

INTERNATIONAL COURT OF JUSTICE

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

TUVALU

RESPONSES TO THE QUESTIONS ASKED BY THE JUDGES



20 DECEMBER 2024

Question From 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. Tuvalu submits that States have due diligence obligations to use all means at their disposal to limit global average temperature rise to cease ongoing significant harm and avoid future harm to the climate system and other parts of the environment, including, at a minimum, by transitioning away from fossil fuels. Tuvalu further emphasizes that, as part of this due diligence, States have corresponding procedural obligations to conduct environmental impact assessments (“EIAs”) for any existing oil, gas, or coal projects, taking into account each project’s cumulative emissions.
2. Tuvalu concurs with the submissions of the Commission of Small Island States on Climate Change and International Law (“COSIS”)—the international organization that Tuvalu co-founded with Antigua and Barbuda—that these obligations flow from both customary and conventional law when read in light of the best available science¹. Consistent with the jurisprudence of the Court and other tribunals², and as many participants concur³, the best available science informs the content of States’ climate-related due diligence obligations. It does so by providing an objective assessment of the risk and severity of harm, as well as the measures necessary to avoid and mitigate that harm⁴.
3. In the context of climate change, there is a science-backed, international consensus that the risk and severity of harm increases with each increment of warming and increases dramatically with warming above 1.5°C⁵. In Tuvalu’s case, the harm above 1.5°C is

¹ Written Statement of COSIS, § III.B.

² See, e.g., *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 (“*Pulp Mills*”), para. 204; see also *Southern Bluefin Tuna (New Zealand-Japan, Australia-Japan)*, Award on Jurisdiction and Admissibility, XXIII R.I.A.A. 1 (4 August 2000), pp. 31–32, para. 41(e); European Court of Human Rights, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Application no. 53600/20, Judgment (Merits and Just Satisfaction) (9 April 2024), paras. 545–546.

³ See, e.g., Written Comments of COSIS, para. 60 & fn. 139 (citing to all participants’ written statements endorsing the role of the best available science in informing the content of States’ due diligence obligations).

⁴ See *Fisheries Jurisdiction Case (Spain v. Canada)*, Judgment, I.C.J. Reports 1998, p. 432, paras. 69–70 (“International law thus characterizes ‘conservation and management measures’ by reference to factual and scientific criteria.”); *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 (referring to the “best scientific evidence available” in relation to conservation measures under UNCLOS Article 61); *Fisheries Jurisdiction Case (United Kingdom v. Iceland)*, Merits, Judgment, I.C.J. Reports 1974, p. 3, para. 72 (“[B]oth Parties have the obligation to keep under review the fishery resources in the disputed waters and to examine together, in the light of scientific and other available information, the measures required for the conservation and development, and equitable exploitation, of those resources[.]”); *Fisheries Jurisdiction Case (Germany v. Iceland)*, Merits, Judgment, I.C.J. Reports. 1974, p. 175, para. 64.

⁵ IPCC, “Summary for Policymakers”, *Sixth Assessment Synthesis Report* (2023), pp. 14–15; 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*

*existential*⁶. The science also establishes that deep, rapid, and sustained reductions in GHG emissions are necessary to mitigate the ongoing significant harm and avoid further *catastrophic* harm⁷.

4. The science is clear on the point of fossil fuels in particular. The IPCC has determined with high confidence that “[f]uture CO₂ emissions from *existing* fossil fuel infrastructures without additional abatement already exceed the remaining carbon budget for limiting warming to 1.5°C”⁸. UNEP reports that to stay within 1.5°C, “most of the world’s proven fossil fuel reserves must be left unburned”⁹. Tuvalu notes that States have already reached broad consensus on the *necessity* of transitioning away from fossil fuels at COP28, where States agreed to “[t]ransition[] away from fossil fuels in energy systems, in a just, orderly and equitable manner, accelerating action in this critical decade, so as to achieve net zero by 2050 in keeping with the science”¹⁰.

