 March 2023.

2. The written statement is organised as follows: Part II addresses matters pertaining to the jurisdiction of the Court to render the requested advisory opinion and the admissibility of the request in the formulation endorsed by consensus by all States of the UN General Assembly. Part III provides background information on Grenada and its situation with respect to climate change. Part IV presents the views of Grenada on certain aspects of the question put before the Court. These include: the applicable law to be considered, State obligations to protect the climate system and the environment, scientific evidence demonstrating the breach of these obligations and the legal consequences that flow from this breach.

3. With respect to State obligations, this submission will focus on the obligations under the UNFCCC, the Paris Agreement, and customary international law – including the Stockholm and Rio Declarations. This submission will also consider the State as a trustee for the global environment and the obligation to protect the integrity of Earth's ecosystems.

4. Regarding the scientific evidence which demonstrates the breach, this submission examines the science as it relates to planetary boundaries, the Earth system and the Anthropocene. It also carefully considers the expert report titled "The Science of Climate Change and the Caribbean: Findings from the Intergovernmental Panel on Climate Change (IPCC) Sixth Assessment Cycle (AR6)" produced by three eminent Caribbean climate scientists (Annex 1).

5. In relation to legal consequences of a breach, this submission considers the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* adopted by the International Law Commission. It also takes into consideration the ICJ judgment of *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*.

6. The submission concludes at Part V.

7. Overall, Grenada respectfully submits that the Court's answers to the questions put to it should emphasise that even the lower threshold of temperature warming of 1.5°C (above pre-industrial levels) would have disastrous effects on small island developing States like Grenada. Furthermore, due to the dire state of the climate system all States need to recognise and accept that they have a universal obligation to hold the environment, including the Earth itself, in trust for the benefit of present and future generations.

II Jurisdiction and Admissibility of the Request

8. This section will address three issues: 1) whether the Court has the power to render the advisory opinion requested; 2) whether there are compelling reasons why the Court should not render the advisory opinion, despite having the power to do so and 3) the formulation of the questions put to the Court.

A. The Court has jurisdiction to render the requested advisory opinion

9. Article 96(1) of the UN Charter states that: "The General Assembly… may request the International Court of Justice to give an advisory opinion on any legal question." Furthermore, article 65(1) of the International Court of Justice (ICJ) Statute asserts that: "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request." The requirements of these two provisions are satisfied in full.

   a. Firstly, the UN General Assembly (UNGA) is expressly empowered under article 96(1) of the UN Charter to request an advisory opinion "on any legal question".

   b. Secondly, the UNGA regularly addresses different matters relating to climate change, including its annual resolution on the *Protection of the global climate for present and future generations of humankind*, the latest of which is resolution 77/165 adopted by consensus on 14 December 2022.

   c. Thirdly, the two questions asked by the UNGA are clear "legal questions". The first question focuses on the "obligations of States under international law",

while the second question focusses on the "legal consequences under these obligations."

d. Finally, it is recalled that the UNGA adopted the said resolution titled *Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change* (Resolution 77/276) by consensus, and that it had been co-sponsored by 132 States (which constitutes almost 70 per cent of the UN Member States). The adoption of Resolution 77/276 by consensus therefore demonstrates that all Member States acknowledged and accepted that the question is a legal question which the ICJ could address under its advisory jurisdiction.

B. There are no compelling reasons for the Court to not exercise its discretion

10. While article 65(1) of the ICJ Statute provides that the Court "may give" an advisory opinion, the ICJ itself has never declined to render an advisory opinion requested by the General Assembly. In the ICJ advisory opinion in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the Court observed that its answer to a request for an advisory opinion "represents its participation in the activities of the Organization, and, in principle, should not be refused.[1] The Court went on to add that there must be "compelling reasons" for the Court to refuse its opinion in response to a request falling within its jurisdiction.[2] After careful consideration, Grenada submits that no such compelling reasons exist in this case for the Court to exercise its discretion not to render the advisory opinion.

C. No need for the Court to reformulate the legal question(s)

11. Grenada also wishes to emphasise that the formulation of the question/questions is clear and that it was endorsed by consensus by all Member States of the UNGA. There are three core arguments against the Court reformulating the questions: (i) the questions are

[1] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, ICJ Reports 2019, p 95* at [65].

[2] At [65].

not ambiguous nor vague, and can be clearly answered 'based on law',[3] (ii) the questions do not prejudge the legal issues to be addressed by the Court, and (iii) most importantly, the text of the question was co-sponsored by almost 70 per cent of the UN Member States, and remarkably, it was adopted by consensus. Thus, all States, through their consensus, considered that the questions were clear enough and could be answered within the context of the advisory opinion.

III Climate Change and its Impact on Grenada

12. Grenada is an island country located in the eastern Caribbean Sea and nestled at the southern end of the Grenadines Island chain. Grenada is an archipelagic State with a total land mass of 344 km^2. The State comprises the island of Grenada itself, two smaller islands – Carriacou and Petite Martinique – and several other smaller islands (see the map of Grenada at Annex 2). Grenada has a population of 113,917 persons. Politically, Grenada is a member of the Caribbean Community (CARICOM), the Organisation of the Eastern Caribbean States (OECS), the Alliance of Small Island States (AOSIS), and the Organisation of African, Caribbean and Pacific States (OACPS). Grenada is also a member of SIDS (Small Island Developing States).

13. Grenada is famously known as the "Isle of Spice" because of its production of a wide variety of spices. The country's principal export crops are the spices of nutmeg and mace. Grenada is responsible for more than 20 per cent of the world's nutmeg production and is the second largest producer after Indonesia.[4] The nutmeg crop thus plays an important role in the country's economy since it provides income to approximately 30 per cent of the island's population.[5] Culturally, the nutmeg is an integral part of Grenada's identity as it is proudly featured on the country's national flag. Other crops that are exported by Grenada include cocoa, citrus fruits, bananas, cloves, and cinnamon.

14. Hurricanes Ivan (2004) and Emily (2005) severely decimated the nutmeg plantations, thereby drastically reducing the industry's export revenue. At its prime, Grenada produced approximately 2,000 tonnes of nutmeg every year, earning up to 13 million

[3] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, above n 1, at [135].

[4] "Grenada Seeking New Markets for Nutmeg" (4 April 2022) Loop <www.caribbean.loopnews.com>.

[5] Daphne Ewing-Chow "Nutmeg: Grenada's 'Black Gold' is on the Cusp of Resurgence" (23 February 2020) Forbes <www.forbes.com>.

USD per annum.[6] However, since a nutmeg tree can take up to 30 years to reach maturity, Grenada's export revenue from nutmeg has not fully recovered nor is it at the same level as it was pre-Ivan and Emily. By 2011, although nutmeg production was high, it was still less than 15 per cent pre-hurricane volumes.[7] Even if Grenada has partly rebounded from the devastating effects and consequences of Hurricanes Ivan and Emily, it is now saddled with the debt burden from the rebuilding process. For instance, the estimated cost of the damage done to Grenada by Hurricane Ivan was estimated to be 885 million USD.[8]

15. Apart from agriculture, Grenada's fishing industry is hugely important for livelihoods, food, cultural value, and tourism.[9] Grenada is the home to important marine and coastal ecosystems including seagrass beds, corals, and mangroves, which support healthy fisheries. Fish stocks that are usually found and caught by fisherfolk within Grenada's maritime waters include tuna, billfish, dolphinfish, king mackerel, groupers, hinds, snappers, spiny lobster, queen conch and turtles.[10] However, the effects of climate change, in the form of rising sea temperatures, ocean acidification, land-based and agricultural pollution, all pose threats to fishing and to fishing livelihoods throughout the country.

16. The issue of sea level rise is also another critical issue for Grenada. It is estimated that between 1901 and 2010, global mean sea level increased by 0.19 ± 0.02 metres (IPCC, 2013).[11] Climate Scientists from the University of the West Indies have projected that most Caribbean SIDS may reach 0.5 m seal level rise by the mid-century (2046-2065) and 1 m sea level rise by the end-of-century (2081-2100).[12] Sea level rise is not an abstract idea but a reality in Grenada. One example which Grenada wishes to underscore is the Tibeau Cemetery, located at the east coast of Carriacou, where graves are floating in the sea and slowly disappearing in the ocean. The loss of tombs and ancestral graves

[6] Ewing-Chow "Nutmeg: Grenada's 'Black Gold' is on the Cusp of Resurgence", above n 5.

