

**INTERNATIONAL COURT OF JUSTICE**

**OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE  
(REQUEST FOR AN ADVISORY OPINION)**



**WRITTEN STATEMENT OF AUSTRALIA**

**22 MARCH 2024**

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## CHAPTER 1. INTRODUCTION AND PRELIMINARY OBSERVATIONS

1.1 By Resolution A/RES/77/276, adopted on 29 March 2023, the United Nations General Assembly ('UNGA') requested an advisory opinion of the International Court of Justice ('ICJ' or 'the Court') on the obligations of States in respect of climate change, specifically:

Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment,

(a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations;

(b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:

(i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?

(ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?

1.2 Australia was proud to co-sponsor, alongside 131 others, Resolution 77/276 requesting the advisory opinion, which was adopted without a vote.<sup>1</sup> In its statement during the adoption of the Resolution,<sup>2</sup> Australia:

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<sup>1</sup> UN GAOR, 77<sup>th</sup> sess, 64<sup>th</sup> plen mtg, Agenda Item 70, UN Doc A/77/PV.64 (29 March 2023) p. 4 (UN Dossier No. 3) ('*Consideration of the Request for an Advisory Opinion*').

<sup>2</sup> Ibid pp. 14-15 (Australia).

- (a) commended the longstanding leadership of Pacific Island States on global responses to climate change and recognised, in particular, Vanuatu’s role in initiating the process leading to the adoption of the Resolution to request this advisory opinion; and
- (b) recalled that, as Pacific Islands Forum Leaders had called for in their July 2022 Communiqué,<sup>3</sup> and reaffirmed in February 2023,<sup>4</sup> the Resolution seeks an advisory opinion on the obligations of all States, including all major emitters, past, present and future.

1.3 Australia wishes to avail itself of the opportunity afforded by the Court to make a written statement on the questions submitted to the Court for an advisory opinion. The following observations are submitted in accordance with the Orders of the Court of 20 April 2023, 4 August 2023 and 15 December 2023.

#### **A. SUMMARY AND STRUCTURE OF AUSTRALIA’S STATEMENT**

1.4 Australia’s submission of this written statement reflects its ongoing commitment to addressing the grave challenges posed by anthropogenic emissions of greenhouse gases upon the climate system (which hereafter, for convenience, is referred to as ‘climate change’). Australia’s statement proceeds as follows:

**Chapter 1** sets out Australia’s commitment to addressing the grave challenges posed by climate change (**Section B**), its submissions on the Court’s jurisdiction and discretion to render the advisory opinion (**Section C**) and its interpretation on the scope of the questions posed to the Court (**Section D**).

#### Addressing paragraph (a) of the question:

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<sup>3</sup> Pacific Islands Forum, *Fifty-First Pacific Islands Forum Communiqué* (Forum Communiqué, 14 July 2022) para. 46 <<https://forumsec.org/publications/report-communique-51st-pacific-islands-forum-leaders-meeting>> (*‘Fifty-First Pacific Islands Forum Communiqué’*). All website references are accurate as at 21 March 2024.

<sup>4</sup> Pacific Islands Forum, *Communiqué of the 2023 Pacific Islands Forum Special Leaders Retreat* (Forum Communiqué, 24 February 2023) para. 27(i) <<https://forumsec.org/publications/communique-2023-pacific-islands-forum-special-leaders-retreat>>.

- **Chapter 2** explains that the international community has elected to respond to climate change by pursuing collective action through and under the United Nations Framework Convention on Climate Change ('UNFCCC') and the Paris Agreement.<sup>5</sup> Australia submits that these two treaties are the principal source of States' obligations under international law in respect of climate change.
- **Chapter 3** addresses other related treaty regimes, focusing on the *United Nations Convention on the Law of the Sea* ('UNCLOS'),<sup>6</sup> and also addressing environmental law treaties and international human rights law.
- **Chapter 4** considers relevant customary international law principles, including the principle of prevention, and the standard of due diligence.

Addressing paragraph (b) of the question:

**Chapter 5** commences by identifying the relevance of the general rules on State responsibility when determining the legal consequences that flow from any failure by States to comply with their obligations with respect to climate change. It then identifies certain challenges related to issues of causation which underpin the decision of the international community of States to address climate change collectively and cooperatively, which they have done principally through the framework agreed in the UNFCCC and the Paris Agreement.

- 1.5 Australia notes the reference in the question to the 'climate system and other parts of the environment'. Having regard to the definition of 'climate system' in Article 1(3) of the UNFCCC, being 'the totality of the atmosphere, hydrosphere, biosphere and the geosphere and their interactions', Australia refers to 'climate

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<sup>5</sup> *United Nations Framework Convention on Climate Change*, opened for signature 20 June 1992, 1771 UNTS 107 (entered into force 21 March 1994) (UN Dossier No. 4) ('UNFCCC'); *Paris Agreement*, opened for signature 22 April 2016, 3156 UNTS (entered into force 4 November 2016) (UN Dossier No. 16) ('Paris Agreement').

<sup>6</sup> *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) (UN Dossier No. 45) ('UNCLOS').

system’ in these submissions as encapsulating both the ‘climate system’ as well as ‘other parts of the environment’.

**B. AUSTRALIA’S COMMITMENT TO ADDRESSING CLIMATE CHANGE**

- 1.6 Australia recognises the importance of taking urgent action to address climate change. Climate change is already having significant impacts in Australia and the Pacific region, and the impacts will increase as the temperature of the planet rises. People in Australia are living, and future generations of Australians will live, with the consequences of climate change. Parts of Australia are susceptible to extreme temperatures, rising sea levels and climate-exacerbated disasters.
- 1.7 First Nations Australians have been effective stewards of the lands, skies and waters of Country for millennia. It is in the context of this longstanding connection with Country that Australia recognises the importance of taking urgent action to address climate change.
- 1.8 Addressing climate change is a fundamental and pressing matter for all States, in particular low-lying and other small island States, countries with fragile mountainous ecosystems and countries with low-lying coastal, arid and semi-arid areas or areas liable to floods, drought and desertification.
- 1.9 Australia acknowledges the extent of the challenge posed by climate change and recognises that effective action must be undertaken collectively. The UNFCCC and the Paris Agreement provide the cooperative international framework to address climate change and its impacts. The near universal membership of these treaties indicates a very high level of consensus on the fact that climate change is a challenge that is best addressed collectively and cooperatively. The Paris Agreement was adopted to strengthen the international response to climate change, recognising that further action is required as new challenges have emerged and as climate science and technologies have developed.
- 1.10 Australia is resolutely committed to achieving the goals of the Paris Agreement, including holding the increase in the global average temperature to well below 2

degree celsius above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 degree celsius.<sup>7</sup> In pursuit of that commitment, Australia is cooperating internationally to accelerate climate action and taking ambitious domestic action to reduce emissions and decarbonise its economy:

- (a) In June 2022, Australia updated its Paris Agreement Nationally Determined Contribution ('NDC'), committing to strengthen its emission reduction targets for 2030 to 43 per cent below 2005 levels, and reaffirming its net zero by 2050 target.<sup>8</sup>
- (b) In September 2022, the Australian Government passed the *Climate Change Act 2022*, enshrining its NDC targets in legislation and underlying a suite of implementing policies.<sup>9</sup>
- (c) In 2023, the Australian Government announced the expansion of the Capacity Investment Scheme. This will enable new renewable energy generation and storage and provides certainty for investors, marking a significant step towards the achievement of Australia's goal of 82 per cent renewable energy by 2030. The Australian Government has also committed twenty billion dollars (AUD \$20 billion) to Rewiring the Nation to deliver affordable, reliable renewable energy to cities, towns and communities and help deliver Australia's NDC targets.
- (d) The Australian Government has recently reformed its Safeguard Mechanism to put Australia's largest industrial emitters on a pathway to net zero by 2050, by placing emissions limits (known as baselines) on industrial facilities that emit more than 100,000 tonnes of carbon dioxide

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<sup>7</sup> *Paris Agreement* (n 5) Article 2(1).

<sup>8</sup> Commonwealth of Australia, *Australia's Nationally Determined Contribution* (Communication to the United Nations Framework Convention to Climate Change, pursuant to Article 4 of the Paris Agreement, 16 June 2022) p. 3 <<https://unfccc.int/sites/default/files/NDC/2022-06/Australias%20NDC%20June%202022%20Update%20%283%29.pdf>>.

<sup>9</sup> *Climate Change Act 2022* (Cth) section 10 <<https://www.legislation.gov.au/C2022A00037/latest/text>>. The Act legislates Australia's greenhouse gas emission reduction targets of 43% below 2005 levels by 2030 and net zero emissions by 2050.



equivalent per year. Additionally, the Government is developing sectoral plans which look beyond 2030 covering electricity and energy, transport, industry, resources, the built environment, and agriculture and land.

(e) In November 2023, the Australian Government presented its second Annual Statement on Climate Change to the Parliament, which outlined policies to expand renewable energy sectors such as solar, hydrogen and offshore wind production, highlighted substantial investments into Australia's clean energy transformation and affirmed Australia's ambitions to rapidly decarbonise the electricity system.<sup>10</sup>

1.11 Australia is also undertaking a National Climate Risk Assessment to understand the risks and impacts it faces.<sup>11</sup> To improve resilience and disaster readiness in communities, Australia has finalised the Second National Action Plan under the National Disaster Risk Reduction Plan and is developing a complementary National Adaptation Plan.<sup>12</sup> These plans will improve climate response effectiveness and deliver better social and environmental outcomes.

1.12 Australia is working to support an orderly transition to net zero by 2050 and to unlock green trade and investment opportunities in the Indo-Pacific region, while ensuring reliable energy access and security. Australia participates in international partnerships relevant to clean transition and climate change, including Mission Innovation, the Clean Energy Ministerial, the Leadership

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<sup>10</sup> Australian Government Department of Climate Change, Energy, the Environment and Water, *Annual Climate Change Statement 2023* (Statement, 30 November 2023) pp. 11-27, sections 1 and 2 <<https://www.dcceew.gov.au/sites/default/files/documents/annual-climate-change-statement-2023.pdf>>.

<sup>11</sup> Australian Government Department of Climate Change, Energy, the Environment and Water, 'National Climate Risk Assessment and Adaptation Plan' (Web Page, 19 October 2023) <<https://www.dcceew.gov.au/climate-change/policy/adaptation/ncra>> ('*Australia's National Climate Risk Assessment and Adaptation Plan*').

<sup>12</sup> Ibid; National Emergency Management Agency, *The Second National Action Plan to implement the National Disaster Risk Reduction Framework* (Report, 25 August 2023) <[https://nema.gov.au/sites/default/files/inline-files/28605%20NEMA%20Second%20Action%20Plan\\_V10\\_A\\_1.pdf](https://nema.gov.au/sites/default/files/inline-files/28605%20NEMA%20Second%20Action%20Plan_V10_A_1.pdf)>.

Group for Industry Transition and the Climate Club.<sup>13</sup> Australia also supports global efforts to enhance adaptation and resilience, particularly in countries across the Indo-Pacific. This includes support for countries to mitigate the risk of, prepare for, and respond to, climate-related disasters, extreme weather events and slow onset climate events. Australia is pleased to support Pacific-led initiatives such as Weather Ready Pacific to enhance access to early warning systems.<sup>14</sup> Our climate resilient agriculture partnerships address long-term food insecurity challenges and resilience: through supporting adaptation to reduce farmers' exposure to short-term climate risks, while also building resilience, so they can cope with longer-term stresses; and through targeting mitigation, aiming to reduce greenhouse gas emissions associated with agricultural production.<sup>15</sup> Australia is partnering with Southeast Asia to respond to infrastructure challenges to maintain growth momentum, tackle poverty and respond to climate change.<sup>16</sup> Climate resilient infrastructure is also a shared priority with our Pacific partners, such as supporting off-grid and community scale renewable energy in remote and rural parts of the Pacific.<sup>17</sup>

- 1.13 In order to support the capacity of other States to increase climate resilience, mitigation and adaptation, Australia is delivering on climate finance

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<sup>13</sup> Australian Government Department of Climate Change, Energy, Environment and Water, 'International climate action' (Web Page, 16 November 2023) <<https://www.dcceew.gov.au/climate-change/international-climate-action>>; Prime Minister The Hon Anthony Albanese MP and Chancellor of Germany Olaf Scholz, 'Joint Press Statement: Australia Joins Global Climate Change Club' (Press Statement, 10 July 2023) <<https://www.pm.gov.au/media/joint-press-statements>>.

<sup>14</sup> Senator the Hon Penny Wong, Minister for Foreign Affairs, 'Australia pledges AUD 30 million support for Weather Ready Pacific' (Speech, Pacific Islands Forum Special Leaders Retreat, 20 March 2023) <<https://www.sprep.org/news/australia-pledges-aud-30-million-support-for-weather-ready-pacific>>.

<sup>15</sup> Australian Government Department of Foreign Affairs and Trade, 'Climate resilient agricultural development and food security' (Web Page) <<https://www.dfat.gov.au/development/topics/development-issues/climate-resilient-agricultural-development-food-security>>.

<sup>16</sup> Australian Government Department of Foreign Affairs and Trade, 'Deepening engagement with Southeast Asia' (Web Page) <<https://www.dfat.gov.au/publications/countries-economies-and-regions/deepening-engagement-southeast-asia>>.

<sup>17</sup> Australian Government Department of Foreign Affairs and Trade, 'Pacific Regional – Australian Infrastructure Financing for the Pacific' (Web Page) <<https://www.dfat.gov.au/geo/pacific/development-assistance/australian-infrastructure-financing-facility-for-the-pacific>>.

commitments under the Paris Agreement. Australia's contribution to the collective one hundred billion dollar (USD \$100 billion) global climate finance commitment has been strengthened and Australia is on track to deliver three billion dollars (AUD \$3 billion) in the years 2020-2025, of which one billion and three hundred million (AUD \$1.3 billion) has been committed to support countries in the Pacific region to build climate resilience and transition their economies. For example, Australia partners with Pacific governments under the Climate and Oceans Support Program framework to prepare for climate extremes and communicate seasonal forecasts, and in programming of more than one billion dollars (AUD \$1 billion) of project finance, including for significant renewable energy projects, under the Australian Infrastructure Financing Facility for the Pacific.<sup>18</sup>

1.14 Australia is also assisting the Pacific by delivering climate finance directly to the region to respond to the climate crisis. At the 28<sup>th</sup> United Nations Climate Change Conference ('**COP28**'), Australia announced it would contribute a foundational one hundred million dollars (AUD \$100 million) to the Pacific Resilience Facility, and that it would re-join the Green Climate Fund with a fifty million dollar (AUD \$50 million) contribution. These contributions will support Pacific priorities including climate adaptation, disaster preparedness, nature-based solutions, and projects which respond to loss and damage.<sup>19</sup>

1.15 Australia is supporting efforts to progress international cooperation and collaboration to avert, minimise, address and respond to loss and damage arising from the adverse impacts of climate change. Australia welcomed the full adoption at COP28 of the UNFCCC Transitional Committee's recommendations

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<sup>18</sup> Australian Infrastructure Financing Facility for the Pacific, 'Australian Infrastructure Financing Facility for the Pacific Update 2022/23' (Report, 19 December 2023) <[https://www.aifffp.gov.au/sites/default/files/2024-01/aifffp\\_annual\\_update\\_2022-2023.pdf](https://www.aifffp.gov.au/sites/default/files/2024-01/aifffp_annual_update_2022-2023.pdf)>.

<sup>19</sup> Senator the Hon Penny Wong, Minister for Foreign Affairs, The Hon Chris Bowen MP, Minister for Climate Change and Energy, The Hon Pat Conroy MP, Minister for International Development and the Pacific, Senator the Hon Jenny McAllister, Assistant Minister for Climate Change and Energy, 'Joint media release: Supporting the Pacific family at COP28 to respond to climate change' (Media Release, 8 December 2023) <<https://minister.dccew.gov.au/bowen/media-releases/joint-media-release-supporting-pacific-family-cop28-respond-climate-change>>.

on the design of a new fund and funding arrangements to assist developing countries particularly vulnerable to the impacts of climate change.<sup>20</sup> Australia contributed actively to this process through its membership of the Transitional Committee, and will continue to support global efforts to operationalise the fund and funding arrangements.

- 1.16 In recognition of the strong nexus between environmental protection and climate change, Australia has committed to protecting and conserving 30 per cent of Australia’s land and 30 per cent of oceans by 2030 (‘30 by 30’) under the Kunming-Montreal Global Biodiversity Framework,<sup>21</sup> and through its membership of the UK-led Global Ocean Alliance and the International Steering Committee of the High Ambition Coalition for Nature and People.<sup>22</sup>
- 1.17 Australia recognises that climate change poses the single-greatest threat to the livelihoods, security and well-being of the peoples of small island States, in particular Pacific Island States.<sup>23</sup> In this respect, Australia seeks to ensure that Pacific voices and perspectives are at the centre of global discussions on climate change. For example, Australia endorsed the *Declaration on Preserving Maritime Zones in the Face of Climate Change-Related Sea-Level Rise* by Pacific

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<sup>20</sup> *Draft decision on the operationalization of the new funding arrangements, including a fund for responding to loss and damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4*, UN Doc FCCC/CP/2023/9–FCCC/PA/CMA/2023/9 (30 November–12 December 2023) Preamble para. 6 and para. 27 (‘*Draft decision on the operationalization of the new funding arrangements*’).

<sup>21</sup> Australian Government Department of Climate Change, Energy, the Environment and Water, ‘A New Global Biodiversity Framework: Kunming-Montreal Global Biodiversity Framework’ (Web Page, 17 January 2023) <<https://www.dcceew.gov.au/environment/biodiversity/international/un-convention-biological-diversity/global-biodiversity-framework>>; Australian Government Department of Foreign Affairs and Trade ‘International cooperation on climate change’ (Web Page) <<https://www.dfat.gov.au/international-relations/themes/climate-change/international-cooperation-on-climate-change>>.

<sup>22</sup> Australian Government Department of Foreign Affairs and Trade, ‘Australia and the Pacific: partnering to support sustainable oceans and livelihoods’ (Web Page) <<https://www.dfat.gov.au/geo/pacific/engagement/supporting-sustainable-oceans-and-livelihoods>>; Australian Government Department of Climate Change, Energy, the Environment and Water, ‘Ocean Sustainability and Climate Change’ (Web Page, 29 September 2023) <<https://www.dcceew.gov.au/climate-change/policy/ocean-sustainability>>.

<sup>23</sup> Pacific Islands Forum, *Boe Declaration on Regional Security* (Declaration, 5 September 2018) <<https://forumsec.org/publications/boe-declaration-regional-security>>.

Islands Forum Leaders in 2021.<sup>24</sup> The Declaration provides that maritime zones, once established and notified in accordance with UNCLOS, continue to apply without reduction notwithstanding any physical changes connected to climate change-related sea-level rise.

- 1.18 Australia was also proud to join with Pacific Island Forum members in November 2023 to endorse the *Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate-Change-Related Sea-Level Rise*.<sup>25</sup> The 2023 Declaration affirms that international law supports a presumption of continuity of statehood and also declares that Pacific Island Forum Members individually and collectively bear an important responsibility to protect persons affected by climate change-related sea-level rise. This includes with respect to their human rights, political status, culture, cultural heritage, identity and dignity, and meeting essential needs.
- 1.19 On 9 November 2023, Australia and Tuvalu signed the *Australia-Tuvalu Falepili Union*.<sup>26</sup> It is a unique agreement that responds to modern challenges, including the existential threat posed by climate change. Through the *Falepili Union*, Australia recognises that the statehood and sovereignty of Tuvalu will continue, and the rights and duties inherent thereto will be maintained, notwithstanding the impact of climate change-related sea-level rise. Australia and Tuvalu commit to working together to help the citizens of Tuvalu to stay in their homes with safety and dignity. Australia has also agreed to arrange for a special human mobility pathway to enable citizens of Tuvalu to study, work and live in Australia, and access Australian education, health, and key income and family support on

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<sup>24</sup> Pacific Islands Forum, *Declaration on Preserving Maritime Zones In the Face of Climate Change-Related Sea-Level Rise* (Declaration, 6 August 2021) p. 3  
<<https://forumsec.org/publications/declaration-preserving-maritime-zones-face-climate-change-related-sea-level-rise>>.

