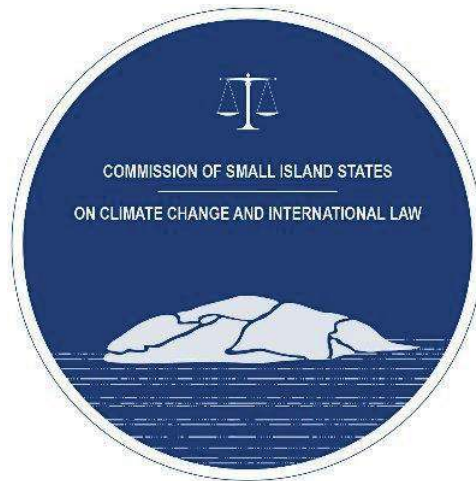


INTERNATIONAL COURT OF JUSTICE

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

COMMISSION OF SMALL ISLAND STATES ON
CLIMATE CHANGE AND INTERNATIONAL LAW

RESPONSES TO QUESTIONS ASKED BY THE JUDGES



20 DECEMBER 2024

TABLE OF CONTENTS

I.	Question 1 Posed By Judge Cleveland.....	1
II.	Question 2 Posed By Judge Tladi.....	4
III.	Question 3 Posed By Judge Aureescu	6
IV.	Question 4 Posed By Judge Charlesworth	9

I. Question 1 Posed 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?

1. The Commission of Small Island States on Climate Change and International Law (“COSIS”) submits that consistent with the best available science, States have an obligation to take all necessary measures to transition away from fossil fuels to ensure protection of the climate system and other parts of the environment from anthropogenic GHG emissions. This is the necessary conclusion of taking account of the best available science to inform the obligations of States under customary and conventional international law.

2. The Court’s jurisprudence has routinely placed science at the heart of its analysis when assessing environmental risks and determining appropriate measures to mitigate those risks¹. That the minimum core content of States’ environmental obligations is informed by the science further inheres from the very nature of the *prevention* obligation in the context of transboundary environmental harm², as well as related obligations under other bodies of international law³. The prevention principle, in particular, takes account of the unique character of environmental harm and underscores that States must, at a minimum, take measures necessary not only to cease ongoing, significant harm, but also to avoid material risk of incremental such harm.

3. In the context of climate change, the best available science informs States’ due diligence obligations to mitigate and adapt in two principal respects. *First*, the science determines the level of risk, including the urgency, and severity of the harm⁴. *Second*, the science establishes the measures that are necessary—that is, indispensable—to mitigate that risk of harm⁵. Many participants agree with these fundamental points about the critical role of the best available science⁶.

¹ *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. 665 (“*Certain Activities*”), para. 104; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14, para. 204; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7 (“*Gabčíkovo-Nagymaros*”), para. 140; *Fisheries Jurisdiction Case (Spain v. Canada)*, Judgment, I.C.J. Reports 1998, p. 432, paras. 69–70; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2022, p. 266, para. 58; *Fisheries Jurisdiction Case (United Kingdom v. Iceland)*, Merits, Judgment, I.C.J. Reports 1974, p. 3, para. 72; *Fisheries Jurisdiction Case (Germany v. Iceland)*, Merits, Judgment, I.C.J. Reports. 1974, p. 175, para. 64.

² *Gabčíkovo-Nagymaros*, para. 140 (“[I]n the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.”).

³ CR 2024/53, pp. 16–19, paras. 6–15 (COSIS).

⁴ Written Statement of COSIS, paras. 84–86; Written Comments of COSIS, §§ IV.B.1, IV.C; CR 2024/53, p. 17, para. 8 (COSIS).

⁵ Written Statement of COSIS, paras. 89–94; Written Comments of COSIS, §§ IV.B.1, IV.C; CR 2024/53, pp. 14–20, paras. 1–20 (COSIS).

⁶ Written Comments of COSIS, para. 60 & fn. 139 (citing to all participants’ written statements concurring that the best available science informs States’ due diligence obligations); *see also, e.g.*, Oral Submissions of: CR 2024/36, p. 17, para. 23 (Antigua and Barbuda); *id.*, p. 61, para. 14 (The Bahamas); *id.*, p. 72, para. 4

4. The failure of States to mitigate GHG emissions in the face of scientific certainty as to the causes and impacts of climate change goes back decades and amounts to a breach of due diligence obligations⁷. In light of the current, best available science, it is well-settled that significant harm to human and natural systems is ongoing, and that the risk and severity of that harm increases with each additional increment of warming. Critically, the risk of catastrophic harm also rises dramatically with warming beyond 1.5°C above pre-industrial levels⁸. In light of these scientific realities, and when considering this imminent, near-certain risk of catastrophic—and, in the case of SIDS, existential—harm, ITLOS appropriately concluded that the standard of due diligence needs to be “stringent”⁹.

5. In line with this degree of due diligence, States must take the measures indispensable to cease the ongoing significant harm and avoid further harm to the climate system and other parts of the environment, including as manifest in the IPCC’s science-driven emissions pathway in relation to limiting global warming to 1.5°C above pre-industrial levels¹⁰. This requires States to make deep, rapid, and sustained reductions in GHG emissions according to the IPCC’s timetable¹¹.