5. Tuvalu agrees with the consensus of States and international organizations that in light of the science, States must undertake the steps necessary to mitigate ongoing significant harm and avoid further harm to the climate system and other parts of the environment¹¹, including by taking legislative and regulatory measures to transition to clean energy systems¹², prohibit new fossil fuel projects¹³, and/or eliminate fossil fuel subsidies¹⁴.

6. Tuvalu notes the growing membership in the Fossil Fuel Non-Proliferation Treaty, which Tuvalu has spearheaded along with Vanuatu¹⁵.

(2018), p. 254, figure 3.21; *see also, e.g.*, COP28, Outcome of the First Global Stocktake, decision -/CMA.5 (Advanced Unedited Version) (13 December 2023), para. 39 (encouraging States Parties to publish NDCs that reflect “ambitious, economy-wide emission reduction targets . . . aligned with *limiting global warming to 1.5°C, as informed by the latest science*” (emphasis added)), paras. 3–5, 27.

⁶ Written Statement of Tuvalu, paras. 62, 70.

⁷ IPCC, “Summary for Policymakers”, *Sixth Assessment Synthesis Report* (2023), p. 21 (Table SPM.1). 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.

⁸ IPCC, “Summary for Policymakers,” *Sixth Assessment Synthesis Report* (2023), p. 20 (emphasis added).

⁹ UNEP, *Production Gap Report* (2019), p. 8.

¹⁰ COP28, Outcome of the First Global Stocktake, decision -/CMA.5 (Advance Unedited Version) (13 December 2023), para. 28(d).

¹¹ Written Statement of COSIS, paras. 90, 95; *see also, e.g.*, Written Statements of: Tuvalu, para. 74; Saint Vincent and the Grenadines, para. 101; Written Comments of Bangladesh, para. 16.

¹² *See, e.g.*, Written Statements of: The Bahamas, para. 184; COSIS, paras. 62, 203(b); IUCN, Appendix II, paras. 18–21; Sierra Leone, para. 3.65 Seychelles, para. 133; Written Comments of: Colombia, para. 1.6; The Gambia, paras. 4.5, 5.6, 5.13; CR 2024/42, p. 64, paras. 14–16 (Indonesia).

¹³ *See, e.g.*, Written Statements of: Albania, para. 133; Colombia, paras. 2.6, 4.10; Melanesian Spearhead Group, para. 314; Vanuatu, paras. 320, 488; Written Comments of Mauritius, paras. 49, 58(b); Oral Submissions of: CR 2024/35, p. 108, para. 7 (Vanuatu and Melanesian Spearhead Group); CR 2024/42, p. 19, para. 7 (The Cook Islands); *id.*, p. 32, para. 14 (The Marshall Islands); CR 2024/54, pp. 11–12, paras. 20–22 (WHO).

¹⁴ *See, e.g.*, Written Statements of: African Union, paras. 106–108; Colombia, para. 2.79; IUCN, paras. 17–18; Mauritius, para. 127(c); Parties to the Nauru Agreement Office, paras. 480–482; Vanuatu, paras. 7, 143–146, 495; *see also* Oral Submissions of: CR 2024/35, p. 108, para. 7 (Vanuatu and Melanesian Spearhead Group); CR 2024/39, pp. 34–35, paras. 20–21 (Côte d’Ivoire); CR 2024/41, p. 39, para. 8 (Ghana); CR 2024/42, p. 19, para. 7 (The Cook Islands); CR 2024/42, p. 32, para. 14 (The Marshall Islands); CR 2024/50, p. 47, para. 3 (Sri Lanka).

¹⁵ The Fossil Fuel Non-Proliferation Treaty Initiative, “Who has Joined the call for a Fossil Fuel Non-Proliferation Treaty?”, *available at* <https://fossilfuel treaty.org/endorsements/#governments>.

7. Tuvalu also submits that States have customary obligations to conduct EIAs in relation to any existing fossil fuel production and export projects¹⁶. This procedural obligation is a corollary of States' due diligence obligations and requires States to assess the "nature and magnitude" of each ongoing activity and "its likely adverse impact on the environment"¹⁷, accounting for the *cumulative* effects of such activity¹⁸. The obligation applies continuously to all activities risking significant environmental harm¹⁹, including both public and private projects²⁰.

