



INTERNATIONAL
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LAW RESEARCH CENTER

Review

STATE POSITIONS WITHIN THE ICJ ADVISORY PROCEEDINGS ON OBLIGATIONS IN RESPECT OF CLIMATE CHANGE



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Abbreviations

ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts (2001)
ECtHR	European Court of Human Rights
EIA	Environmental Impact Assessment
ICJ	International Court of Justice
ILC Articles on Prevention	Draft Articles on Prevention of Transboundary Harm from Hazardous Activities. Report of the International Law Commission on the work of its fifty-third session
ITLOS Climate Change AO	Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion
NDC	Nationally Determined Contribution
Pulp Mills	Pulp Mills on the River Uruguay (<i>Argentina v. Uruguay</i>), Judgment
SIDS	Small Island Developing States
UNCLOS	United Nations Convention on the Law of the Sea, adopted on 10 December 1982
UNFCCC	United Nations Framework Convention on Climate Change, adopted on 9 May 1992
UNGA	United Nations General Assembly

Introduction*

On 29 March 2023 the United Nations General Assembly (**UNGA**) adopted the Resolution 77/276 requesting an advisory opinion of the International Court of Justice (**ICJ**) on the obligations of States in respect of climate change. The resolution was initiated by Vanuatu and widely supported by other States: about 130 countries co-sponsored the draft, whereas the resolution itself was adopted by consensus.

Shortly before that, the Commission of Small Island States on Climate Change and International Law requested an advisory opinion of the International Tribunal for the Law of the Sea on the obligation of States under the United Nations Convention on the Law of the Sea (**UNCLOS**) in relation to prevention of pollution of the marine environment caused by climate change. During the ICJ oral hearings, many States expressed their views on the Tribunal's findings. Alongside the ICJ's opinion, an advisory opinion of the Inter-American Court of Human Rights is also expected, addressing States' obligations related to climate change in the context of human rights law.

The advisory proceedings before the ICJ represent an unprecedented case in the Courts' practice, with 96 States and 12 international organizations appearing before it. This was the first ever appearance before the Court for some States, e.g., Barbados, Nepal, Samoa, Sierra Leone, the Cook Islands, the Federated States of Micronesia, Uruguay.

While ICJ advisory opinions are not legally binding, they are regarded as an authoritative interpretation of international law.¹ Through the General Assembly, the Security Council and specialized agencies, States have frequently sought the Court's opinion to clarify the framework of proper behavior and to define existing obligations in various areas of international law.²

This time the following questions are brought before the International Court of Justice:

- “What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations;
- What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:
 - States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?

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¹ Kolb, R. (2013). *The International Court of Justice*. Hart Publishing. Pp. 1197-1100.

² The following advisory opinions are an example: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, I.C.J. Reports 1971, p. 16; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I. C. J. Reports 2004, p. 136. In these opinions, the Court addressed the existing obligations and restrictions on States in the use of nuclear weapons, the consequences of non-compliance with Security Council's resolutions, and the consequences of the construction of a wall in the occupied territory in the light of international humanitarian law.

- Peoples and individuals of the present and future generations affected by the adverse effects of climate change?³

This review analyzes the positions expressed by States in their written statements and comments, as well as during oral hearings held from 2 to 13 December 2024. Its objective is to provide an insight into the key debated aspects of States' obligations in respect of climate change and the consequences of causing significant harm to the environment and the climate system. The analysis does not attempt to cover the full scope of issues raised before the Court and focuses on those where divergence among States is most pronounced. The views of the majority of States do not prejudice the Court's conclusions. It is also important to note that the ICJ is to determine the present state of international law, rather than to prescribe its progressive development.

The review may be of interest to specialists in international law, as well as to researchers and practitioners engaged in the development of the global climate regime and multilateral negotiations in the sphere of climate change.

The classification of countries into "developed" and "developing" is based on the annexes to the United Nations Framework Convention on Climate Change (**UNFCCC**).⁴ For the purposes of this review, the top 15 countries in terms of anthropogenic emissions of greenhouse gas (**GHG**) based on national reports under the UNFCCC and the Paris Agreement are considered as major emitters among developing States:⁵ China, India, the Russian Federation, Brazil, Indonesia, South Korea, Mexico, Saudi Arabia, Iran, Argentina, Pakistan, South Africa, Thailand, Nigeria, and Vietnam.

³ UNGA. Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change. Resolution adopted by the General Assembly on 29 March 2023. A/RES/77/276. [URL](#)

⁴ For the purposes of this review, the list of developed countries encompasses States included in Annex II of the UNFCCC as of 2025, as well as Liechtenstein, Slovakia and Slovenia. [URL](#). Read more about the classification of countries under the UNFCCC in the ICLRC paper. [URL](#)

⁵ The data source is the official UNFCCC database ([URL](#)), the European commission's database – EDGAR ([URL](#)) and the Climate Watch database ([URL](#)).