6. With respect to fossil fuel usage in particular, the IPCC has determined that “[e]stimates of future CO₂ emissions from *existing* fossil fuel infrastructures without additional abatement *already exceed the remaining carbon budget for limiting warming to 1.5°C*”¹². UNEP similarly concluded that this emissions pathway “mean[s] that most of the world’s proven fossil fuel reserves must be left unburned”¹³. On the basis of the best available science, at COP28, States Parties to the Paris Agreement reached a consensus Decision on the necessity of “[t]ransitioning away from fossil fuels in energy systems, in a

(Bangladesh); CR 2024/41, p. 22, paras. 12–13 (Siera Leone); CR 2024/51, p. 53, para. 7 (Tuvalu); CR 2024/53, p. 14, para. 3 & fn. 18 (COSIS) (citing to participants endorsing the IPCC reports as the best available science).

⁷ See, e.g., Oral Submissions of: CR 2024/35, p. 110, para. 11 (Vanuatu); CR 2024/36, pp. 85, 88–89 (Barbados).

⁸ IPCC, “Summary for Policymakers”, *Sixth Assessment Synthesis Report* (2023), pp. 12, 15; IPCC, “Summary for Policymakers”, *Special Report: Global Warming of 1.5°C* (2018), pp. 8–9, 15; IPCC, “Chapter 3: Impacts of 1.5°C of Global Warming on Natural and Human Systems”, *Special Report: Global Warming of 1.5°C* (2018), p. 254, figure 3.21; Written Comments of COSIS, para. 15 & fn. 13 (citing to all participants’ written statements concurring on this point); CR 2024/53, p. 15, para. 5(b) & fn. 21 (COSIS) (citing to participants’ written comments and oral submissions concurring on this point); see also *id.*, p. 15, para. 5(a) & fn. 20 (citing to participants’ written and oral submissions that acknowledge the ongoing and severe harm caused by global warming).

⁹ ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion Submitted to ITLOS)*, Case No. 31, *Advisory Opinion, ITLOS Reports 2024* (“COSIS Advisory Opinion”), para. 241.

¹⁰ Written Statement of COSIS, § III.B.3; Written Comments of COSIS, § IV.C.; CR 2024/53, pp. 14–20, paras. 1–21 (COSIS); see also IPCC, “Summary for Policymakers”, *Sixth Assessment Synthesis Report* (2023), p. 22 (Table SPM.1).

¹¹ Specifically, the IPCC has assessed that, to have even a 50% chance of staying within the 1.5°C threshold, States must reduce GHG emissions, as measured against 2019 levels, by at least 43% by 2030, 60% by 2035, 69% by 2040, and 84% by 2050. COSIS Written Comments, para. 80 & fn. 193 (citing to the consensus across the participants’ written statements); see also, e.g., CR 2024/37, pp. 10–12, paras. 2–3, 10 (Belize); CR 2024/42, p. 31, para. 14 (Marshall Islands); CR 2024/44, p. 23, para. 1 (Liechtenstein); *id.*, p. 36, para. 15 (Malawi); CR 2024/46, p. 48, para. 9 (Palestine); CR 2024/51, p. 55, para. 18 (Tuvalu); CR 2024/54, p. 37, paras. 48–50 (IUCN).

¹² IPCC, “Summary for Policymakers”, *Sixth Assessment Synthesis Report* (2023), p. 21 (emphasis added).

¹³ UNEP, *Production Gap Report* (2019), p. 8; see UNEP, *Production Gap Report* (2024), p. 2 (“Governments, in aggregate, still plan to produce more than double the amount of fossil fuels in 2030 than would be consistent with limiting warming to 1.5°C.”), *Emissions Gap Report* (2024), pp. XII–XXI (outlining the need for more drastic GHG reductions).

just, orderly and equitable manner, accelerating action in this critical decade, so as to achieve net zero by 2050 in keeping with the science”¹⁴.

7. Accordingly, even as States maintain a level of discretion in implementation, in light of these certain, scientific facts, States have a specific obligation to take all necessary measures to transition away from fossil fuels, as many States in these proceedings have recognized¹⁵.

8. Vanuatu and the Melanesian Spearhead Group, for example, have urged that “reaching net-zero emissions by 2050 requires that no new oil, gas or coal projects are approved, beyond those committed in 2021”¹⁶. As Vanuatu observes, the historical reality is that major emitting States have subsidized, produced, and consumed fossil fuels, notwithstanding their awareness of the harm posed to the climate system, and today they “continue to implement policies that expand production of fossil fuels” despite their climate pledges and obligations¹⁷. Several other participants note that States must rapidly transition to clean energy systems, including by adopting time-bound legislation and regulation phasing fossil fuels out of all economic sectors¹⁸. Five COSIS Member States and a total of 16 parties have likewise joined the call for a Fossil Fuel Non-Proliferation Treaty¹⁹.

9. Participants in these proceedings also emphasize the need to redirect global financial flows away from the fossil fuel industry, including eliminating subsidies, as part of fulfilling due diligence obligations²⁰. This is consistent with the science; the IPCC has concluded that finance flows are “critical enablers for accelerated climate action” and “[r]emoving fossil fuel subsidies would reduce emissions”²¹.