<sup>25</sup> Pacific Islands Forum, *Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Sea-Level Rise* (Declaration, 9 November 2023)  
<<https://forumsec.org/sites/default/files/2024-02/2023%20PIF%20Declaration%20on%20Statehood%20and%20Protections%20of%20Persons.pdf>>.

<sup>26</sup> *Australia-Tuvalu Falepili Union*, signed 10 November 2023 (not yet in force)  
<<https://www.dfat.gov.au/sites/default/files/australia-tuvalu-falepili-union-treaty.pdf>>.

arrival. To support Tuvalu's climate adaptation interests, Australia will provide additional funding for the Tuvalu Coastal Adaptation Project, which will expand Funafuti's land by around 6 per cent, to help Tuvaluans live and thrive at home and preserve their culture.<sup>27</sup>

- 1.20 Australia was also an active proponent of the *Global Compact for Safe, Orderly and Regular Migration*, which includes among its objectives action to 'minimize the adverse drivers and structural factors that compel people to leave their country of origin', including 'natural disasters, the adverse effects of climate change, and environmental degradation'.<sup>28</sup>
- 1.21 Australia commends the longstanding leadership of Pacific Island States on global responses to climate change and recognises, in particular, Vanuatu's initiation of the process leading to the adoption of the UNGA resolution to request this advisory opinion. This advisory opinion has been strongly supported by Pacific Island Forum Leaders who called for an advisory opinion on the obligations of States under international law, including all major emitters past, present and future, in order to ensure maximum impact in terms of limiting the temperature increase to 1.5 degrees celsius.<sup>29</sup>
- 1.22 The IPCC has found that, in order for the collective actions of all States to ensure that 1.5 degrees is kept within reach, global greenhouse emissions need to peak before 2025 at the latest.<sup>30</sup> Australia recognises that this does not imply peaking in all countries within this time frame. However, the facts compel the conclusion that global peaking of emissions cannot be achieved without the absolute

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<sup>27</sup> Prime Minister The Hon Anthony Albanese MP, 'Strengthening regional ties through the Pacific Islands Forum' (Media Release, 10 November 2023) <<https://www.pm.gov.au/media/strengthening-regional-ties-through-pacific-islands-forum>>.

<sup>28</sup> UN GAOR 73<sup>rd</sup> sess, 60<sup>th</sup> plen mtg, Agenda Items 14 and 119, UN Doc A/RES/73/195 (19 December 2018) para. 18 (UN Dossier No. 247).

<sup>29</sup> *Fifty-First Pacific Islands Forum Communiqué* (n 3) para. 46.

<sup>30</sup> Intergovernmental Panel on Climate Change (IPCC), *Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers*, (2023) IPCC AR6 SYR, p. 20 <[https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC\\_AR6\\_SYR\\_SPM.pdf](https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf)> (UN Dossier No. 78) ('*IPCC AR6 Summary for Policymakers*').

reduction in emissions by all major emitters, including in particular the prompt peaking and reduction of emissions by major emitters whose emissions are yet to reach their peak.<sup>31</sup> That factual reality provides an important part of the context for the Court's consideration of States' legal obligations.

## C. JURISDICTION AND DISCRETION

1.23 Before turning to the substance of the questions, the Court must consider two matters.<sup>32</sup> The first is whether it has jurisdiction to give the advisory opinion requested by the UNGA. If the Court concludes that it has jurisdiction, the second is whether it should exercise its discretion to render the advisory opinion sought in this case. We address each of these matters in turn below.

### 1. Jurisdiction of the Court

1.24 The Court's competence to give an advisory opinion on 'any legal question' at the request of the UNGA is established under Article 96 of the Charter of the United Nations ('UN Charter') and Article 65 of the Statute of the International Court of Justice ('ICJ Statute'). It is well established that the Court's advisory jurisdiction is limited to 'legal questions',<sup>33</sup> and the Court has held that '[i]f the question is not a legal one, the Court has no discretion in the matter; it must decline to give the opinion requested.'<sup>34</sup>

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<sup>31</sup> Intergovernmental Panel on Climate Change (IPCC), *Synthesis Report of the IPCC Sixth Assessment Report (AR6) (2023)* IPCC AR6 SYR  
<[https://report.ipcc.ch/ar6syr/pdf/IPCC\\_AR6\\_SYR\\_LongerReport.pdf](https://report.ipcc.ch/ar6syr/pdf/IPCC_AR6_SYR_LongerReport.pdf)>.

<sup>32</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 111, para. 54 ('Chagos Advisory Opinion'); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 232, para. 10 ('Nuclear Weapons Advisory Opinion'); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 144, para. 13 ('Construction of a Wall Advisory Opinion'); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 412, para. 17 ('Kosovo Advisory Opinion').

<sup>33</sup> *Chagos Advisory Opinion* (n 32) p. 112, para. 57.

<sup>34</sup> *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155.

1.25 The request for an advisory opinion in this matter was made by the UNGA, in accordance with Article 96 of the UN Charter. Australia considers that the questions transmitted to the Court constitute ‘legal questions’ for the purposes of Article 65(1). The question in paragraph (a) concerns the *legal obligations of States* under international law regarding protection of the climate system from climate change, while the question in paragraph (b) concerns the *legal consequences for States* where they have caused significant harm to the climate system. Australia thus considers that the Court has jurisdiction to give the advisory opinion on the questions asked.

## 2. Exercise of the Court’s Discretion

1.26 The Court has discretion to decline to give an advisory opinion even if the conditions of jurisdiction are met.<sup>35</sup> However, the Court has clarified that ‘only “compelling reasons” may lead the Court to refuse its opinion in response to a request falling within its jurisdiction’.<sup>36</sup>

1.27 Australia submits that there is no reason that the Court, in exercising its discretion, should not give an opinion in this case. As noted above, over 130 States co-sponsored Resolution 77/276 requesting the advisory opinion.<sup>37</sup> The request reflects the broad consensus that climate change is an urgent global challenge, and Australia welcomes an advisory opinion from the Court that clarifies the obligations of States under international law to ensure the protection of the climate system.

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<sup>35</sup> See Article 65(1) ICJ Statute; *Chagos Advisory Opinion* (n 32), p. 113, para. 63; *Construction of a Wall Advisory Opinion* (n 32) p. 156, para. 44; *Kosovo Advisory Opinion* (n 32) pp. 415-416, para. 29; and *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase), Advisory Opinion, I.C.J. Reports 1950*, p. 72.

<sup>36</sup> *Chagos Advisory Opinion* (n 32) p. 113, para. 65; *Construction of a Wall Advisory Opinion* (n 32) p. 156, para. 44; *Kosovo Advisory Opinion* (n 32) p. 416, para. 30.

<sup>37</sup> See *Consideration of the Request for an Advisory Opinion*, UN Doc A/77/PV.64 (n 1) p. 15.



#### D. SCOPE OF THE QUESTION ASKED OF THE COURT

1.28 To assist the Court in clarifying and interpreting the question put to it,<sup>38</sup> as is necessary in order for the Court to decide how to go about answering the question, Australia makes six submissions.

1.29 *First*, Australia submits that the Court should focus on the obligations of *all* States, and legal consequences for *all* States. This is consistent with the terms of both paragraphs (a) and (b) of the question, which refer to ‘obligations of States’, and consequences under ‘these obligations for States’. It is also consistent with the broad co-sponsorship of Resolution 77/276, which reflects that there is a shared responsibility for *all States* to act on climate change and shared commitment to do so. It is also a point specifically made by a number of States during the adoption of Resolution 77/276.<sup>39</sup>

1.30 *Second*, Australia submits that the framing of the question, in particular the use of the present tense in paragraph (a), invites the Court to consider *existing* obligations of all States to ensure the protection of the climate system. This is consistent with the Court’s ‘normal judicial function’, as described by the Court in its *Advisory Opinion on the Threat or Use of Nuclear Weapons*:

It is clear that the Court cannot legislate, and in the circumstances of the present case, it is not called upon to do so. Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons.<sup>40</sup>

1.31 By addressing the *existing* obligations of States, the opinion will clarify the scope of those obligations, and will also enable States to identify where there may be gaps or limitations in the existing legal framework as it relates to climate change,

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<sup>38</sup> *Chagos Advisory Opinion* (n 32) p. 112, para. 61; *Construction of a Wall Advisory Opinion* (n 32) pp. 153-154, para. 38.

<sup>39</sup> See *Consideration of the Request for an Advisory Opinion*, UN Doc A/77/PV.64 (n 1) pp. 4-5 (Jordan), p. 8 (European Union), p. 14 (Australia), p. 18 (Germany), p. 20 (United Kingdom), p. 23 (Iceland), p. 26 (Norway), p. 28 (United States of America), p. 29 (Austria).

<sup>40</sup> *Nuclear Weapons Advisory Opinion* (n 32) p. 237, para. 18.

which may then be considered and addressed by States, including through multilateral cooperative processes. Further, in advising as to States' existing obligations, the Court may take note of the ongoing cooperative processes under the UNFCCC and the Paris Agreement, preserving States' ability to continue negotiating towards collective outcomes under those agreements.

- 1.32 *Third*, Australia notes the request refers in its preambular paragraph to several treaties and principles of international law, and asks the Court to have 'particular regard' to these treaties and principles. In light of the breadth of the question, and the significant number of treaties and principles explicitly referred to in the preambular paragraph, Australia submits that the Court should focus on those treaties and principles that are of primary relevance to the question.<sup>41</sup> In doing so, it will be necessary to consider their content, whether they are binding, and whether they are subject to any temporal or jurisdictional limitations.
- 1.33 *Fourth*, the questions before the Court refer to particularly vulnerable States and to peoples and individuals of the present and future generations affected by the adverse effects of climate change. In respect of particularly vulnerable States, as previously noted Australia recognises that climate change poses a significant threat to small island developing States. In light of this particular vulnerability, Australia welcomed the focus in Resolution 77/276 on small island developing States and least developed countries. The unequal impacts of climate change on vulnerable States are reflected in the preambles to the Paris Agreement and the UNFCCC, as well as being identified as a guiding principle for State Parties in Article 3(2) of the UNFCCC.<sup>42</sup>
- 1.34 In respect of peoples and individuals, the obligations identified by Australia below are all obligations owed between States, none of which confer direct rights on peoples or individuals (with the exception of international human rights

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<sup>41</sup> Australia notes the large volume of documents contained within the dossier prepared by the Secretariat of the United Nations. Within this material, Australia submits that the Court should focus, in particular, on material related to the treaties, instruments and principles explicitly referred to in the preambular paragraph.

<sup>42</sup> *Paris Agreement* (n 5) Preamble para. 5; *UNFCCC* (n 5) Preamble para. 19, Article 3(3).

law).<sup>43</sup> That, of course, does not diminish the critical importance of the involvement of peoples and individuals in States' responses to climate change and the need to maintain the stability of the climate system for future generations.<sup>44</sup> Indeed, Australia recognises that present generations are currently being impacted by climate change, and expects that children and young people of current and future generations will have the greatest exposure to climate change across their lifetime.<sup>45</sup> Though the obligations as they are owed between States should be reflected in the Court's answer to the questions on which its opinion has been sought, Australia welcomes that actions taken to protect the climate system today will benefit peoples and individuals of present and future generations – a fact that is central both to the Paris Agreement and the UNFCCC.<sup>46</sup>

- 1.35 *Fifth*, in respect of paragraph (b) of the question, Australia notes the Court has been asked to advise on legal consequences in a specific and limited situation: where States 'have caused significant harm'.
- 1.36 *Sixth*, Australia understands the reference to 'these obligations' in paragraph (b) of the question should be understood as referring back to the obligations identified in response to paragraph (a) of the question. It follows that the question does not seek to prejudge what States' obligations are to ensure the protection of the climate system, the source of those obligations or whether breaches have occurred, are occurring or will occur. Similarly, it is Australia's understanding

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<sup>43</sup> Cf *Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials who have passed into the Polish Service, Against the Polish Railways Administration)*, Advisory Opinion, 1928 P.C.I.J. (ser B) No. 15, pp. 17-18; *LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, p. 494, para. 77.

<sup>44</sup> See *Protection of global climate for present and future generations of humankind*, GA Res 78/153, 78<sup>th</sup> sess, 49<sup>th</sup> plen mtg, UN Doc A/RES/78/153 (19 December 2023) para. 32.

<sup>45</sup> *IPCC AR6 Summary for Policymakers* (n 30) pp. 7, 14 and 16.

<sup>46</sup> *UNFCCC* (n 5) Preamble para. 23, Article 3(1); *Paris Agreement* (n 5) Preamble para. 11.

that the question whether any States have been specially affected or injured has not been prejudged.<sup>47</sup>

- 1.37 Finally, Australia reiterates the factual context that informs the Court's consideration of the question before it: that significant effort and ambition at both the individual and collective level is needed to address climate change, particularly by those States whose emissions account for the majority of global emissions past, present and future and including by those major emitters who have not yet peaked their emissions.<sup>48</sup>

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<sup>47</sup> A number of statements were made to this effect during the adoption of Resolution 77/276: see *Consideration of the Request for an Advisory Opinion*, UN Doc A/77/PV.64 (n 1) p. 8 (European Union), p. 20 (United Kingdom), p. 22 (Republic of Korea), p. 24 (Iceland), p. 26 (Norway), p. 28 (United States of America).

<sup>48</sup> As noted in paragraph 1.22 above.

## CHAPTER 2. THE UNFCCC AND THE PARIS AGREEMENT

- 2.1 As explained in Chapter 1 above, Australia recognises the importance of taking urgent action to address climate change and to achieve stabilisation of greenhouse gas concentrations in the atmosphere at a level that prevents dangerous anthropogenic interference with the climate system.<sup>49</sup> This includes, as noted in paragraph 1.22 above, the rapid reduction of emissions from major emitters as global emissions continue to increase. The diffuse sources of greenhouse gas emissions and their impacts (both temporal and geographic) mean that achieving these objectives necessarily requires collective action and cooperation.<sup>50</sup> The international community has elected to address this global challenge through collective action, principally through and under the auspices of the UNFCCC and the Paris Agreement. These specialised climate change treaties create obligations for Parties to take action to protect the climate system from anthropogenic greenhouse gas emissions.
- 2.2 In Australia's view, the UNFCCC and the Paris Agreement are the primary sources of States' obligations under international law in respect of climate change.<sup>51</sup> They create legally binding obligations for the States party to them, covering the vast majority of States in the international community. They also include specific, detailed mechanisms for tracking and reviewing implementation

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<sup>49</sup> The 'stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system' is the 'ultimate objective' of the UNFCCC: *UNFCCC* (n 5) Article 2.

<sup>50</sup> *UNFCCC* (n 5) Preamble para. 6 acknowledges, in part, 'that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response...'.

<sup>51</sup> This view is supported by the submissions of a significant number of States in *Request for an advisory opinion submitted by the Commission of Small Island States on Climate Change and International Law (Advisory Opinion)* [2023] International Tribunal for the Law of the Sea (ITLOS) ('*ITLOS Case No. 31*'). See, eg, Written Statement of Singapore, para. 38; Written Statement of Canada, para. 37; Written Statement of New Zealand, paras. 70-71; Written Statement of the United Kingdom, para. 7; Written Statement of the European Union, paras. 26, 28; Written Statement of Mauritius, para. 47; Written Statement of Norway, p. 3; Written Statement of Portugal, para. 65; Written Statement of Micronesia, para. 47.

of States' obligations and ongoing collective review of the measures taken in pursuit of the stated goals of these treaties.

2.3 This Chapter provides an in-depth analysis of the UNFCCC and the Paris Agreement and the specific framework they create for State cooperation and collective action in response to climate change. After setting out an overview of the UNFCCC and the Paris Agreement framework, including its negotiation (**Section A**), it outlines the three major areas of action under the Paris Agreement: mitigation (**Section B**); adaptation (**Section C**); and finance, technology and capacity-building (**Section D**). It also addresses other mechanisms established under the UNFCCC and the Paris Agreement for their effective implementation (**Section E**), and the issue of loss and damage (**Section F**).

## **A. THE UNFCCC AND THE PARIS AGREEMENT FRAMEWORK**

### **1. Negotiation of the UNFCCC and the Paris Agreement**

2.4 The UNFCCC and the Paris Agreement are the product of close negotiation and careful compromise. In 1988, the UNGA adopted its first resolution on climate change, which recognised 'climate change as a common concern of mankind'<sup>52</sup> and resolved that 'necessary and timely action should be taken to deal with climate change within a global framework'.<sup>53</sup> Following this, in 1990, recalling Resolution 43/53, the UNGA adopted Resolution 45/212, establishing an intergovernmental negotiating process for 'an effective framework convention on climate change, containing appropriate commitments, and any related instruments as may be agreed upon'.<sup>54</sup> The negotiating process was established under the auspices of the UNGA, the UN Environment Programme and the World Meteorological Organization and was open to all UN Member States and

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<sup>52</sup> *Protection of global climate for present and future generations of mankind*, GA Res 43/53, 43<sup>rd</sup> sess, 70<sup>th</sup> plen mtg, UN Doc A/RES/43/53 (6 December 1988) para. 1 (UN Dossier No. 104).

<sup>53</sup> *Ibid.*

<sup>54</sup> *Protection of global climate for present and future generations of mankind*, GA Res 45/212, 45<sup>th</sup> sess, 71<sup>st</sup> plen mtg, UN Doc A/RES/45/212 (21 December 1990) para. 1 (UN Dossier No. 106).

specialised agencies.<sup>55</sup> The negotiations took place over five intensive sessions held in 1991 and 1992 and were attended by representatives from over 100 States, alongside representatives from UN specialised agencies, intergovernmental organisations and non-governmental organisations.<sup>56</sup> In May 1992, the Intergovernmental Negotiating Committee adopted the text of the UNFCCC.<sup>57</sup> The UNFCCC was opened for signature at the UN Conference on Environment and Development in Rio de Janeiro, which was held from 4 to 14 June 1992. By the end of the Conference, it had been signed by 154 States. The UNFCCC entered into force two years later in accordance with its Article 23.<sup>58</sup> Today the UNFCCC is widely endorsed by the international community, with 198 Parties.<sup>59</sup>

2.5 The UNFCCC established a Conference of the Parties ('COP').<sup>60</sup> The COP is the 'supreme body' of the UNFCCC which 'may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention'.<sup>61</sup> The COP has played an important role in the development of the specialised treaties on climate change. The first COP ('COP1') was held in

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<sup>55</sup> Ibid.

<sup>56</sup> Daniel Bodansky, Jutta Brunnee and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press, 2017) p. 102. For example, at the first session, representatives from over 100 states, as well as the United Nations and various associated bodies (including the United Nations Environment Program, World Meteorological Organization, and Intergovernmental Panel on Climate Change) attended. See also, Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, *Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of the Second Part of its Fifth Session Held at Washington D.C From 4 to 14 February 1991*, UN Doc A/AC.237/6 (8 March 1991) p. 7 (UN Dossier No. 138).

<sup>57</sup> Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, *Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of the Second Part of its Fifth Session*, UN Doc A/AC.237/18 (Part II) (16 October 1992) p. 9, para. 28 (UN Dossier No. 147).

<sup>58</sup> UNFCCC (n 5) Article 23.

<sup>59</sup> UNFCCC, United Nations Treaty Collection (Web Page, 28 July 2023) <[https://treaties.un.org/pages/ViewDetailsIII.aspx?src=IND&mtdsg\\_no=XXVII7&chapter=27&Temp=mtdsg3&clang=\\_en](https://treaties.un.org/pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXVII7&chapter=27&Temp=mtdsg3&clang=_en)> ('UNFCCC United Nations Treaty Collection'); United Nations Climate Change, Status of Ratification of the Treaty (Web Page) <<https://unfccc.int/process-and-meetings/the-convention/status-of-ratification-of-the-convention>>.

<sup>60</sup> UNFCCC (n 5) Article 7(1). In addition to the COP, the UNFCCC also establishes a subsidiary body for scientific and technological advice (Article 9) and a subsidiary body for implementation (Article 10) and defines a financial mechanism (Article 11) which operate under the guidance of the COP.

<sup>61</sup> UNFCCC (n 5) Article 7(2).

