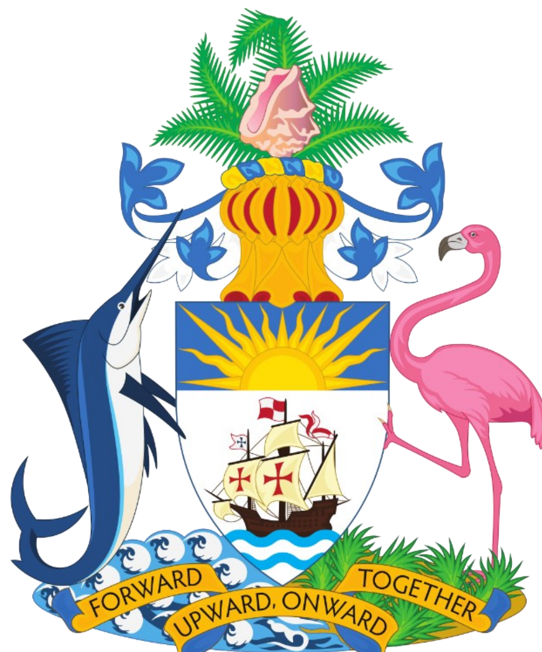
INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

(REQUEST FOR ADVISORY OPINION)

WRITTEN REPLIES OF THE COMMONWEALTH OF THE BAHAMAS TO THE QUESTIONS PUT BY THE COURT

20 December 2024



1. On 13 December 2024, the Court's Registrar transmitted to participants in the advisory proceedings on the *Obligations of States in respect of Climate Change* the questions put by Judges Cleveland, Tladi, Aurescu and Charlesworth. The Bahamas sets out below its written replies to the questions put by Judges Cleveland, Tladi and Charlesworth.

I.
Question put by Judge Cleveland

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

2. Carbon dioxide (CO_2) accounts for approximately 75% of anthropogenic greenhouse gas ("***GHG***") emissions and has the highest "global warming potential".[1] According to the Intergovernmental Panel on Climate Change ("***IPCC***"), current CO_2 concentrations "are higher than at any time over at least the past *two million years*", increasing by 47% over 1750 levels.[2] The burning of fossil fuels is the dominant driver of that increase.[3]

3. Under international law, States are required to effect deep, rapid and sustained reduction in GHG emissions in order to limit climate change to sustainable levels. The obligation arises from international environmental law, the law of the sea, and international human rights law.[4] In order to achieve the required reduction in GHG emissions, the IPCC has observed that States' energy policies need to include "a substantial reduction in overall fossil fuel use; minimal use of unabated fossil fuels, and use of carbon capture and storage in the remaining fossil fuel systems".[5]

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[1] Intergovernmental Panel on Climate Change, *Climate Change 2022: Mitigation of Climate Change. Contributions of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (2022) (hereinafter "**IPCC 2022 Report on Mitigation of Climate Change**"), p. 7, Figure SPM.1.

[2] Intergovernmental Panel on Climate Change, *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (March 2023) (hereinafter "**IPCC 2023 Synthesis Report**"), p. 44 (emphasis added).

[3] Intergovernmental Panel on Climate Change, *Special Report on Carbon Dioxide Capture and Storage. Prepared by Working Group III of the Intergovernmental Panel on Climate Change* (2005) (hereinafter "**IPCC 2005 Special Report on Carbon Dioxide Capture and Storage**"), p. 19.

[4] First Written Statement of The Bahamas, Sections IV.A–IV.

[5] IPCC 2023 Synthesis Report, p. 104.

4. Thus, while it is in principle open to States to choose the means through which they discharge their mitigation obligations,[6] the current scientific consensus strongly indicates that States are required to very substantially reduce the use of fossil fuels in their economies. In particular, current technology such as carbon capture and storage is able to remove only a small portion of CO_2 emissions from the atmosphere.[7] Accordingly, and consistent with the precaution and vigilance which informs States' obligations with respect to the environment,[8] States are (at present) required to very substantially, and urgently, reduce their use of fossil fuels.