10. Some participants attempt to dilute the content of the obligation to transition away from fossil fuels or to evade its application by arguing that such an obligation contravenes the right to economic development and/or sovereignty over natural resources²². However, these

¹⁴ COP28, Outcome of the First Global Stocktake, decision -/CMA.5 (Advance Unedited Version) (13 December 2023), para. 28(d).

¹⁵ See, e.g., Written Statements of: African Union, paras. 106–108; OACPS, para. 165; United States, para. 3.39; Vanuatu, paras. 144–146; see also, e.g., Oral Submissions of: CR 2024/36, pp. 40–41, para. 3(b) (Australia); CR 2024/39, pp. 35–36, para. 22 (Cote D’Ivoire); CR 2024/40, p. 15, para. 44 (United Arab Emirates); *id.*, p. 18, para. 6 (Ecuador); CR 2024/42, p. 19, para. 7 (Cook Islands); *id.*, p. 32, para. 14 (Marshall Islands); CR 2024/44, p. 41, para. 13 (Malawi); CR 2024/47, p. 30, para. 15 (The Netherlands); CR 2024/48, p. 66–67, para. 7 (Saint Lucia); CR 2024/49, pp. 69–70, para. 13 (The Gambia); CR 2024/50, p. 47, para. 3 (Sri Lanka); CR 2024/53, pp. 29–30, para. 18 (Pacific Community); CR 2024/54, pp. 11–12, para. 20 (WHO); *id.*, p. 33, para. 25 (IUCN); see also CR 2024/40, p. 40, para. 4 (United States) (noting the COP28 decision to transition away from fossil fuels).

¹⁶ CR 2024/35, p. 108, para. 7 (Vanuatu and Melanesian Spearhead Group) (citing the IPCC and the International Energy Agency).

¹⁷ Written Comments of Vanuatu, para. 39, see also *id.*, § 2.3.

¹⁸ See, e.g., Written Statements of: African Union, paras. 106–108; The Bahamas, para. 184; IUCN, paras. 77–78; Seychelles, para. 132–133; Written Comments of The Gambia, paras. 4.5, 5.6, 5.13; CR 2024/35, p. 108, para. 7 (Vanuatu and Melanesian Spearhead Group).

¹⁹ The Fossil Fuel Non-Proliferation Treaty Initiative, “Who has Joined the call for a Fossil Fuel Non-Proliferation Treaty?”, available at <https://fossilfuelstreaty.org/endorsements/#governments>.

²⁰ See, e.g., Oral Submissions of: CR 2024/48, pp. 66–67, para. 7 (Saint Lucia); CR 2024/54, pp. 11–12, para. 20 (WHO). See also Paris Agreement, *United Nations Treaty Series*, Vol. 3156, p. 79 (2015) (“Paris Agreement”), Art. 2(1)(c).

²¹ IPCC, “Longer Report”, Sixth Assessment Synthesis Report (2023), p. 79.

²² See, e.g., Oral Submissions of: CR 2024/40, pp. 11–14, paras. 21–35 (United Arab Emirates); CR 2024/42, p. 50, paras. 29–30 (India); CR 2024/43, p. 57, para. 17 (Kuwait); CR 2024/51, p. 26, para. 17 (Timor Leste).

rights are subject to limitation in the context of environmental protection²³. As the Court has recognized, “[t]hroughout the ages, mankind has, for economic or other reasons, constantly interfered with nature . . . often . . . without consideration of the effects upon the environment”²⁴. However, “[o]wing to new scientific insights and to a growing awareness of the risks for mankind”, there is a “need to reconcile economic development with protection of the environment”²⁵. Thus, neither the right to development nor sovereign rights over one’s natural resources offers a State “*carte blanche*” to degrade the global environment.

11. Relatedly, the principle of CBDR-RC does not allow States to justify the continued production, export, or consumption of fossil fuels, contrary to what has been suggested by a minority of participants²⁶. As ITLOS held, and as many participants in these proceedings agree²⁷, “[a]ll States must make mitigation efforts”²⁸. Indeed, the science is clear that going forward, the remaining carbon budget to stay within 1.5°C will not allow States to opt out of their obligations to make deep, rapid, and sustained GHG emission reductions, including the necessity of transitioning away from fossil fuels²⁹. Further, the CBDR-RC argument is based on a false premise. Climate action and economic development are not mutually exclusive. The science is instructive in this regard as the IPCC has concluded that the necessary emissions reductions can be “achieved synergistically” with economic development³⁰.

12. In sum, all States have a specific obligation to take all necessary measures to cease ongoing significant harm and avoid further harm to the climate system and other parts of the environment, and with respect to fossil fuel-producing States in particular, this requires transitioning away from fossil fuels, in accordance with the best available science.

II. Question 2 Posed 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

²³ See, e.g., Report of the United Nations Conference on the Human Environment, document A/CONF.48/14/Rev.1 (16 June 1972), § 1 (Declaration of the United Nations Conference on the Human Environment) (“Stockholm Declaration”), Principle 21; Rio Declaration on Environment and Development, document A/CONF.151/26 (Vol. I) (Annex I) (12 August 1992) (“Rio Declaration”), Principle 2; *COSIS* Advisory Opinion, paras. 184–187.

²⁴ *Gabčíkovo-Nagymaros*, para. 140.

²⁵ *Id.* (emphasis added).