[7] Ewing-Chow "Nutmeg: Grenada's 'Black Gold' is on the Cusp of Resurgence", above n 5.

[8] Tannecia S Stephenson and Jhordanne J Jones "Impacts of Climate Change on Extreme Events in the Coastal Marine Environments of Caribbean Small Island Developing States (SIDS)" (2017) Science Review 10 at 11.

[9] "Commonwealth Marine Economies Programme Grenada Fisheries: Adapting to Climate Change, May 2022" (2022) <www.gov.uk>.

[10] "Commonwealth Marine Economies Programme Grenada Fisheries: Adapting to Climate Change, May 2022".

[11] Stephenson and Jones, above n 8, at 12.

[12] Stephenson and Jones, above n 8, at 14.

represent a tragic loss of the cultural heritage of the people of Carriacou and by extension, Grenada. Today there is a fear that, due to sea level rise, the graves in the cemetery will be lost forever.[13] A witness statement on the loss of ancestral graves is hereby attached at Annex 3 in this submission for the Court's consideration.

17. Grenada has decided to participate in these advisory opinion proceedings due to the existential threat that climate change poses on a national and global scale. This is a historic moment for Grenada since it is the very first time that the country will make submissions before the ICJ.

IV Submissions on the Question

18. The State of Grenada recognises that there are two critical questions before the Court. The first question (question a) pertains to the obligations of States under international law to protect the climate system, and other parts of the environment, from anthropocentric emissions of greenhouse gases (such as methane, carbon dioxide and nitrous oxide) for States and for present and future generations. The second question (question b) speaks to the legal consequences that arise if these obligations are breached thereby causing significant harm to states (in particular, SIDS), peoples, and individuals of the present and future generations. These two issues will be dealt with in this section.

A. The Applicable Law

19. UNGA Resolution 77/276 specifically asks the Court to clarify the relevant obligations of States under international law as it relates to the protection of the climate system and the environment and to assess the legal consequences of the conduct if a breach of these obligations occur. In so doing, Resolution 77/276 specifically requests the Court not to limit itself to the interpretation of one or two treaties, such as the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement. This is confirmed in the fifth preambular paragraph of Resolution 77/276 which recognises the importance of several Conventions, international law instruments and relevant obligations of customary international law which directly concern the conduct of States over time in relation to the activities that contribute to climate change and its adverse

[13] "Losing History to Rising Seas at Tibeau, Carriacou (Grenada)" Michael McLeod <www.youtube.com>.

effects.[14] In this submission, Grenada will therefore not only rely on the UNFCCC and the Paris Agreement, but also the Conventions and international law instruments referred to explicitly and implicitly under Resolution 77/276.

B. The Obligations of States to Protect the Climate System and the Environment

(I) Interpretation of the 'Climate System'

20. In response to the first question before the Court, under international law, the "climate system" means "the totality of the atmosphere, hydrosphere, biosphere, geosphere and their interactions."[15] Leading international scholars also recognise the Earth's "climate system" as composing the interactions between the atmosphere, the hydrosphere (the combined mass of water on Earth, including the oceans), the cryosphere (ice and snow), the land surface and the biosphere (the geographic region containing all life on Earth).[16] The climate system is said to represent a manifestation of the amount, distribution, and net balance of energy at Earth's surface.[17]

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[14] This relevant section of the Preamble states: *Emphasizing* the importance of the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the United Nations Convention on the Law of the Sea, the Vienna Convention for the Protection of the Ozone Layer, the Montreal Protocol on Substances that Deplete the Ozone Layer, the Convention on Biological Diversity and the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, among other instruments, and of the relevant principles and relevant obligations of customary international law, including those reflected in the Declaration of the United Nations Conference on the Human Environment and the Rio Declaration on Environment and Development (emphasis added).

[15] United Nations Framework Convention on Climate Change (opened for signature 4 June 1992, entered into force 21 March 1994), art 1(3).

[16] Katherine Richardson, Will Steffen and Diana Liverman *Climate Change – Global Risks, Challenges and Decisions* (Cambridge University Press, New York, 2011) at 3. See also Louis J Kotzé "Earth System Law for the Anthropocene: Rethinking Environmental Law Alongside the Earth System Metaphor" (2020) 11(1-2) Transnational Legal Theory 75.

[17] Will Steffen and others "Planetary Boundaries: Guiding Human Development on a Changing Planet" (2015) 347 (6223) Science 1259855 at 736.

21. Since the climate system is composed of many complex and integral parts, the Court could consider the obligations of States under other Conventions and international law instruments outside the UNFCCC and Paris Agreement, such as (but not limited to) the UN Convention on the Law of the Sea (UNCLOS), the Vienna Convention for the Protection of the Ozone Layer and the Convention on Biological Diversity.

22. This argument is further strengthened by the fact that question (a) also refers to the protection of the climate system and "other parts of the environment". This latter phrase suggests that the Court should consider not only obligations under international law relating to the emission of greenhouses gasses into the atmosphere, but also the obligations to protect, inter alia, the oceans and the marine environment, freshwater, rivers, biodiversity, wetlands, nature, and glaciers from the harmful impacts of these emissions. The use of the words "climate system and other parts of the environment" therefore implies a more holistic approach and understanding of the Earth as a single, intertwined, complex system which must also be the subject of States' obligation and protection.[18]

(II) Obligations under the UNFCCC and the Paris Agreement

23. The UNFCCC, in its preamble, specifically recognises that the Earth's climate and its adverse effects are a common concern of humankind. The preamble further expresses the concern that human (anthropocentric) activities have substantially increased the atmospheric concentrations of greenhouse gases thereby resulting in an additional warming of the Earth's surface and atmosphere that may adversely affect natural ecosystems and humankind.[19] Article 3(1) of the UNFCCC expressly stipulates that: "The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with common but differentiated responsibilities and respective capabilities."

24. Just like the UNFCCC, the Paris Agreement also acknowledges that climate change is a common concern of humankind.[20] When taking action to address climate change, State

[18] Will Steffen and others "Stratigraphic and Earth System Approaches to Defining the Anthropocene" (2016) 4(8) Earth's Future 324 at 325.

[19] United Nations Framework Convention on Climate Change, preamble [1] and [2].

[20] Paris Agreement (opened for signature 12 December 2015, entered into force 4 November 2016), preamble.

Parties should respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.[21] This language indicates that the Paris Agreement draws an inextricable link between climate change obligations and human rights obligations.

25. The aim of the Paris Agreement, as expressed under article 2(1), is to: "strengthen the global response to the threat of climate change". Article 2(1)(a) sets the temperature goal for State Parties:

> Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognising that this would significantly reduce the risks and impacts of climate change…

26. Article 2.1(a) sets out the temperature goal to hold global average temperature increases to "well below" 2°C above pre-industrial levels, and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels. Recent decisions[22] taken by consensus of Parties have confirmed the resolve to limit warming to 1.5°C. Article 4(1) of the Paris Agreement goes on to state:

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

[21] Paris Agreement, preamble.

[22] See decision 1/CMA.3 paragraph 21 as follows. '*Recognizes* that the impacts of climate change will be much lower at the temperature increase of 1.5 °C compared with 2 °C and *resolves* to pursue efforts to limit the temperature increase to 1.5 °C;' contained in document FCCC/PA/CMA/2021/10/Add.1available at https://unfccc.int/sites/default/files/resource/cma2021_10_add1_adv.pdf last accessed 11 March 2024. And 1/CMA.5 (GST Decision) paragraph 4 '*Underscores* that the impacts of climate change will be much lower at the temperature increase of 1.5 °C compared with 2 °C and *resolves* to pursue efforts to limit the temperature increase to 1.5 °C' and paragraph 5 '…and *emphasizes* the need for urgent action and support to keep the 1.5 °C goal within reach…'

century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.

27. Article 4.1 is designed to operationalise the long-term temperature goal (in Article 2.1(a)) in terms of a global emissions pathway based upon the best available science. The elements of Article 4.1 are first, "to reach global peaking of greenhouse gas emissions as soon as possible" and then "to undertake rapid reductions" of emissions thereafter and to achieve net zero greenhouse gas emissions in the second half of the century. All this must be juxtaposed with the 2023 IPCC report which warns that modelled pathways that limit global warming to 1.5°C involve "rapid and deep" and, in most cases, "immediate" greenhouse gas emissions reductions in all sectors this decade.[23] This decade therefore represents the make-or-break decade for climate action and the restoration of healthy ecosystems.