Berlin in 1995. At that COP the Parties adopted the Berlin Mandate, which led to the eventual adoption of the Kyoto Protocol in December 1997.<sup>62</sup>

2.6 The Kyoto Protocol's first commitment period ended in 2012.<sup>63</sup> However, following the entry into force of the Kyoto Protocol on 16 February 2005, attention quickly turned to the period after 2012.<sup>64</sup> In particular, Parties established the Ad Hoc Working Group for Further Commitments for Annex I Parties under the Kyoto Protocol, which resulted in the adoption of the Doha Amendment to the Protocol in 2012. That amendment established the Kyoto Protocol's second commitment period, running from 2013-2020.<sup>65</sup> Many developed countries, including Australia, had binding emission targets under both the first and second commitment periods of the Kyoto Protocol.

2.7 In parallel, in 2007 the Ad Hoc Working Group on Long-term Cooperative Action under the Convention ('AWG-LCA') was established to enable the full implementation of the UNFCCC, particularly after 2012.<sup>66</sup> In 2010, the AWG-LCA delivered the Cancun Agreements, under which the large majority of countries took on pledges to limit or reduce their emissions by 2020.<sup>67</sup> The Cancun Agreements also resulted in significant improvements to the institutional and transparency arrangements under the UNFCCC, and in a commitment by developed countries jointly to mobilise one hundred billion dollars (USD \$100

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<sup>62</sup> *The Berlin Mandate: Review of the adequacy of Article 4, paragraph 2 (a) and (b), of the Convention, including proposals related to a protocol and decisions on follow-up*, Decision 1/CP.1, UN Doc FCCC/CP/1995/7/Add.1 (7 April 1995); *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 2303 UNTS 162 (entered into force 16 February 2005) (UN Dossier No. 11) ('*Kyoto Protocol*'). See, *Adoption of the Kyoto Protocol to the United Nations Framework Convention on Climate Change*, Decision 1/CP.3, UN Doc FCCC/CP/1997/7/Add.1 (11 December 1997) para. 1.

<sup>63</sup> *Kyoto Protocol* (n 62) Article 3(1) and (7).

<sup>64</sup> The Kyoto Protocol was extended in 2020 at COP18 in Doha: see *Amendment to the Kyoto Protocol pursuant to its Article 3, paragraph 9 ('Doha Amendment')*, Decision 1/CMP.8, UN Doc FCCC/KP/CMP/2012/13/Add.1 (8 December 2012) section I. para. 4.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Bali Action Plan*, Decision 1/CP.13, UN Doc FCCC/CP/2007/6/Add.1 (14-15 December 2007) p. 5.

<sup>67</sup> *The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*, Decision 1/CP.16, UN Doc FCCC/CP/2010/7/Add.1 (10 December 2010) paras. 36, 49 (UN Dossier No. 156).



billion) a year by 2020 to address the needs of developing countries, in the context of meaningful mitigation actions and transparency on implementation.<sup>68</sup>

- 2.8 In December 2011, following lengthy and detailed discussions at COP17, the Parties decided ‘to launch a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the UNFCCC applicable to all Parties through a subsidiary body under the [UNFCCC] and to be known as the Ad Hoc Working Group on the Durban Platform for Enhanced Action’ (‘ADP’).<sup>69</sup> Some four years later, this process led to the agreement and adoption of the Paris Agreement at COP21.
- 2.9 The Paris Agreement is the product of years of engaged, detailed and at times contentious multilateral negotiations. The ADP held fifteen sessions between COP17 and COP21 and produced draft iterations of the Agreement of various lengths.<sup>70</sup> By the opening of COP21 in Paris, which was attended by 196 Parties, the draft text included 1600 square brackets reflecting proposed insertions and options to be decided upon.<sup>71</sup> Key areas for discussion at COP21 included the form, scope and focus of the Agreement and its approach to differentiation between Parties based on their national circumstances and capacities. In that regard, the reporting and ratchet up mechanisms that ensured continued learning and ambition, while recognising different countries’ national circumstances, were key to a successful outcome.
- 2.10 The Paris Agreement was adopted by the Parties on 12 December 2015.<sup>72</sup> It was opened for signature on 22 April 2016 and entered into force on 4 November

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<sup>68</sup> Ibid para. 98.

<sup>69</sup> *Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action*, Decision 1/CP.17, UN Doc FCCC/CP/2011/9/Add.1 (11 December 2011) para. 2 (UN Dossier No. 148).

<sup>70</sup> See, eg, *Ad Hoc Working Group on the Durban Platform for Enhanced Action, Negotiating text*, UN Doc FCCC/ADP/2015/1 (25 February 2015).

<sup>71</sup> See *Draft Paris Agreement (Draft conclusions proposed by the Co-Chairs)*, UN Doc FCCC/ADP/2015/L.6 (5 December 2015) (UN Dossier No. 151).

<sup>72</sup> *Adoption of the Paris Agreement*, Decision 1/CP.21, UN Doc FCCC/CP/2015/10/Add.1 (13 December 2015) (UN Dossier No. 155) (‘*Adoption of the Paris Agreement*’).

2016 in accordance with its Article 21.<sup>73</sup> Similar to the UNFCCC, it is widely endorsed by the international community, with 195 Parties.<sup>74</sup> The final adopted text of the Paris Agreement has been described as creating ‘cascading levels’ of obligations that are designed collectively to meet the purpose of the Agreement.<sup>75</sup> That approach reflects the Parties’ ambition and the delicate balances and careful negotiations that Parties have engaged in to create, maintain and enforce the specialised climate change treaty regime. The adoption and agreement of the Paris Agreement was described by then UN Secretary General Ban Ki-moon as a ‘monumental success for the people and its planet’.<sup>76</sup>

2.11 The COP to the UNFCCC also serves as the Meeting of the Parties to the Paris Agreement (‘CMA’).<sup>77</sup> The Paris Agreement provides that the COP ‘shall keep under regular review the implementation of the Agreement and shall make, within its mandate, the decisions necessary to promote its effective implementation’.<sup>78</sup> Decisions of the COP and CMA are generally not legally binding,<sup>79</sup> but they nevertheless carry significant weight and authority. Decisions of the COP and the CMA may also reflect subsequent agreement or practice in the application of the UNFCCC and the Paris Agreement for the purposes of interpreting those two agreements.<sup>80</sup>

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<sup>73</sup> *Paris Agreement* (n 5) Articles 20(1) and 21(1).

<sup>74</sup> *UNFCCC United Nations Treaty Collection* (n 59); Paris Agreement, *United Nations Treaty Collection* (Web Page, 28 July 2023) <[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XXVII-7-d&chapter=27&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=_en)>.

<sup>75</sup> Lavanya Rajamani, ‘The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations’ (2016) 28(2) *Journal of Environmental Law* p. 343.

<sup>76</sup> ‘UN Chief Hails New Climate Change Agreement As “Monumental Triumph”’, United Nations Department of Economic and Social Affairs (12 December 2015) <<https://www.un.org/development/desa/en/news/sustainable/parisagreement-cop21.html>>.

<sup>77</sup> *Paris Agreement* (n 5) Article 16(1).

<sup>78</sup> *Ibid* Article 16(4).

<sup>79</sup> *UNFCCC* (n 5) Articles 15 and 16 set out the process for amendment of the UNFCCC and adoption and amendment of annexes to the UNFCCC.

<sup>80</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1968, 1155 UNTS 331 (entered into force 27 January 1980), Articles 31(3)(a–b).

## 2. Overview of the UNFCCC and the Paris Agreement Framework

- 2.12 The UNFCCC and the Paris Agreement create a specific framework for State cooperation and collective action in response to climate change as a ‘common concern of humankind’.<sup>81</sup> Their provisions include collective goals and aims alongside individual obligations applicable to State Parties. They also establish institutions and mechanisms for effective implementation of those obligations, and to enhance international cooperation in pursuit of the objective of the UNFCCC and the goals of the Paris Agreement. This includes a range of committees and bodies established by the COP and CMA, which are referred to as ‘constituted bodies’, and which provide guidance and technical advice and enhance engagement with stakeholders to facilitate implementation of the agreements.
- 2.13 The ultimate objective of the UNFCCC, set out in Article 2, is the ‘stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system’.<sup>82</sup> The Paris Agreement reflects Parties’ intention to take ambitious action to address climate change through enhancing the implementation of the UNFCCC, including its ultimate objective, and to strengthen the global response to the threat of climate change by setting global goals under Article 2(1), including the long-term temperature goal. Article 3 of the Paris Agreement provides that, with a view to achieving the purpose of the Agreement, ‘all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13’ and that ‘[t]he efforts of all Parties will represent a progression over time’.
- 2.14 Expectations of Parties’ actions and commitments under these instruments reflect a shared general understanding that different Parties may have a different role to play, driven by their national circumstances. These expectations – concerning how to differentiate on the basis of different circumstances – have changed over

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<sup>81</sup> UNFCCC (n 5) Preamble para. 1; *Paris Agreement* (n 5) Preamble para. 11.

<sup>82</sup> UNFCCC (n 5) Article 2.

time. A guiding principle<sup>83</sup> of the UNFCCC is that Parties ‘should protect the climate system’ in accordance with their ‘common but differentiated responsibilities and respective capabilities’ (‘**CBDR-RC**’).<sup>84</sup> Thus, under Article 4(1) of the UNFCCC, all Parties have commitments ‘taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances’. Moreover, in addition to the commitments made by all Parties, under the UNFCCC further specific commitments apply to different categories of Parties, as specified in Annexes.<sup>85</sup>

- 2.15 The Paris Agreement introduces the phrase ‘in light of different national circumstances’ to its formulation of CBDR-RC.<sup>86</sup> Further, unlike the UNFCCC, the Paris Agreement does not differentiate Parties’ obligations based on category Annexes.<sup>87</sup> Rather, its approach to differentiation accommodates the full spectrum of national circumstances, including Parties’ changing circumstances.

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<sup>83</sup> Article 3 of the UNFCCC sets out a number of principles which its chapeau provides are to guide the Parties in ‘their actions to achieve the object of the Convention and to implement its provisions’. It is clear on the terms of the chapeau that these principles apply only in relation to the UNFCCC, only to its Parties, and that the Parties are to be to be ‘guided’ by the principles. As such, they do not give rise to specific legal obligations for Parties to the UNFCCC. See Daniel Bodansky, ‘The United Nations Framework Convention on Climate Change: A Commentary’ (1993) 18(2) *The Yale Journal of International Law* p. 502.

<sup>84</sup> UNFCCC (n 5) Article 3(1). The preamble to the UNFCCC also refers to CBDR-RC. See UNFCCC (n 5) Preamble para. 6.

<sup>85</sup> For example, UNFCCC (n 5) Articles 4(2) and 12(2) apply to developed country Parties and other Parties included in Annex I. Articles 4(3)–4(5) apply to developed country Parties and other developed Parties included in Annex II.

<sup>86</sup> *Paris Agreement* (n 5) Preamble para. 3, Article 2(2), Article 4(3), Article 4(19).

<sup>87</sup> Certain provisions of the Paris Agreement differentiate between Parties depending on whether they are ‘developed’ or ‘developing’ countries. See, eg, *Paris Agreement* (n 5) Article 4(4) and Article 9(7). However, the terms ‘developed’ and ‘developing’ are not defined in the Paris Agreement, nor are the countries falling into either of these categories specified. As such, Parties are left to determine whether they are a ‘developed’ or ‘developing’ country in accordance with the relevant principles of treaty interpretation.

## **B. THE TEMPERATURE GOAL AND MITIGATION**

- 2.16 Article 2 of the Paris Agreement establishes the long-term goals of the Paris Agreement, including its temperature goal under Article 2(1)(a) of:

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.<sup>88</sup>

- 2.17 In pursuit of that temperature goal, Article 4 of the Paris Agreement sets out collective and national mitigation obligations. Parties aim to ‘reach global peaking of greenhouse gas emissions as soon as possible’ 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 gas emissions in the second half of this century’.<sup>89</sup>

- 2.18 The Paris Agreement comprehensively sets out obligations for national action in respect of mitigating greenhouse gas emissions, through the mechanism of NDCs. Specifically, Article 4(2) of the Paris Agreement, which has been referred to as the ‘heart’ of the Paris Agreement,<sup>90</sup> provides:

Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.

- 2.19 Article 4(3) provides that:

Each Party’s successive [NDC] will represent a progression beyond the Party’s then current [NDC] and reflect its highest possible ambition,

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<sup>88</sup> *Paris Agreement* (n 5) Article 2(1)(a).

<sup>89</sup> *Ibid* Article 4(1).

<sup>90</sup> Rajamani (n 75) p. 353.

reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

- 2.20 Under Article 4(9), each Party is required to ‘communicate a [NDC] every five years’.<sup>91</sup> In communicating their NDCs, ‘all Parties shall provide the information necessary for clarity, transparency and understanding...’.<sup>92</sup>
- 2.21 All State Parties are also required to ‘account for their [NDCs]’ and, in doing so, to promote environmental integrity, transparency, accuracy, completeness, comparability and consistency, and ensure the avoidance of double counting.<sup>93</sup>
- 2.22 Under Article 13 of the Paris Agreement, each Party shall regularly provide information necessary to track progress made in implementing its NDC, as well as a national inventory report of anthropogenic emissions by sources and removals by sinks of greenhouse gases.
- 2.23 The system of NDCs to address the mitigation objective reflects the consensus of the international community that cooperative action is needed to realise the temperature goal set out in Article 2(1)(a). Rather than prescribing particular action to control or reduce emissions, or imposing particular mitigation targets,<sup>94</sup> these provisions accord States discretion as to how they give effect to their ‘highest possible ambition’ to achieve the reductions of greenhouse gases necessary to attain the temperature goal.

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<sup>91</sup> In accordance with Decision 1/CP.21 and any relevant decisions of the Conference of the Parties: see *Paris Agreement* (n 5) Article 4(9).

<sup>92</sup> *Paris Agreement* (n 5) Article 4(8). See also *Adoption of the Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1 (n 72) paras. 22-40, which, among other things, provides guidance to Parties in respect of communicating their NDCs, in order to facilitate clarity, transparency and understanding.

<sup>93</sup> *Paris Agreement* (n 5) Article 4(13).

<sup>94</sup> Cf for example the *Kyoto Protocol* (n 62), which imposed individual emission reduction targets for each Party. The second commitment period of the Kyoto Protocol expired on 31 December 2020: *Doha Amendment*, UN Doc FCCC/KP/CMP/2012/13/Add.1 (n 64) p. 3, para. 4.

## C. THE ADAPTATION GOAL

- 2.24 Article 2(1)(b) of the Paris Agreement recognises the importance of adaptation to the impacts of climate change, by including as the second aim of the Agreement:

Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production...

- 2.25 The adaptation goal and the means by which States have agreed to pursue it are then set out in more detailed provisions, most significantly in Article 7. Article 7(1) states:

Parties hereby establish the global goal on adaptation of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change, with a view to contributing to sustainable development and ensuring an adequate adaptation response in the context of the temperature goal referred to in Article 2.

- 2.26 Several provisions reflect the reality that the adaptation goal requires collective and cooperative action. While many adaptation and planning actions take place at the local or national level, support and planning for adaptation efforts may be strengthened at the regional and international level. Reflecting that, Article 7(2) of the Paris Agreement provides:

Parties recognize that adaptation is a global challenge faced by all with local, subnational, national, regional and international dimensions, and that it is a key component of and makes a contribution to the long-term global response to climate change to protect people, livelihoods and ecosystems, taking into account the urgent and immediate needs of those developing country Parties that are particularly vulnerable to the adverse effects of climate change.

- 2.27 Consistently with the fact that adaptation is a global challenge, Article 7(6) of the Paris Agreement ‘[r]ecognises the importance of support for and international cooperation on adaptation efforts’. Article 7(7) then promotes the strengthening of cooperation on enhancing adaptation action, including with regard to: (a) sharing information and good practices; (b) strengthening institutional arrangements; (c) strengthening scientific knowledge; (d) assisting developing

country Parties; and (e) improving the effectiveness and durability of adaptation actions.

2.28 The Paris Agreement goes on to provide for States to engage in adaptation planning and implementation. Specifically, Article 7(9) provides:

Each Party shall, as appropriate, engage in adaptation planning processes and the implementation of actions, including the development or enhancement of relevant plans, policies and/or contributions, which may include:

- (a) The implementation of adaptation actions, undertakings and/or efforts;
- (b) The process to formulate and implement national adaptation plans;
- (c) The assessment of climate change impacts and vulnerability, with a view to formulating nationally determined prioritized actions, taking into account vulnerable people, places and ecosystems;
- (d) Monitoring and evaluating and learning from adaptation plans, policies, programmes and actions; and
- (e) Building the resilience of socioeconomic and ecological systems, including through economic diversification and sustainable management of natural resources.

2.29 Again, emphasising the global nature of the adaptation challenge, Article 7(10) of the Paris Agreement provides:

Each Party should, as appropriate, submit and update periodically an adaptation communication, which may include its priorities, implementation and support needs, plans and actions, without creating any additional burden for developing country Parties.

2.30 While the Paris Agreement does not require States to submit an adaptation communication, or impose a deadline for any such submission, the CMA has invited States that elect to submit an adaptation plan to do so in time to inform



each global stocktake.<sup>95</sup> To date, 64 States, including Australia, have submitted adaptation communications to the secretariat of the Paris Agreement. The adaptation communications are available on a public registry,<sup>96</sup> as required by Article 7(12). They are a tool to increase the visibility and profile of adaptation; strengthen adaptation action; provide input to the global stocktake;<sup>97</sup> and enhance learning and understanding of adaptation needs and actions.<sup>98</sup> They are thus consistent with, and reinforce, the cooperative and collective approach that States have elected to pursue in order to address the global challenge of climate change.

- 2.31 At COP28, Parties to the Paris Agreement adopted a new framework to guide the achievement and review the overall progress in achieving the global goal on adaptation, including establishing targets on specific themes, such as water and food systems. The framework does not impose any additional obligations on States, but rather serves to guide and strengthen adaptation efforts on general themes in ways that reflect good practice.<sup>99</sup>

#### **D. FINANCE, TECHNOLOGY AND CAPACITY-BUILDING**

- 2.32 The third long-term goal of the Paris Agreement relates to finance flows, and is set out in Article 2(1)(c) as follows:

Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.

- 2.33 This provision reflects the reality that achieving the first two goals of the Paris Agreement requires capital in all economies to be channelled accordingly,

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<sup>95</sup> *Further guidance in relation to the adaptation communication, including, inter alia, as a component of nationally determined contributions, referred to in Article 7, paragraphs 10 and 11, of the Paris Agreement*, Decision 9/CMA.1, UN Doc FCCC/PA/CMA/2018/3/Add.1 (15 December 2018) para. 6 (UN Dossier No. 170) ('*Adaptation Communication Guidance*').

<sup>96</sup> United Nations Climate Change, *Adaption Communications Registry* (Web Page) <<https://unfccc.int/ACR>>.

<sup>97</sup> See also *Paris Agreement* (n 5) Article 7(14).

<sup>98</sup> *Adaptation Communication Guidance*, UN Doc FCCC/PA/CMA/2018/3/Add.1 (n 95) para. 1(d).

<sup>99</sup> *Outcome of the first global stocktake*, Decision -/CMA.5 (revised advance version), UN Doc FCCC/PA/CMA/2023/L.17 (13 December 2023) paras. 44-65 ('*Outcome of the first global stocktake*').

including the mobilisation of investment towards decarbonisation and resilience, and away from activities that are contrary to these goals, in a manner which also supports sustainable development outcomes.