²⁶ See, e.g., CR 2024/36, pp. 26–27, para. 3 (Saudi Arabia); *id.*, p. 32, para. 7; Written Statement of India, paras. 37, 39(vii).

²⁷ Written Comments of *COSIS*, para. 69 & fn. 160.

²⁸ *COSIS* Advisory Opinion, para. 229 (emphasis added).

²⁹ Written Statement of *COSIS*, §§ II.B.4–5.

³⁰ IPCC, “Chapter 2: Mitigation Pathways Compatible with 1.5°C in the Context of Sustainable Development”, *Special Report on 1.5°C* (2018), p. 97; see also *IPCC*, “Chapter 17: Accelerating the Transition in the Context of Sustainable Development”, *Sixth Assessment Report: Mitigation of Climate Change* (2022), pp. 1739–1742; see also CR 2024/54, p. 12, para. 23 (WHO) (pointing to numerous co-benefits of taking action to address climate change and concluding that “every US dollar spent on specific climate and health actions will bring an average return of US\$4”).

treaty framework in general, has any effect on this interpretation and if so, what effect does it have?

13. As COSIS has previously observed, Article 4 of the Paris Agreement contains largely procedural obligations³¹. Contrary to the view taken by some States³², the Paris Agreement’s procedural obligations contained in Article 4 are not merely discretionary. Article 4, by its terms, obligates States Parties to “prepare, communicate and maintain” NDCs that “reflect [the State’s] highest possible ambition” towards the overarching objective “to achieve the long-term temperature goal” of 1.5°C above pre-industrial levels³³.

14. Consistent with Article 31(1) of the Vienna Convention on the Law of Treaties (“VCLT”), the interpretation of the plain text of Article 4 requires consideration of the object and purpose of the Paris Agreement, such that, as submitted by Antigua and Barbuda, “States must make ready an NDC that is fit for the purposes of contributing to the collective efforts to meet the Paris temperature goal and to prevent dangerous anthropogenic interference within the climate system”³⁴. Likewise, several participants also point out that considering Article 4 in light of the object and purpose of the Paris Agreement again yields the conclusion that States are constrained in their selection of NDCs³⁵. Under the plain text of Article 4(3), successive NDCs must represent a “progression” as well as reflect that State’s “highest possible ambition”³⁶. Further, looking to the preamble, the Paris Agreement aims at “effective and progressive” action against the “urgent threat of climate change on the basis of the best available scientific knowledge”³⁷. As such, properly interpreted, Article 4 requires that States align their NDCs with the overall temperature goal of the Paris Agreement and the IPCC’s emissions pathway, as well as ensure successively progressive commitments³⁸.

15. Participants also point out that States must exercise best efforts to achieve their NDCs³⁹, again due to the object and purpose of the Paris Agreement, but also on account of harmonization of the Paris Agreement with other relevant rules of international law⁴⁰. As COSIS recognized in its Written Comments, nothing in the UNFCCC and/or the Paris Agreement suggests that either was intended to cover the field in terms of the international response to climate change exclusively and exhaustively⁴¹. As such, neither the UNFCCC

³¹ Written Comments of COSIS, paras. 71–72; *see generally id.*, § IV.B.3.; CR 2024/53, p. 21, para. 4 (COSIS).

³² *See, e.g.*, Written Statements of: Saudi Arabia, paras. 4.64–4.68; United States, paras. 3.17–3.18; Written Comments of United Kingdom, paras. 14–18, 21–22.

³³ Paris Agreement, Arts. 2(1)(a), 4.

³⁴ Written Statement of Antigua and Barbuda, para. 241.

³⁵ *See, e.g.*, Written Statements of: Ecuador, paras. 3.76–3.77, 3.81; European Union, paras. 126–132; Latvia, para. 29; New Zealand, paras. 48–52, 54, 59, 61; Vanuatu, paras. 408–413, 418–421.

³⁶ Paris Agreement, Art. 4(3).

³⁷ *Id.*, Preamble.

³⁸ *See id.*, Arts. 2, 4, Preamble; *see also* Vienna Convention on the Law of Treaties, *United Nations Treaty Series*, Vol. 1155, p. 331 (1969) (“VCLT”), Art. 31; *see also, e.g.*, Written Statements of: Antigua and Barbuda, para. 295; IUCN, paras. 125–151.

³⁹ *See, e.g.*, Written Statements of: Antigua and Barbuda, para. 295; Ecuador, paras. 3.76–3.77; Latvia, paras. 29–30; South Korea, para. 20; Oral Submissions of: CR 2024/35, pp. 142–144, paras. 10–23 (Germany); CR 2024/39, p. 30, para. 14 (Côte d’Ivoire); CR 2024/41, p. 59, paras. 25–27 (Guatemala); CR 2024/43, p. 36, paras. 22–25 (Kenya); *id.*, pp. 49–50, paras. 34–35 (Kiribati); CR 2024/44, p. 13, paras. 8–9 (Latvia); *see also Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Judgment*, *I.C.J. Reports 1986*, p. 14, para. 276 (finding a violation of the obligation not to defeat the object and purpose of the treaty).

⁴⁰ CR 2024/53, pp. 21–25, paras. 1–21 (COSIS).

⁴¹ Written Comments of COSIS, § IV.B.3, para. 72.

nor the Paris Agreement constitutes a “self-contained regime” that applies to the exclusion of general international law⁴².