Summary

1. Based on the UNGA Resolution 77/276, advisory proceedings before the ICJ on States' obligations in respect of climate change have been pending since 12 April 2023. Within the scope of the first question posed before the Court, one of the most debated aspect is the determination of the applicable law governing the conduct of States in addressing climate change: whether the range of sources is primarily consisted of the UN climate change treaty regime (UNFCCC, Kyoto Protocol, and Paris Agreement) or whether it also encompasses other sources of international law and its different branches, including human rights law and the law of the sea.
2. Most States assume that the body of law applicable to States' behavior in the sphere of climate change is not limited to the UN climate change treaty regime (**para. 13 below**). The principle of prevention of significant harm to the environment and the duty of due diligence are also cited as relevant rules of customary international law, among others.
3. The majority of States, mainly those particularly vulnerable to climate change and developing countries, consider the principle of prevention of significant harm to the environment to be applicable as a general rule aimed at protecting the environment as a whole, including climate system (**paras 19-22 below**). This position is not shared by some developed States and major emitters among developing countries, including Australia, Canada, China, India, Indonesia, New Zealand, the Nordic countries (Denmark, Sweden, Norway, Iceland, and Finland), the OPEC countries (excluding UAE), the United Kingdom, and the USA. They emphasize that this principle has been elaborated to regulate relations between neighbouring countries and to respond to situations where both the specific source of harm and the extent of damage caused are identifiable. However, anthropogenic greenhouse gas emissions (**GHG emissions**) are global and cumulative; this leads to practical impossibility to identify their specific source, potential affected area and the degree of damage, whereas the harm becomes "significant" only being caused by cumulative emissions from several sources (**paras 23-26 below**).
4. States differently approach to identification of the content of the duty of due diligence. Developed countries and major emitters among developing ones consider it to be exhaustively defined by the standard of conduct under the UNFCCC and the Paris Agreement (**paras 33-35 below**). Most States, particularly the most vulnerable to climate change, believe that the duty of due diligence provides a stricter standard of conduct than the climate change treaty regime and imposes additional obligations on States (e.g., to conduct preliminary environmental impact assessment, to co-operate with other States when there is a risk of causing significant harm to their territory) (**paras 30-32 below**).
5. Recognizing the impact of climate change on the realization of human rights, not all States agree that human rights law can prescribe for States to make additional efforts towards addressing climate change. Developed and some developing States' arguments are based on significant differences between two legal regimes: human rights law is territorially bound, with an individual as the main beneficiary, whereas the climate change regime governs exclusively inter-State relations, with anthropogenic GHG emissions being extraterritorial (**paras 42-43 below**). However, the majority of States, relying on the recent decision of the European Court of Human Rights (**ECtHR**) in *Verein Klimasenioren Schweiz v. Switzerland*, believe that human rights may be infringed by ineffective mitigation and adaptation measures (**paras 38-41 below**).
6. In this context, States also consider that there exists the right to clean, healthy, and sustainable environment at the universal level, with distinct normative content (**paras 45-46 below**). In contrast, developed and some developing States (including Australia, Canada,

Egypt, Germany, Indonesia, Latvia, New Zealand, the Nordic countries, the Russian Federation, Switzerland, the United Kingdom, and the USA) note that this right currently lacks either universal treaty or customary basis (**para. 47 below**).

7. In light of the Tribunal's advisory opinion of 21 May 2024, most States support its conclusions on the correlation between the obligations under Part XII of the UNCLOS and the obligations of States in respect of climate change, and on the extension of the notion "pollution of the marine environment" to anthropogenic GHG emissions (**para. 54 below**). China, the Russian Federation, Saudi Arabia, and the Nordic countries criticize the Tribunal's findings on the interpretation of international law (**paras 50-53 below**).
8. The second question raised before the ICJ relates to the legal consequences under State's obligation in respect of climate change in the event of causing significant harm to the climate system and other parts of the environment. The majority of States consider such consequences to be the invocation of international responsibility with corresponding obligation to make full reparation (**paras 60-61, 67, 70-73 below**). Given the specificity of climate change and its impacts, the most vulnerable States propose new means of restitution, as well as methods of establishing causality for the purposes of compensation.
9. At the same time, some developed and developing countries (including Australia, Canada, China, France, the European Union, Kuwait, the Nordic countries, the Russian Federation, and the USA) admit the possibility of invoking international responsibility under customary international law but consider it ineffective in the context of climate change (**paras 62, 64, 69 below**). The global and cumulative nature of the harm caused by anthropogenic GHG emissions makes it impossible to determine a causal link between a concrete act of a State and the damage caused. Moreover, an internationally wrongful act is defined as a breach of an obligation that was in force for a State at the time the act occurred. According to developed States and major emitters among developing ones, binding rules in respect of climate change appeared only when the UNFCCC came into force. To ensure compliance with these binding rules, the UNFCCC and the Paris Agreement provide relevant mechanisms instead of invocation of international responsibility.

I. Sources of State's Obligations in Respect of Climate Change under International Law

10. The UNGA Resolution provides a list of international legal instruments and customary rules that the ICJ should consider. These include the United Nations Charter, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the UNFCCC, the Paris Agreement, the UNCLOS, the duty of due diligence, the rights recognised under the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment. In their positions, States went far beyond these sources, however, for the purposes of this review, we will focus on the most discussed ones.
11. This part of the review focuses on States' positions regarding the applicable law, in particular the sources of States' international obligations in the field of climate change. The identification of sources is the starting point for further establishing the scope and content of obligations. Most States, in their written submissions and oral statements, focused on this issue rather than on the further definition of existing obligations and their normative content.