- 2.34 The Paris Agreement includes provisions related to financial, technical and capacity-building assistance for those countries that need it, recognising that support can be a means of, and strengthen, implementation of the Paris Agreement in particular in capacity-limited developing countries. In this way, the Paris Agreement recognises the need for and central role of cooperation, including as between developed country Parties and developing country Parties.
- 2.35 Article 9(1) of the Paris Agreement sets out the obligation of developed country Parties to provide financial resources to assist developing country Parties to mitigate and adapt to climate change, and Article 9(2) encourages voluntary contributions from other countries. Article 9(3) provides that, as part of a global effort, developed country Parties should continue to take the lead in mobilising climate finance from a wide variety of sources, instruments and channels, and that mobilisation should represent a progression beyond previous efforts. Article 9(4) provides that financial resources should aim to achieve a balance between adaptation and mitigation. Article 9(5) requires developed country Parties to provide quantitative and qualitative information on a biennial basis about projected levels of public financial resources to be provided to developing country Parties. Pursuant to Article 9(6), that information shall be taken into account in the global stocktake (discussed in **section F** below). Article 9(7) provides that developed country Parties shall provide transparent and consistent information on support for developing country Parties.
- 2.36 Article 10 provides that Parties will strengthen cooperative action on technology development and transfer,<sup>100</sup> and reinforces the long-term vision of fully realising technology development and transfer to improve resilience to climate change and

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<sup>100</sup> *Paris Agreement* (n 5) Article 10(2).

to reduce greenhouse gas emissions.<sup>101</sup> The Technology Mechanism under the UNFCCC also serves the Paris Agreement,<sup>102</sup> and the Paris Agreement establishes a technology framework to provide guidance to the work of that Technology Mechanism.<sup>103</sup> Parties also recognise the importance of financial support for strengthening cooperative action on technology development and transfer at different stages of the technology cycle.<sup>104</sup>

2.37 Article 11 provides that capacity-building under the Paris Agreement should enhance the capacity and ability of developing country Parties, in particular countries with the least capacity, such as the least developed countries, and those that are particularly vulnerable to the adverse effects of climate change, such as small island developing States, to take effective climate change action.<sup>105</sup> It encourages all Parties to cooperate to enhance the capacity of developing country Parties to implement the Agreement,<sup>106</sup> and provides that developed country Parties should enhance support for capacity-building actions in developing country Parties.<sup>107</sup> Parties enhancing the capacity of developing country Parties shall communicate on their actions and on measures on capacity-building, and developing country Parties shall regularly communicate on progress in implementing capacity-building plans, policies, actions or measures to implement the Agreement.<sup>108</sup>

2.38 Article 11(5) provides for enhancement of capacity-building activities through appropriate institutional arrangements. In 2019, the CMA2 decided that the Paris Committee on Capacity-building, established by the COP under the UNFCCC in

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<sup>101</sup> Ibid Article 10(1).

<sup>102</sup> Ibid Article 10(3).

<sup>103</sup> Ibid Article 10(4).

<sup>104</sup> Ibid Articles 10(5) and 10(6).

<sup>105</sup> Ibid Article 11(1).

<sup>106</sup> Ibid Article 11(3).

<sup>107</sup> Ibid Article 11(4).

<sup>108</sup> Ibid.

2015,<sup>109</sup> would also serve the Paris Agreement.<sup>110</sup> The Committee meets annually and regularly reports to the COP and the CMA on its progress and activities.<sup>111</sup> In 2019, the COP decided that the Paris Committee's priority areas are:

- (a) enhancing coherence and coordination of capacity-building;
- (b) identifying current and emerging capacity gaps and needs, and recommending ways to address them; and
- (c) promoting awareness-raising, knowledge- and information-sharing and stakeholder engagement.<sup>112</sup>

2.39 Article 12 provides that Parties shall cooperate in taking measures, as appropriate, to enhance climate change education, training, public awareness, public participation and public access to information.

2.40 In a series of detailed paragraphs, Article 13 imposes reporting obligations for Parties to provide information on financial, technology transfer and capacity-building support provided to developing country Parties under Articles 9, 10 and 11.<sup>113</sup> It encourages developing country Parties to provide information on financial, technology transfer and capacity-building support needed and received.<sup>114</sup>

2.41 The decision adopting the Paris Agreement extended to 2025 the collective goal of jointly mobilising one hundred billion dollars (USD \$100 billion) per year to

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<sup>109</sup> *Adoption of the Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1 (n 72) para. 71.

<sup>110</sup> *Initial institutional arrangements for capacity-building under the Paris Agreement*, Decision 3/CMA.2, UN Doc FCCC/PA/CMA/2019/6/Add.1 (12 December 2019) para. 3.

<sup>111</sup> *Ibid* para. 8.

<sup>112</sup> *Review of the Paris Committee on Capacity-building*, Decision 9/CP.25, UN Doc FCCC/CP/2019/13/Add.2 (12 December 2019) para. 9. Paragraph 10 also provides that the annex of this decision sets out the activities the Paris Committee will undertake in accordance with paragraph 9.

<sup>113</sup> See, eg, *Paris Agreement* (n 5) Articles 13(7)-(9).

<sup>114</sup> *Paris Agreement* (n 5) Article 13(10).

support the needs of developing countries' mitigation and adaptation actions, in the context of meaningful mitigation actions and transparency on implementation.<sup>115</sup> Parties are currently negotiating a new collective quantified goal on climate finance, anticipated to be agreed in 2024.

## **E. LOSS AND DAMAGE**

2.42 Article 8(1) of the Paris Agreement recognises:

the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage.

2.43 Article 8(2) anchors the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts, which was established in 2013,<sup>116</sup> within the Paris Agreement ('**the Warsaw Mechanism**') to address loss and damage associated with impacts of climate change, including extreme events and slow onset events and in developing countries that are particularly vulnerable to the adverse effects of climate change. It also provides that the Warsaw Mechanism 'shall be subject to the authority and guidance of the Conference of the Parties serving as the meeting of the Parties to this Agreement' and 'may be enhanced and strengthened as determined by the Conference of the Parties serving as the meeting of the Parties to this Agreement'.<sup>117</sup> Article 8(3) provides that 'Parties should enhance understanding, action and support, including through the Warsaw International Mechanism, as appropriate, on a cooperative facilitative basis'.<sup>118</sup> The Executive Committee of the Warsaw Mechanism, consisting of 20 elected members, guides the implementation of the Mechanism

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<sup>115</sup> *Adoption of the Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1 (n 72) para. 53.

<sup>116</sup> *Warsaw international mechanism for loss and damage associated with climate change impacts*, Decision 2/CP.19, UN Doc FCCC/CP/2013/10/Add.1 (23 November 2013) para. 1 (UN Dossier No. 159) ('*Warsaw Mechanism*').

<sup>117</sup> *Paris Agreement* (n 5) Article 8(2).

<sup>118</sup> *Ibid* Article 8(3).

in accordance with its five-year rolling workplans and with the support of five thematic expert groups.<sup>119</sup>

- 2.44 To enhance approaches to averting, minimising and addressing loss and damage, at COP25/CMA2 the Santiago Network was established under the Warsaw Mechanism.<sup>120</sup> The Santiago Network facilitates the provision of technical assistance to developing countries particularly vulnerable to the adverse effects of climate change. At COP27/CMA4 Parties to the Paris Agreement and the UNFCCC decided to establish new funding arrangements, including a fund, to support developing countries particularly vulnerable to the adverse effects of climate change.<sup>121</sup> At COP28/CMA5, Parties operationalised the new funding arrangements, including a new fund to ‘assist developing countries particularly vulnerable to the adverse effects of climate change in responding to economic and non-economic loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events’.<sup>122</sup>
- 2.45 The decision adopting the Paris Agreement reflects the understanding of State Parties that Article 8 does not provide a basis for liability or compensation.<sup>123</sup> This is also supported by the terms of Article 8, which is directed at Parties taking a cooperative, practical and facilitative approach in a number of areas,<sup>124</sup> for the purpose of averting and minimising, as well as addressing, loss and damage

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<sup>119</sup> *Warsaw Mechanism* (n 116) paras. 2-17.

<sup>120</sup> *Santiago network for averting, minimizing and addressing loss and damage associated with the adverse effects of climate change under the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts*, Decision 11/CP.27, UN Doc FCCC/CP/2022/10/Add.1 (20 November 2022) pp. 37-40 (UN Dossier No. 169).

<sup>121</sup> *Funding arrangements for responding to loss and damage associated with the adverse effects of climate change change, including a focus on addressing loss and damage*, Decision 2/CP.27, UN Doc FCCC/CP/2022/10/Add.1 (20 November 2022) pp. 11-15 (UN Dossier No. 168).

<sup>122</sup> *Draft decision on the operationalization of the new funding arrangements* UN Doc FCCC/CP/2023/9–FCCC/PA/CMA/2023/9 (n 20) Annex II, para. 2. Additionally, this decision recalled that loss and damage funding arrangements are based on cooperation and facilitation and do not involve liability or compensation.

<sup>123</sup> See *Adoption of the Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1 (n 72) para. 51.

<sup>124</sup> For example, on early warning systems, emergency preparedness, non-economic losses and resilience of communities.

related to climate change. It is also consistent with the character of other provisions under the Paris Agreement and the Warsaw Mechanism and the Santiago Network, in providing for cooperation to assist developing countries, including particularly those vulnerable to the adverse effects of climate change.

2.46 The ongoing developments to enhance approaches to averting, minimising and addressing loss and damage, including at COP28/CMA5, in particular to account for those States which are particularly vulnerable to the adverse effects of climate change, demonstrates the productive cooperation that is occurring with respect to loss and damage under the UNFCCC and the Paris Agreement. For this reason, in Australia's view, this framework includes the appropriate mechanisms to facilitate cooperation between States to address the issue of loss and damage associated with the adverse effects of climate change.

#### **F. OTHER IMPLEMENTATION MECHANISMS, INCLUDING THE GLOBAL STOCKTAKE**

2.47 Effective implementation of the Paris Agreement is supported by an enhanced transparency framework for action and support. This framework is established by Article 13 in order to build mutual trust and confidence and to promote effective implementation.<sup>125</sup> It is the Agreement's chief accountability mechanism, requiring Parties to provide regular detailed information on their implementation of the Agreement, which is subject to independent expert review and a multilateral peer review process. Under Article 13, Parties are to regularly provide a national inventory report on anthropogenic greenhouse gas emissions by sources and removals, information on progress towards the implementation and achievement of the NDCs under Article 4, information on support provided, needed and received under Articles 9, 10 and 11, and information on climate impacts and adaptation action.<sup>126</sup> As noted in paragraph 2.20 above, Parties to the Paris Agreement are also required to provide information necessary for clarity,

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<sup>125</sup> *Paris Agreement* (n 5) Articles 13(1) and 13(5).

<sup>126</sup> *Ibid* Articles 13(7)-(10).

transparency and understanding when communicating their NDCs,<sup>127</sup> and to ensure environmental integrity, avoid double counting and promote similar principles when accounting for anthropogenic emissions and removals corresponding to their NDCs.<sup>128</sup> The information provided under the enhanced transparency framework is also central to inform the global stocktake under Article 14, discussed immediately below.<sup>129</sup>

## 1. The Global Stocktake

2.48 A key aspect of the effective implementation of the Paris Agreement is through the global stocktake. Article 14(1) provides:

The Conference of the Parties serving as the meeting of the Parties to this Agreement shall periodically take stock of the implementation of this Agreement to assess the collective progress towards achieving the purpose of this Agreement and its long-term goals (referred to as the “global stocktake”). It shall do so in a comprehensive and facilitative manner, considering mitigation, adaptation and the means of implementation and support, and in the light of equity and the best available science.

2.49 The global stocktake addresses efforts, progress and implementation in respect of mitigation, adaptation, climate finance and technology development and transfer. Specifically, the global stocktake shall:

- (a) recognize adaptation efforts of developing country Parties;<sup>130</sup>
- (b) inform Parties NDCs to be communicated every five years under Article 4(9);<sup>131</sup>
- (c) enhance the implementation of adaptation action taking into account the adaptation communication referred to in [Article 7(10)];<sup>132</sup>

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<sup>127</sup> Ibid Article 4(8).

<sup>128</sup> Ibid Article 4(13).

<sup>129</sup> Ibid Articles 13(5) and (6).

<sup>130</sup> Ibid Article 7(14)(a).

<sup>131</sup> Ibid Article 4(9).

<sup>132</sup> Ibid Article 7(14)(b).



(d) review the adequacy and effectiveness of adaptation and support provided for adaptation;<sup>133</sup> and

(e) review the overall progress made in achieving the global goal on adaptation referred to in [Article 7(1)].<sup>134</sup>

2.50 Further, the global stocktake shall take into account relevant information provided by Parties and/or Agreement bodies on efforts related to climate finance,<sup>135</sup> as well as available information on efforts related to support on technology development and transfer for developing country Parties.<sup>136</sup>

2.51 The outcome of the global stocktake is to be used to inform Parties' future mitigation actions and support, in particular, enhanced international cooperation. In this regard, Article 14(3) of the Paris Agreement provides:

The outcome of the global stocktake shall inform Parties in updating and enhancing, in a nationally determined manner, their actions and support in accordance with the relevant provisions of this Agreement, as well as in enhancing international cooperation for climate action.

2.52 The first global stocktake of collective progress under the Paris Agreement concluded at COP28/CMA5 in December 2023.<sup>137</sup> The stocktake provided both a backward-looking account of progress towards the Paris Agreement's global goals, as well as a forward-looking account of actions that could be undertaken in order to put the world on track to achieving those goals, including to keep the 1.5 degree temperature goal within reach. Significantly, the forward-looking actions are applicable to all Parties, regardless of their status as developed or developing countries under the UNFCCC.<sup>138</sup>

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<sup>133</sup> Ibid Article 7(14)(c).

<sup>134</sup> Ibid Article 7(14)(d).

<sup>135</sup> Ibid Article 9(6).

<sup>136</sup> Ibid Article 10(6).

<sup>137</sup> Ibid Article 14(2).

<sup>138</sup> See generally, *Outcome of the first global stocktake*, UN Doc FCCC/PA/CMA/2023/L.17 (n 99).

2.53 The global stocktake affirmed that deep, rapid and sustained reductions in greenhouse gas emissions are needed to align with 1.5 degree pathways.<sup>139</sup> Over 190 Parties, including Australia, committed to goals that include tripling global renewable energy capacity by 2030 and transitioning away from fossil fuels in energy systems so as to achieve net zero by 2050.<sup>140</sup> The global stocktake also recognised advancements in international efforts related to averting, minimising and addressing loss and damage, and response measures.<sup>141</sup>

## 2. The Article 15 Committee

2.54 The Paris Agreement also establishes a mechanism to ‘facilitate implementation of and promote compliance with [its] provisions’,<sup>142</sup> through an expert-based committee,<sup>143</sup> to operate under procedures adopted by the CMA.<sup>144</sup> Article 15(2) of the Paris Agreement provides that the committee ‘shall be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive’ and ‘pay particular attention to the respective national capabilities and circumstances of Parties’.<sup>145</sup> In 2015, the COP decided that the Article 15 Committee shall consist of 12 members with ‘recognized competence in relevant scientific, technical, socioeconomic or legal fields’, to be elected by the CMA on the basis of equitable geographical representation.<sup>146</sup>

2.55 In 2018, the CMA1 adopted modalities and procedures for the effective operation of the Article 15 Committee.<sup>147</sup> Those stipulate that the Committee shall strive to

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<sup>139</sup> Ibid para. 39.

<sup>140</sup> Ibid para. 28(d).

<sup>141</sup> Ibid para. 124.

<sup>142</sup> *Paris Agreement* (n 5) Article 15(1).

<sup>143</sup> Ibid Article 15(2).

<sup>144</sup> Ibid Article 15(3).

<sup>145</sup> Ibid Article 15(2).

<sup>146</sup> *Adoption of the Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1 (n 72) para. 102.

<sup>147</sup> *Modalities and procedures for the effective operation of the committee to facilitate implementation and promote compliance referred to in Article 15, paragraph 2, of the Paris Agreement*, Decision

avoid duplication of effort, shall neither function as an enforcement or dispute settlement mechanism, nor impose penalties or sanctions, and shall respect national sovereignty.<sup>148</sup>

2.56 In 2022, the Article 15 Committee adopted rules of procedure for its effective operation.<sup>149</sup> The objective of the rules of procedure is to facilitate implementation of and promote compliance with the provisions of the Paris Agreement and they are required to be read together with the modalities and procedure for effective operation.<sup>150</sup> Among other things, the rules of procedure provide further guidance in respect of the procedure applied to consideration of issues initiated both by a Party<sup>151</sup> and the Committee.<sup>152</sup>

2.57 The Article 15 Committee is competent to consider issues related to a Party's implementation of or compliance with the provisions of the Paris Agreement on the basis of a written submission from that Party.<sup>153</sup> The Committee will also initiate consideration of issues in cases where a Party has not:

(a) communicated or maintained an NDC under Article 4 of the Paris Agreement, based on the most up-to-date status of communication in the public registry referred to in Article 4(12);

(b) submitted a mandatory report or communication of information under Article 13(7) and (9), or Article 9(7);

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20/CMA. 1, UN Doc FCCC/PA/CMA/2018/3/Add.2 (15 December 2018) Annex para. 1 (UN Dossier No. 171) ('*Modalities and Procedures*').

<sup>148</sup> Ibid Annex para. 4.

<sup>149</sup> *Rules of procedure of the committee to facilitate implementation and promote compliance referred to in Article 15, paragraph 2, of the Paris Agreement*, Decision 24/CMA.4, UN Doc FCCC/PA/CMA/2022/10/Add.3 (17 November 2022) para. 1.

<sup>150</sup> Ibid Annex paras. 1-2.

<sup>151</sup> Ibid Annex rule 17.

<sup>152</sup> Ibid Annex rule 18.

<sup>153</sup> *Modalities and procedures*, UN Doc FCCC/PA/CMA/2018/3/Add.2 (n 148) Annex para. 20.

(c) participated in the facilitative, multilateral consideration of progress, based on information provided by the Secretariat; or

(d) submitted a mandatory communication of information under Article 9(5).<sup>154</sup>

2.58 The Article 15 Committee may also, with the consent of the Party concerned, engage in a facilitative consideration of issues in cases of significant and persistent inconsistencies of the information submitted by a Party.<sup>155</sup>

2.59 The Article 15 Committee is empowered to take appropriate measures with a view to facilitating implementation and promoting compliance with the Paris Agreement. Such measures may include:

(a) engaging in dialogue with the purpose of identifying challenges, making recommendations and sharing information;

(b) assisting the Party concerned in the engagement with the appropriate finance, technology and capacity-building bodies or arrangements;

(c) making recommendations to the Party concerned, including recommending the development of an action plan; and

(d) issuing findings of fact in relation to matters of implementation and compliance.<sup>156</sup>

2.60 The Article 15 Committee reports annually to the CMA.<sup>157</sup> By way of example as to its operation, it has identified Parties who have not communicated an NDC as required by Article 4(2), as well as Parties who have not communicated

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<sup>154</sup> Ibid Annex para. 22(a).

<sup>155</sup> Ibid Annex para. 22(b).

<sup>156</sup> *Modalities and procedures*, UN Doc FCCC/PA/CMA/2018/3/Add.2 (n 148) Annex, para. 30.

<sup>157</sup> *Paris Agreement* (n 5) Article 15(3).

mandatory biennial information as required by Article 9(5).<sup>158</sup> Following this, in accordance with rules 18 and 20 of its rules of procedure, the Committee notified the Parties concerned and requested that the information on the matter at hand be submitted.<sup>159</sup> Following receipt of the notification, one of the Parties concerned submitted its NDC and the other submitted its information to be provided by Parties in accordance with Article 9(5) of the Paris Agreement.<sup>160</sup>

**G. THE UNFCCC AND THE PARIS AGREEMENT ARE THE PRINCIPAL SOURCE OF INTERNATIONAL OBLIGATIONS CONCERNING CLIMATE CHANGE**

2.61 Climate change represents one of the defining challenges of our time. It is a challenge that can only be effectively addressed by collective and cooperative action. The international community of States has responded to this enormous challenge through the negotiation and agreement of a specialised climate change treaty regime, identifying concrete objectives and goals, and imposing specific obligations on States with a view to mobilising the international community to work towards achievement of those objectives and goals. The UNFCCC and the Paris Agreement provide the framework for the action needed to address both the causes, and the impacts, of climate change. They create a dynamic process for assessing the effectiveness of this collective action over time, and for adjusting action over time as is necessary. This dynamic process is currently resulting in scaled up action and ambition at both the individual and collective levels. Progress has also been made on the international response to the impacts of climate change. Australia has made significant commitments under this framework and will continue to do its part.

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<sup>158</sup> *Annual report of the Paris Agreement Implementation and Compliance Committee to the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement*, UN Doc FCCC/PA/CMA/2023/4 (25 September 2023) paras. 12-13.

<sup>159</sup> *Ibid* paras. 12-13, 22.

<sup>160</sup> *Ibid* para. 23.