Question From 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?

8. Tuvalu submits that, contrary to the suggestion of a few participants, Article 4 of the Paris Agreement, when properly interpreted, plainly obligates States Parties to use their "highest ambition" to make meaningful, successively progressive contributions to the overall temperature goal of 1.5°C above pre-industrial levels set in the Paris Agreement²¹.

9. Looking to Article 4, Tuvalu submits that under a proper reading, Article 4 does not allow States unfettered discretion in crafting NDCs. The object and purpose of the Paris Agreement is to take "effective and progressive" action against the "urgent threat of climate change on the basis of the best available science"²². Article 4, by its terms, obligates States Parties to "prepare, communicate and maintain" NDCs in line with the overarching objective "to *achieve* the long-term temperature goal" of 1.5°C above pre-industrial levels²³. Successive NDCs must reflect the State's "highest possible ambition" as well as a "progression" in overall contribution towards the reduction of GHG emissions²⁴.

10. Further, pursuant to Article 31(3)(c) of the VCLT, reflecting the principle of harmonization, Article 4 must also be interpreted in accordance with other relevant rules of

¹⁶ *Certain Activities*, para. 104.

¹⁷ *Id.*

¹⁸ *See Certain Activities*, para. 104; *Pulp Mills*, para. 205; *see also* UNCLOS, Arts. 204–206; 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. 441; Written Statements of: Belize, para. 51; Ecuador, paras. 3.32–3.42; IUCN, paras. 418–428; Kenya, paras. 5.14–5.16; Mexico, para. 53 & fn. 37.

¹⁹ *Pulp Mills*, para. 204.

²⁰ *Id.*, para. 197; *see also* Convention on Environmental Impact Assessment in a Transboundary Context, *United Nations Treaty Series*, Vol. 1989, p. 309 (1991), Art. 7.

²¹ Paris Agreement, *United Nations Treaty Series*, Vol. 3156, p. 79 (2015) ("Paris Agreement"), Arts. 2(1)(a), 4.

²² *Id.*, Preamble.

²³ *Id.*, Arts. 2(1)(a), 4(1)–(3) (emphasis added).

²⁴ *Id.*, Arts. 4(3).

international law, including the obligation to prevent transboundary harm, Part XII of UNCLOS, and human rights obligations²⁵. Thus, Article 4 read in light of the object and purpose of the Paris Agreement, along with other rules of international law, necessarily leads to the conclusion that States must exercise best efforts to formulate NDCs consistent with staying below 1.5°C and actually achieve their NDCs²⁶.

11. At the same time, Tuvalu stresses that Article 4 of the Paris Agreement does not, as a handful of high-emitting States have suggested, in any way limit or displace States' other climate-related obligations, including the customary obligation to prevent transboundary harm from GHG emissions²⁷.

12. As Tuvalu set out in its Written Comments, the UNFCCC and Paris Agreement neither constitute *lex specialis* nor can they be considered self-contained regimes excluding application of general international law²⁸. Only a small minority of participants argue that the Paris Agreement displaces or subsumes other sources of international law, a position which ITLOS expressly rejected²⁹. Many participants thus agree with Tuvalu that obligations under customary international environmental law, human rights law, UNCLOS, and other sources apply without limitation in parallel to Article 4 of the Paris Agreement³⁰.

13. These other obligations are furthermore not, as a handful of States have suggested, simply reducible to the content of the Paris Agreement's obligations³¹. In this regard, Tuvalu rejects the suggestion by some States that climate-related obligations under general international law are subject only to an individual State's unfettered discretion³². The principles of due diligence and prevention, as recognized by the Court in the context of transboundary environmental harm, as well as obligations under UNCLOS, human rights law, right of self-determination, and sovereignty principles, make clear that more is required of States. Specifically, States must take steps, informed by the objective science, that are actually capable of ceasing ongoing significant harm and preventing further harm, and "discretion" is no justification for noncompliance. Such other sources of climate-related obligations are in no way diluted or neutralized through harmonization with the Paris Agreement.