16. Likewise, neither instrument was intended to displace other sources of international law⁴³, nor, as ITLOS has found, does either instrument in fact displace other obligations⁴⁴. There is no actual inconsistency between obligations under these instruments and general sources of international law, including the obligations to prevent transboundary harm, Part XII of UNCLOS, and human rights obligations⁴⁵. This means that the Paris Agreement is informed by States’ obligations to reduce GHG emissions under these other rules of international law. Article 4 thus requires States to pursue NDCs in good faith, through progressively ambitious commitments, as necessary contributions to the reduction of GHG emissions. At the same time, Article 4 does not affect States’ rights and obligations under customary international law, UNCLOS, and other instruments, which compel significant reductions in GHG emissions in parallel.

III. Question 3 Posed By Judge Aurescu

Some participants have argued, during the written and / or oral stages of the proceedings, that there exists the right to a clean, healthy and sustainable environment in international law. Could you please develop what is, in your view, the legal content of this right and its relation with the other human rights which you consider relevant for this advisory opinion?

17. The right to a clean, healthy, and sustainable environment draws roots in a variety of sources, ranging from the Stockholm Convention⁴⁶ and the Rio Declaration⁴⁷ to the International Covenant on Economic, Social, and Cultural Rights⁴⁸ and numerous other major

⁴² *Id.*; see also CR 2024/53, pp. 21–25, paras. 1–21 (COSIS).

⁴³ Written Comments of COSIS, § IV.B.3, para. 74.

⁴⁴ COSIS Advisory Opinion, para. 224.

⁴⁵ Written Comments of COSIS, § IV.B.3, para. 70.

⁴⁶ Stockholm Declaration, Principle 1 (“[Humanity] has the fundamental right to freedom, equality and adequate conditions of life, *in an environment of a quality that permits a life of dignity and well-being*, and...bears a solemn responsibility to protect and improve the environment for present and future generations.” (emphasis added)).

⁴⁷ Rio Declaration, Principle 10.

⁴⁸ International Covenant on Economic, Social, and Cultural Rights, *United Nations Treaty Series*, Vol. 993, p. 3 (1966) (Dossier No. 52), Art. 12(2)(b).

human rights treaties⁴⁹, as multiple participants in these proceedings have noted⁵⁰. The Inter-American Court of Human Rights (“IACtHR”)⁵¹ and the African Commission on Human and Peoples’ Rights⁵² have notably also upheld the right to a healthy environment, as has the European Court of Human Rights⁵³.

18. In these proceedings, at least 53 States and international organizations recognize in their written and oral statements the human right to a clean, healthy, and sustainable environment and that climate change is undermining this right⁵⁴. Likewise, some four-fifths of States have recognized this right in their domestic law, at the national or the regional level⁵⁵.

⁴⁹ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”), *OAS Treaty Series*, No. 69 (1988), Art. 11 (“Everyone shall have the right to live in a healthy environment and to have access to basic public services.”); African Charter on Human and Peoples’ Rights, *United Nations Treaty Series*, Vol. 1520, p. 217 (1981), Art. 24 (“All peoples shall have the right to a general satisfactory environment favourable to their development”); Maputo Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, *United Nations Treaty Series*, Vol. 3268 (2003), Art. 18(1) (“Women shall have the right to live in a healthy and sustainable environment.”); Council of the League of Arab States, Arab Charter on Human Rights, *reprinted in 12 Int’l Hum. Rts. Rep.* 893 (2005), Art. 38 (“Every person has the right to an adequate standard of living for himself and his family, which ensures their well-being and a decent life, including ... the right to a healthy environment.”); *see also* Association of Southeast Asian Nations (“ASEAN”), ASEAN Human Rights Declaration (2012), Art. 28(f) (“Every person has the right to an adequate standard of living for himself or herself and his or her family including ... [t]he right to a safe, clean and sustainable environment.”); Organization of American States, American Declaration on the Rights of Indigenous Peoples, AG/RES.2888 (XLVI-O/16) (2016), Art. 19(1) (“Indigenous peoples have the right to live in harmony with nature and to a healthy, safe, and sustainable environment, essential conditions for the full enjoyment of the right to life, to their spirituality, worldview and to collective well-being.”).

⁵⁰ *See, e.g.*, Written Statement of Vanuatu, paras. 378–380, fn. 753; Written Comments of: Albania, para. 36; Chile, para. 28; Samoa, para. 133; Oral Submissions of: CR 2024/41, p. 36, para. 22 (Ghana); CR 2024/44, p. 30, para. 24 (Liechtenstein); CR 2024/50, p. 23, para. 5 (Slovenia).

⁵¹ Inter-American Court of Human Rights, *State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity*, Case No. OC-23/17, Advisory Opinion (15 November 2017).

⁵² African Commission on Human and Peoples’ Rights, *Case of the Social and Economic Rights Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, Communication 155/96, Decision of October 27, 2001, paras. 51–53.

⁵³ *See, e.g.*, European Court of Human Rights, *Case of Di Sarno v. Italy*, Application no. 30765/08, Judgment (10 January 2012), para. 110.