2.62 The UNFCCC and the Paris Agreement are the product of engaged, protracted negotiations and careful compromise between States. They are the principal source of States' international obligations to protect the climate system from anthropogenic emissions of greenhouse gases. In answering the question before the Court, it is these treaties that are of central importance. Other international treaties or customary rules, which were not negotiated or did not develop in order to address the threat posed by climate change, should not be interpreted as operating inconsistently with, or as going beyond, the UNFCCC and Paris Agreement. To do so would alter the delicate balancing of interests that has allowed the international community to reach agreement to cooperate in the manner that is critical to meeting the challenge of climate change. The near universal membership of the specialised climate change treaties indicates a very high level of international consensus that climate change is a challenge that is best addressed collectively and cooperatively through the framework of these treaties. Australia is resolutely committed to achieving the objective of the UNFCCC and the goals of the Paris Agreement and, in doing so, to acting in a way that fully complies with its international obligations with respect to climate change.

## CHAPTER 3. OTHER TREATY OBLIGATIONS AND RELATED REGIMES

3.1 While the specialised climate change treaties addressed in Chapter 2 above are the principal source of international obligations to protect the climate system from anthropogenic emissions of greenhouse gases, other treaties contain provisions that are relevant to that topic. This Chapter addresses those treaties. **Section A** addresses relevant obligations under Part XII of UNCLOS to protect and preserve the marine environment. **Section B** addresses international environmental treaties and sector-specific agreements that complement the climate change treaties through addressing specific types of anthropogenic greenhouse gas emissions, and by promoting mitigation and adaptation measures that are relevant to the protection of the climate system. **Section C** outlines how obligations under international human rights law are also relevant to States' actions to address climate change, notwithstanding certain limitations inherent in the international human rights law regime.

### A. UNCLOS AND THE DUTY TO PROTECT AND PRESERVE THE MARINE ENVIRONMENT

3.2 UNCLOS provides the comprehensive legal framework within which all activities in the oceans and seas must be carried out. One fundamental purpose of UNCLOS is the establishment of a legal order for the seas and oceans to promote the protection and preservation of the marine environment. The importance of this objective is recognised in the preamble to UNCLOS.<sup>161</sup>

3.3 As noted above in paragraph 1.5 the Court has been asked to advise on the obligations of States with respect to the 'climate system and other parts of the environment'. The reference to the 'climate system' picks up the language of the

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<sup>161</sup> *UNCLOS* (n 6) Preamble para. 4: 'Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment'.

UNFCCC, which defines the ‘climate system’ to mean ‘the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions.’<sup>162</sup> This definition, including its specific reference to the hydrosphere, is plainly capable of extending to the marine environment. In answering the question about the obligations of States with respect to the ‘climate system’, it is therefore necessary for the Court to consider the obligations imposed under UNCLOS with respect to the protection and preservation of the marine environment.

3.4 The protection and preservation of the marine environment is dealt with primarily in Part XII of UNCLOS. Part XII includes general obligations to protect and preserve the marine environment and to cooperate for this purpose,<sup>163</sup> and specific obligations to take measures to prevent, reduce and control ‘pollution of the marine environment’.<sup>164</sup> The phrase ‘pollution of the marine environment’ is defined in Article 1(1)(4) of UNCLOS as ‘the introduction by man, directly or indirectly, of substances or energy into the marine environment’ which ‘results or is likely to result’ in harm to living resources and marine life or such other ‘deleterious effects’ as are referred to in the provision. Australia agrees with the general consensus among States that anthropogenic greenhouse gas emissions are a source of ‘pollution of the marine environment’ within the definition in Article 1(1)(4) of UNCLOS.<sup>165</sup>

3.5 As outlined in Chapter 2 above, the international community has, after careful consideration and negotiation, adopted the UNFCCC and the Paris Agreement as the primary means by which States will give effect to the shared objective of

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<sup>162</sup> UNFCCC (n 5) Article 1(3).

<sup>163</sup> UNCLOS (n 6) Articles 192, 197.

<sup>164</sup> Ibid Article 194, Part XII ss 2-7.

<sup>165</sup> See, eg, Australia’s submissions, to this effect, in ‘Written Statement of Australia’, *ITLOS Case No. 31* (n 51) paras. 24-30 and Australia’s Oral Submissions, *Request for an advisory opinion submitted by the Commission of Small Island States on Climate Change and International Law (Advisory Opinion)* [2023] International Tribunal for the Law of the Sea (ITLOS), ITLOS/PV.23/C31/5, p. 6, lines 22-26 (Donaghue). This view is also supported by the submissions of a number of States in ITLOS Case No. 31. See, eg, Written Statement of Bangladesh, paras. 29-30, Written Statement of the European Union, paras. 42-47, Written Statement of the Republic of Mauritius, para. 72, Written Statement of Nauru, paras. 37-39, Written Statement of the United Kingdom, paras. 31-41.



protecting the environment from the adverse effects of climate change. Consistently with that, Part XII of UNCLOS should not be interpreted as imposing obligations with respect to anthropogenic greenhouse gas emissions that are inconsistent with, or that go beyond, those agreed by the international community in the specific context of the UNFCCC and the Paris Agreement. The implications of this for specific provisions in Part XII are addressed in more detail below.

3.6 The above submission is consistent with the nature of UNCLOS as a framework agreement. The framework nature of UNCLOS has, since its inception, placed UNCLOS at the centre of the legal order of the seas and the oceans, and has allowed it to continue to be fit for purpose as distinct and unforeseen challenges have arisen over time. UNCLOS quite deliberately leaves the development of specific rules and standards on particular topics for the future, including by imposing obligations on State Parties to adopt and enforce laws and regulations,<sup>166</sup> and to agree and establish international instruments, rules, standards, practices and procedures,<sup>167</sup> to give effect to the generalised obligations and objectives set out in Part XII. Of particular significance is Article 197, which envisages that States will cooperate to formulate and elaborate international rules, standards, recommended practices and procedures for the protection and preservation of the marine environment. Climate change is a paradigm example of an issue requiring a cooperative response of the kind contemplated by Article 197.

#### **1. General obligation to protect and preserve the marine environment under Article 192 of UNCLOS**

3.7 The framework character of Part XII of UNCLOS is exemplified by Article 192. Article 192 is headed ‘General obligation’ and provides: ‘States have the obligation to protect and preserve the marine environment’. The general

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<sup>166</sup> UNCLOS (n 6) Articles 213-222.

<sup>167</sup> Ibid Articles 207-212.

obligation imposed by Article 192 accommodates both a positive duty to take measures to protect and preserve the marine environment and a negative obligation not to degrade the marine environment. Given the general nature of the obligation, its content is informed by other provisions of Part XII of UNCLOS and by other applicable rules of international law.<sup>168</sup> A primary example of an obligation which gives further content to the general obligation in Article 192 to protect and preserve the marine environment is the duty of cooperation in Article 197 of UNCLOS, addressed further below.

- 3.8 The general obligation to protect and preserve the marine environment reflected in Article 192 of UNCLOS is commonly regarded as a general principle of international law or a rule of customary international law.<sup>169</sup> The International Tribunal for the Law of the Sea ('ITLOS') has also recognised the *erga omnes* character of States' obligations relating to preservation of the environment of the high seas and the seabed, ocean floor and subsoil beyond the limits of national jurisdiction.<sup>170</sup> As to the content of the obligation, Australia submits that the general obligation to protect and preserve the marine environment, like Article 192, should be understood as imposing both a positive obligation on State Parties to take active measures to protect and preserve the marine environment and, by

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<sup>168</sup> See, eg, *South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China) (Award on Merit)* (Permanent Court of Arbitration Case No. 2013-19, 12 July 2016) pp. 373-374, para. 941. See also Alan Boyle, 'Litigating Climate Change under Part XII of the LOSC' (2019) 34 *International Journal of Marine and Coastal Law* p. 464; Myron Nordquist, Shabtai Rosenne and Alexander Yankov (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Martinus Nijhoff Publishers, 1990) vol IV, p. 43, which provides: 'It is clear from the Convention as a whole (and not merely from Part XII) that the obligation of article 192 and with it the right of article 193 is always subject to the specific rights and duties laid down in the Convention'.

<sup>169</sup> Detlef Czybulka, 'Article 192. General obligation' in Alexander Proelss (ed), *The United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck, 2017) p. 1284 notes that there is recognition of this obligation forming part of customary international law, while Nordquist, Rosenne and Yankov (eds) (n 169) vol IV, pp. 39-40, argue that the duty to protect and preserve the marine environment is a general principle of international law.

<sup>170</sup> *Responsibilities and obligations of States with respect to activities in the Area (Advisory Opinion)* (Seabed Disputes Chamber, International Tribunal for the Law of the Sea, Case No. 17, 1 February 2011) p. 59, para. 180 ('*Activities in the Area ITLOS Advisory Opinion*'); See also Jutta Brunée 'Common Areas, Common Heritage, and Common Concern' in Daniel Bodansky, Jutta Brunée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) pp. 550, 558.

logical implication, a negative obligation not to degrade the marine environment.<sup>171</sup>

- 3.9 With respect to anthropogenic greenhouse gas emissions, Australia submits that the UNFCCC and the Paris Agreement specify the standards against which compliance with the general obligation imposed by Article 192 must be assessed. For the reasons outlined in paragraphs 3.5 - 3.8 above, Article 192 should not be interpreted as imposing ‘specific obligations’ to protect and preserve the marine environment over and above those that apply under the UNFCCC and the Paris Agreement.

## **2. Obligations to take measures to prevent, reduce and control pollution of the marine environment under Article 194 and Sections 2 to 7 of Part XII of UNCLOS**

- 3.10 Article 194 anchors the obligation to protect and preserve the marine environment to more concrete requirements. These include, relevantly, the requirements in Section 5 of Part XII (addressing international rules and national legislation to prevent, reduce and control pollution of the marine environment) and Section 6 of Part XII (on enforcement of laws and regulations adopted in accordance with Section 5).
- 3.11 The impact of greenhouse gas emissions on the marine environment is a preeminent concern for States today in a way that was not anticipated by the drafters of UNCLOS.<sup>172</sup> While, as noted above, Australia considers that the definition of ‘pollution of the marine environment’ in UNCLOS extends to anthropogenic greenhouse gas emissions, Article 194 clearly was not drafted with a view to addressing pollution in the nature of greenhouse gas emissions in

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<sup>171</sup> Nordquist, Rosenne and Yankov (eds) (n 169) vol IV pp. 39-40.

<sup>172</sup> Lan Ngoc Nguyen, ‘Expanding the Environmental Regulatory Scope of UNCLOS Through the Rule of Reference: Potentials and Limits’ (2021) 52 *Ocean Development and International Law* p. 430; Boyle (n 169) p. 462.

particular. Rather, Article 194 was formulated to address more conventional cases of pollution.<sup>173</sup>

3.12 The diffuse geographic sources of anthropogenic greenhouse gas emissions, and the time periods over which they accumulate in such a way that they can harm the marine environment, set these emissions apart from the more conventional forms of pollution by reference to which principles concerning transboundary pollution have developed. The sources of greenhouse gas emissions are geographically diffuse, and their impacts may occur in locations far removed from their initial source. Moreover, the impact of such emissions is cumulative, both over time and across different sources. As such, although greenhouse gas emissions are a form of pollution to which Article 194 applies, these characteristics must be taken into account when analysing the obligations arising under Article 194 with respect to greenhouse gas emissions, as they have the consequence that such emissions cannot be properly characterised as an ordinary case of transboundary harm.

3.13 Article 194(1) requires States to take certain measures ‘individually or jointly as appropriate’ that are ‘necessary to prevent, reduce and control pollution of the marine environment’. As climate change presents challenges that can only be addressed through the cooperation and collective action of States, the requirement in Article 194(1) to take measures ‘jointly’ is of particular relevance in the context of pollution that takes the form of greenhouse gas emissions. It requires States to use their ‘best efforts’ to ‘endeavour to harmonize [their] policies’ to reduce and control pollution of the marine environment.<sup>174</sup>

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<sup>173</sup> This is apparent from the references in Article 194(3) to pollution from vessels, installations and devices, or from ‘the release of toxic, harmful or noxious substances’ from land-based sources or through the atmosphere, and from Article 194(2) which is addressed to conventional transboundary pollution.

<sup>174</sup> *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom) (Award)* (United Nations Convention on the Law of the Sea Arbitral Tribunal, 18 March 2015) p. 211, para. 539.

- 3.14 The obligation in Article 194(1) to ‘take ... measures’ is an obligation of conduct, not an obligation of result.<sup>175</sup> That submission is supported by the fact that Article 194(1) refers to States using ‘the best practicable means at their disposal and in accordance with their capabilities’. This language gives content to States’ obligations by reference to practicable means directed to achieving the specified result, rather than by reference to the achievement of the result itself.
- 3.15 Where an international obligation is an obligation of conduct rather than result, compliance with that obligation is assessed against a standard of due diligence. As the Seabed Disputes Chamber of ITLOS has previously observed, an obligation of due diligence is not ‘an obligation to achieve ... rather, it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result.’<sup>176</sup> Those observations were endorsed by ITLOS in its advisory opinion to the Sub-Regional Fisheries Commission.<sup>177</sup> Similarly, this Court held in *Pulp Mills* that an obligation of due diligence requires a State to adopt appropriate rules and measures, and to exercise vigilance in enforcing those rules and measures within its jurisdiction.<sup>178</sup>

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<sup>175</sup> This view is supported by the submissions of a significant number of States in *ITLOS Case No. 31* (n 51) who have submitted that, broadly speaking, the substantive obligations under Part XII of UNCLOS, including Article 194(1), impose obligations of conduct not result. See, for example, Guatemala Oral Submissions, ITLOS/PV.23/C31/8, p. 13, lines 44-48 (Neumann); Latvia Oral Submissions, ITLOS/PV.23/C31/9, p. 13, lines 6-11 (Paparinskis); Singapore Oral Submissions, ITLOS/PV.23/C31/13, p. 2, lines 21-26 (Yee); Timor-Leste Oral Submissions, ITLOS/PV.23/C31/14, p. 15, lines 30-38 (Sthoeger); European Union Oral Submissions, ITLOS/PV.23/C31/14, p. 26, lines 29-33 (Bouquet); Viet Nam Oral Submissions, ITLOS/PV.23/C31/14, p. 44, line 9 (Hanh); France Oral Submissions, ITLOS/PV.23/C31/18, p. 10, lines 36-38, p. 11, lines 1-4 (Forteau); Kingdom of the Netherlands Oral Submissions, ITLOS/PV.23/C31/18, p. 25, lines 1-16 (Lefeber); United Kingdom Oral Submissions, ITLOS/PV.23/C31/18, p. 36, lines 1-8 (Juratowitch).

<sup>176</sup> *Activities in the Area ITLOS Advisory Opinion* (n 171) p. 41, para. 110.

<sup>177</sup> *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (Advisory Opinion)* (International Tribunal for the Law of the Sea, Case No. 21, 2 April 2015) p. 39, para. 128 (‘*Fisheries ITLOS Advisory Opinion*’).

<sup>178</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Judgment*, *I.C.J. Reports 2010*, p. 79, para. 197 (‘*Pulp Mills*’).

- 3.16 The content of a standard of due diligence is variable and context-dependent.<sup>179</sup> Accordingly, the scope of the due diligence obligation imposed by Article 194(1) must be interpreted by reference to the specific terms of that provision.
- 3.17 Article 194(1) contains a single obligation to take measures directed towards three interrelated ends, being to ‘prevent, reduce and control pollution’. By identifying those three interrelated ends, Article 194(1) recognises that it may not be practically possible to *prevent* all pollution of the marine environment all the time. That is particularly true as the standard of conduct required of States in seeking to prevent, reduce and control marine pollution varies between States, each State being obliged to take ‘all measures ... necessary’ using ‘the best practicable means at their disposal in accordance with their capabilities.’ Pollution of some types, at some points in time, may lawfully occur (because, even exercising due diligence, not all pollution will be ‘prevented’). That being so, Article 194(1) requires States to use their best efforts to mitigate the impact of such pollution of the marine environment as does occur.
- 3.18 Both the UNFCCC and the Paris Agreement recognise the reality that at present the global economy is structured in such a way that it is not currently practicable, nor within the capabilities of States, completely to prevent anthropogenic greenhouse gas emissions. As explained in Chapter 2 above, both of those agreements focus on the progressive reduction and control of such emissions, rather than prohibiting all such emissions.
- 3.19 Australia submits that compliance with the UNFCCC and the Paris Agreement satisfies the specific obligation under Article 194(1) of UNCLOS to take measures necessary to prevent, reduce and control pollution of the marine environment arising from greenhouse gas emissions using ‘the best practicable

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<sup>179</sup> This was recognised by the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea in its advisory opinion in *Responsibilities and obligations of States with respect to activities in the Area*, which described due diligence as a ‘variable concept’ and said that ‘[t]he content of ‘due diligence’ obligations may not easily be described in precise terms’. See, *Activities in the Area ITLOS Advisory Opinion* (n 171) p. 43, para. 117. See also *Fisheries ITLOS Advisory Opinion* (n 178) p. 41, para. 132.

means at their disposal and in accordance with their capabilities'. The UNFCCC and the Paris Agreement reflect the standard of conduct which States have agreed is 'necessary' to reduce and control greenhouse gas emissions, until the prevention of pollution of the marine environment from such emissions is achieved. States have set a collective goal of holding the increase in the global average temperature to below 2 degrees above pre-industrial levels and of pursuing efforts to limit the increase to 1.5 degrees above pre-industrial levels. States have resolved that those goals are to be achieved by the mechanisms provided for under the Paris Agreement. Central among these is the provision for NDCs, which are to be prepared, communicated and maintained by individual States and are to reflect each State's highest possible ambition.<sup>180</sup> If a State pursues with due diligence the setting and achievement of its NDCs, it follows that it will discharge its obligations under Article 194(1) with respect to greenhouse gas emissions.

3.20 It is necessary to give separate consideration to Article 194(2). It is apparent from the terms of that article that it was formulated by reference to a conventional case of transboundary pollution. Thus, Article 194(2) requires States to take measures necessary to ensure that activities within their jurisdiction or control do not cause 'damage by pollution to other States and their environment' (as opposed to the pollution of the marine environment more generally), and that pollution from incidents or activities within their jurisdiction or control does not 'spread' to areas beyond national jurisdiction.

3.21 Having regard to the length of time that greenhouse gas emissions remain in the atmosphere, and to the fact that Article 194(1) does not require States to take measures immediately and entirely to prevent those emissions, Article 194(2) cannot be interpreted as requiring States to ensure that such greenhouse gases as are emitted do not 'spread' to the territory of another State or on to the high seas. Otherwise, Article 194(2) would impose an obligation with which it would be impossible for any State to comply. For that reason, Australia's primary

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<sup>180</sup> *Paris Agreement* (n 5) Articles 4(2), 4(3).

submission is that pollution by greenhouse gas emissions is not pollution of the kind to which Article 194(2) is directed.

- 3.22 Articles 207(1) and 212(1) establish duties to adopt laws and regulations at the national level to prevent, reduce and control pollution from, respectively, land-based sources and pollution from or through the atmosphere. In developing such national laws and regulations, States must take into account internationally agreed rules, standards and recommended practices and procedures. In Australia's submission, the UNFCCC and the Paris Agreement establish the internationally agreed measures that States must 'take into account' when adopting national laws to prevent, reduce and control pollution of the marine environment under Articles 207 and 212. The obligation to take those standards into account requires States to consider them in good faith in developing their national laws. In that way, Articles 207 and 212 of UNCLOS provide a pathway by which national laws may be influenced or shaped by obligations that States have undertaken in the UNFCCC and Paris Agreement, potentially providing a means for the enforcement of such obligations in the domestic laws of State Parties.
- 3.23 Articles 207(4) and 212(3) require States, acting especially through competent international organisations, to endeavour to formulate and elaborate global and regional rules and standards to prevent, reduce and control pollution of the marine environment from land-based sources and from or through the atmosphere. These provisions are consistent with the general duty of cooperation imposed by Article 197, addressed in more detail below.
- 3.24 With respect to pollution from land-based sources, Article 207(3) requires States to endeavour to harmonise their policies at the 'appropriate regional level'. Australia submits that, in the context of greenhouse gas emissions, the appropriate regional level is necessarily global. The measures that States are required to adopt under Article 207(3) must be 'designed to minimize, to the fullest extent possible', the release of toxic, harmful or noxious substances into



the marine environment.<sup>181</sup> Having regard to the due diligence nature of the obligations imposed by Part XII, in the context of greenhouse gas emissions what is ‘possible’ depends on the complex interplay of considerations that underpin the agreements reached in the UNFCCC and the Paris Agreement.