1. International Climate Change Treaties

12. The positions of States are similar in recognizing the UNFCCC and the Paris Agreement as primary sources of their obligations in respect of climate change.⁶ For example, **the USA** and **Japan** note that these two international treaties are the ultimate, clearest and most specific expression of States' consent to the regulation of anthropogenic GHG emissions,⁷ and therefore they should be the first ones for analysis when addressing States' obligations regarding climate change.
13. This status of the climate change treaties does not exclude the applicability of other sources of international obligations, but it does define the relationship between the UNFCCC and the Paris Agreement and other sources. For instance, **the United Kingdom** submits that the main obligations of States in respect of climate change are contained in the UNFCCC and the Paris Agreement, but there are other complementary treaties and customary rules containing such obligations.⁸ This common idea shared by the majority of States can be illustrated by the following quote from **Canada**:

“While the UNFCCC and the Paris Agreement are the two preeminent treaties negotiated to address climate change, Canada acknowledges that climate change is relevant to a variety of international legal obligation”.⁹
14. At the same time, **Saudi Arabia** considers the UNFCCC and the Paris Agreement to be the only and exclusive sources of international obligations of States.¹⁰ Developed and major emitters among developing countries take a more nuanced position: in case of a conflict of norms the UNFCCC and the Paris Agreement prevail over other applicable sources, and all States' obligations contained in other international legal instruments with a similar scope of

⁶ The Kyoto Protocol has not received widespread attention in States' positions because its second commitment period ended in 2020.

⁷ Written comments of the United States of America, para. 3.1; Written statement of Japan, para. 13.

⁸ Written statement of the United Kingdom of Great Britain and Northern Ireland, paras 29-33.

⁹ Written statement of Canada, para. 19.

¹⁰ Written statement of the Kingdom of Saudi Arabia, para. 4.90.

application should be implemented in line with the standard of conduct set out in the climate change treaties. As **Canada** states in its oral presentation on the conditions of applicability of other legal sources, “they cannot be interpreted as imposing international legal obligations that are incompatible with those carefully negotiated through the international climate change régime”.¹¹

15. Thus, the point of disagreement is the regulation of States’ cooperation in addressing climate change outside the UN climate change treaty regime. Summarily, the positions of the States can be presented as follows:
- The UNFCCC and the Paris Agreement are not *lex specialis*,¹² so other international treaties and customary international law are also applicable to the relations of States in the field of climate change. This view is supported by the **majority of States**: among them are the most vulnerable to climate change, developing, and some developed States;
 - The UNFCCC and the Paris Agreement constitute the specialized treaty regime,¹³ therefore, they are the primary sources of international obligations of States in respect of climate change. The obligations from other sources do not impose new burden on States, and their normative content does not go beyond the limits defined by the climate change treaties. This position, with some variations with respect to the different sources of international law, is held by **some developed countries** and the **major emitters among developing States**.

2. Customary International Law

16. The UNGA resolution mentions two rules of customary international law as sources to be analysed: the principle of prevention of significant harm to the environment and the duty of due diligence. In this regard, the question of the applicability of customary international law and its correlation with treaty obligations holds a significant place in the positions of States.
17. This increased attention to customary international law is also due to a number of reasons, which appeared explicitly and implicitly in the arguments of States:
- i. international custom applies to relations outside treaties; in other words, customary law applies to States regardless of their participation in the UNFCCC and the Paris Agreement and independently of the obligations they have accepted under the treaty regime;
 - ii. customary international law could prescribe a wider range of obligations than the climate change treaties, and therefore impose greater burden on States;

¹¹ Verbatim record 2024/38. Public sitting held on Tuesday 3 December 2024, at 3 p.m., at the Peace Palace, President Salam presiding, on the Obligations of States in respect of Climate Change (Request for advisory opinion submitted by the General Assembly of the United Nations), p. 12, para. 22.

¹² According to the general principle of law *lex specialis derogat legi generali*, in case of conflict between general and specific norms, preference should be given to the latter, which, however, does not exclude the application of general norms in cases not regulated by the specific ones and also as general guidelines in the interpretation of specific rules. See. ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the International Law Commission on the work of its fifty-eighth session (1 May – 9 June and 3 July – 11 August 2006). A/61/10. [URL](#)

¹³ A specialized (special, self-contained) regime is a set of legal rules and principles affecting a particular specific subject-matter. The existence of a specialized regime does not exclude the application of general norms to eliminate legal gaps, as well as to prevent situations where the implementation of the norms of a specialized regime leads to the non-fulfillment of the objectives of such a regime or its rules are not implemented at all. ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the International Law Commission on the work of its fifty-eighth session (1 May – 9 June and 3 July – 11 August 2006). A/61/10. [URL](#)

- iii. customary rules are mostly formulated in general terms, and therefore their content can be quite broad, leading to difficulties in determining the precise required conduct in specific cases.