⁵⁴ *See* Written Statements of: African Union, paras. 62, 192; Albania, para. 96; Antigua and Barbuda, paras. 180–185; Argentina, para. 38; The Bahamas, para. 141; Bangladesh, para. 110; Barbados, paras. 164–166; Bolivia, para. 17; Burkina Faso, paras. 215–219; Canada, para. 24; Chile, para. 64; Colombia, para. 3.67; Cook Islands, para. 214; COSIS, para. 132; Costa Rica, paras. 81–82; Democratic Republic of the Congo, paras. 147–156; Ecuador, paras. 3.103–3.108; El Salvador, paras. 42–43; European Union, § 4.6.2.2; Grenada, para. 65; IUCN, para. 481; Kenya, paras. 5.73–5.75; Republic of Korea, para. 28; Liechtenstein, paras. 45–47; Madagascar, § III.D.2; Marshall Islands, para. 113; Mauritius, paras. 184–185; Melanesian Spearhead Group, paras. 283–289; Mexico, paras. 87–96; Federated States of Micronesia, paras. 78–80; Namibia, paras. 121–126; Nepal, para. 31; Netherlands, paras. 3.27, 3.34; Philippines, paras. 11, 54; Portugal, para. 69; Saint Vincent and the Grenadines, paras. 37, 120–123; Seychelles, paras. 136–145; Sierra Leone, § 2.II.F; Slovenia, § II.A; Solomon Islands, para. 1.7; Spain, paras. 14–17; Sri Lanka, para. 94(b); Thailand, para. 27; Timor-Leste, para. 298; Tuvalu, para. 100; Vanuatu, § 4.4.4.C; Written Comments of: Cameroon, para. 86; The Gambia, paras. 3.37–3.38; Kiribati, paras. 42–45; OACPS, para. 51; Samoa, paras. 130–140; Uruguay, paras. 107–115; CR 2024/41, pp. 36–37 (Ghana).

⁵⁵ *See* CR 2024/50, p. 23 (Slovenia); *see also* UN General Assembly, 77th Session, Note by the UN Secretary-General, Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, 10 August 2022, para. 26 (“[M]ore than 80 per cent of Member States (156 of 193) legally

19. This widespread recognition of the right to a clean, healthy, and sustainable environment in these proceedings is consistent with the voting record for UN General Assembly Resolution 76/300⁵⁶ as well as UN Human Rights Council’s Resolution 48/13⁵⁷, both of which attracted vast support⁵⁸ and saw no States voting in opposition.

20. Only a handful of States in these proceedings question the customary status of this right to a clean, healthy, and sustainable environment⁵⁹. These States argue that in order for the right to develop as a customary norm of international law, the treaty-making process must be followed⁶⁰. In doing so, however, these States attempt to impose a treaty requirement on the very definition of custom⁶¹, which, of course, the Court does not require.

21. States recognizing the right to a clean, healthy, and sustainable environment recall that protection of the right is necessary for the enjoyment and fulfilment of other human rights, including the rights to life and to an adequate standard of living⁶². Many States consider the right to be fundamental for this reason, with a few States referring to the right as peremptory in nature⁶³.

22. As to the content of the right, it contains both substantive and procedural obligations. On the substantive side, it requires the establishment, maintenance, and enforcement of effective legal and institutional frameworks that regulate, *inter alia*, air quality, the global climate, freshwater quality, food quality, marine pollution, waste, toxic substances, protected

recognize the right to a clean, healthy and sustainable environment, establishing binding duties for Governments.”).

⁵⁶ General Assembly, resolution 76/300, The Human Right to a Clean, Healthy and Sustainable Environment, document A/76/300 (1 August 2022).

⁵⁷ United Nations Human Rights Council, resolution 48/13, The Human Right to a Clean, Healthy and Sustainable Environment, document A/HRC/RES/48/13 (8 October 2021).

⁵⁸ See United Nations, Press Release, “With 161 Votes in Favour, 8 Abstentions, General Assembly Adopts Landmark Resolution Recognizing Clean, Healthy, Sustainable Environment as Human Right” (28 July 2022), available at <https://press.un.org/en/2022/ga12437.doc.htm> (Belarus, Cambodia, China, Ethiopia, Iran, Kyrgyzstan, the Russian Federation, and Syria abstained). See also COP16, Kunming-Montreal Global Biodiversity Framework, decision 15/4 (19 December 2022), para. 7(g).

⁵⁹ See Written Statements of: Germany, paras. 104–106; Indonesia, paras. 42–43; Latvia, para. 64; Tonga, para. 244; United States, paras. 4.54–4.58; Written Comments of: Australia, para. 4.18; New Zealand, p. 11; Saudi Arabia, para. 4.46; United Kingdom, para. 53; Oral Submissions of: CR 2024/38, p. 17, para. 33 (Canada); CR 2024/50, p. 69, para. 43 (Serbia).

⁶⁰ See Written Statements of: Indonesia, para. 42–43; United States, paras. 4.54–4.58; Written Comments of New Zealand, p. 11; Oral Submissions of: CR 2024/38, p. 17 (Canada); CR 2024/40, p. 47 (United States).

⁶¹ See also *North Sea Continental Shelf (Federal Republic of Germany/Netherlands), Judgment*, I.C.J. Reports 1969, p. 4.