3.25 Section 6 of Part XII is headed ‘Enforcement’. Under Articles 213 and 222, States are obliged to enforce the laws and regulations adopted in accordance with Articles 207(1) and 212(1) and to adopt legal, regulatory and other measures ‘necessary to implement applicable international rules and standards’. Articles 213 and 222 do not prescribe the means by which enforcement is to occur, and thereby accord a degree of discretion to States. Australia submits that these articles are satisfied where States can show they are able to enforce their relevant national laws and regulations, and where they have in good faith adopted measures to give effect to applicable international rules and standards (which, again, are the rules and standards agreed under the UNFCCC and the Paris Agreement).

3.26 Through these provisions, and in particular by imposing requirements to take account of relevant international rules and standards in domestic law, and for those domestic laws to be enforced, UNCLOS has a particular role to play in giving concrete effect to international obligations to ensure protection of the climate system from anthropogenic emissions of greenhouse gases, in particular in relation to the protection and preservation of the marine environment. UNCLOS effectively operates to encourage States to implement and enforce the rules and standards that they have agreed at the international level in and through their domestic law. UNCLOS thereby provides a bridge between relevant international rules and standards and their enforcement at the domestic level. In this way, and given the progress that has been made at the international level to agree relevant rules and standards relating to greenhouse gas emissions, in particular through the UNFCCC and the Paris Agreement, UNCLOS makes an

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<sup>181</sup> *UNCLOS* (n 6) Article 207(5).

important contribution to the international legal framework to address climate change.

### **3. Duty to cooperate under Article 197**

- 3.27 As discussed below at paragraphs 4.2 - 4.6, the general duty of cooperation in respect of the environment has been recognised as a fundamental principle of international environmental law. Cooperation underscores numerous provisions of Part XII of UNCLOS, and is the focus of Article 197, which requires States to ‘cooperate on a global basis and, as appropriate, on a regional basis ... in formulating and elaborating international rules, standards and recommended practices and procedures consistent with’ UNCLOS, for the protection and preservation of the marine environment.
- 3.28 The duty of cooperation in Article 197 requires States to make meaningful and substantial efforts with a view to adopting effective measures in pursuit of the goal of protecting and preserving the marine environment.<sup>182</sup> It does not prescribe any particular forum or method for State Parties’ cooperative efforts, allowing States to choose to cooperate directly (bilaterally or otherwise), or through competent international organisations. The obligation imposed by Article 197 is one of conduct, rather than of result.
- 3.29 In respect of greenhouse gas emissions, States have made – and are continuing to make – detailed, meaningful and substantial efforts to give effect to their duty to cooperate under Article 197. As explained in Chapter 2 above, under the auspices of the UNFCCC and the Paris Agreement, States have negotiated and adopted rules, practices and procedures to reduce global emissions, as well as to pursue climate change mitigation and adaptation, such as through climate technology development and transfer, and climate finance and capacity-building. States are also pursuing a range of cooperative efforts through other international organisations, and in other international fora, to address sector-specific

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<sup>182</sup> See *Fisheries ITLOS Advisory Opinion* (n 178) pp. 59-60, para. 210.

greenhouse gas emissions, as discussed in the following section. By taking these steps in good faith, States are meeting their duties of cooperation under Article 197 with respect to anthropogenic greenhouse gas emissions.

## **B. OTHER ENVIRONMENTAL TREATIES**

3.30 As already explained, the UNFCCC and the Paris Agreement are the primary treaties through which the international community has agreed to respond to climate change, and they are the principal source of States' obligations to ensure the protection of the climate system from anthropogenic greenhouse gas emissions. However, other environmental treaties, and sector-specific treaties addressing discrete environmental issues, also contain obligations that are relevant to the protection of the climate system from anthropogenic greenhouse gas emissions. These treaties contain such obligations to the extent that they set limits on the emissions of certain greenhouse gases (see **subsection 1**). There is also a range of other environmental treaties that complement the specialised climate change treaties. These treaties contribute to the global response to climate change in that measures taken by States pursuant to these treaties contribute to removing greenhouse gases from the atmosphere and/or adapting to the impacts of climate change (see **subsection 2**). The climate change treaties and these other complementary treaties provide an interrelated and coordinated response to the causes and impacts of climate change.

### **1. Obligations to regulate and limit greenhouse gas emissions**

3.31 Beyond the UNFCCC and the Paris Agreement, there are two other significant environmental treaty regimes that impose obligations on States to limit emissions of certain greenhouse gases. These regimes are: (a) the Vienna Convention for the Protection of the Ozone Layer ('**Vienna Convention**') and the associated Montreal Protocol on Substances that Deplete the Ozone Layer ('**Montreal**

Protocol’);<sup>183</sup> and (b) the International Convention for the Prevention of Pollution from Ships, as modified by the Protocol of 1978 (‘MARPOL’).<sup>184</sup> Each is addressed in turn below.

*a. The Vienna Convention for the Protection of the Ozone Layer and Montreal Protocol on Substances that Deplete the Ozone Layer*

3.32 The Vienna Convention is addressed to measures to protect human health and the environment against adverse effects resulting from modification of the ozone layer.<sup>185</sup> It requires State Parties to:

take appropriate measures in accordance with the provisions of this Convention and of those protocols in force to which they are party to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer.<sup>186</sup>

3.33 To that end, the Vienna Convention requires State Parties, in accordance with the means at their disposal and their capabilities, to cooperate and to adopt certain measures. Article 2(2) provides that Parties shall:

a. Co-operate by means of systematic observations, research and information exchange in order to better understand and assess the effects of human activities on the ozone layer and the effects on human health and the environment from modification of the ozone layer;

b. Adopt appropriate legislative or administrative measures and co-operate in harmonizing appropriate policies to control, limit, reduce or prevent human activities under their jurisdiction or control should it be

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<sup>183</sup> *Vienna Convention for the Protection of the Ozone Layer*, opened for signature 22 March 1985, 1513 UNTS 293 (entered into force 22 September 1985) (UN Dossier No. 25) (‘*Vienna Convention*’); *Montreal Protocol on Substances that Deplete the Ozone Layer*, opened for signature 16 September 1987, 1522 UNTS 3 (entered into force 1 January 1989) (UN Dossier No. 26) (‘*Montreal Protocol*’).

<sup>184</sup> *International Convention for the Prevention of Pollution from Ships as modified by the Protocol of 1978*, opened for signature 17 February 1978, 1340 UNTS 61 (entered into force 2 October 1983).

<sup>185</sup> *Vienna Convention* (n 184) Article 1(1) defines the ozone layer as the layer of atmospheric ozone above the planetary boundary layer. It sits between 15 kilometres and 30 kilometres above the earth and filters particular ultraviolet solar radiations harmful to living things according to the Australian Government Department of Climate Change, Energy, the Environment and Water, ‘The ozone layer’ (Web Page, 09 October 2021) <<https://www.dcceew.gov.au/environment/protection/ozone/ozone-science/ozone-layer>>.

<sup>186</sup> *Vienna Convention* (n 184) Article 2(1).

found that these activities have or are likely to have adverse effects resulting from modification or likely modification of the ozone layer;

c. Co-operate in the formulation of agreed measures, procedures and standards for the implementation of this Convention, with a view to the adoption of protocols and annexes;

d. Co-operate with competent international bodies to implement effectively this Convention and protocols to which they are party.

3.34 The Montreal Protocol was adopted by Parties to the Vienna Convention in 1987. Referring to the obligation to take measures under Article 2(1) of the Vienna Convention, paragraph 3 of the preamble to the Montreal Protocol recognises:

that world-wide emissions of certain substances can significantly deplete and otherwise modify the ozone layer in a manner that is likely to result in adverse effects on human health and the environment.

3.35 In light of this recognition, the Montreal Protocol requires Parties to phase out the production and consumption of nearly 100 man-made ozone depleting substances.<sup>187</sup> That is of significance in relation to the obligations of States with respect to climate change, because most of the regulated ozone depleting substances are extremely powerful greenhouse gases.<sup>188</sup>

3.36 Parties to the Montreal Protocol are required to implement certain ‘control measures’ relating to the phasing out of production and consumption of ozone depleting substances.<sup>189</sup> Control measures are expressed as a rate of reduction

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<sup>187</sup> *Montreal Protocol* (n 184) Article 2, Annex A as amended by the *Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer*, adopted 29 June 1990, 1684 UNTS 315 (entered into force 10 August 1992) (UN Dossier No. 29) (‘1990 London Amendment’); *Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer*, adopted 25 November 1992, 1785 UNTS 517 (entered into force 14 June 1994) (UN Dossier No. 31) (‘1992 Copenhagen Amendment’); *Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer*, adopted 17 September 1997, 2054 UNTS 522 (entered into force 10 November 1999) (UN Dossier No. 35) (‘1997 Montreal Amendment’); *Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer*, adopted 3 December 1999, 2173 UNTS 183 (entered into force 25 February 2002) (UN Dossier No. 36) (‘1999 Beijing Amendment’) and *Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer*, adopted 15 October 2016, (entered into force 1 January 2019) (UN Dossier No. 40) (‘2016 Kigali Amendment’).

<sup>188</sup> For example, Chlorofluorocarbon-13 has an estimated 100-year global warming potential 13,900 times greater than the same mass of carbon dioxide.

<sup>189</sup> *Montreal Protocol* (n 184) Article 2.

from a Party's level of consumption and production of the substance in a particular year. For example, developed State Parties were required to freeze consumption and production of chlorofluorocarbons ('CFCs') at 1986 levels by 1989, reduce consumption and production by 75 per cent by 1994 and phase out CFCs by 1996.<sup>190</sup> In acknowledgment of the economic, technological, and regulatory capacity limitations that developing countries may face, certain developing country Parties are permitted to delay their compliance with the control measures.<sup>191</sup>

- 3.37 The Montreal Protocol has been further strengthened through five amendments, which have brought forward phase out schedules and added new substances to the list of substances regulated by the Protocol.<sup>192</sup> The most recent amendment, the 2016 Kigali Amendment, addresses the production and consumption of hydrofluorocarbons which are an ozone depleting substance substitute.<sup>193</sup> Parties are required to freeze consumption and production at its average level of consumption and production from 2011 to 2013.<sup>194</sup> Developed State Parties must achieve an 85 per cent reduction on production and consumption by 2036, while most developing State Parties must achieve an 80 per cent reduction by 2045.<sup>195</sup>
- 3.38 The Vienna Convention and Montreal Protocol have been universally ratified, making them the first treaties to reach universal participation in the history of the United Nations.<sup>196</sup> This regime has resulted in the reduction and eventual phasing out of ozone depleting greenhouse gas substances and substitutes and has both protected the ozone layer and significantly contributed to climate change

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<sup>190</sup> Ibid Articles 2A(1), (3) and (4).

<sup>191</sup> Ibid Article 5(1).

<sup>192</sup> *1990 London Amendment* (n 188); *1992 Copenhagen Amendment* (n 188); *1997 Montreal Amendment* (n 188); *1999 Beijing Amendment* (n 188); *2016 Kigali Amendment* (n 188).

<sup>193</sup> The *2016 Kigali Amendment* (n 188) applies to hydrofluorocarbons.

<sup>194</sup> *Montreal Protocol* (n 184) Article 2J(1) and (3).

<sup>195</sup> Ibid Articles 2J(1) and (3), and 5(8 *qua*)(a).

<sup>196</sup> Simon Chesterman, David M Malone and Santiago Villalpando, *The Oxford Handbook of United Nations Treaties* (Oxford Handbooks, 2019) p. 325.

mitigation.<sup>197</sup> The World Meteorological Organization’s 2022 Scientific Assessment of Ozone Depletion reports that actions taken under the Montreal Protocol have made a significant contribution to mitigating climate change, avoiding temperature increases of approximately 0.5–1 degree by 2050.<sup>198</sup> The resounding success of the regime demonstrates the international community’s willingness and ability to cooperate and undertake substantial action to address a significant environmental concern.<sup>199</sup>

3.39 Australia was one of the first countries to ratify the Montreal Protocol and continues to be a leader in the phase out of ozone depleting substances. Australia has met or exceeded all of its phase out obligations under the Montreal Protocol. For example, Australia phased out consumption of hydrochlorofluorocarbons by 2016, four years ahead of the schedule required under the Montreal Protocol.<sup>200</sup> Australia is also assisting countries in the Pacific to phase out the use of substances controlled by the Montreal Protocol.<sup>201</sup>

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<sup>197</sup> Oxford Public International Law, *Max Planck Encyclopaedias of International Law* (online at 2 August 2023) ‘Ozone Layer, International Protection’ para. 42 <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1767>>.

<sup>198</sup> World Meteorological Organization, *Scientific Assessment of Ozone Depletion: 2022 - Executive Summary* (Report No. 278, October 2022) p. 20 <<https://ozone.unep.org/system/files/documents/Scientific-Assessment-of-Ozone-Depletion-2022-Executive-Summary.pdf>>. See also Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2022: Mitigation of Climate Change, Working Group III contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (2022) p. 1496, quoting Molina et al. (2009) <[ipcc.ch/report/ar6/wg3/downloads/report/IPCC\\_AR6\\_WGIII\\_FullReport.pdf](http://ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_FullReport.pdf)> (UN Dossier No. 77).

<sup>199</sup> Former United Nations Secretary General Kofi Annan described the Montreal Protocol as ‘perhaps the single most successful international environmental agreement to date’. See ‘Key achievements of the Montreal Protocol to Date’ (Web Page, 2012) <[https://ozone.unep.org/sites/default/files/Key\\_achievements\\_of\\_the\\_Montreal\\_Protocol\\_2012\\_0\\_0.pdf](https://ozone.unep.org/sites/default/files/Key_achievements_of_the_Montreal_Protocol_2012_0_0.pdf)>.

<sup>200</sup> Australian Government Department of Climate Change, Energy, the Environment and Water, ‘Montreal Protocol on Substances that Deplete the Ozone Layer’ (Web Page, 3 October 2021) <<https://www.dcceew.gov.au/environment/protection/ozone/montreal-protocol>>; *Montreal Protocol* (n 184) Article 2F(6).

<sup>201</sup> Minister for International Development and the Pacific, ‘Australia to assist regional partners with Montreal Protocol’ (Media Release, 28 September 2022) <<https://ministers.dfat.gov.au/minister/pat-conroy/media-release/australia-assist-regional-partners-montreal-protocol>>.

3.40 The structure of this regime, consisting of a framework convention defining general objectives and principles for international cooperation followed by a protocol containing substantive rules and national commitments, inspired, and was replicated in, the UNFCCC regime.<sup>202</sup> It also demonstrates that a sectoral approach designed to address a specific environmental concern can have substantial impacts on the climate system as a whole.

#### ***b. MARPOL***

3.41 MARPOL provides global regulations aimed at preventing and minimising pollution from ships. Annex VI to MARPOL regulates emissions of certain greenhouse gases, including nitrogen oxide, sulphur oxides and certain ozone depleting substances from ships engaged on international or domestic voyages.<sup>203</sup> Annex VI applies to all ships 400 gross tonnage and above, fixed and floating drilling rigs and other platforms.<sup>204</sup>

3.42 States that have accepted Annex VI are required to conduct annual surveys of ships 400 gross tonnage and above, and every fixed and floating drilling rig or other platform, to ensure compliance with the emission control requirements set out in Chapter 3 of Annex VI. Under Chapter 3, Parties are required to prohibit deliberate emissions of ozone depleting substances,<sup>205</sup> and limit nitrogen oxide

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<sup>202</sup> Benoit Mayer, *The International Law on Climate Change* (Cambridge University Press, 2018) pp. 51-53.

<sup>203</sup> *MARPOL, 2021 Amendments to the Annex of the Protocol of 1997 to Amend the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto*, Resolution MEPC.328(76), Regulations 12-15 ('*MARPOL Annex VI*'). To date, 100 State Parties, including Australia, have accepted *MARPOL Annex VI*.

<sup>204</sup> *Ibid* Regulations 3, 5 and 6, 13. Regulation 3 generally stipulates that Annex VI regulations shall not apply to any emission necessary for the purpose of securing the safety of a ship and saving a life at sea, or any emission resulting from damage to a ship or its equipment provided that all reasonable precautions have been taken after a damage occurred.

<sup>205</sup> *MARPOL Annex VI* Regulation 12(2). Regulation 12(3.1) provides this prohibition applies to installations that contain ozone-depleting substances (other than hydrofluorocarbons) on ships constructed on or after 19 May 2005. Regulation 12(1) provides the prohibition does not apply to permanently sealed equipment where there are no refrigerant charging connections or potentially removable components containing ozone depleting substances.



emissions from installed marine diesel engines,<sup>206</sup> including in specified areas, such as ports, where stricter emission requirements apply.<sup>207</sup>

3.43 Regulation 6(1) of Annex VI requires States Parties to issue International Air Pollution Prevention certificates to:

(1) any ship of 400 gross tonnage and above engaged in voyages to ports or offshore terminals under the jurisdiction of other Parties; and

(2) platforms and drilling rigs engaged in voyages to waters under the sovereignty or jurisdiction of other Parties to the Protocol of 1997.<sup>208</sup>

3.44 An International Air Pollution Prevention certificate provides evidence that the ship, platform or drilling rig complies with the requirements of Annex VI.

3.45 In 2021, Annex VI was amended to include operational measures to reduce the carbon intensity of international shipping, meaning that over time ships are required to produce less carbon dioxide per nautical mile.<sup>209</sup>

3.46 The pollution regime included in Annex VI to MARPOL has evolved significantly over the past decade to respond to the challenges of greenhouse gas emissions. The five yearly greenhouse gas studies of the International Maritime Organization ('IMO') have informed increasingly ambitious development of the MARPOL pollution regime, and promote protection of the climate system from the shipping industry.

## **2. Other environmental treaties relevant to protection of the climate system**

3.47 Other environmental treaties complement the UNFCCC and the Paris Agreement by contributing to the global response to the causes and impacts of climate change. Under these treaties, States do not have direct obligations to reduce

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<sup>206</sup> Ibid Regulation 13.

<sup>207</sup> Ibid Regulation 13(6).

<sup>208</sup> Ibid Regulation 6(1).

<sup>209</sup> Ibid Regulation 6(6).

anthropogenic emissions of greenhouse gases. However, by taking action pursuant to these treaties, States can increase the number of carbon sinks that remove carbon dioxide from the atmosphere and contribute to adaptation measures, limiting impacts of anthropogenic greenhouse gases on the climate system.

- 3.48 Four environmental treaty regimes are particularly relevant to the protection of the climate system from the causes and impacts of climate change. They are the Convention on Biological Diversity (**‘CBD’**), the United Nations Convention to Combat Desertification (**‘UNCCD’**), UNCLOS (already discussed in **Section A** above) and the Agreement under UNCLOS on the Conservation and Sustainable use of Marine Biological Diversity of Areas Beyond National Jurisdiction (**‘BBNJ Agreement’**). The provisions of these treaties are interrelated and coordinated.
- 3.49 The CBD requires State Parties to prepare a national biodiversity strategy for the conservation and sustainable use of biological diversity.<sup>210</sup> In certain instances, measures to conserve vulnerable ecosystems can operate as mitigation and/or adaptation measures. For example, the protection and restoration of wetlands serves to mitigate climate change through preserving valuable carbon sinks and can also fulfil adaptation objectives through reducing coastal flooding and erosion.
- 3.50 In 2022, the CBD’s COP committed to adaptation activities concerning climate change.<sup>211</sup> Significantly, the Kunming-Montreal Global Biodiversity Framework Target 8 encourages Parties to ‘[m]inimize the impact of climate change and ocean acidification on biodiversity and increase its resilience through mitigation,

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<sup>210</sup> *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) Article 6(a) (UN Dossier No. 19).