28. Another IPCC Report (2018) on *Global Warming of 1.5°C*, found that "every bit of warming matters" and that there are clear benefits to keeping warming to 1.5°C rather than 2°C or higher.[24] This Report added that limiting global warming to 1.5°C, compared with 2°C, could reduce the number of people both exposed to climate-related risks and susceptible to poverty by up to several hundred million by 2050 (medium confidence).[25] Limiting warming to 1.5°C therefore is in tandem with achieving other goals such as the 2030 Sustainable Development Agenda.[26]

29. From a Caribbean/SIDS perspective, avoiding the risk of global warming at 2°C is a matter of survival. In the Caribbean, up to 50 per cent of the year is projected to be warm

[23] IPCC *Climate Change 2023 Synthesis Report – Summary for Policymakers. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change,* IPCC, Geneva, Switzerland, at 20.

[24] IPCC, 2018: *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* at v-vi (Foreword).

[25] IPCC, 2018: *Global Warming of 1.5°C*, at [B.5.1].

[26] IPCC, 2018: *Global Warming of 1.5°C*, at vi.

at 1.5°C, with a further increase by up to 70 days at 2°C.[27] Above 1.5°C some natural solutions such as ecosystem-based approaches may no longer work e.g. coastal species would not be able to keep up with sea level rise or changing conditions.[28] Additionally, a scenario of above 1.5°C temperature increase will also lead to ocean acidification which will have a negative impact on coastal and marine adaptation options.[29]

30. This does not mean that all the ills associated with climate change will come to a complete halt at a temperature increase of 1.5°C. According to three Caribbean climate scientists – even at 1.5°C of global warming, the compounding impacts of changes in rainfall, temperature, tropical cyclones and sea level are likely to be significant across multiple natural and human systems.[30] Thus global warming, even at 1.5°C, is expected to be challenging for SIDS that are already experiencing impacts associated with climate change.[31] Indeed, from a Caribbean/SIDS perspective, a temperature increase of 1.5°C is the lesser of two evils vis-à-vis a temperature increase of 2°C. As a result, even if the Paris Agreement sets a temperature goal for State Parties, based on the scientific data presented, and notwithstanding the effort to be made to achieve the goal it will result in unavoidable levels of risk and harm for Grenada and other Caribbean/SIDS countries.

31. Article 4 of the Paris Agreement sets out several legal obligations on Parties, including:

    a. To prepare, communicate and maintain successive nationally determined contributions (NDCs) and to pursue domestic mitigation measures with the aim of achieving the objectives of each NDC (Article 4.2).

[27] Michael Taylor, Michelle Mycoo and Adelle Thomas "Making a Case with by and for Caribbean Climate Science" (paper presented to the Caribbean ICJ Climate Change Workshop, St Gerorge's, Grenada, February 2024).

[28] Michelle Mycoo "The Science and Law Nexus: Articulating Climate Justice for Small Island Developing States" (paper presented to the Caribbean ICJ Climate Change Workshop, St Gerorge's, Grenada, February 2024).

[29] Mycoo, above n 28.

[30] Taylor, Mycoo and Thomas, above n 27.

[31] Taylor, Mycoo and Thomas, above n 27.

b. To communicate a NDC every five years, with the information necessary for clarity, transparency and understanding (ICTU), and be informed by the outcomes of the global stocktake (Article 4.9).

c. That each Party's successive NDC will represent a progression beyond the then current NDC and reflect its highest possible ambition (Article 4.3).

d. That Parties must account for their NDCs (art. 4.13).

32. The Paris Rulebook decision on mitigation provides further guidance on the obligations of Parties to provide information to facilitate clarity, transparency and understanding (ICTU) of their NDCs and to account for their NDCs (Decision 4/CMA.1). The Article 4 provisions on ICTU and accounting provide that parties are to act "in accordance with" relevant COP decisions (technically, decisions of the Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement, or CMA), making the Paris Rulebook decisions on ICTU and accounting binding on Parties.

33. In addition to establishing legal obligations, Article 4 articulates several important normative expectations, that should inform all actions taken by Parties in line with the objectives of the Paris Agreement, including that:

a. Developed country Parties should undertake absolute economy-wide emission reduction targets, with developing countries encouraged to move towards such targets over time (art. 4.4); and

b. All Parties should strive to formulate and communicate long-term low greenhouse gas emission development strategies (art. 4.19).

34. Recent CMA decisions have also set heightened expectations on all Parties with respect to the nature and scope of their next NDCs. For example, the Global Stocktake (GST) decision from COP28 in December 2023 (1/CMA.5 paragraph 39) "*Reaffirms* the nationally determined nature of nationally determined contributions…and *encourages* Parties to come forward in their next nationally determined contributions with ambitious, economy-wide emission reduction targets, covering all greenhouse gases, sectors and categories and aligned with limiting global warming to 1.5ºC, as informed by the latest science, in the light of different national circumstances."

35. The UNFCCC and the Paris Agreement are relevant when inquiring into the specific obligations of States under international law with respect to the protection of the climate system and other parts of the environment. The recent decisions taken under the Paris Agreement also establish state practice on how the Paris Agreement obligations are interpreted by States and on the actions needed to fulfil these obligations. Parties have recently taken a decision[32] that, in recognition of the need for deep, rapid, and sustained reductions in greenhouse gas emissions in line with 1.5°C pathways, which requires emissions reductions of 43 per cent by 2030 and 60 per cent by 2035 relative to the 2019 level and reaching net zero carbon dioxide emissions by 2050, calls on Parties to contribute to a suite of global actions in a nationally determined manner. These actions include, inter alia: tripling renewable energy capacity globally and doubling the average rate of energy efficiency improvements by 2030; accelerating efforts towards the phase-down of unabated coal power; accelerating efforts globally towards net zero emissions energy systems and *'transitioning 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'* (GST decision 1/CMA.5, paragraphs 27 and 28).

36. However, it is submitted that the bottom up, and nationally determined aspects of the Paris Agreement have been used by States to undermine in many instances the obligations that are set out therein. It is submitted that given the harm that States such as Grenada have already suffered and are likely to suffer based on scientific evidence as a result of climate change, the Court should consider that actions that undermine the objectives and obligations contained in the Paris Agreement constitute a breach of international law for the protection of the climate system and other parts of the environment.

37. Moreover, the legal obligations to ensure the protection of the climate system and other parts of the environment did not start, nor did it end, in 2015 with the adoption of the Paris Agreement. For these reasons, this submission will consider other obligations under international law which supplement and are in some cases more robust than those of the Paris Agreement.

[32] As set out in Annex 1 of the UNFCCC Contained in document FCCC/PA/CMA/2023/L.17.

(III) Obligations under Customary International Law

38. The Declaration of the United Nations Conference on the Human Environment (the "Stockholm Declaration")[33] and the Rio Declaration on Environment and Development ("the Rio Declaration")[34] are two international law instruments mentioned within Resolution 77/276 and are, for all intents and purposes, relevant to this advisory opinion. Both the Stockholm and Rio Declarations advance the "no-harm rule" (or the principle of prevention) which specifies that States, have the sovereign right to exploit their resources pursuant to their environmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond their national jurisdiction.[35]

39. The no-harm rule is a widely recognised principle of customary international law and has its roots in "good neighbourliness" which is reflected in the Latin maxim *sic utere tuo non laedas* (use your property in such a way that you do not injure other people's property).[36] The no-harm rule/principle of prevention has a dual content. States have a duty to 1) prevent and control transboundary pollution and environmental harm resulting from activities under their jurisdiction or control and 2) co-operate in mitigating such transboundary risks and emergencies by means of consultation, negotiation, and where necessary, environmental impact assessments.[37]

40. The decision in the *Legality of The Threat or Use of Nuclear Weapons* endorsed the no-harm rule/principle of prevention as enshrined under the Stockholm and Rio Declarations. There the ICJ stated: "The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other

[33] *Report of the UN Conference on the Human Environment* UN Doc A/CONF.48/14/Rev 1 (5-16 June 1972).