⁶² See, e.g., Written Statements of: Portugal, paras. 70–78; Vanuatu, para. 381; Written Comments of Sri Lanka, para. 39; CR 2024/41, p. 37, para. 24 (Ghana); see also Human Rights Committee, General Comment No. 36, Right to Life, para. 65; Inter-American Court of Human Rights, *State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity*, Case No. OC-23/17, Advisory Opinion (15 November 2017), p. 59 (“[A] healthy environment is a fundamental right for the existence of humankind.”); COP28, Outcome of the First Global Stocktake, decision -/CMA.5 (Advance Unedited Version) (13 December 2023), p. 2 (“[C]limate change is a common concern of humankind and that Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to a clean, healthy and sustainable environment.”).

⁶³ See Written Statements of: Costa Rica, para. 82; Ecuador, para. 3.108; El Salvador, para. 42; European Union, para. 258; Melanesian Spearhead Group, paras. 284–286; Philippines, para. 54; Sierra Leone, para. 3.117; Sri Lanka, para. 94(b); Vanuatu, para. 379; Written Comments of Kiribati, p. 15.

areas, conservation and biological diversity⁶⁴. Participants in these proceedings further recall that the right to a healthy environment entails procedural obligations, including to ensure access to environmental information, public participation in environmental decision-making, and access to environmental justice⁶⁵.

23. In terms of the scope of the right, COSIS submits that the right applies to present and future generations⁶⁶, owing to both its individual and collective dimensions, as recognized by the IACtHR⁶⁷. In terms of its geographic dimension, the right applies to the prevention and curtailment of environmental harm that threatens individuals within the State's jurisdiction⁶⁸. But the right also applies extraterritorially to protect natural systems even beyond political borders, as it encompasses the customary due diligence obligation of preventing transboundary harm⁶⁹. In this regard, UN General Assembly Resolution 76/300 recognizing the right refers to the prevention of losses of biodiversity, protection of air, land, and water resources from pollution, as well as the need for protection in the face of climate change⁷⁰.

IV. Question 4 Posed 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?

24. COSIS observes that several States, including several COSIS Member States, made declarations upon joining the UNFCCC and the Paris Agreement to the effect that:⁷¹

- (a) *“no provisions in the Convention can be interpreted as derogating from the principles of general international law”*;
- (b) *“the Paris Agreement and its application 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 provision in the Paris Agreement can be interpreted as derogating from principles of*

⁶⁴ See, e.g., Written Comments of: Chile, pp. 12–13; Vanuatu, p. 91; CR 2024/40, p. 33, para. 10 (Spain); CR 2024/44, p. 30 (Liechtenstein).

⁶⁵ See, e.g., Written Comments of Vanuatu, p. 91, fn. 314; CR 2024/40, p. 33, para. 10 (Spain).

⁶⁶ See, e.g., Written Comments of Vanuatu, p. 91.

⁶⁷ Inter-American Court of Human Rights, State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity, Case No. OC-23/17, Advisory Opinion (15 November 2017), para. 59.

⁶⁸ CR 2024/50 pp. 24–25, para. 9 (Slovenia).

⁶⁹ See, e.g., Written Statements of: Portugal, para. 86; Vanuatu, para. 382; Written Comments of: Chile, paras. 38–42; Vanuatu, p. 91.

⁷⁰ General Assembly, resolution 76/300, The Human Right to a Clean, Healthy and Sustainable Environment, document A/76/300 (1 August 2022), p. 2.

⁷¹ In relation to the UNFCCC, such declarations were made by: Fiji, Kiribati, Nauru, Papua New Guinea, and Tuvalu. In relation to the Paris Agreement, such declarations were made by: Cook Islands, Federated States of Micronesia, Nauru, Niue, Solomon Islands, Tuvalu, and Vanuatu. See Status of United Nations Framework Convention on Climate Change, *United Nations Treaty Collection*, available at https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en; Status of Paris Agreement, *United Nations Treaty Collection*, available at https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=xxvii-7-d&chapter=27&clang=_en.

general international law or any claims or rights concerning compensation due to the impacts of climate change”; or

- (c) “no provision in the Paris Agreement can be interpreted as derogating from principles of general international law or any claims or rights concerning compensation due to the impacts of climate change”.

25. These declarations—largely made by States that recognize their unique and existential vulnerability to the worst effects of climate change—emphasize that neither the UNFCCC nor the Paris Agreement should be understood as displacing rights and obligations in respect of climate change under general international law sources. While these interpretive declarations are not binding, they may be taken into account, per Article 31(2) of the VCLT, as part of the “context” for interpreting provisions under the UNFCCC and the Paris Agreement⁷².

26. These declarations—none of which encountered objection—confirm that neither the UNFCCC nor the Paris Agreement was intended to displace other international law obligations or restrict any responsibilities incurred by States under such obligations⁷³. There is no “actual inconsistency” of obligations between these sources⁷⁴. As ITLOS held in its *COSIS* Advisory Opinion, “[w]hile the Paris Agreement complements [UNCLOS] in relation to the obligation to regulate marine pollution from anthropogenic GHG emissions, the former does not supersede the latter”⁷⁵. The Paris Agreement and UNCLOS are “separate agreements, with separate sets of obligations”⁷⁶. The same is true of other obligations, including the customary obligation on transboundary harm and human rights obligations⁷⁷.