<sup>211</sup> *Biodiversity and climate change: guidance to promote synergy among activities for biodiversity conservation, mitigating or adapting to climate change and combating land degradation*, Decision VIII/30, UN Doc UNEP/CBD/COP/DEC/VIII/30 (15 June 2006); *Progress in implementing activities under the Nairobi work programme on impacts, vulnerability and adaptation to climate change*, UN Doc FCCC/SBSTA/2023/2 (28 March 2023).

adaptation, and disaster risk reduction actions'.<sup>212</sup> As noted above, Australia has joined with other States under this Framework to commit to protecting and conserving 30 per cent of land and 30 per cent of oceans by 2030.<sup>213</sup>

3.51 The UNCCD calls on State Parties to adopt national action programmes identifying factors contributing to desertification and practical measures necessary to combat desertification and mitigate the effects of drought.<sup>214</sup> Consequently, measures taken by States pursuant to the UNCCD can contribute to adaptation to some of the impacts of climate change, desertification and drought. Further, Article 8 of the UNCCD requires that Parties:

encourage the coordination of activities carried out under [the UNCCD] and, if they are Parties to them, under other relevant international agreements, particularly the UNFCCC and the CBD, in order to derive maximum benefit from activities under each agreement while avoiding duplication of effort.

3.52 The BBNJ Agreement provides for the establishment of 'area-based management tools', including marine protected areas, with the objective of restoring biodiversity and ecosystems in order to build resilience to stressors, including those related to climate change and ocean acidification.<sup>215</sup> As such, actions taken by States pursuant to the BBNJ Agreement can contribute to adaptation to the impacts of climate change.

3.53 Finally, a variety of international organisations have introduced measures in line with the collective temperature goal established in the Paris Agreement. For example, the International Civil Aviation Organization ('ICAO') has adopted

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<sup>212</sup> *Kunming-Montreal Global Biodiversity Framework*, Decision 15/4, UN Doc CBD/COP/DEC/15/4 (19 December 2022) p. 10, Target 8 (UN Dossier No. 183).

<sup>213</sup> See paragraph 1.16 above.

<sup>214</sup> *United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*, opened for signature 14 October 1994, 1954 UNTS 3 (entered into force 26 December 1996) Articles 5(e), 9(1), 10(1) (UN Dossier No. 17). Article 9(1) provides that certain Parties particularly affected by drought are required to prepare, make public and implement national action programmes.

<sup>215</sup> *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 19 June 2023, UN Doc A/CONF.232/2023/4 (not yet in force) (UN Dossier No. 48).

the collective long-term aspirational goal of net zero carbon dioxide emissions from aviation by 2050.<sup>216</sup> Similarly, the 2023 IMO strategy on the reduction of greenhouse gas emissions from ships includes the common ambition to reach net zero greenhouse gas emissions from international shipping by or around 2050.<sup>217</sup>

### C. INTERNATIONAL HUMAN RIGHTS LAW

3.54 In the present request for an advisory opinion, the Court is asked what obligations States have under international law to ensure the protection of the climate system from anthropogenic greenhouse gas emissions. The preambular language invites the Court to have particular regard, amongst many listed sources of law, to the International Covenant on Civil and Political Rights ('**ICCPR**')<sup>218</sup> and the International Covenant on Economic, Social and Cultural Rights ('**ICESCR**')<sup>219</sup> (with corresponding provisions in the Universal Declaration on Human Rights ('**UDHR**')).<sup>220</sup>

3.55 This Court has recognised the connection between human rights and the environment, stating that 'the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn'.<sup>221</sup>

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<sup>216</sup> *Consolidated statement of continuing ICAO policies and practices related to environmental protection – Climate change*, Resolution A41-21 (October 2022) <[https://www.icao.int/environmental-protection/Documents/Assembly/Resolution\\_A41-21\\_Climate\\_change.pdf](https://www.icao.int/environmental-protection/Documents/Assembly/Resolution_A41-21_Climate_change.pdf)>.

<sup>217</sup> *2023 International Maritime Organization Strategy on Reduction of GHG Emissions from Ships*, Resolution MEPC.377(80) (adopted 7 July 2023) para. 3.3(4) <<https://www.wcdn.imo.org/localresources/en/OurWork/Environment/Documents/annex/MEPC%2080/Annex%2015.pdf>>.

<sup>218</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (UN Dossier No. 49) ('**ICCPR**').

<sup>219</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (UN Dossier No. 52) ('**ICESCR**').

<sup>220</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) (UN Dossier No. 257) ('**UDHR**').

<sup>221</sup> *Nuclear Weapons Advisory Opinion* (n 32) p. 241, para. 29; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 41, para. 53.

- 3.56 Similarly, there is widespread acceptance that the effects of climate change can impact the enjoyment of human rights.<sup>222</sup> Climate change may have adverse impacts on the physical and mental health of people and communities – including through heat-related illnesses and fatalities, poor air quality, extreme weather events, food insecurity, poverty, disrupted water supply and community displacement. These effects have potentially far-reaching and complex implications, and are often disproportionately borne by the most vulnerable and disadvantaged members of society. This includes individuals in geographic regions facing existential threats from climate change, such as small Pacific islands.
- 3.57 In Australia, First Nations people are disproportionately affected by climate change, owing to their close relationship with and dependence upon the environment and their connection to Country. Changes to the climate can impact ongoing connection to land, sea and Country, and can threaten cultural knowledge, heritage and traditional practices, lead to displacement from ancestral homelands and affect the ability to access Country. For this reason, Australia considers the United Nations Declaration on the Rights of Indigenous Peoples ('**UNDRIP**')<sup>223</sup> to be an important instrument in the present context. First Nations people's knowledge and care of Country is vital to tackling climate change. The Australian Government is committed to working closely with First

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<sup>222</sup> The UN Office of the High Commissioner for Human Rights has recognised 'broad agreement' on this point: see *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, UN Doc A/HRC/10/61 (15 January 2009) p. 23, para. 69 (UN Dossier No. 283). See also *Human Rights and Climate Change*, HRC Res 26/27, UN Doc A/HRC/RES/26/27 (27 June 2014) paras. 1-2 (UN Dossier No. 267); *Human Rights and Climate Change*, HRC Res 29/15, UN Doc A/HRC/RES/29/15 (2 July 2015) para. 1 (UN Dossier No. 268); *Human Rights and Climate Change*, HRC Res 32/33, UN Doc A/HRC/RES/32/33 (1 July 2016) para. 1 (UN Dossier No. 269); *Human Rights and Climate Change*, HRC Res 35/20, UN Doc A/HRC/RES/35/20 (22 June 2017) paras. 1-2 (UN Dossier No. 270); *Human Rights and Climate Change*, HRC Res 38/4, UN Doc A/HRC/RES/38/4 (5 July 2018) para. 1 (UN Dossier No. 271); *Human Rights and Climate Change*, HRC Res 41/21, UN Doc A/HRC/RES/41/21 (12 July 2019) para. 1 (UN Dossier No. 272); *Human Rights and Climate Change*, HRC Res 44/7, UN Doc A/HRC/RES/44/7 (16 July 2020) para. 1 (UN Dossier No. 273); *Human Rights and Climate Change*, HRC Res 47/24, UN Doc A/HRC/RES/47/24 (14 July 2021) para. 1 (UN Dossier No. 274); *Human Rights and Climate Change*, HRC Res 50/9, UN Doc A/HRC/RES/50/9 (7 July 2022) para. 1 (UN Dossier No. 275).

<sup>223</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007).

Nations communities to address the climate impacts they are facing, including to protect cultural heritage. Although not itself legally binding, UNDRIP assists in informing the direction of relevant policy, programs and legislation as they apply to First Nations people.

3.58 International human rights law is directed at ensuring *individuals' human rights and fundamental freedoms*. The ICCPR, the ICESCR and the UDHR do not contain any express or direct obligations to 'ensure the protection of *the climate system*' (emphasis added). The primary source of States' obligations concerning the protection of the climate system from anthropogenic emissions of greenhouse gases are the specialised climate change treaties, i.e. the UNFCCC and the Paris Agreement (as explained in Chapter 2 above). It is by discharging those obligations that States foster an environment conducive to the enjoyment of human rights by present and future generations. The focus in these treaties on collective and cooperative action reflects the fact that climate change is a 'common concern of humankind'.<sup>224</sup>

3.59 However, international human rights law has an important complementary role to play alongside the climate change treaties. This is recognised in the preamble to the Paris Agreement, which states that:

...Parties should, when taking action to address climate change, *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.<sup>225</sup>

While the above paragraph does not create separate obligations,<sup>226</sup> it affirms the importance of States' respecting, promoting and considering human rights in taking measures to address climate change.

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<sup>224</sup> UNFCCC (n 5) Preamble para. 1; *Paris Agreement* (n 5) Preamble para. 11.

<sup>225</sup> *Paris Agreement* (n 5) Preamble para. 11 (emphasis added).

<sup>226</sup> Bodansky, Brunée and Rajamani (n 56) p. 25.

3.60 Climate change may have implications for States' obligations under international human rights law in two respects.

3.61 *First*, climate change can impact the enjoyment by individuals of their human rights, with the consequence that States may be obliged to take action in response to such impacts. The enjoyment of a range of rights under the ICCPR and ICESCR could be impacted by the effects of climate change, including the rights to life;<sup>227</sup> home and family life;<sup>228</sup> an adequate standard of living, including adequate food, clothing and housing, safe drinking water,<sup>229</sup> and the continuous improvement of living conditions;<sup>230</sup> and the right to the enjoyment of the highest attainable standard of physical and mental health.<sup>231</sup> Any precise measures that a State would be required to take in a particular situation would vary depending on the right in question and the situation in issue, including the character of the impacts (or risk thereof) on the human rights of the individuals in question that are caused by the effects of climate change.

3.62 *Second*, when States take action to address climate change, they must do so consistently with their obligations under international human rights law. In fact, obligations that arise under international human rights law are well suited to promoting transparency and participation in the formulation and implementation of measures to address climate change. Potentially relevant obligations include:

- (a) freedom of speech, including freedom to seek, receive and impart information;<sup>232</sup>

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<sup>227</sup> ICCPR (n 219) Article 6; UDHR (n 221) Article 3.

<sup>228</sup> ICCPR (n 219) Article 17; UDHR (n 221) Article 12.

<sup>229</sup> The right to water forms an essential component part of the rights in Articles 11 and 12. See Committee on Economic, Social and Cultural Rights, *General Comment No. 15 (2002) on The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)* (20 January 2003), 29<sup>th</sup> sess, UN Doc E/C.12/2002/11 p. 2, para. 3 (UN Dossier No. 294).

<sup>230</sup> ICESCR (n 220) Article 11; UDHR (n 221) Article 25.

<sup>231</sup> ICESCR (n 220) Article 12.

<sup>232</sup> ICCPR (n 219) Article 19(2); see also UDHR (n 221) Article 19.

- (b) the rights to peaceful assembly and freedom of association;<sup>233</sup> and
- (c) the right to take part in public affairs, vote and have equal access to public service.<sup>234</sup>

3.63 Consultation and participation obligations may be specifically owed to certain groups affected by climate change. For example, under Article 27 of the ICCPR, States must not deny persons belonging to minorities the common enjoyment of their cultural life, the common practice of their religion and the common use of their language. Certain aspects of the rights of individuals protected by Article 27 – for example, to enjoy a particular culture – may consist of a way of life which is closely associated with territory, ecosystem and resource use.<sup>235</sup> The enjoyment of these rights may require States to take measures to ensure the effective participation of members of minority communities in decisions to address climate change that affect those communities.

3.64 International human rights law has an important role to play alongside the climate change treaties (as described above), though that role is limited because States owe international human rights law obligations only to individuals within their respective territories or jurisdiction.<sup>236</sup> Specifically:

- (a) Article 2(1) of the ICCPR provides that State Parties owe human rights obligations to individuals within the State's '*territory and subject to its*

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<sup>233</sup> ICCPR (n 219) Article 21, 22; see also UDHR (n 221) Article 20.

<sup>234</sup> ICCPR (n 219) Article 25; see also UDHR (n 221) Article 21.

<sup>235</sup> Human Rights Committee, *General Comment No. 23 on Article 27 (Rights of Minorities)*, 50<sup>th</sup> sess, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994) para. 3.2.

<sup>236</sup> In this respect, Australia reiterates that human rights only apply extraterritorially where a State exercises 'effective control' over territory or persons. See, eg, Committee Against Torture, *General Comment No. 2: Implementation of article 2 by State Parties*, UN Doc CAT/C/GC/2 (25 January 2008) para. 16; Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation on State Parties to the Covenant*, UN Doc. CCPR/c/21/Rev.1/Add.13 (26 May 2004) para. 10; *General Comment No. 35, Article 9 (Liberty and security of person)*, UN Doc. CCPR/C/GC/35 (2014) para. 63; Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant*, UN Doc E/C.12/1/Add.90 (23 May 2003) para. 31; Australia, *Replies to the list of issues to be taken up in connection with the consideration of the Fifth Periodic Report of the Government of Australia*, UN Doc CCPR/C/AUS/Q/5/Add.1 (2009) paras. 16-17.



*jurisdiction*' (emphasis added); and

- (b) although the ICESCR does not have a jurisdiction clause, the Court has attributed this to the 'fact that [the ICESCR] guarantees rights which are *essentially territorial*' (emphasis added), extending its application also 'both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction'.<sup>237</sup>

3.65 The territorial and jurisdictional limit just identified is important when ascertaining the obligations of States with respect to climate change under international human rights law because, due to the collective nature and multiple causes of climate change, its adverse human rights impacts cannot be fully mitigated by a State alone (even for individuals within its territory or jurisdiction). Consistently with that submission, and echoing the UNFCCC,<sup>238</sup> the UN Human Rights Council has recognised that climate change is a 'global problem' requiring a 'global solution',<sup>239</sup> calling for the 'widest possible cooperation by all countries and their participation in an effective and appropriate international response'.<sup>240</sup> The UN Committee on Economic, Social and Cultural Rights has likewise observed that international cooperation is 'essential' in the context of

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<sup>237</sup> *Construction of a Wall Advisory Opinion* (n 32) p. 180, para. 112.

<sup>238</sup> UNFCCC (n 5) Preamble para. 6: '*Acknowledging* that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response...'

<sup>239</sup> *Human Rights and Climate Change*, HRC Res 7/23, UN Doc A/HRC/7/78 (28 March 2008) Preamble para. 2 (UN Dossier No. 264); *Human Rights and Climate Change*, HRC Res 26/27, UN Doc A/HRC/RES/26/27 (27 June 2014) Preamble para. 21 (UN Dossier No. 267) ('*Human Rights and Climate Change*').

<sup>240</sup> *Human Rights and Climate Change*, HRC Res 29/15, UN Doc A/HRC/RES/29/15 (2 July 2015) Preamble para. 5 (UN Dossier No. 268); *Human Rights and Climate Change*, HRC Res 32/33, UN Doc A/HRC/RES/32/33 (1 July 2016) Preamble para. 7 (UN Dossier No. 269); *Human Rights and Climate Change*, HRC Res 35/20, UN Doc A/HRC/RES/35/20 (22 June 2017) Preamble para. 7 (UN Dossier No. 270); *Human Rights and Climate Change*, HRC Res 38/4, UN Doc A/HRC/RES/38/4 (5 July 2018) Preamble para. 9 (UN Dossier No. 271); *Human Rights and Climate Change*, HRC Res 41/21, UN Doc A/HRC/RES/41/21 (12 July 2019) Preamble para. 10 (UN Dossier No. 272); *Human Rights and Climate Change*, HRC Res 44/7, UN Doc A/HRC/RES/44/7 (16 July 2020) Preamble para. 10 (UN Dossier No. 273); *Human Rights and Climate Change*, HRC Res 47/24, UN Doc A/HRC/RES/47/24 (1 July 2021) Preamble para. 10 (UN Dossier No. 274); *Human Rights and Climate Change*, HRC Res 50/9, UN Doc A/HRC/RES/50/9 (7 July 2022) Preamble para. 10 (UN Dossier No. 275).

climate change because it ‘is transnational and cannot be addressed without robust international cooperation’.<sup>241</sup>

3.66 It is notable that the ICESCR recognises the important role of ‘international assistance and co-operation’ in the progressive realisation of rights under that Covenant,<sup>242</sup> including in the context of certain specific rights which explicitly refer to the importance of international cooperation.<sup>243</sup> This emphasis on international cooperation, being one way through which States may take steps to progressively realise rights, is consistent with the approach of the international community to the collective environmental challenge of climate change, specifically through the specialised climate change treaties.

3.67 Accordingly – and again as recognised by the UN Human Rights Council<sup>244</sup> – implementation of, and cooperation through, the UNFCCC and the Paris Agreement is vital to address the root cause of the impacts of anthropogenic greenhouse gas emissions on human rights and to deliver a healthy environment for future generations. Avoidance of the most severe impacts of climate change on individuals depends on ambitious and coordinated efforts of all States – individually and collectively – to reduce, mitigate and adapt to its effects, consistent with their obligations under the UNFCCC and the Paris Agreement.

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<sup>241</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 25 (2020) on Science and Economic, Social and Cultural Rights (article 15(1)(b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights)*, 67<sup>th</sup> sess, UN Doc E/C.12/GC/25 (30 April 2020) para. 81.

<sup>242</sup> ICESCR (n 220) Article 2; Committee on Economic, Social and Cultural Rights, *General Comment No. 3 on The Nature of States Parties’ Obligations (1990)*, 5<sup>th</sup> sess, UN Doc E/1991/23, (14 December 1990) paras. 13-14; UDHR Article 22 (‘through national effort and international co-operation’).

<sup>243</sup> See, eg, ICESCR (n 220) Articles 11, 15(4).

<sup>244</sup> *Human Rights and Climate Change*, UN Doc A/HRC/RES/26/27 (n 240) Preamble para. 21: ‘Recognizing also that climate change is an urgent global problem requiring a global solution, and that effective international cooperation to enable the full, effective and sustained implementation of the [UNFCCC] in accordance with the principles and provisions of the Convention is important in order to support national efforts for the realization of human rights affected by climate change-related impact’.

## CHAPTER 4. RELEVANT OBLIGATIONS OF STATES UNDER CUSTOMARY INTERNATIONAL LAW

4.1 This Court's judgments have analysed and explained various aspects of international law governing the protection of the environment, including the duty to cooperate and the principle of prevention of significant harm. Some of these principles are obligations of conduct, compliance with which must be assessed against a standard of due diligence. The Court has often addressed these principles in the context of specific treaty provisions, applicable as between the State parties to a contentious dispute. However, it has recognised that some also form part of customary international law. This Chapter addresses the relevance of States' obligations under customary international law to climate change, including the relationship between those obligations and the specialised climate change treaties.

### A. THE DUTY TO COOPERATE

4.2 Cooperation has been recognised as a 'fundamental principle' in international environmental law.<sup>245</sup> It is reflected in a range of international environmental law treaties. It has been observed that '[t]he concept of a duty of co-operation is the foundation of legal régimes dealing (*inter alia*) with shared resources and the environment'.<sup>246</sup>

4.3 At the United Nations Conference on the Human Environment in 1972, States adopted non-binding instruments, including the Stockholm Declaration, containing 26 Principles to 'inspire and guide the peoples of the world in the

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<sup>245</sup> See, eg, *MOX Plant (Ireland v. United Kingdom) (Provisional Measures)* Order of 3 December 2001, International Tribunal for the Law of the Sea Reports 2001, p. 110, para. 82; *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore) (Provisional Measures)* Order of 8 October 2003, International Tribunal for the Law of the Sea Reports 2003, p. 25, para. 92.

<sup>246</sup> *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening), Judgment, I.C.J. Reports 2014*, p. 457, para. 13 (Judge *ad hoc* Charlesworth).

preservation and enhancement of the human environment'.<sup>247</sup> The essential role of cooperation was noted in Principle 24 in the following terms:

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. Co-operation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States.

- 4.4 The duty to cooperate is also reflected in the Rio Declaration, adopted by the United Nations Conference on Environment and Development in 1992.<sup>248</sup> Principle 7 of the Rio Declaration provides that:

States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. ...

- 4.5 Principle 27 of the Rio Declaration further provides that:

States and people shall cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development.