5. Importantly, the obligation rests on *all* States—because all States use fossil fuels, even if they do not produce them. It is the burning of fossil fuels (rather than their production) that releases CO_2 into the atmosphere and leads to global warming.[9] While restricting the supply of fossil fuels is one policy option open to States in order to mitigate GHG emissions, it is equally important to regulate the demand side by restricting the *use* of fossil fuels. As the IPCC has observed, limiting climate change to sustainable levels requires "major energy system transitions".[10] Consistent with the States' obligation to use "all means at [their] disposal" to prevent transboundary environmental harm,[11] States need to adopt a holistic approach to their energy policies and seriously consider both supply-side and demand-side regulation.

6. With respect to supply-side regulation, the best available science suggests that all fossil fuel producing States have a legal obligation to transition away from fossil fuels. In addition, fossil fuel subsidies need to be approached with extreme caution. For instance, the IPCC has observed that "fossil fuel subsidy removal is projected by various studies to reduce global CO_2

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[6] First Written Statement of The Bahamas, para. 121, Section V.A; Written Comments of The Bahamas, paras. 45-50.

[7] IPCC 2022 Report on Mitigation of Climate Change, p. 38, Figure SPM.7.

[8] First Written Statement of The Bahamas, paras. 62, 87, 96-98, 102(c)-(d), 199; Written Comments of The Bahamas, Section II.D.1, para. 121.

[9] IPCC 2023 Synthesis Report, p. 53. However, the production and distribution of fossil fuels is a major source of methane emissions, which also contribute significantly to global warming, especially in the short term. *See* Intergovernmental Panel on Climate Change, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (2021), p. 102, Figure TS.20. Therefore, fossil fuel producing States need to reflect that scientific consensus in their overall design of energy policies.

[10] IPCC 2023 Synthesis Report, p. 104.

[11] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, para. 101. *See also* United Nations Convention on the Law of the Sea, art. 194(1) ("States shall take . . . *all measures . . . that are necessary* to prevent, reduce and control pollution of the marine environment").

emissions by 1–4%, and GHG emissions by up to 10% by 2030".[12] It can be a powerful tool in the States' GHG mitigation toolkits. Accordingly, there is a heavy burden on States providing such subsidies to show that they have comprehensively assessed the harm caused by such subsidies, considered their legitimacy, necessity and proportionality, and taken measures to mitigate the harm caused. For instance, subsidies for fossil fuel projects with integrated CO_2 removal infrastructure would be more likely to pass the test than subsidies for "unabated" fossil fuel projects.

II.
Question put by Judge Tladi

> "*In their written and oral pleadings, participants have generally engaged in an interpretation of the various paragraphs of Article 4 of the Paris Agreement. Many participants have, on the basis of this interpretation, come to the conclusion that, to the extent that Article 4 imposes any obligations in respect of Nationally Determined Contributions, these are procedural obligations. Participants coming to this conclusion have, in general, relied on the ordinary meaning of the words, context and sometimes some elements in Article 31 (3) of the Vienna Convention on the Law of Treaties. I would like to know from the participants whether, according to them, "the object and purpose" of the Paris Agreement, and the object and purpose of the climate change treaty framework in general, has any effect on this interpretation and if so, what effect does it have?*"

7. As The Bahamas has observed in its written submissions, classifying obligations as one of conduct or result may be a convenient shorthand, but it can also blur important nuances among different provisions.[13] That is also true with respect to designating obligations as "procedural" and "substantive". Rather, each norm must be interpreted on its own terms. The Paris Agreement is a legally binding agreement for all signatories. Therefore, any article emanating from it should not and cannot be considered merely "procedural."