2.1. The Principle of Prevention of Significant Harm to the Environment

18. The principle of prevention of significant harm (prevention principle¹⁴) is a rule of customary international law, as it has been consistently confirmed by arbitral tribunals (*Trail Smelter Arbitration (U.S. v. Canada)* and *Iron Rhine case (Belgium v. Netherlands)*) and courts when dealing with the compensation for transboundary harm to one State for activities in the territory of another State, as well as in various international legal instruments¹⁵ including treaties.¹⁶ The ICJ, in its decisions¹⁷ and advisory opinion,¹⁸ consistently recognized the customary nature of this principle. States do not dispute the existence of such a custom in general international law but differ in their approach to its applicability in the field of climate change. The main points of view can be summarized as follows:

- the prevention principle is aimed at protecting the environment, including the climate system, and has broad subject-matter application. The adverse effects of climate change are covered by the notion of significant harm. The fact that the principle was previously applied in relations between neighbouring States does not preclude its applicability in a global context, since the transboundary character implies harm to the territory of any other State, even in the absence of common borders. This view is supported by **the majority of States**, including small island developing States (**SIDS**), least developed countries, African Union member States, the majority of developing States and some developed ones;¹⁹
- the prevention principle has a narrow scope of application, as it was elaborated and applied in situations of causing harm to neighbouring States with a common border, where both the source of harm and its scale are easily identifiable. These situations are quite different from the harm caused by the effects of climate change due to anthropogenic GHG emissions. This view is supported by **Australia, Canada, China, India, Indonesia, New Zealand, the Nordic countries** (Denmark, Sweden, Norway, Iceland, and Finland), **the OPEC countries** (excluding the UAE), **the United Kingdom**, and **the USA**.

¹⁴ In their positions, States have used prevention principle and no-harm rule interchangeably to refer to the principle of prevention of significant harm. The term *prevention principle* will be used throughout this review.

¹⁵ For example, this principle is reflected in the Declaration of the United Nations Conference on the Human Environment (adopted by the United Nations Conference on the Human Environment, Stockholm, 1972), principle 21; the Rio Declaration on Environment and Development (adopted by the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June, 1992), principle 2. See also 1975 Helsinki Final Act of the Conference on Security and Co-Operation in Europe, part 5. URL. This principle is also elaborated in the following work of the International Law Commission: Draft Articles on Prevention of Transboundary Harm from Hazardous Activities. Report of the International Law Commission on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001). A/56/10 (hereinafter **ILC Articles on Prevention**). [URL](#)

¹⁶ For example, UNFCCC (preamble), United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (preamble), Convention on Biological Diversity (Article 3), Vienna Convention for the Protection of the Ozone Layer (preamble), UNCLOS (Article 194(2)).

¹⁷ Pulp Mills on the River Uruguay (*Argentina v. Uruguay*), Judgment, I.C.J. Reports 2010, p. 14, para. 101 (**Pulp Mills**); 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, para. 104.

¹⁸ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, para. 29.

¹⁹ For example, Albania, Egypt, Romania, South Korea. Among developed countries, France, the Netherlands, Spain, Switzerland, Japan, and the European Union support this position. Notably, the UAE is in favor of applying the prevention, although the OPEC in its written position insists on the opposite.

19. The position of the majority is that the existence of climate change treaties does not prejudice the applicability of customary law. The fact that the practice of inter-State disputes concerning the application of the prevention principle has so far been limited to environmental cases involving harm to neighbouring States does not predetermine its inapplicability in a global context. The International Law Commission notes that “transboundary harm” means harm caused in the territory or other places under the jurisdiction or control of a State other than the State of origin, irrespective of the existence of a common border between them.²⁰ **Barbados** notes that it is a mistake to consider this principle only in the context of relations between neighbouring States.²¹ According to **Egypt**, “States are under an obligation not to cause harm to the environment. They are also under an obligation not to cause harm to the climate system, which forms part of the environment”.²² This principle can be applied in different contexts due to its broad definition. Moreover, it is mentioned in the preamble to the UNFCCC.
20. According to developing States and those most vulnerable to climate change, the principle of prevention of significant harm caused to the environment prescribes a broader range of obligations than the climate change treaty regime. For example, **Belize** submits the following: “In the context of greenhouse gas emissions and climate change, the scope of the Prevention Obligation is not fully reflected in the modest commitments that States Parties have thus far undertaken pursuant to the UNFCCC”.²³ Supporting this view, **Switzerland** states that the mere fact of participation in climate change treaties and the implementation of their provisions is not necessarily sufficient to ensure compliance with customary international law.²⁴
21. Among the duties arising out of the prevention principle, **most States** include the following:
- the obligation to conduct an environmental impact assessment (**EIA**) for the planned activities within the State’s territory or under its jurisdiction or control;
 - the obligation to inform affected States of potential risks of significant harm and, when necessary, to consult or otherwise co-operate to prevent harm or reduce the potential consequences of planned activity;
 - the obligation to control the environmental impact of projects and actions already in operation carried out in the territory or under jurisdiction or control of the State.
22. A detailed analysis of these duties can be found in the statements of **Grenada, Egypt, the Netherlands, Latvia, Saint Vincent and the Grenadines**, and **Saint Lucia**. **Belize** distinguishes three stages of EIA (identifying activities having the potential adversely to affect the environment of another State; ascertaining the risks of significant transboundary harm; conducting the assessment, if such risks are identified) and sets out the requirements for each stage.²⁵ **The Netherlands** notes that the prevention principle comprises a set of distinct duties arising throughout the whole life-cycle of an activity.²⁶
23. Developed States and major emitters among developing ones argued that the principle of prevention of significant harm does not apply in the climate change context. The starting point

²⁰ ILC Articles on Prevention, Article 2. [URL](#)

²¹ Answers of Barbados, para. 37.