- 4.6 The duty to cooperate is given specific expression and content in the context of climate change through provisions of the UNFCCC and the Paris Agreement. As noted in Chapter 2 above, a central aspect of the climate change treaty regime is cooperation, reflecting the fact that the international community has recognised that cooperation is key to meeting the challenge of climate change. The preamble to the UNFCCC acknowledges that 'the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response...'.<sup>249</sup> Cooperation is also a core

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<sup>247</sup> *Report on the United Nations Conference on the Human Environment*, UN Doc A/CONF.48/14/Rev.1 (5-16 June 1972) p. 3 (UN Dossier No. 136).

<sup>248</sup> *Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF.151/26/Rev.1 (Vol.I) (3-14 June 1992) p. 3 (UN Dossier No. 137).

<sup>249</sup> UNFCCC (n 5) Preamble para. 6.

feature of the Paris Agreement,<sup>250</sup> which requires States to cooperate in areas including mitigation,<sup>251</sup> adaptation,<sup>252</sup> financial assistance,<sup>253</sup> research,<sup>254</sup> capacity-building,<sup>255</sup> transfer of technology,<sup>256</sup> education, training and public awareness,<sup>257</sup> loss and damage,<sup>258</sup> and market-based mechanisms.<sup>259</sup> For States party to the UNFCCC and the Paris Agreement, compliance with the specific obligations of cooperation under those treaties would meet any obligation to cooperate under international law in respect of such emissions.

## **B. THE PRINCIPLE OF PREVENTION**

4.7 In the question, the Court has been asked to have particular regard to ‘the principle of prevention of significant harm to the environment’, and to the ‘duty of due diligence’.

4.8 The principle of prevention has been accepted by this Court, among others, as ‘part of the corpus of international law relating to the environment’,<sup>260</sup> including as a principle of customary international environmental law.<sup>261</sup> The principle has substantive and procedural aspects. As the Court has explained, the substantive aspect imposes an obligation of conduct, and due diligence is the relevant

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<sup>250</sup> See, eg, *Paris Agreement* (n 5) Preamble para. 14, Article 3.

<sup>251</sup> See, eg, *Paris Agreement* (n 5) Articles 4(5), 6(1), 6(2).

<sup>252</sup> See, eg, *UNFCCC* (n 5) Article 4(1)(e); *Paris Agreement* (n 5) Articles 7(6)-7(8).

<sup>253</sup> See, eg, *UNFCCC* (n 5) Articles 4(3) and 4(4); *Paris Agreement* (n 5) Articles 9(1)-9(3).

<sup>254</sup> See, eg, *UNFCCC* (n 5) Articles 4(1)(g), 5; *Paris Agreement* (n 5) Article 7(7)(c).

<sup>255</sup> See, eg, *Paris Agreement* (n 5) Article 11(3).

<sup>256</sup> See, eg, *UNFCCC* (n 5) Article 4(1)(c); *Paris Agreement* (n 5) Articles 10(2), 10(6).

<sup>257</sup> See, eg, *UNFCCC* (n 5) Article 4(1)(i), 6(b); *Paris Agreement* (n 5) Article 12.

<sup>258</sup> See, eg, *Paris Agreement* (n 5) Articles 8(3), 8(4).

<sup>259</sup> See, eg, *Paris Agreement* (n 5) Article 6(2).

<sup>260</sup> *Nuclear Weapons Advisory Opinion* (n 32) p. 242, para. 29.

<sup>261</sup> *Iron Rhine Arbitration (Belgium v. the Netherlands) (Award)* (Permanent Court of Arbitration, Case No. 2003-02, 24 May 2005) p. 90 para. 222 (‘*Iron Rhine Arbitration*’); *Pulp Mills* (n 179) pp. 55-56, para. 101.

standard of compliance.<sup>262</sup> It therefore obliges States ‘to deploy adequate means, to exercise best possible efforts, to do the utmost’<sup>263</sup> to prevent activities which take place in its territory, or in any area under its jurisdiction, from causing significant harm to the environment of other States,<sup>264</sup> or to minimise the risk of such significant harm.<sup>265</sup> Procedural aspects of the principle include cooperation and the obligation to undertake environmental impact assessments in appropriate circumstances.<sup>266</sup>

4.9 On the application of the principle of prevention to anthropogenic greenhouse gas emissions, Australia makes the following submissions.

4.10 *First*, the principle of prevention has been formulated and applied (including by the Court) in the context of conventional cases of transboundary environmental harm, typically from one State to a neighbouring State, where there is a direct cause of environmental harm from a single source. Climate change presents a new and different type of challenge. The environmental consequences of anthropogenic greenhouse gas emissions result from a much more complex and diffuse causal chain, linked to the actions of States and countless private actors over decades. The cumulative nature of those impacts, and the fact that they may occur in locations far removed from the source of emissions that contribute to those impacts, further differentiate climate change from the conventional case of transboundary harm. This gives rise to novel questions with respect to the causation of ‘significant harm’ and attribution of responsibility for specific impacts. These issues suggest that the complex situation of climate change is materially distinct from the situation of an ordinary case of transboundary harm.

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<sup>262</sup> *Pulp Mills* (n 179) pp. 55-56, para. 101; *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015, p. 706, para. 104 (‘*San Juan River case*’).

<sup>263</sup> *Activities in the Area ITLOS Advisory Opinion* (n 71) p. 41, para. 110.

<sup>264</sup> *Pulp Mills* (n 179) pp. 55-56, para. 101; *San Juan River case* (n 263) pp. 706-707, para. 104.

<sup>265</sup> International Law Commission, *Report of the International Law Commission on the work of its fifty-third session*, UN GAOR, A/56/10 (2001) p. 153; *Iron Rhine Arbitration* (n 262) pp. 28-29, para. 59; *Indus Waters Kishenganga Arbitration (Pakistan v. India) (Partial Award)* (Permanent Court of Arbitration, Case No. 2011-01, 18 February 2013) p. 170, para. 451.

<sup>266</sup> *Pulp Mills* (n 179) p. 83, para. 204; *San Juan River case* (n 263) p. 706, para. 104.

To the extent that obligations developed and applied in the context of conventional transboundary harm apply in respect of climate change, those obligations will need to account for the unique nature and features of harm caused by anthropogenic greenhouse gas emissions, and to address the novel and complex questions of causation and attribution to which they give rise.

- 4.11 *Second*, as discussed above, the international community of States has elected to address the complex challenge of climate change through the specialised climate treaty regime, including the UNFCCC and the Paris Agreement. That treaty regime contains detailed and specific obligations on States with respect to anthropogenic greenhouse gas emissions, which necessarily address the impacts of such emissions on the environment of other States or of areas beyond national jurisdiction at their source. While the preamble to the UNFCCC refers to the responsibility to ensure that activities within States' jurisdiction and control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction, neither the substantive nor the procedural aspects of the principle of prevention are otherwise incorporated into the specialised climate change treaties. Rather, States have elected to address the challenge of climate change, and specifically any adverse impacts of greenhouse gas emissions, by alternative means. Those means focus on the reduction and control of greenhouse gas emissions through increasingly ambitious measures and through cooperation, including as between developing and developed States. These obligations are tailored to the distinct, cumulative and collective nature of this global challenge. Given the widespread adoption of the climate change treaties, customary international law should not be held to have developed in a way that approaches the same problem by imposing obligations of a different kind.

### **C. DUE DILIGENCE**

- 4.12 The question also refers to 'the duty of due diligence'. As to the concept of due diligence in the context of environmental protection, Australia makes three submissions.

- 4.13 *First*, due diligence is a standard against which State conduct can be assessed. Due diligence is the standard of compliance that applies to certain obligations applicable to States, including in international environmental law. It is not a self-standing obligation.
- 4.14 *Second*, it is well accepted that compliance with an obligation of conduct must be assessed against the standard of due diligence. For example, where the obligation of conduct is directed to a particular objective or result, a State must exercise due diligence to achieve that objective or result. The Court considered in *Pulp Mills* that due diligence requires a State to adopt appropriate rules and measures, and to exercise vigilance in enforcing those rules and measures within its jurisdiction.<sup>267</sup> Similarly, the Seabed Disputes Chamber of ITLOS observed that an obligation ‘to ensure’ ‘is not an obligation to achieve... [r]ather, it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result.’<sup>268</sup>
- 4.15 *Third*, the precise content and application of the due diligence standard is variable and context-dependent. In its advisory opinion in *Responsibilities and obligations of States with respect to activities in the Area*, the Seabed Disputes Chamber of ITLOS described due diligence as a ‘variable concept’ and said that ‘[t]he content of ‘due diligence’ obligations may not easily be described in precise terms’.<sup>269</sup> A range of factors may inform the requirements of due diligence in any particular context, including scientific, technical and economic considerations, and an ongoing requirement to evaluate measures in light of new scientific, technical and economic information. A due diligence standard may also be informed by the evolving circumstances of an individual State over time,

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<sup>267</sup> *Pulp Mills* (n 179) pp. 79-80, para. 197.

<sup>268</sup> *Activities in the Area ITLOS Advisory Opinion* (n 171) p. 41, para. 110. See also *Fisheries ITLOS Advisory Opinion* (n 178) p. 38, para. 125, and pp. 39-40, paras. 128-129.

<sup>269</sup> *Activities in the Area ITLOS Advisory Opinion* (n 171) p. 43, para. 117. See also *Fisheries ITLOS Advisory Opinion* (n 178) p. 41, para. 132.



which will have a bearing on the capabilities of the State in respect of the objective or result in question.

## CHAPTER 5. LEGAL CONSEQUENCES ARISING FROM ACTS OR OMISSIONS CAUSING SIGNIFICANT HARM

5.1 Paragraph (b) of the request for an advisory opinion asks ‘[w]hat are the legal consequences under these obligations [being the obligations discussed above] for States where they, by their actions or omissions, have caused significant harm to the climate system and other parts of the environment’, with respect to:

(i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?

(ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?

5.2 In its statement during the adoption of the Resolution,<sup>270</sup> Australia welcomed the focus on small island developing States and least developed countries given their particular vulnerability to the impacts of climate change. Australia recognises, as noted in Chapter 1, that climate change poses the single-greatest threat to the livelihoods, security and well-being of the peoples of small island developing States, in particular Pacific Island States.

5.3 In this Chapter, Australia first outlines the various elements that would have to be established in order for it to be found, in a specific context, that a State has committed an internationally wrongful act and to determine the legal consequences of that act (**Section A**). It then identifies specific issues of causation connected with the reference to ‘caused significant harm’ in paragraph (b) of the question (**Section B**). These issues of causation present particular complexities, both in relation to determining whether States have breached a primary obligation and in relation to determining any legal consequences

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<sup>270</sup> See *Consideration of the Request for an Advisory Opinion*, UN Doc A/77/PV.64 (n 1) pp. 14-15 (Australia).

resulting from any breach. The complexity arises *inter alia* from the fact that it is the combined effect of all greenhouse gas emissions, over a significant period of time, that causes harm to the climate system, and that it is the combined effort of all States that will be necessary to avert such harm. That is why it is crucial for all States, including major emitters past, present and future, to continue to address climate change collectively.

**A. INTERNATIONALLY WRONGFUL ACTS AND THE LEGAL CONSEQUENCES ARISING FROM THOSE ACTS**

5.4 Legal consequences only arise in international law if an internationally wrongful act is committed.<sup>271</sup> As the Court explained in the *Wall* advisory opinion, before determining the legal consequences of particular conduct, it is first necessary to assess whether that conduct constitutes a breach of international law.<sup>272</sup> Therefore, even if it is assumed that it could be proved that particular conduct that occurred under the jurisdiction of a particular State caused significant harm to the climate system, that would not itself be sufficient to establish the commission of an internationally wrongful act. Four questions would need to be addressed:

- (a) *First*, what obligation is it alleged that the State thereby breached?
- (b) *Second*, was the State bound by that particular obligation when the conduct alleged to breach the obligation occurred?<sup>273</sup>
- (c) *Third*, if so, was the conduct in question attributable to the State?<sup>274</sup>
- (d) *Fourth*, if so, did that attributable conduct constitute a breach of the

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<sup>271</sup> *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) Articles 2, 28 ('*Articles on States Responsibility*').

<sup>272</sup> *Construction of a Wall Advisory Opinion* (n 32) p. 154, para. 39, pp. 164-165, para. 68. See also *Chagos Advisory Opinion* (n 32) p. 138, para. 175.

<sup>273</sup> *Articles on States Responsibility* (n 272) Article 13.

<sup>274</sup> *Ibid* Article 2(a) and, in general, Chapter II ('Attribution of Conduct to a State').

obligation?<sup>275</sup>

- 5.5 If each of the latter three questions were to be answered in the affirmative, an internationally wrongful act would have been committed.
- 5.6 As in any field of international law, where a State is in breach of an international obligation then, under the general rules of State responsibility, the legal consequences flowing from such a breach are those outlined below.<sup>276</sup> However, the specific conduct that will be required of a State as a result, including the form that any reparation shall take, is always context specific and will depend upon the primary obligation and conduct in question. For example, failure to exercise due diligence, which results in a failure to comply with an obligation of conduct, would not have the consequence that a State is required to make reparation for harm that would have occurred whether or not due diligence had been exercised (and which therefore was not caused by the breach of the obligation of conduct).
- 5.7 It is well established that one legal consequence of an internationally wrongful act is that the responsible State is under an obligation to cease its wrongful act, if it is continuing, and to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.<sup>277</sup> For example, if a State were to commit an internationally wrongful act by failing to exercise due diligence in seeking to prevent, reduce or control harm to the climate system contrary to Article 194(1) of UNCLOS in respect of the marine environment, and its wrongful act were continuing, the State would be subject to the obligation of cessation.
- 5.8 Another legal consequence of an internationally wrongful act is that the responsible State is under an obligation to make full reparation.<sup>278</sup> However, a State is only required to make reparation for damage 'caused' by its wrongful

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<sup>275</sup> Ibid Articles 2(b), 12.

<sup>276</sup> Except where, and to the extent that, legal consequences are 'governed by special rules of international law': Ibid Article 55.

<sup>277</sup> Ibid Article 30.

<sup>278</sup> Ibid Article 31(1).

act.<sup>279</sup> For a State to be obliged to make reparation for particular damage it must be established, as a matter of *fact*, that the damage was caused by the State's wrongful act. Even then, a State is not obliged to make reparation for 'any and all consequences flowing from an internationally wrongful act'.<sup>280</sup> It must also be established that the particular damage was caused by the State's wrongful act as a matter of *law*. That is why a State is not required to make reparation for damage that is too remote or uncertain.<sup>281</sup> As the Court identified in *Bosnia Genocide*, the 'question is *whether there is a sufficiently direct and certain causal nexus*' between the wrongful act and the injury suffered.<sup>282</sup>

## B. CAUSATION AND SIGNIFICANT HARM

5.9 Paragraph (b) of the question seeks the Court's advice on the legal consequences where States *cause significant harm* to the climate system. This paragraph of the question is premised on the assumption that an internationally wrongful act constituted by conduct of a State or States that fails to comply with the obligations identified in answering paragraph (a) of the question may *cause significant harm* to the climate system. In any individual case, that assumption could not be made, and causation would have to be proved. The threshold of 'significant harm' is a high one, requiring serious harm.<sup>283</sup> As has been noted in other parts of Australia's submissions, the diffuse geographic sources of anthropogenic greenhouse gas emissions, and the time periods over which they

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<sup>279</sup> Ibid Article 31(2).

<sup>280</sup> International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 53<sup>rd</sup> sess, A/56/10 (November 2001) Article 31, para. 9 ('*Draft articles on Responsibility of States for Internationally Wrongful Acts*').

<sup>281</sup> Ibid Article 31, para. 10; *Trail smelter case (United States of America v. Canada)*, Decision of 11 March 1941, III UNRIAA 1938, p. 1931 ('*Trail smelter case*').

<sup>282</sup> *Case concerning Application of The Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 234, para. 462 (emphasis added) ('*Case concerning Application of The Convention on the Prevention and Punishment of the Crime of Genocide*').

<sup>283</sup> See, eg, *Trail smelter case* (n 282) p. 1965; *Lac Lanoux Award (France v. Spain)*, Decision of 16 November 1957, XII UNRIAA 1957, p. 308; Philippe Sands, Jacqueline Peel, Adriana Fabra and Ruth MacKenzie, *Principles of International Environmental Law* (Cambridge University Press, 4<sup>th</sup> ed, 2018) p.744.

accumulate in such a way that they could cause significant harm, set these emissions apart from the more conventional forms of pollution. It is the combined effect of all greenhouse gas emissions, over time, which leads to changed climate patterns and, ultimately, to the consequences of climate change for individual States. In answering question (b), the Court may wish to give careful consideration to the factual difficulty that may arise in establishing that a State has or States have in fact *caused significant harm*. In addition, as a matter of law a State will only have caused, and be required to make reparation for, damage that has a ‘sufficiently direct and certain causal nexus’ with the State’s internationally wrongful act.<sup>284</sup> As noted above, a State cannot be required to make reparation for damage that is too remote or uncertain.<sup>285</sup>

- 5.10 The considerations identified above concerning the answer to paragraph (b) of the request for an advisory opinion cohere with, and reinforce, the reasons why the international community of States has elected to address the complex challenge of climate change through the specialised climate treaty regime. As outlined in Chapter 2 above, the UNFCCC and the Paris Agreement have been carefully negotiated taking account of the diffuse sources of greenhouse gas emissions and their impacts. In addition, and critically for present purposes, they include mechanisms and ways for States Parties to cooperate to address issues of loss and damage associated with the adverse effects of climate change, which is consistent with the reality that there are real obstacles to addressing issues of loss and damage under the principles of State responsibility.

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<sup>284</sup> *Case concerning Application of The Convention on the Prevention and Punishment of the Crime of Genocide* (n 283) p. 234, para. 462.

<sup>285</sup> *Draft articles on Responsibility of States for Internationally Wrongful Acts* (n 281) Article 31, para. 10.

## CHAPTER 6. CONCLUSION

- 6.1 The UNFCCC and the Paris Agreement are the primary sources of States' obligations under international law concerning the protection of the climate system from anthropogenic emissions of greenhouse gases. These specialised climate change treaties create legally binding obligations for the vast majority of States in the international community. They also include specific, detailed mechanisms for the implementation of States' obligations and ongoing review of the measures taken in pursuit of the stated goals of these treaties. Other treaties also contain provisions relevant to the obligations of States to ensure the protection of the climate system from climate change, which play an important complementary role alongside the climate change treaties. These treaties are: (a) UNCLOS; (b) international environmental treaties and sector-specific agreements that address specific types of anthropogenic greenhouse gas emissions, and promote mitigation and adaptation measures; and (c) international human rights law treaties. Where customary international law also imposes obligations relevant to the protection of the climate system from climate change, those obligations must be consistent with those that arise under the UNFCCC and the Paris Agreement.
- 6.2 Global cooperation is critical to delivering an effective response to climate change. Australia acknowledges the extent of the challenge posed by climate change and recognises that action must be undertaken collectively. The UNFCCC and the Paris Agreement provide the framework for the collective international action needed to address both the causes and the impacts of climate change. They do so through a dynamic process for assessing the effectiveness of this collective action over time and adjusting it as necessary. This dynamic process is resulting in scaled up action and ambition at both the individual and collective levels.
- 6.3 Progress has also been made on the international response to the impacts of climate change. Australia has made significant commitments under this framework and will continue to do its part, including by taking ambitious

domestic action to reduce emissions and decarbonise its economy, and by supporting vulnerable countries in its region to adapt to the changing climate. Achieving the collective goals of the specialised climate treaty framework will continue to require significant effort, particularly by major emitters, past, present and future.

- 6.4 The UNFCCC and the Paris Agreement are the product of engaged, protracted negotiations and careful compromise between States. It is these treaties that are of central importance in answering the question before the Court. These treaties were negotiated to address the threat posed by climate change and the complex and novel issues it raises. Other international treaties and customary rules were not negotiated, or did not develop, in such a context. They should not be interpreted as operating inconsistently with, or going beyond, the UNFCCC and Paris Agreement. To do so would alter the delicate balance of interests struck by States in the UNFCCC and the Paris Agreement, these being the treaties which can produce the cooperation needed to meet the challenge of climate change. The near universal membership of those treaties indicates the very high level of consensus between States that climate change is best addressed collectively and cooperatively through the framework of those treaties. Australia is resolutely committed to the objective of the UNFCCC and the goals of the Paris Agreement.



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22 March 2024