[34] *Report of the UN Conference on Environment and Development* UN Doc A/CONF.151/26 (Vol I) (12 August 1992).

[35] *Report of the UN Conference on the Human Environment*, above n 33, at 5 (principle 21). See also *Report of the UN Conference on Environment and Development*, above n 34, Annex I at principle 2.

[36] Patricia Birnie, Alan Boyle and Catherine Redgwell *International Law and the Environment* (3rd ed, Oxford University Press, Oxford, 2009) at 143.

[37] Malgosia Fitzmaurice "Legitimacy of International Environmental Law. The Sovereign States Overwhelmed by Obligations: Responsibility to React to Problems Beyond National Jurisdiction?" (2017) 77 (2) Heidelberg Journal of International law 339 at 342–343.

States or of areas beyond national control is now part of the corpus of international law relating to the environment."[38]

41. The ICJ decision of *Pulp Mills on the River Uruguay* also pointed out that the principle of prevention is a customary rule but emphasised that such a rule has its origins in the "due diligence" required of a State in its territory.[39] This obligation of due diligence entails not only the adoption of appropriate rules and measures but also a certain level of vigilance on the part of the State.[40] In applying the due diligence test the ICJ in *Pulp Mills* pronounced: "A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State."[41] It is noted that although in the *Legality of The Threat or Use of Nuclear Weapons* the Court used the phrase to "respect the environment of other States", the Court in the more recent case of *Pulp Mills* elected to use the language of not "causing significant damage to the environment of another State." Grenada submits that the latter interpretation by the Court in the *Pulp Mills* decision is more pertinent given the critical importance of this advisory opinion on climate change.

42. Another rule of customary international law that is relevant to this advisory opinion is the precautionary principle. This rule, as articulated under the Rio Declaration, imposes significant obligations on States to safeguard the climate system. Principle 15 of the Rio Declaration asserts that to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities, and where there are threats of serious or irreversible damage, lack of scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[42] In the context of climate change, this entails that States should not delay in implementing measures to mitigate greenhouse gas emissions.

43. There are two other rules of customary international law that are applicable to this advisory opinion. They are the duty to cooperate and the notion of due regard. In relation

[38] *Legality of The Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 at [29].

[39] *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)* [2010] ICJ Rep 14 at [101].

[40] *Pulp Mills on the River Uruguay*, above n 39, at [197].

[41] At [101].

[42] *Report of the UN Conference on Environment and Development,* above n 34, at principle 15.

to the duty to cooperate, principle 7 of the Rio Declaration asserts that States "shall cooperate in the spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem."[43] This duty to cooperate is read in tandem with the well-known concept of States having "common but differentiated responsibilities."[44] The Rio Declaration, at principle 27, adds that States shall cooperate in good faith, in the further development of international law in the field of sustainable development.

44. The duty to cooperate is also expressed at principle 24 of the Stockholm Declaration which states that: "International matters concerning the protection and improvement of the environment should be handled in a co-operative spirit **by all countries, big and small, on an equal footing."**[45] A UNGA Resolution, which also recognises this duty to cooperate, provides that:[46]

> States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences.

45. Based on these findings, the duty to cooperate transcends political, economic, and social differences among States, emphasising a collective action for the common good.

46. The duty of States to cooperate in protecting the environment is apparent especially when one considers that climate change has no respect for national sovereignty and domestic borders. Due to its transboundary nature, States cannot singlehandedly control the environment. Hickey in his treatise *The Sovereignty Game,* describes climate change as a public good problem, since "no one owns it" yet it is ultimately "everyone's problem."[47] In connection to the conservation of the planet, Weiss argues that "we must face the

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[43] *Report of the UN Conference on Environment and Development,* above n 34, at principle 7. See also principle 27.

[44] At Principle 7.

[45] *Report of the UN Conference on the Human Environment*, above n 33, principle 24 (emphasis added).

[46] *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* GA Res 2625 XXV (1970).

[47] Will Hickey *The Sovereignty Game: Neo-colonialism and the Westphalian System* (Springer Nature, Singapore, 2020) at 48.

reality of a kaleidoscopic world in which no one State or even a group of States can go it [protect the environment] alone."[48] It is because the environment (including climate change) cannot be controlled by States individually that international law has placed obligations on States to not harm the environment of others.

47. The obligation of having due regard to others has a particular history in the law of the sea context.[49] In the 1974 cases of *Fisheries Jurisdiction (United Kingdom v Iceland) (Federal Republic of Germany v Iceland)* the ICJ observed that due to the intensification of fishing, the former laissez faire treatment of living resources in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all.[50] Foster, an international law professor at the University of Auckland, notes that the principle of 'due regard' is also employed in several provisions of UNCLOS to capture the conduct to which States commit in their relations with one another on the high seas and in the Exclusive Economic Zone.[51] Furthermore, under the recently adopted *Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction* (the BBNJ Agreement) the collection and sampling of marine genetic resources found within areas beyond national jurisdiction must be carried out with due regard to the interests of other States.[52]

[48] Edith Brown Weiss "The Future of the Planetary Trust in a Kaleidoscopic World" (2020) 50 Environmental Policy and Law 449 at 453.

[49] Caroline E Foster *Global Regulatory Standards in Environmental and Health Disputes: Regulatory Coherence, Due Regard, and Due Diligence* (Oxford University Press, Oxford, 2021) at 89.

[50] *Fisheries Jurisdiction (United Kingdom v Iceland) (Merits)* [1974] ICJ Rep 3 at [72]. *Fisheries Jurisdiction (Federal Republic of Germany v Iceland) (Merits)* [1974] ICJ Rep 175 at [64].

[51] Foster, above n 49, at 328. See also United Nations Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994), art 87(2) and art 56(2) and art 58(3) respectively.

[52] *Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction* (opened for signature on 20 September 2023, not yet in force), art 11 (3).

(IV) The State as a Trustee for the Environment

48. Humanity currently faces a triple planetary crisis comprising the climate emergency, the collapse of biodiversity and pervasive pollution.[53] In essence, the triple planetary crisis is a symptom of a much broader and comprehensive crisis – an ecological crisis. As a result of this, States are now being increasingly challenged to create innovative multilateral and domestic responses to the triple planetary crisis (or ecological crisis).[54] The triple planetary crisis causes us to reflect on the value of the fiduciary obligation of a State to act as a trustee for the environment for the benefit of present and future generations.

49. A fiduciary is someone who has undertaken to act for, or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.[55] The distinguishing obligation of a fiduciary is the obligation of loyalty.[56] The fiduciary conception of State authority can be traced back to the writings of Plato and Aristotle, who each referred to public officials as "guardians" charged with promoting the public good.[57] In modern times, the law has applied fiduciary duties to certain relationships such as solicitor-client, trustee-beneficiary, director-company, and parent-child relationships.[58] The core idea of a modern democratic State is founded on the idea that it acts through its people, by its people, and for its people.[59] This notion of a state acting for, and on behalf of its people is, for example, consistent with the Virginia Declaration of Rights (1776) which enshrined that: "all power is vested in, and

[53] *General Comment No. 26 (2023) on Children's Rights and the Environment, With a Special Focus on Climate Change* UN Doc CRC/C/G/26 (22 August 2023) at [1].

[54] Robyn Eckersley *The Green State – Rethinking Democracy and Sovereignty* (MIT Press, Cambridge, 2004) at 33.

[55] *Bristol v Mothew* [1998] Ch 1 (CA) at 18.

[56] At 18.

[57] Evan J Criddle and Evan Fox-Decent *Fiduciaries of Humanity: How International Law Constitutes Authority* (Oxford University Press. New York, 2016) at 13.

[58] Himmy Lui "A Fiduciary Perspective on the State's Duty to Protect the Environment" (2014) 20 Auckland University LR 101 at 106.