²² Written statement of Egypt, para. 88.

²³ Written statement of Belize, para. 36.

²⁴ Written statement of Switzerland, para. 70.

²⁵ Written statement of Belize, para. 42.

²⁶ Written statement of the Kingdom of Netherlands, para. 3.58.

of their argument is that this principle has evolved and applied to situations significantly different from climate change. **The United States**²⁷ and **the United Kingdom**²⁸ emphasize that the prevention principle has been formulated in the context of relations between neighbouring States, where the source of pollution and the harm caused by it are precisely identifiable, so the principle is not intended to address a global climate change context.

24. **New Zealand** consistently distinguishes between significant transboundary harm and harm associated with anthropogenic GHG emissions. In the latter case, harm arises from cumulative and global emissions in the sense that they originate from activities occurring simultaneously in several States, and it is not possible to identify the specific source of an individual set of emissions. In contrast, the source of transboundary harm and the limits of its spread can be accurately identified, and it is possible to define the causal link between a particular State's activity and its consequences.²⁹ **China** mentions the historical nature of anthropogenic GHG emissions,³⁰ which occurred when there were no binding rules of conduct in the context of climate change. **India** recognizes the different time periods of the emergence of the obligation to prevent transboundary harm and obligations in respect of climate change, as well as the differences in the spatial distribution of transboundary harm and the harm caused by anthropogenic GHG emissions.³¹ Moreover, the latter is global not only in its content but also in impact on the environment. It is as difficult to determine specific damaged area as it is to identify specific harm-doers.
25. **The United Kingdom** notes that the prevention principle involves proving that specific harm has been caused to a concrete State, whereas there is currently no single or agreed scientific methodology to determine the harm caused by climate change and to link a particular activity with the damage done to the environment in the context of climate change.³²
26. **The European Union**, while supporting the applicability of the prevention principle in general, believes that its implementation should be analysed in terms of accepted international standards. It names only the Paris Agreement as such a standard.³³
27. Commenting on these statements, **Vanuatu** contends that the attempts to exclude the application of the prevention principle are motivated by the understanding that this principle implies a higher bar for a minimum standard of conduct than major emitters have currently been exercising.³⁴

2.2. The Duty of Due Diligence³⁵

28. In *Pulp Mills*, the Court recognized that the principle of prevention of significant harm to the environment is closely related to the duty of due diligence.³⁶ This duty defines the standard

²⁷ Written statement of the United States of America, footnote 297.

²⁸ Written comments of the United Kingdom of Great Britain and Northern Ireland, para. 34.1.

²⁹ Written statement of New Zealand, paras 101-102.

³⁰ Written statement of China, para. 128.

³¹ Written statement of India, para. 17.

³² Written comments of the United Kingdom of Great Britain and Northern Ireland, para. 34.2.

³³ Written statement of the European Union, paras 318-321.

³⁴ Written comments of Vanuatu, para. 110.

³⁵ Referring to the same issue, States have used different names in their positions: principle of due diligence, standard of due diligence, duty of due diligence, obligation of due diligence. Since UNGA resolution 77/276 names it as duty of due diligence, this term will be used in the review.

³⁶ *Pulp Mills*, para. 101.

for the implementation of obligations; in other words, it clarifies what measures States must take and guides the assessment of the sufficiency of those measures to fulfil the obligations. As a general rule, the duty of due diligence implies that, in implementing their obligations, States are to make all necessary and feasible efforts to prevent harm.³⁷ The specific content of due diligence depends on the nature of the obligations, applicable international legal instruments, as well as the factual circumstances and the available capabilities of a State. The content of the due diligence standard may be determined by various factors, including the level of scientific knowledge and the existing legal regulation of States' conduct in a particular area.³⁸

29. Taking into account that the content of the duty of due diligence depends on the context and may vary significantly in different areas of international relations, the positions of States are focused on defining the content of the standard of behaviour in the field of climate change. The main points of view can be summarized as follows:
- the duty of due diligence implies stricter requirements for States' actions to reduce anthropogenic GHG emissions than those found in the climate change treaty regime. This position is largely shared by the same countries that argue for the applicability of the prevention principle in the context of climate change (these are the most vulnerable States, SIDS, African Union member States, developing States, and some of developed States);³⁹
 - the content of the duty of due diligence is exhaustively defined and covered by the UNFCCC and the Paris Agreement. This view is expressed by **Australia, East Timor, India, Kuwait, New Zealand, Saudi Arabia, Singapore, the Nordic countries, the United Kingdom, the USA, Japan, and the European Union.**
30. **Egypt** argues that the duty of due diligence is not limited to the provisions of climate change treaties. It also entails the duty to adopt national laws and regulations aimed at reducing anthropogenic GHG emissions and prescribes a certain level of vigilance in their enforcement and monitoring their compliance by private operators.⁴⁰ **Colombia** considers that the duty of due diligence imposes even more of a burden than the prevention principle, since the duty is not linked to the notion of significance and implies the adoption of measures aimed at preventing any harm and any risks.⁴¹ **The Democratic Republic of the Congo** notes the following:
- “This also means that a State’s compliance with the duty of due diligence cannot be assessed on the sole basis of the fulfilment of its obligations pursuant to the UNFCCC and the agreements concluded thereunder. If that were the case, the reference to such a duty in the UNFCCC would be deprived of any *effet utile*”.⁴²
31. As the duty of due diligence implies taking effective measures defined by international standards and scientific evidence, **Switzerland** submits that such relevant standards and rules