²⁵ Vienna Convention on the Law of Treaties, *United Nations Treaty Series*, Vol. 1155, p. 331 (1969) ("VCLT"), Art. 31(3)(c).

²⁶ *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.

²⁷ *See* Written Comments of Tuvalu, para. 21.

²⁸ *Id.*; *see also* Written Comments of COSIS, § IV.B.3.

²⁹ COSIS Advisory Opinion, paras. 223–224.

³⁰ Written Comments of Tuvalu, para. 21; *see also* Written Comments of COSIS, para. 74 & fn. 178 (citing the vast consensus that the UNFCCC and Paris Agreement are not *lex specialis* and other obligations apply to the climate crisis).

³¹ *See, e.g.*, Oral Submissions of: CR 2024/35, pp. 147–149, paras. 2–15 (Germany); CR 2024/36, pp. 40–42, paras. 2–6 (Australia); CR 2024/43, pp. 57–59, paras. 20–23 (Kuwait); CR 2024/54, pp. 18–20, paras. 5–8 (European Union).

³² *See, e.g.*, CR 2024/40, pp. 41–46, paras. 11–29 (United States); Written Statement of Saudi Arabia, paras. 4.64–4.68; Written Comments of United Kingdom, paras. 14–18, 21–22.

Question From 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?

14. Tuvalu concurs with the many participants that agree that the right to a clean, healthy, and sustainable environment contains both procedural and substantive elements³³. The procedural obligations contained in the right include adopting and enforcing effective legal and institutional frameworks regulating the environment, providing access to environmental information and justice, and permitting public participation in environmental decision-making³⁴. Further, as many participants also agree³⁵, and as the UN Special Rapporteur concludes, the right contains substantive guarantees to, *inter alia*: clean air, safe climate, non-toxic environments, healthy ecosystems and biodiversity, water, and food³⁶.

15. The right to a clean, healthy, and sustainable environment is also necessarily linked to many other human rights³⁷, including, *inter alia*, rights to life, health, food, water, cultural and religious freedoms, and family life. The inextricable link between these fundamental human rights and the environment inheres from the fact that the environment is the necessary predicate to the exercise of those other rights. As the Court recognized, “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”³⁸. Tuvalu is the paradigmatic example of the link between the environment and human rights, as illustrated by the wide-ranging and severe human rights impacts of climate change on the Tuvaluan people³⁹. The rights of the Tuvaluan people have been and are being violated, as States fail to adhere to their obligations to prevent significant harm to the climate system and other parts of the environment, and as Tuvalu sits on the precipice of mass submergence and destruction of its territory⁴⁰.

16. In addition to these critical anthropocentric dimensions, Tuvalu agrees with and endorses Vanuatu’s emphasis of the ecocentric dimensions of the right to a clean, healthy, and

³³ See, e.g., Written Comments of: Chile, paras. 33–38; Vanuatu, p. 91; CR 2024/50, pp. 24–25, para. 9 (Slovenia).

³⁴ United Nations Human Rights Council, Right to a Healthy Environment: Good Practices, Report of the UN Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, document A/HRC/43/53 (2019), paras. 14–37.

³⁵ See, e.g., Written Comments of: Chile, paras. 33–34; Vanuatu, p. 91; Oral Submissions of: CR 2024/40, p. 33, para. 10 (Spain); CR 2024/44, p. 30 (Liechtenstein).

³⁶ United Nations Human Rights Council, Right to a Healthy Environment: Good Practices, Report of the UN Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, document A/HRC/43/53 (2019), paras. 38–112.

³⁷ 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), p. 3, para. 3.

³⁸ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports* 1996, p. 226, para. 29 (emphasis added).

³⁹ Written Statement of Tuvalu, § II.B; Written Comments of Tuvalu, § II; CR 2024/51, pp. 47–56, paras. 1–21 (Tuvalu).

⁴⁰ United Nations Human Rights Council, Issues of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, document A/HRC/40/55 (2019), paras. 109–111.

sustainable environment, which protects the intrinsic value of nature⁴¹. As the Inter-American Court of Human Rights has emphasized, this right,

“protects nature not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life or personal integrity, but [also] because of their importance to the other living organisms with which we share the planet that also merit protection in their own right”⁴².