27. Moreover, there is no indication of any intention in either climate treaty to displace other sources of international law. To the contrary, both the UNFCCC and the Paris Agreement contain language suggesting that obligations were meant to complement and reinforce customary rules of international law related to the protection of the environment⁷⁸. And as The Bahamas notes, the UNFCCC also recalls the Stockholm Declaration, which in turn references protection of the environment for purposes of the enjoyment of human rights⁷⁹. The Paris Agreement likewise expressly calls upon States to “respect, promote and consider their respective obligations on human rights”⁸⁰. Moreover, nothing in the

⁷² See VCLT, Art. 31(2); O. Dörr et al. (eds.), “Article 19: Formulation of Reservations”, in *Vienna Convention on the Law of Treaties: A Commentary* (2018), p. 264; Guide to Practice on Reservations to Treaties, *Yearbook of International Law Commission*, Vol. II, Part Two, document A/66/10 (2011), Guideline 3.1.

⁷³ Written Comments of COSIS, § IV.B.3; see also *COSIS* Advisory Opinion, paras. 223–224.

⁷⁴ Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, *Yearbook of the International Law Commission*, 2001, Vol. II (Part Two), p. 140, Commentary to Art. 55, para. 4 (referring to an “actual inconsistency between [sources], or else a discernible intention that one provision is to exclude the other”); Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, *Yearbook of the International Law Commission*, Vol. II, Part Two, document A/61/10 (2006), pp. 408, 414.

⁷⁵ *COSIS* Advisory Opinion, para. 223.

⁷⁶ *Id.*

⁷⁷ See, e.g., *Certain Activities*, para. 108.

⁷⁸ United Nations Framework Convention on Climate Change, *United Nations Treaty Series*, Vol. 1771, p. 107 (1992), Preamble (“States have, in accordance with the Charter of the United Nations and the principles of international law, . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”); Paris Agreement, Art. 2(1) (“This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by” (emphasis added)).

⁷⁹ Written Comments of The Bahamas, para. 20.

⁸⁰ Paris Agreement, Preamble.

negotiating history of either instrument suggests an intention to displace general international law sources⁸¹.

28. COSIS thus agrees with numerous States that the declarations provide further support for the conclusion that neither climate treaty constitutes *lex specialis* and that other sources of climate-related obligations continue to apply in parallel⁸². Notably, the few, largely high-emitting States that disagree on the relationship between the UNFCCC and the Paris Agreement and general international law do not actually take a different position on these declarations⁸³.

29. These declarations made also underscore that the loss and damage mechanisms provided for under the Paris Agreement coexist with, and do not displace, general international law regimes of State responsibility, as COSIS noted in its Written Comments⁸⁴. In this respect, the declarations just reaffirm that any loss and damage included in the Paris Agreement is complementary to options for redress available under general customary rules of State responsibility. In doing so, as already noted, they met with no objection, meaning that the ILC's strong presumption against finding displacement absent a clear "intent" to displace is not overcome in this context⁸⁵. COSIS accordingly agrees with numerous other participants⁸⁶ that States continue to incur responsibility under general international law for harms resulting from the breaches of obligations considered in Part (a).

⁸¹ Written Comments of The Bahamas, para. 20; *see also Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), Judgment, I.C.J. Reports 1989*, p. 15, para. 50 (explaining that the Court should not "accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so"); *see generally Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Jurisdiction and Admissibility, Award of 4 August 2000, XXIII RIAA 1*, pp. 40–41, para. 52 ("There is no reason why a given act of a State may not violate its obligations under more than one treaty").

⁸² Oral Submissions of: CR 2024/36, p. 82, para. 5 (Barbados); CR 2024/37, pp. 10–11, para. 5 (Belize); CR 2024/43, p. 49, para. 33 (Kiribati); CR 2024/46, p. 8, para. 2 (Nauru); Written Statements of: Albania, para. 129 & fn. 195; Mauritius, para. 123; Samoa, paras. 134–135 & fns. 56, 58; Sierra Leone, para. 3.134 & fn. 408; Vanuatu, para. 433; Written Comments of: Antigua & Barbuda, paras. 94–95; Bahamas, para. 20; Barbados, para. 34; Belize, para. 37; Cook Islands, para. 56(c); DRC, para. 44; Egypt, para. 72; Gambia, para. 5.4; MSG, para. 188; Namibia, para. 59; Nauru, paras. 30–31; OACPS, para. 82; Pakistan, para. 20; Sri Lanka, para. 63.

⁸³ *See, e.g.*, Oral Submissions of: CR 2024/36, pp. 28–30, paras. 5–11 (Saudi Arabia); CR 2024/38, pp. 29–30, paras. 8–9 (China); CR 2024/42, pp. 46–47, para. 11 (India); CR 2024/43, pp. 54–59, paras. 2–23 (Kuwait).

⁸⁴ Written Comments of COSIS, para. 93; *see also* C. Voigt, "International Responsibility and Liability", *Oxford Handbook of International Environmental Law* (J. Rajamani & J. Peel eds., 2d ed. 2021), pp. 1008–1010.

⁸⁵ Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, *Yearbook of the International Law Commission*, Vol. II, Part Two, document A/61/10 (2006), pp. 413–414.

⁸⁶ Written Comments of COSIS, paras. 106–108 & fns. 247 & 250 (citing to participants' written statements agreeing that the law of State responsibility applies alongside the UNFCCC and Paris Agreement).