³⁷ Pulp Mills, paras 101, 197; ILC Articles on Prevention, page 154, Article 3, para. 7; ITLOS. Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion, 21 May 2024 (**ITLOS Climate Change AO**), para. 235. [URL](#)

³⁸ ITLOS. Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, para. 117, [URL](#); ITLOS Climate Change AO, para. 239. [URL](#)

³⁹ See footnote 19.

⁴⁰ Written statement of Egypt, para. 245.

⁴¹ Written comments of Colombia, paras 3.23-3.25.

⁴² Written comments of the Democratic Republic of Congo, para. 11.

are composed of the global goal defined in Article 2 of the UNFCCC, the temperature goal enshrined in Article 2 of the Paris Agreement, and the decisions of the Conferences of the Parties to the UNFCCC and the Paris Agreement, which develop the provisions of the climate change treaties in terms of specific methodologies for assessing States' actions on mitigation and adaptation.⁴³

32. In terms of reliance on scientific evidence, developing States refer to the precautionary principle, which suggests that, where there is a threat of serious or irreversible damage, lack of scientific certainty should not be a reason for postponing such measures, given that climate change policies and measures should be cost-effective so as to ensure global benefits at the lowest possible cost.⁴⁴ **Vanuatu** notes that the duty of due diligence arises even where there is no sufficient evidence as to the existence of risks of harm.⁴⁵
33. A group of States represented by developed countries (**Australia, Japan, the Nordic countries, the United Kingdom, the USA, and the European Union**) and some developing ones (**East Timor, India, Kuwait, Saudi Arabia, and Singapore**) argues that the content of the duty of due diligence is limited to the standards reflected in the climate change treaties and therefore does not prescribe additional burdens. In particular, **Singapore** states:

“The discharge by States of their customary international law obligation of due diligence in the context of climate change must be informed by their full participation in collective efforts by the international community to address anthropogenic GHG emissions, and, in particular, the treaties which are the outcome of these collective efforts”.⁴⁶
34. The Paris Agreement contains both provisions that define objective standards of behaviour and leave it to States' discretion. Article 4(2) of the Paris Agreement establishes an obligation to prepare, communicate, and maintain nationally determined contributions (**NDCs**), and to pursue domestic mitigation measures with the aim of achieving the objectives of such contributions. Article 4(3) prescribes that each successive NDC should represent progression over time and reflect the highest possible ambition. This implies that States will increase their efforts with advances in science and technology, considering national capabilities. Some decisions of the Conference of the Parties clarify and elaborate on certain requirements for the content of an NDC, which defines the criteria for assessing States' activities in the field of climate change.⁴⁷
35. As noted by **the USA**, “where States have decided almost universally on a particular approach to addressing a problem—which is the case with respect to the Paris Agreement's nationally determined approach to mitigation of anthropogenic GHG emissions—that approach should be considered a reasonable or appropriate approach”.⁴⁸ **Australia** emphasizes that the very purpose of the UNFCCC and the Paris Agreement is to identify the necessary measures to address climate change, so only these measures specify the content of the duty of due

⁴³ Written statement of Switzerland, para. 29.

⁴⁴ The precautionary principle is enshrined in Article 3(3) of the UNFCCC.

⁴⁵ Written statement of Vanuatu, paras 246, 416.

⁴⁶ Written statement of Singapore, para. 3.19.

⁴⁷ Such clarifications are contained in the following decisions of the Conference of the Parties: UNFCCC. Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015. Decision 1/CP.21. Adoption of the Paris Agreement. FCCC/CP/2015/10/Add.1. [URL](#); UNFCCC. Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on the third part of its first session, held in Katowice from 2 to 15 December 2018. Decision 4/CMA.1. Further guidance in relation to the mitigation section of decision 1/CP.21. FCCC/PA/CMA/2018/3/Add.1. [URL](#)

⁴⁸ Written statement of the United States of America, para. 4.24.

diligence.⁴⁹ **The Nordic countries** highlight that the UNFCCC and the Paris Agreement are the key interpretative factors to be taken into account when determining the duty of due diligence.⁵⁰

3. Human Rights in the Climate Change Context

36. The preamble to the Paris Agreement encourages States to respect, promote, and consider their human rights obligations when taking actions to address climate change. Human Rights Council Resolution 53/6 of 12 July 2023 emphasizes that the adverse effects of climate change have a number of direct and indirect consequences that make the realization of human rights more complicated.⁵¹ In their statements before the International Court of Justice, no State doubts the impact of climate change on the realization of human rights, but not all of them support the interpretation of existing human rights obligations as requiring States to take effective measures to address climate change. Moreover, not all States recognize the right to clean, healthy, and sustainable environment as an established universal human right.