Further, recognizing this dimension of the right to a clean, healthy, and sustainable environment reflects and honors indigenous laws and cultural concepts that view the Earth and the environment as having legal personality and rights, such as the Tuvaluan concept of *Fenua* and the concept of “Mother Earth” in Bolivia⁴³.

17. The right to a clean, healthy, and sustainable environment has crystallized into customary international law. This is apparent from near-ubiquitous recognition of the right within international and domestic legal systems. For instance, in these proceedings alone, at least 53 States and international organizations recognize the right, and that it is being infringed by climate change⁴⁴. This widespread recognition reflects the right’s historical origins in the Stockholm Declaration and Rio Declaration, both of which reference the “fundamental” right to a healthy environment⁴⁵. Further, the UN General Assembly adopted a landmark resolution recognizing the right by a vote of 161 States in favour, 8 abstentions, and no votes against⁴⁶. The UN Human Rights Council Resolution 48/13 was adopted with

⁴¹ Written Statement of Vanuatu, para. 383.

⁴² 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. 62.

⁴³ UN General Assembly, *Harmony with Nature*, Report of the Secretary-General, document A/74/236 (2019), paras. 8, 13; Written Statement of Tuvalu, § II.A.1; CR 2024/51, p. 47, paras. 3–4 (Tuvalu); *see also* Written Statement of Vanuatu, para. 388; CR 2024/53, pp. 24–25, paras. 16–21 (COSIS).

⁴⁴ *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, 107–115; CR 2024/41, pp. 36–37 (Ghana).

⁴⁵ Declaration of the United Nations Conference on the Human Environment, document A/CONF.48/14/Rev.1 (16 June 1972), 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.”); Rio Declaration on Environment and Development, document A/CONF.151/26 (Vol. I) (Annex I) (12 August 1992), Preamble (reaffirming the Stockholm Declaration and “[r]ecognizing the integral and interdependent nature of the Earth, our home”), Principle 10.

⁴⁶ General Assembly, resolution 76/300, *The Human Right to a Clean, Healthy and Sustainable Environment*, document A/76/300 (1 August 2022); United Nations, Press Release, “With 161 Votes in Favour, 8 Abstentions, General Assembly Adopts Landmark Resolution Recognizing Clean, Healthy, Sustainable

similar unanimity⁴⁷. The right's broad recognition also extends to national legal systems: nearly four-fifths of States have recognized the right in some capacity in their domestic law⁴⁸. With such overwhelming support, there can be no doubt that there exists a customary right to a clean, healthy, and sustainable environment.

18. Finally, the extraterritorial application of the right to a clean, healthy, and sustainable environment derives from its very nature⁴⁹. *First*, where human rights are implicated in the context of transboundary harm, UN human rights bodies agree that the rights apply extraterritorially⁵⁰. *Second*, the environment is a global common that is not divisible along political boundaries; consequently, the right to a clean, healthy, and sustainable environment cannot be guaranteed if there is no protection from harm that transcends those political boundaries. *Third*, the right is recognized in the context of transboundary harm, particularly in light of its ecocentric dimension. For example, the UN General Assembly cited several transboundary environmental phenomena where the right is implicated, including climate change, air pollution, and biodiversity loss⁵¹. Likewise, the UN Human Rights Council resolution recognizing the right did so in the context of similar transboundary examples, including “climate change”, emphasizing that “the human rights implications of environmental damage are felt by individuals and communities *around the world*”⁵².

Question From 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?

19. Tuvalu is among the small island States that made a declaration upon joining the UNFCCC and the Paris Agreement to the effect that,

“[The] Paris Agreement and its provisional application shall in no way constitute a renunciation of any rights under international law concerning

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).

⁴⁷ 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) (adopted with 43 States in favor, none in opposition, and 4 abstentions).

⁴⁸ CR 2024/50, p. 23, para. 5 (Slovenia); see also UNGA 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 recognize the right to a clean, healthy and sustainable environment, establishing binding duties for Governments.”).