8. However, insofar as the reference to "procedural" obligations under Article 4 of the Paris Agreement is meant to imply that States are merely required to submit *any* nationally determined contributions ("***NDCs***") in order to discharge their obligations, that is incorrect. As The Bahamas has explained in its written and oral submissions, each State's NDCs must reflect that State's "highest possible ambition" and "represent a progression over time".[14] In addition, NDCs must be informed by Conference of Parties decisions and the outcomes of the global

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[12] IPCC 2023 Synthesis Report, p. 111.

[13] Written Comments of The Bahamas, para. 42.

[14] Paris Agreement to the United Nations Framework Convention on Climate Change, December 12, 2015, 3156 *UNTS* 219 (hereinafter "**Paris Agreement**"), arts. 3, 4(3).

stocktake.[15] Crucially, the object and purpose of the Paris Agreement, as expressed in Article 2, provides important guardrails for the setting of States' NDCs. Article 2 of the Paris Agreement records the Parties' common goal to limit the increase in global average temperatures to "well below 2ºC above pre-industrial levels" and "pursu[e] efforts to limit the temperature increase to 1.5ºC".[16] Interpreted in light of that object and purpose, Article 4 requires States to set their NDCs at a level that makes it reasonably possible to achieve the temperature goal.[17] In other words, improperly low NDCs would be a violation of the State's obligations under the Paris Agreement. That interpretation also follows from the well-established principle that States must perform treaty obligations in good faith.[18]

9. For completeness, Article 4 of the Paris Agreement also requires States to exercise due diligence and pursue effective mitigation measures which are reasonably aligned with their NDCs.[19] All signatories to the Paris Agreement are bound by its terms, inclusive of Article 2 and Article 4 to implement their NDCs fully.

III.
Question put by Judge Charlesworth

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

10. Such interpretative declarations reflect the contemporaneous intent of the relevant State parties and their understanding of the scope and meaning of the treaty in question. As such, they are an auxiliary or complementary means of interpreting the climate treaties. In particular, they are relevant to the Court's assessment of whether the relevant treaty has the purpose or effect of displacing general international law, including norms of State responsibility.

11. Several states made declarations upon becoming parties to the climate treaties. With respect to the UNFCCC, Fiji, Kiribati, Nauru, Papua New Guinea, and Tuvalu made

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[15] Paris Agreement, arts. 4(9), 14(3).

[16] Paris Agreement, art. 2.

[17] *See, e.g.*, Paris Agreement, art. 3 (expressly linking the Parties' mitigation obligations with the temperature goal by providing that "all Parties are to undertake and communicate ambitious efforts . . . with a view to achieving the purpose of this Agreement as set out in Article 2"). *See also* Written Comments of The Bahamas, para. 48; CR 2024/36, p. 62, para. 22 (Blake).

[18] Vienna Convention on the Law of Treaties, art. 26; CR 2024/36, p. 62, para. 22 (Blake).

[19] Written Comments of The Bahamas, para. 49.

declarations expressing their "understanding that signature of the Convention shall, in no way, constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change, and that no provisions in the Convention can be interpreted as derogating from the principles of general international law."[20] Similarly, regarding the Paris Agreement, Cook Islands, Micronesia, Nauru, Niue, Philippines, Solomon Islands, Tuvalu and Vanuatu submitted declarations to the same effect, underscoring that "no provision in this Paris Agreement can be interpreted as derogating from principles of general international law or any claims or rights concerning compensation due to impacts of climate change".[21] These declarations were made upon signature or ratification, and no State has filed a declaration rejecting these views or advancing a conflicting one. In these proceedings, The Bahamas and other Participants have submitted that these declarations are additional evidence that customary international law (such as the prevention obligation and the law of State responsibility) applies alongside the climate treaties.[22]

12. According to the International Law Commission, an interpretative declaration is a unilateral statement that "purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions."[23] Interpretative declarations may thus be used as "auxiliary or complementary means of interpretation,"[24] because such instruments are "a means of determining the intention of the contracting States or contracting organizations with regard to their treaty obligations."[25] Courts therefore take them into account to confirm or corroborate

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[20] *See, e.g.*, United Nations Framework Convention on Climate Change, 9 May 1992, 1771 *UNTS* 107, Declarations of Fiji, Kiribati, Nauru, Papua New Guinea, and Tuvalu upon their signature of the UNFCCC, *available at* https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en.