3.1. The Correlation between Human Rights Law and State's Obligations in Respect of Climate Change

37. States do not dispute the impact of climate change on the implementation of human rights, but they define the relationship between human rights law and obligations in respect of climate change in different ways. The approaches can be summarized as follows:
- the implementation of human rights obligations requires States to take certain measures to address climate change, which entails the possibility to violate human rights by failure to implement the obligations under climate change treaties or to pursue effective climate policy. This position is primarily advocated by the **least developed countries and SIDS**. Among developing States, it is supported by **Argentina, Albania, Bolivia, Colombia, Costa Rica, Egypt, Iran, Kenya, Mexico, Peru, the Philippines, Thailand, Singapore, Uruguay**; and among developed States – by **Spain, Liechtenstein, the Netherlands, Portugal, Slovenia, and the European Union**;
 - human rights law and regulation of co-operation in addressing climate change are two parallel legal regimes that do not overlap due to the specifics of their subject-matter and the relationship between their main actors. Therefore, ineffective implementation of climate policy does not entail the possibility of invoking international responsibility for violation of those human rights that are not directly related to the socio-economic conditions of life (e.g., the right to life). This position is supported by **Australia, Canada, China, Japan, Indonesia, Saudi Arabia, Switzerland, the United Kingdom, the Russian Federation, the Nordic countries, the USA**.
38. **The Netherlands** considers that human rights law requires States to take necessary mitigation measures, even though the texts of international human rights treaties do not address this directly.⁵² **Slovenia's** oral presentation supports this:

⁴⁹ Written comments of Australia, para. 3.15.

⁵⁰ Joint written statement of Denmark, Finland, Iceland, Norway and Sweden, para. 73.

⁵¹ Human Rights Council. Human rights and climate change. Resolution adopted by the Human Rights Council on 12 July 2023. A/HRC/RES/53/6. [URL](#)

⁵² Written statement of the Kingdom of Netherlands, paras 3.23-3.25.

“This does not only imply that States parties need to ensure that their actions are consistent with their human rights obligations, but also that respect for and enhancement of human rights require appropriate actions concerning the protection of the climate system and the environment more largely”.⁵³

39. **Singapore** offers the following broad interpretation of States’ human rights obligations in the climate change context:

“Most substantive human rights obligations under customary international law and in human rights treaties not only require States to abstain from direct violations of human rights but also impose positive obligations on them to take appropriate measures to protect and ensure the rights for individuals within their jurisdiction”.⁵⁴

40. **Portugal** adds here the obligation to conduct EIAs, to make environmental information public, to facilitate public participation in environmental and climate change-related decision-making, including by guaranteeing freedom of expression and freedom of assembly.⁵⁵

41. Many States refer in their positions to the ECtHR judgment in *Verein Klimaseniorinnen Schweiz v. Switzerland*, where the Court found that the inadequacy and ineffectiveness of Switzerland’s national climate change measures violated Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The affirmative reactions to this decision can be seen in the positions of, e.g., **Albania, Cameroon, Colombia, the Dominican Republic, Egypt, France, Kenya, Latvia, the Netherlands, New Zealand, Tuvalu, the Philippines, and the European Union.**

42. The opposite position is held by **Australia, Canada, China, Indonesia, Japan, the Russian Federation, Saudi Arabia, Switzerland, the Nordic countries, the United Kingdom, the USA,** and it is based on the idea of parallel existence of States’ human rights obligations and climate change obligations. This means that the impact of the adverse effects of climate change cannot be used to expand the range and content of existing States’ obligations in respect of climate change and create new obligations. **Canada** notes that “the positive impact that climate change action can have on human rights cannot be relied on to broaden the scope of States’ obligations under international human rights law”.⁵⁶ As the main arguments supporting this position, States put forward the following:

- i. human rights law has a jurisdictional scope of application: State’s action in this area concerns those who are its nationals and/or located on its territory. As climate change is extraterritorial, global in nature, its effects cannot be limited to a single jurisdiction;
- ii. States’ human rights obligations are vertical, because they are realized in relation to their citizens. At the same time, obligations in respect of climate change have exclusively a horizontal, inter-State character. This predetermines not only the interaction between the actors of the behaviour concerned, but also the ways of response to non-compliance with obligations;

⁵³ Verbatim record 2024/50. Public sitting held on Wednesday 11 December 2024, at 3 p.m., at the Peace Palace, President Salam presiding, on the Obligations of States in respect of Climate Change (Request for advisory opinion submitted by the General Assembly of the United Nations), p. 21, para. 7.

⁵⁴ Written statement of Singapore, para. 3.82.

⁵⁵ Written statement of Portugal, para. 84.

⁵⁶ Written statement of Canada, para. 27.