⁴⁹ Written Statement of Tuvalu, para. 102; Written Comments of Tuvalu, § II.B; see also Written Statement of Vanuatu, para. 383 (noting that the right to a clean, healthy, and sustainable environment applies extraterritorially).

⁵⁰ See, e.g., United Nations Committee on the Rights of the Child, Decision Adopted in Respect of Communication No. 104/2019, *Sacchi, et al. v. Argentina*, document CRC/C/88/D/104/2019 (22 September 2021), para. 10.7; 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. 101.

⁵¹ General Assembly, resolution 76/300, The Human Right to a Clean, Healthy and Sustainable Environment, document A/76/300 (1 August 2022), p. 2.

⁵² 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), pp. 1–2 (emphasis added).

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 general international law or any claims or rights concerning compensation due to the impacts of climate change”⁵³.

20. Tuvalu’s declaration, as well as the declarations of a handful of other States, reflect what is evident from the text of the UNFCCC and the Paris Agreement and from the principle of *lex specialis*: these instruments were not intended to displace or otherwise alter States’ climate-related obligations under international law and the legal consequences flowing from the breach of those obligations⁵⁴. Notably, none of the declarations made was met with any objections. Also notably, only a small minority of participants in these proceedings—comprised of high emitting States—advance the *lex specialis* argument, and none of them cites to these declarations in support of their argument⁵⁵.

21. The majority of participants agree with Tuvalu that the UN Climate Change Regime is *not* a self-contained regime that displaces other sources of international law, including the obligation to prevent transboundary harm, human rights obligations, and UNCLOS⁵⁶. Further, the text of the UNFCCC and Paris Agreement make clear that these instruments are intended to apply alongside other relevant rules of international law. For instance, the UNFCCC recalls States Parties’ “responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment”⁵⁷. Likewise, the Paris Agreement calls upon States Parties to “respect, promote and consider their respective obligations on human rights”⁵⁸. In Tuvalu’s view, and as many participants agree⁵⁹, the declarations further confirm what is evident from the treaty text.

22. The conclusion is the same when considering the application of secondary rules of international law⁶⁰. Tuvalu has already suffered and continues to suffer loss and damage of considerable financial magnitude: the financial cost of Tuvalu’s Long-Term Adaptation Plan alone—the plan to keep Tuvalu above water—costs an estimated US\$1.3 billion to finish and

⁵³ 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; 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 (lodging an analogous declaration when joining the UNFCCC).

⁵⁴ Written Comments of Tuvalu, § III.A; Written Statement of COSIS, § III; Written Comments of COSIS, § IV.B.3; *see also* COSIS Advisory Opinion, paras. 223–224.

⁵⁵ *See, e.g.*, 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).

⁵⁶ Written Comments of COSIS, para. 74 & fns. 178–179 (citing the written statements of at least 62 States that endorse the view that the UNFCCC and Paris Agreement do not displace or otherwise alter the application of other rules of international law); *see also* COSIS Advisory Opinion, paras. 223–224.

⁵⁷ United Nations Framework Convention on Climate Change, *United Nations Treaty Series*, Vol. 1771, p. 107 (1992) (“UNFCCC”), Preamble.

⁵⁸ Paris Agreement, Preamble.

⁵⁹ 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; DRC, para. 44; Cook Islands, para. 56(c); 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.

⁶⁰ 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.

maintain⁶¹. In light of the stark reality of historical and ongoing significant harm, Tuvalu sought to make explicit its existing rights under international law to seek the responsibility of States breaching their climate-related obligations. The declaration made clear that the loss and damage provisions in the Paris Agreement operate complementarily to any redress sought under the general international law of State responsibility, and again, was met with no objection from other States Parties to the Paris Agreement⁶².

⁶¹ Written Comments of Tuvalu, para. 41.

⁶² See Daniel Bodansky, “The United Nations Framework Convention on Climate Change: A Commentary”, *Yale Journal of International Law*, Vol. 18, p. 451 (1993) at 528–529 & fn. 466.