[59] Klaus Bosselmann "The Atmosphere as a Global Commons" in Jordi Jaria-Manzano and Susana Borrás (eds) *Research Handbook on Global Climate Constitutionalism* (Edward Elgar Publishing Ltd, Gloucestershire, 2019) 75 at 82.

consequently derived from, the people; that magistrates are their trustees and servants and at all times amenable to them."[60] Similarly, Madison noted in the Federalist Papers: "The federal and State governments are in fact but different agents and trustees of the people…[because] the ultimate authority…resides in the people alone."[61] This has led to the scholarly argument that State sovereignty is ultimately a trust relationship between the State and its citizens.[62]

50. Few governments could argue that they do not owe a fiduciary duty to their citizens.[63] Eyal Benvenisti, a leading scholar in this area, expands this argument further by applying the theory of sovereign States as "trustees of humanity".[64] Benvenisti posits his theory on the wide recognition of the equal moral worth of all human beings which is deeply engrained in the contemporary concept of universal human rights founded under the Universal Declaration of Human Rights (UDHR) which envisions "everyone" as right holders entitled to "universal respect" for their human rights and fundamental freedoms.[65] Furthermore, the entire international human rights system (e.g. the UDHR, the Office of the United Nations High Commissioner for Human Rights, and the UN Human Rights Council) is premised on States being responsible for the promotion and protection of all human rights and fundamental freedoms.[66] As a result, under international law, States can be perceived as being trustees for the protection of global human rights.

51. Apart from States having trusteeship responsibilities for human rights, the idea of States accepting global trusteeship responsibilities for the environment has been promoted by

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[60] The Virginia Declaration of Rights 1776 (United States), s 2. See also Eyal Benvenisti "The Paradoxes of Sovereigns as Trustees of Humanity: Concluding Remarks" (2015) 16(2) Theoretical Inquiries in Law 535 at 545.

[61] James Madison "The Federalist Papers: No 46" (29 January 1788) Yale Law School, The Avalon Project <www.avalon.law.yale.edu>.

[62] Bosselmann "The Atmosphere as a Global Commons", above n 59, at 82.

[63] Bosselmann, above n 59, at 84.

[64] Eyal Benvenisti "The Paradoxes of Sovereigns as Trustees of Humanity: Concluding Remarks" (2015) 16(2) Theoretical Inquiries in Law 535. Eyal Benvenisti "Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders" (2013) 107 Am J Int Law 295.

[65] Benvenisti "Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders", above n 64, at 307 and 317.

[66] *High Commissioner for the Promotion and Protection of all Human Rights* GA Res 48/141 (1994), preamble. See also *Human Rights Council* GA Res 60/251 (2006), preamble.

highly acclaimed environmental law scholars (Bosselmann, Sand, Weiss and Wood).[67] Wood, for example, advances the notion of the "Nature's Trust" which reflects an understanding that some natural resources, including water, wildlife, and air, are so vital that they cannot be given over to private property ownership.[68] The Nature's Trust paradigm builds upon the ancient and enduring principle of the public trust doctrine (PTD).[69] In 1970, the PTD was finetuned by an American scholar, Joseph Sax, in one of the most cited articles of all time – *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*.[70]

52. Another scholarly view is that of Bosselmann who opines that States should jointly exercise trusteeship responsibilities for the global commons.[71] The global commons, are areas located outside national jurisdictions (such as the atmosphere, Antarctica, the oceans, and the Earth).[72] The Earth, for example, has been described as the single most important global commons that we have.[73] The global commons are considered *res nullius* (nobody's thing/not owned by anyone) and do not possess any legal status that could be used to protect against interferences such as greenhouse gas emissions or, in the case of oceans, acidification, pollution, overfishing and biodiversity loss.[74] There therefore needs to be a particular governance structure in place which protects the environment and/or environmental spaces that fall outside the scope of national boundaries. It is argued that States should play a pivotal role in this institution of

[67] Bosselmann, above n 59, at 81.

[68] Mary Christina Wood "Nature's Trust: Protecting an Ecological Endowment for Posterity" (2022) 52(4) Environmental Law 749 at 756. See also Mary Christina Wood *Nature's Trust – Environmental Law for a New Ecological Age* (Cambridge University Press, New York, 2014).

[69] Mary C Wood "You Can't Negotiate with a Beetle: Environmental Law for a New Ecological Age" (2010) 50(1) Natural Resources Journal 167 at 200.

[70] Joseph L Sax "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention" (1970) 68 Mich LR 471.

[71] Klaus Bosselmann *Earth Governance – Trusteeship of the Global Commons* (Edward Elgar Publishing Ltd, Cheltenham, 2015) at 254 and 267.

[72] Klaus Bosselmann "Environmental Trusteeship and State Sovereignty: Can They be Reconciled?" (2020) 11 (1–2) Transnational Legal Theory 47 at 54.

[73] David Bollier "The Commoners at Crottorf Castle (Part I)" (12 August 2009) On the Commons <www.onthecommons.org>.

[74] Bosselmann, above n 72, at 51.

environmental and ecological governance. For example, Professor Eckersley argues that the State is potentially the "most legitimate" social institution to assume the role of "public ecological trustee" which protects public goods, such as life-support services (such as ecosystems) and biodiversity.[75]

53. Similarly, Weiss refers to the concept of a planetary trust which recognises that we all share one Earth and have a fiduciary obligation to conserve it for future generations.[76] According to Weiss, the threats to future generations resulting from human activities – such as the anthropocentric emissions of greenhouse gases – make the normative framework of the planetary trust even more urgent when compared to past decades.[77] In her seminal treatise *In Fairness to Future Generations* Weiss argues that States serve as the guarantors for fulfilling planetary obligations to the present and future generations.[78] Weiss' planetary trust is akin to the Earth Trusteeship framework, advanced by Bosselmann and other scholars.[79]

54. The notion of States acting as trustees for the environment, or the Earth at large, is not novel under domestic and international law. An example of such an obligation is founded under South Africa's National Environmental Management Act which stipulates that the environment is held in "public trust" for the people and that it must be protected as "the people's common heritage". [80] This trust principle is further developed in South Africa's National Environmental Management Biodiversity Act which speaks to the "State's

[75] Robyn Eckersley *The Green State*, above n 54, at 12.

[76] Weiss "The Future of the Planetary Trust in a Kaleidoscopic World", above n 48, at 449.

[77] Weiss, above n 48, at 450.

[78] Edith Brown Weiss *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (The United Nations University, Tokyo and Transnational Publishers Inc, New York, 1989) at 86.

[79] Klaus Bosselmann *Earth Trusteeship and State Sovereignty* (Routledge, 2024) (forthcoming). See also Justin Sobion and Hans van Willenswaard (eds) *Reflections on Earth Trusteeship – Mother Earth and a New 21st-century Governance Paradigm* (INI Books, Nonthaburi, 2023). For further readings see *The Hague Principles for a Universal Declaration on Responsibilities for Human Rights and Earth Trusteeship* (2018) at <www.earthtrusteeship.world>.

[80] National Environmental Management Act 1998 (South Africa), s 2(4)(o).

trusteeship of biological diversity" and the fact that the State must "manage, conserve and sustain" South Africa's biodiversity and genetic resources.[81]

55. Under domestic constitutional law, the Constitution of Papua New Guinea expressly prescribes that natural resources and the environment are held "in trust for future generations." [82] Likewise, in Uganda the constitution enshrines that natural lakes, rivers, wetlands, forest reserves, national parks and land reserved for ecological and touristic purposes be held in trust by the State for the common good of all citizens.[83] The constitution of Bhutan goes even further than that of Papua New Guinea and Uganda in that it perceives all individuals as trustees. Article 5(1) of that constitution stipulates that: "Every Bhutanese is a trustee of the Kingdom's natural resources and environment for the benefit of the present and future generations."[84] Bhutan (one of the world's carbon-negative countries) therefore accepts that everyone in the Kingdom shares a universal responsibility to care for the environment for the present and future citizens.

56. A strong expression of this sense of universal responsibility to the environment is elucidated in the Earth Charter.[85] The history of the Earth Charter can be traced back to the 1987 Report of the World Commission on Environment and Development (or Brundtland Report) which recognised that there was a "need to consolidate and extend relevant legal principles in a new charter to guide State behaviour in the transition to sustainable development."[86] According to the Brundtland report, this new charter should "prescribe new norms for state and interstate behaviour needed to maintain livelihoods and life on our shared planet."[87] During the preparations for the 1992 Earth Summit in Rio de Janeiro, States had contemplated an Earth Charter as being that "new charter" that was envisioned by the Brundtland Report.[88] However, this new charter never materialised

[81] National Environmental Management Biodiversity Act 2004 (South Africa), s 3(a).

[82] Constitution of the Independent State of Papua New Guinea 1975 (Rev), preamble [4].