[21] Paris Agreement, Declarations of the Cook Islands, Micronesia, Nauru, Niue, Philippines, Solomon Islands, Tuvalu and Vanuatu upon their signature or ratification of the Paris Agreement, *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en. The declaration of Nauru was even more specific, noting "its understanding that Article 8 and decision 1/CP.21, paragraph 51 in no way limits the ability of Parties to UNFCCC or the Agreement to raise, discuss, or address any present or future concerns regarding the issues of liability and compensation."

[22] *See e.g.*, Written Comments of The Bahamas, para. 20; Written Comments of Tuvalu, paras. 39–40; Written Comments of Vanuatu, para. 433.

[23] Guide to Practice on Reservations to Treaties, *Yearbook of the International Law Commission*, 2011, Vol. II (Part Three), document A/CN.4/SER.A/2011/Add.1 (hereinafter "**Guide to Practice on Reservations to Treaties**"), guideline 1.2.

[24] Guide to Practice on Reservations to Treaties, guideline 4.7.1, commentary, para. 31.

[25] Guide to Practice on Reservations to Treaties, commentary to guideline 4.7.1, para. 12 (citing D. McRae, "The legal effect of interpretative declarations", 49 *BYBIL* (1978) 155, p. 169 ("In fact, it is here that the legal significance of an interpretative declaration lies, for it provides evidence of intention in the light of which the treaty is to be interpreted.")).

the meaning established by the ordinary terms of the treaty in light of its object and purpose.[26] For instance, in the *International Status of South West Africa* Advisory Opinion, when considering the international obligations of the Union of South Africa under the Mandate for South West Africa, the Court noted that the Union's declarations had "probative value" and confirmed the Court's conclusions.[27]

13. Here, the Court may use the interpretative declarations of the Small Island States and the Philippines as auxiliary means to interpret the UNFCCC and the Paris Agreement. In particular, on the issue of the relationship between the climate treaties and customary international law, these declarations hold "probative value" in ascertaining the ordinary meaning of the climate treaties in their context and in light of their object and purpose, because they are contemporaneous evidence of what the declarant parties intended the treaty terms to mean when they consented to be bound.[28] As The Bahamas argued in its Written Comments, nothing in the language or negotiating history of the climate treaties reflects an intention to displace general norms of international law, including the law on State responsibility.[29] The declarations at hand, which at the time were not objected to or contested by any other State, are complementary evidence in favor of this interpretation. On the other hand, subsequent declarations as to the interpretation of the treaties made in the context of litigation are not entitled to the same weight.

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[26] Guide to Practice on Reservations to Treaties, commentary to guideline 4.7.1, paras. 31–32.

[27] *International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, pp. 135–136. *See also* Council of Europe, *Report of the European Commission of Human Rights*, 7 May 1986, para. 102 (interpretative declarations "may be taken into account when an article of the Convention is being interpreted"); French Constitutional Council, *Decision No. 99-412 DC of 15 June 1999, European Charter for Regional or Minority Languages, Official Gazette of the French Republic*, 18 June 1999, p. 8965, para. 4 (holding that, in a case involving the European Charter for Regional or Minority Languages, France's declaration could be used to interpret the meaning and scope that France intended to give to certain provisions of the Charter).

[28] *Cf. International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 135; Guide to Practice on Reservations to Treaties, commentary to guideline 4.7.1, para. 32.

[29] Written Comments of The Bahamas, para. 20. This conclusion need not rely on the interpretative declarations, rather on an analysis of the text and context of the treaties, in light of their object and purpose.