[83] Constitution of Uganda 1995 (with amendments), art 237(2)(b).

[84] Constitution of the Kingdom of Bhutan 2008, art 5(1).

[85] The Earth Charter (2000), preamble, under "Universal Responsibility" <www.earthcharter.org>.

[86] *Report of the World Commission on Environment and Development – "Our Common Future"* UN Doc A/42/427 (4 August 1987) at 324.

[87] At 324.

[88] Klaus Bosselmann *The Principle of Sustainability – Transforming Law and Governance* (2nd ed, Routledge, Oxon, 2017) at 3.

at the Rio Summit and it was left to global civil society to develop an Earth Charter as an "ethical framework for a just, sustainable and peaceful future."[89]

57. The Earth Charter was formally launched at the Peace Palace in The Hague in 2000.[90] The Earth Charter's preamble asserts that: "The global environment with its finite resources is a common concern of all peoples" and that: "The protection of Earth's vitality, diversity, and beauty is a *sacred trust*."[91] There are four core principles of the Earth Charter. In terms of relevance for this advisory opinion, Principle I focus is on "respect and care for the community of life" while Principle II speaks to Ecological Integrity and the need to "protect and restore the integrity of Earth's ecological systems, with special concern for biological diversity and the natural processes that sustain life." To build a sustainable community, the Earth Charter calls upon the nations of the world to "fulfill their obligations under existing international agreements."[92]

58. To date, the Earth Charter has been formally endorsed by over 2,000 organisations including UNESCO, the International Union for Conservation of Nature (IUCN), and several States.[93] With respect to UNESCO, in November 2019 the 40th General Conference adopted a resolution titled *Contribution of the Earth Charter to UNESCO activities concerning Education for Sustainable Development*.[94] This Resolution expressed that the Earth Charter includes "principles for a sustainable way of life as a common standard by which the conduct of individuals, organisations, businesses, governments and institutions is to be guided."[95]

59. Professor Bosselmann describes The Earth Charter's fundamental principles of respect and care for the community of life (Principle I) and ecological integrity (Principle II) as

[89] Bosselmann *The Principle of Sustainability*, above n 88, at 3.

[90] "History" Earth Charter <www.earthcharter.org>.

[91] The Earth Charter (2000), preamble (emphasis added).

[92] The Earth Charter (2000).

[93] Bosselmann *Earth Governance*, above n 71, at 250, at fn 90.

[94] *Contribution of the Earth Charter to UNESCO activities concerning Education for Sustainable Development* 40 C/Resolution 20 (2019).

[95] *Contribution of the Earth Charter to UNESCO activities concerning Education for Sustainable Development*, preamble.

"the most powerful expression of global responsibility to date."[96] For instance, the duty to protect the integrity of ecological systems has been expressed in no less than 25 international environmental agreements over the course of more than 50 years.[97] One of these agreements is the Paris Agreement, which acknowledges the importance of "ensuring the integrity of all ecosystems, including the oceans and the protection of biodiversity."[98] The Paris Agreement further mandates that States Parties, in accounting for atmospheric emissions, must promote, inter alia, environmental integrity.[99] A more current example is the *Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction* (2023) which provides that State Parties shall be guided by the "ecosystem approach" which "builds ecosystems resilience" through the maintenance of "ecosystem integrity" within the oceans.[100] The incorporation of principles of the Earth Charter into other international law agreements marks "a significant, even if very gradual, shift in humanity's ethical awareness".[101] By outlining State obligations in terms of trusteeship of the planet and maintaining ecological integrity, the Earth Charter represents a relevant international instrument for the Court's consideration under Resolution 77/276.

60. The concept of a State acting as a trustee of the environment has also arisen at the UNGA. In 1967 Arvid Pardo the Ambassador of Malta, in his stirring speech at the UNGA, urged delegates to create a special international agency to administer the oceans and the ocean floor situated beyond national jurisdiction. Pardo envisaged that this agency should not act as a sovereign but rather as "a trustee for all countries" over the oceans and ocean

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[96] Bosselmann *The Principle of Sustainability*, above n 88, at 190.

[97] These examples include: the Stockholm Declaration (at principle 3), *World Charter For Nature* A/RES/37/7 (at principle 4), the Rio Declaration (at principle 7), the Convention on the Conservation of Antarctic Marine Living Resources, (preamble) and the Paris Agreement. See also Klaus Bosselmann "The Next Step: Earth Trusteeship" (United Nations General Assembly, Seventh Interactive Dialogue on Harmony With Nature, New York, 21 April 2017).

[98] The Paris Agreement, preamble.

[99] Article 4 (13). See also art 6(1) and art 6(2) of The Paris Agreement.

[100] *Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction*, art 7(f) and art 7(h).

[101] Steven Rockefeller "The Transition to Sustainability" in Blaze Corcoran, P (ed.), *The Earth Charter in Action: Toward a Sustainable World* (Amsterdam, KIT Publishers) 165 at 167.

floor (which he described as the "common heritage of mankind").[102] In advancing this proposition, Pardo noted the growing strategic importance of the seabed and the need to restrict the national exploitation of vast mineral deposits and wealth (such as petroleum, natural gas, manganese nodules and phosphorite) on and beneath the ocean floor.[103]

61. Pardo's statement was influential to the UN Convention on the Law of the Sea (UNCLOS) declaring the international seabed Area (which includes the seabed, ocean floor, and subsoil beyond national jurisdiction) and its mineral resources as "the common heritage of mankind."[104] Under UNCLOS, all rights in the mineral resources of the Area are to be vested "in mankind as a whole" on whose behalf the International Seabed Authority is mandated to act.[105] Article 156(2) of UNCLOS makes it clear that all States Parties are *ipso facto* members of the International Seabed Authority. Redgwell, a renowned Oxford Professor of Public International Law, has described the common heritage of mankind principle as expressed in UNCLOS as: "one of the most developed applications of a trusteeship or fiduciary relationship in an environmental context."[106]

62. At least two Secretaries-General of the UN have advanced proposals for States to act as trustees for the environment. In 1997, Secretary-General Annan proposed to member States "a new concept of trusteeship" whereby the defunct UN Trusteeship Council be "reconstituted" as a forum through which Member States exercise their collective trusteeship for the integrity of the global commons – such as the oceans, atmosphere, and outer space.[107] Secretary-General Guterres, in his 2021 *Our Common Agenda* Report, acknowledged that we (States) need to improve on the protection and governance of the

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[102] *Official Records of the 1516th Meeting of the First Committee of the 22nd Session of the General Assembly* UN Doc A/C 1/PV 1515 (1 November 1967) at 1–2.

[103] *Official Records of the 1515th Meeting of the First Committee of the 22nd Session of the General Assembly*, above n 177, at 3–4.

[104] United Nations Convention on the Law of the Sea (UNCLOS), art 1(1), art 133 and art 136. Under art 1(1) of UNCLOS, the "Area" means: the seabed, ocean floor and subsoil beyond the limits of national jurisdiction. Article 136 asserts that The Area and its resources are the "common heritage of mankind".

[105] Article 137(2).

[106] Catherine Redgwell "Reforming the United Nations Trusteeship Council" in W Bradnee Chambers and Jessica F Green (eds) *Reforming International Environmental Governance: From Institutional Limits to Innovative Reforms* (United Nations University Press, Tokyo, 2005) 178 at 179.

[107] *Renewing the UN: A Programme for Reform – Report of the Secretary-General* GA Res A/51/950 (1997) at [85].

global commons, which he referred to as "the climate, the environment, and the planet."[108] Secretary-General Guterres thereby established a High-level Advisory Board (HLAB), led by two former Heads of State and Government,[109] to identify global public goods and other areas of common interest where governance improvements were most needed, and to propose options for how this could be achieved.[110] In response, the HLAB report (which preparation was ably supported by United Nations University Centre for Policy Research) stated that "our responsibilities to current and future generations can only be met if we act in *trusteeship for the planet.*"[111]

63. The ICJ has also previously pronounced on the notion of trusteeship in the context of the environment. This can be found in Separate Opinion of Judge Weeramantry (then Vice-President of the Court) in the decision of *Gabčíkovo-Nagymaros Project*.[112] When the concept of sustainable development came up before the Court, Judge Weeramantry referred to the ancient sermon of the monk Mahinda, son of Emperor Ashoka of India, to the King of Sri Lanka who was on a hunting expedition (around 223 BC). Mahinda preached the following sermon on Buddhism to the ears of the King, which eventually led to the King's conversion:[113]

> "O great King, the birds of the air and the beasts have as equal a right to live and move about in any part of the land as thou. The land belongs to the people and all living beings; thou art only the guardian of it."

64. Judge Weeramantry opined that this sermon constituted the "first principle of modern environmental law – the principle of trusteeship of earth resources". [114] To demonstrate

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[108] *Our Common Agenda – Report of the Secretary-General* (The United Nations, New York, 2021) at 17, 48 and 55.

[109] The Co-chairs of the HLAB were Ellen Johnson Sirleaf (former President of Liberia) and Stefan Löfven (former Prime Minister of Sweden).

[110] *Our Common Agenda – Report of the Secretary-General*, above n 108, at 4 and 65.

[111] HLAB *A Breakthrough for People and Planet: Effective and Inclusive Global Governance for Today and the Future* (United Nations University, New York, 2023) at 23 (emphasis added).

[112] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Judgment)* [1997] ICJ Rep 7 at 88.

[113] At 102. See also C G Weeramantry *Tread Lightly on the Earth – Religion, The Environment and the Human Future* (Stamford Lake (Pvt) Ltd, Pannipitiya, 2014) at 137.

[114] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Judgment)*, above n 112, at 102.

its importance, Judge Weeramantry referred to the principle of "trusteeship of earth resources" three times in his Separate Opinion.[115] Judge Weeramantry concluded:[116]

> We have entered an era of international law in which international law subserves not only the interests of individual States, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare.

65. As a result of these authorities, Grenada submits that State sovereignty includes fiduciary and trusteeship obligations towards its citizens in the context of both human rights and the environment. Under international law, human rights are intertwined with environmental rights. This point is further justified when one considers that the UNGA in 2022, adopted a resolution recognising the human right to a clean, healthy, and sustainable environment.[117]

C. Identifying the Breach of the Obligations – An Analysis of the Science

(I) Planetary Boundaries, the Earth System, and the Anthropocene

66. The planetary boundary (PB) framework, which was developed by Earth system scientists, provides a science-based analysis of how human perturbations destabilize the Earth system on a planetary scale.[118] Scientists define the Earth system as "the suite of interacting physical, chemical, and biological global-scale cycles (often called biogeochemical cycles) and energy fluxes which provide the conditions necessary for life on the planet."[119] The PB framework consists of nine processes which are clearly modified by human actions.[120] They comprise: climate change, novel entities (which include novel anthropogenic introductions to the Earth system such as synthetic chemicals and substances e.g.; microplastics, endocrine disruptors, organic pollutants

[115] At 102, 108 and 110.

[116] At 118.

[117] *The Human Right to a Clean, Healthy and Sustainable Environment* GA Res 76/300 (2022).

[118] Steffen and others, above n 17, at 736.

[119] Will Steffen and others *Global Change and the Earth System – A Planet Under Pressure* (Springer Berlin, Heidelberg, 2005) at 7.

[120] Steffen and others, above n 17, at 1259855-1.

and nuclear waste),[121] stratospheric ozone depletion, atmospheric aerosol loading, ocean acidification, biogeochemical flows, freshwater change, land system change and biosphere integrity.[122]

67. According to the most recent research on the PB framework, anthropocentric perturbation levels of six out of nine Earth system processes have been transgressed, namely, climate change, biosphere integrity, biogeochemical flows, land system change, freshwater change and novel entities.[123] Earth system scientists have recognised climate change and biosphere integrity as the "core" planetary boundaries which are fundamentally important for the functioning of the Earth system.[124] Climate change and biosphere integrity are so fundamental that if transgressed they are the only two with individual potential to push the Earth system into a new state – i.e. from the stable Holocene to the unstable Anthropocene state.[125] The term Anthropocene suggests that the Earth is now moving out of its current geological epoch, called the Holocene, and that human activity is largely responsible for this exit.[126]Some scientists claim that humanity is already well into the Anthropocene – the geological epoch where human pressures have put the Earth system on a trajectory that undermines critical life-support systems, and where significant societal impacts are already felt.[127] On 21 May 2019, a panel of scientists, established under the Anthropocene Working Group, officially recognised that we now live in the epoch of the Anthropocene, where there is an unmistakeable imprint of human activities on the planet.[128] The Anthropocene signifies that humans (*Anthropos*) activities

[121] Katherine Richardson and others "Earth Beyond Six of Nine Planetary Boundaries" (2023) 9(37) Science Advances 1 at 6.

[122] Richardson and others, above n 121, at 4.

[123] At 4.

[124] Steffen and others, above n 17, at 736.

[125] Will Steffen "The Planetary Boundaries Framework: Defining a Safe Operating Space for Humanity" in Paulo Magalhães (ed) and others *The Safe Operating Space Treaty – A New Approach to Managing Our Use of the Earth System* (Cambridge Scholars Publishing, Newcastle upon Tyne, 2016) 23 at 31.

[126] Will Steffen and others "The Anthropocene: Conceptual and Historical Perspectives" (2011) 369 (No 1938) Philosophical Transactions: Mathematical, Physical and Engineering Sciences 842 at 843.

[127] Johan Rockström and others "Safe and Just Earth System Boundaries" (2023) 619 Nature 102 at 102.

[128] Bharat H Desai (ed) *Our Earth Matters – Pathways to a Better Common Environmental Future* (IOS Press BV, Amsterdam, 2021) at v.

have profoundly altered the many conditions and processes on Earth.[129] This has led some scholars to argue that humans are now a force of nature (or "geological agents") in a geological sense.[130] As a result, a transgression of the climate system (or climate change) is sufficient to destabilize the Earth system.

68. Scholars, such as Kotzé and others, have boldly asserted that environmental law is unable to respond to socio-ecological realities that are associated with the Anthropocene's complex Earth system.[131] As a result, the Paris Agreement (and other international environmental law treaties) must not be read in isolation from the scientific understanding of the complex, and fascinating dynamics of the PB framework and the Earth system, and the role that we as humans play as a geological force on the planet.[132]

(II) The Science of Climate Change and the Caribbean

69. An expert report titled *The Science of Climate Change and the Caribbean* co-authored by three renowned Caribbean scientists (Adelle Thomas, Michelle Mycoo and Michael Taylor), has made it clear that human activities have unequivocally caused global warming.[133] Much of the Caribbean region shows statistically significant warming of the atmosphere and detectable trends in precipitation.[134] The most severe drought in the Caribbean region – felt between the period 2013 to 2016 – was strongly related to anthropocentric warming.[135] The report warns that up to 50 per cent of the year is projected to be very warm in the Caribbean at 1.5°C, with a further increase by up to 70

[129] Paul J Crutzen and Eugene F Stoermer "The 'Anthropocene'" in Libby Robin, Sverker Sörlin and Paul Warde (eds) *The Future of Nature – Documents of Global Change* (Yale University Press, New Haven, 2013) 483 at 484.

[130] Peter D Burdon *The Anthropocene – New Trajectories in Law* (Routledge, London, 2023) at 67.

[131] Louis J Kotzé "Earth System Law for the Anthropocene: Rethinking Environmental Law Alongside the Earth System Metaphor" (2020) 11(1-2) Transnational Legal Theory 75; Louise du Toit and Louis J Kotzé "Reimagining International Environmental Law for the Anthropocene: An Earth System Law Perspective" (2022) 11 Earth System Governance (Article 100132) 1 at 5.

[132] Carl Folke, Johan Rockström and Katherine Richardson "Obituary – Will Steffen, the Father of Earth System Science" (2023) 6 Global Sustainability 1.

[133] Adelle Thomas, Michelle Mycoo and Michael Taylor "Science of Climate Change and the Caribbean: Findings from the Intergovernmental Panel on Climate Change (IPCC) Sixth Assessment Cycle (AR6) (March 2024).

[134] Thomas, Mycoo, Taylor, above n 133, at 4.

[135] At 4.

days at 2°C versus 1.5°C.[136] Small islands of the Caribbean, like Grenada, have also experienced negative changes to terrestrial, freshwater and ocean ecosystems with adverse implications for biodiversity.[137] For example, in Grenada recent studies have confirmed increasing shoreline retreat and beach loss over the past decades mainly due to tropical cyclones and human disturbances.[138]

70. As already discussed at Part III of this submission, sea level rise has contributed to the loss of ancestral graves by the people of Carriacou. The report adds that on Carriacou, culturally and historically significant archaeological sites (such as those found in Grand Bay) are also being lost due to coastal erosion caused by a combination of sand mining and extreme climate-ocean events exacerbated by sea level rise.[139] Grand Bay is one of the largest and archaeologically richest sites in the Caribbean region. Data (from 2006) indicated that the loss of cultural remains due to natural (sea level rise) and human causes is catastrophic and that these prehistoric sites will likely be destroyed within the next two decades.[140]

71. In a study of sea level rise impacts on insular biodiversity hotspots, it was reported that the Caribbean islands (along with Sundaland and the Philippines) were projected to suffer the most habitat loss.[141] The Caribbean is projected to have between 8.7 per cent and 49.2 per cent of its islands entirely submerged, respectively, from 1-m to 6-m sea-level rise.[142] As a result, there is growing concern that some island nations like Grenada, may become uninhabitable due to rising sea levels and climate change, with implications for relocation, sovereignty, and statehood.[143]

[136] At 22.

[137] At 4.

[138] At 16.

[139] At 19–20.

[140] Scott M Fitzpatrick, Michiel Kappers and Quetta Kaye "Coastal Erosion and Site Destruction on Carriacou, West Indies" (2006) 31 (3) Journal of Field Archaeology 251 at 251.

[141] Thomas, Mycoo, Taylor, above n 133, at 27.

[142] At 27.

[143] At 22.

72. In terms of temperature rise, SIDS across the globe contribute approximately only 0.5 per cent of historical cumulative emissions.[144] Thus SIDS, including Grenada and the wider Caribbean region, are disproportionately affected by current impacts and future risks of climate change.[145] Surpassing 1.5°C is therefore a critical threshold for Grenada, with escalating impacts of climate change resulting in limits in the ability of people and nature to adapt.[146] Global warming of 1.5°C is expected to prove challenging for SIDS, like Grenada, that are already experiencing impacts associated with climate change (high confidence).[147] Even at 1.5°C of global warming, the compounding impacts of changes in rainfall, temperature, tropical cyclones and sea level are likely to be significant across multiple natural and human systems.[148] Unfortunately, current emissions as well as future emissions planned by countries and detailed in their submissions to the UNFCCC make it likely that global warming will exceed 1.5°C this century.[149]

73. The science is very clear. Caribbean SIDS have made negligible contributions to the emissions that drive current and future climate change, and they are disproportionately affected by current impacts and future risks of climate change.[150] The expert report titled "The Science of Climate Change and the Caribbean" is hereby annexed (at Annex 1) for further examination and study.

D. <u>The Legal Consequences</u>

74. In response to the legal consequences (part b of the question), Grenada notes the respective provisions in the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* adopted by the International Law Commission (ILC) which speaks to the obligation of a State responsible for an internationally wrongful act to continue to perform all obligations required by international law (article 29), to cease any continuing unlawful acts and to offer appropriate assurances and guarantees of non-repetition (article 30), and to make full reparation (article 31), including restitution (article 35),

[144] At 4.

[145] At 4.

[146] At 5

[147] At 22.

[148] At 22.

[149] At 4–5 and 9.

[150] At 5.

compensation (article 36), and satisfaction (article 37, e.g. an acknowledgment of the breach, an expression of regret or a formal apology).[151]

75. Regarding the issue of compensation (at article 36), Grenada refers to the ICJ judgment of *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* where the Court made it unequivocally clear that the damage to the environment, and the consequent impairment or loss of the ability of the environment to provide goods and services, is compensable under international law.[152] In the same decision, the ICJ acknowledges that the payment for restoration accounts for the fact that natural recovery may not always suffice to return an environment to the state in which it was before the damage occurred. In these instances, restoration measures may be required to return the environment to its prior condition, in so far as that is possible.[153]

76. In determining the actual loss of the damage of the environment, the Court in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* preferred the ecocentric approach of valuing **"the ecosystem as a whole"**, rather than attributing values to specific categories of environmental goods and services and estimating recovery periods for each of them.[154]

77. Grenada reserves its right to further elaborate upon the legal consequences of the significant harm caused to the climate system and other parts of the environment in its Reply and/or at the oral hearing of these advisory opinion proceedings.

[151] *Report of the International Law Commission on the work of its fifty-third session* [2001] vol 2, pt 2 YILC 31.

[152] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) Compensation, Judgement, I.C.J. Reports 2018,* p 15 at [42].

[153] At [43].

[154] At [78] (emphasis added).

V Conclusion

78. Climate change is an unprecedented challenge of exponential proportions and the well-being of present and future generations of humankind depends on an immediate response by all States.[155] Scientists assert that "turbo-charged" climate change is driving the prolonged period of record temperatures currently baking much of the planet.[156] In 2023, annual average global temperature was 1.45 ± 0.12 °C above pre-industrial levels.[157] In January 2024, the World Meteorological Organization (WMO) officially confirmed that 2023 is the warmest year on record by a huge margin, and that 2024 is expected to be possibly even warmer.[158] At a recent meeting in Guyana in February 2024, Heads of Government of CARICOM unanimously declared that despite the many commitments and promises made by our international partners, the window of opportunity to limit global warming to 1.5°C above pre-industrial levels is rapidly closing.[159] As this submission demonstrates, even a temperature increase of 1.5°C above pre-industrial levels could have severe socio-economic repercussions, never before seen in the history of Grenada. Based on the foregoing, it is difficult to dispute that anthropocentric emissions of greenhouse gases lead to global warming and that this is largely responsible for the damage done to the climate system and other parts of the environment.

79. Grenada, like all other CARICOM States, remain on the frontline of the global climate crisis.[160] For example, extreme weather events, such as hurricanes, will continue to have a negative economic impact on our local nutmeg industry. Sea level rise will slowly and gradually, swallow up our families' graves and our nation's cultural artefacts. The facts are clear. Even though Grenada contributes negligibly to the global emissions of

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[155] *Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change* GA Res 77/276 (2023), preamble.

[156] "Longer heatwaves driven by 'turbo-charged' climate change, says scientists" The Guardian (online ed, London, 17 July 2023).

[157] "WMO confirms that 2023 smashes global temperature record" (12 January 2024) World Meteorological Organization <www.wmo.int>.

[158] "WMO confirms that 2023 smashes global temperature record", above n 157.

[159] "Communiqué – 46th Regular Meeting of the Conference of Heads of Government of CARICOM" (1 March 2024) CARICOM <www.hgc.caricom.org>.

[160] "Communiqué – 46th Regular Meeting of the Conference of Heads of Government of CARICOM", above n 159.

greenhouse gases, it is disproportionately affected by current impacts and future risks of climate change.

80. The responsibility to protect the Earth and the climate system goes beyond the local and extends to the global. We are now facing a triple planetary crisis, and States must redouble their efforts in addressing the root causes of climate change. Due to the dire state of the climate system all States need to recognise and accept that they have a universal obligation to hold the environment, and the Earth itself, in trust for the benefit of present and future generations. The choice is ours. We must either rapidly transform our energy systems away from fossil fuels into renewable and other sustainable forms of energy (e.g. solar, wind and hydro power) or continue to allow the planet to become more and more unhealthy and unhabitable.[161]

81. For these reasons, an ICJ advisory opinion on climate change is critical since it would clearly demarcate in international law what are our legal obligations to protect the climate system and other parts of the environment, and what are the legal consequences if we fail to do so.

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Mr Desmond Simon, Charge d' Affaires, Embassies of the Eastern Caribbean States and Missions to the European Union, Organisation of Eastern Caribbean States

21st March 2024

[161] Bernie Sanders "It's OK to be Angry about Capitalism" (Allen Lane, London, 2023) at 275.

List of Annexes

Annex 1 – The Science of Climate Change and the Caribbean: Findings from the Intergovernmental Panel on Climate Change (IPCC) Sixth Assessment Cycle (AR6) by Dr Adelle Thomas, Professor Michelle Mycoo and Professor Michael Taylor (5 March 2024).

Annex 2 – The map of Grenada.

Annex 3 – Witness statement of Kennisha Douglas on the disappearance of ancestral graves in Carriacou.