- iii. harm caused by climate change is global. This leads to the practical impossibility of identifying both the specific harm-doer and their individual contribution, as well as the precise harm caused to certain individuals (victims);
- iv. additionally, **the Nordic countries** highlight the different purposes of States' co-operation in the field of human rights and of climate change:

“Fundamentally, human rights law defines the obligations of States with regard to their treatment of individuals, whereas international environmental law focuses primarily on obligations that States owe to one another, or to international organisations. The effects of anthropogenic emissions of greenhouse gases are global and do not respect borders, thereby emissions from one State’s territory may affect the enjoyment of human rights in another State, although to differing degrees”;⁵⁷

- v. **New Zealand** adds:

“International human rights law is generally concerned with actual or imminent violations of rights rather than future or speculative violations. While there are current impacts of climate change that affect the enjoyment of human rights, international human rights law does not obviously impose actionable obligations on States to take mitigation measures today to avoid the very serious human rights consequences that may arise from unmitigated climate change 30 years hence”;⁵⁸

- vi. in the same spirit, **the Russian Federation** says that human rights obligations are sometimes described as obligations that should be fulfilled “here and now”, while obligations in respect of climate change are future-oriented,⁵⁹ which is another important difference between the two compared legal regimes.

- 43. **Switzerland** notes that if there is an overlap between human rights law and law governing co-operation in addressing climate change, this still needs to be kept in mind that international human rights treaties have not been designed as “instruments at the service of the environment” and climate change. Their supervisory bodies cannot be required to check States’ compliance with their obligations under the climate change treaty regime.⁶⁰

3.2. The Right to Clean, Healthy, and Sustainable Environment

- 44. States also differ in defining the status of the right to clean, healthy, and sustainable environment as a universal norm of international law.⁶¹ The national legislation of many countries⁶² enshrines similar legal rules (the right to a healthy/clean environment). The same right is also found in regional legal instruments, for example, the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement), the African Charter on Human and Peoples’ Rights, and the Convention on Access to Information, Public Participation in Decision-making

⁵⁷ Joint written statement of Denmark, Finland, Iceland, Norway and Sweden, para. 83.

⁵⁸ Written statement of New Zealand, para. 170.

⁵⁹ Written statement of the Russian Federation, p. 10.

⁶⁰ Written statement of Switzerland, para. 61.

⁶¹ “Universal” means that a legal rule is binding for all or most States.

⁶² According to the report of the Special Rapporteur on Human Rights and the Environment, the right to clean, healthy, and sustainable environment is recognized as a legal norm in the legislation of 155 States. See Human Rights Council. Report of the Special Rapporteur. Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. A/HRC/40/55. (2019). [URL](#)

and Access to Justice in Environmental Matters (Aarhus Convention). Based on this, some States claim that the right to clean, healthy, and sustainable environment exists as a universal norm of international law.

45. Not all States expressed their views on the right under discussion, but many of those that addressed this aspect in their positions concluded that the right to clean, healthy, and sustainable environment has crystallized into a customary rule. These include SIDS and least developed States, as well as some developing ones (**Albania, Argentina, Bolivia, Chile, Costa Rica, Ecuador, Iran, Kenya, Mexico, Thailand, Uruguay, and the Philippines**) and developed (**Spain, Liechtenstein, the Netherlands, Portugal, and Slovenia**). In support of their position, they refer to the UNGA resolution of 28 July 2022,⁶³ which recognizes the right to clean, healthy, and sustainable environment as a human right, as well as to the reports of the Special Rapporteur on Human Rights and the Environment.⁶⁴ The declaration of the right to clean, healthy, and sustainable environment in the national legislation of most countries in the world, the existence of numerous regional agreements with similar content, and the consistent reaffirmation of this right in resolutions of international organizations, are considered by this group of States to be sufficient evidence of both elements of international custom (practice and *opinio juris*).⁶⁵
46. **Vanuatu** derives the right to clean, healthy, and sustainable environment as a treaty norm through the interpretation of socio-economic human rights, considering that it is a necessary derivation from already existing rights.⁶⁶ **Slovenia** and **Sierra Leone** note that the absence of an explicit reference to the right to clean, healthy, and sustainable environment in international legal instruments is not indicative of its status (or lack thereof) under international law.⁶⁷
47. This is countered by some developed and developing States, which generally do not support the overlap between obligations of States in respect of climate change and obligations under human rights law, along with several other States. This group includes **Australia, Canada, Egypt, Germany, Indonesia, Latvia, New Zealand, Switzerland, the United Kingdom, the Nordic countries, the Russian Federation, and the USA**. They all emphasize the absence of *opinio juris*.⁶⁸ Commenting on the UNGA resolution of 28 July 2022, **the Russian Federation** draws attention to the lack of consensus in the vote on this resolution,⁶⁹ therefore, it cannot be used as evidence of the emergence of a universal norm of international law. **Australia** and **Tonga** also note that the normative content of the right to clean, healthy, and sustainable environment has not yet been settled.⁷⁰

⁶³ General Assembly. Resolution adopted by the General Assembly on 28 July 2022. Seventy-sixth Session. A/RES/76/300. (2022). [URL](#)

⁶⁴ Safe Climate: Report of the Special Rapporteur on Human Rights and the Environment. A/74/161. (2019). [URL](#)

⁶⁵ For example, an extensive list of international legal instruments referring to this right is contained in the written statements of the Democratic Republic of the Congo (paras 147-157), Spain (paras 15-17), Slovenia (paras 21-34).

⁶⁶ Written statement of Vanuatu, para. 381.

⁶⁷ Written statement of Sierra Leone, para. 3.29; Written statement of Slovenia, para. 25.

⁶⁸ Written comments of the United States of America, paras 4.57-4.59; Verbatim record 2024/40. Public sitting held on Wednesday 4 December 2024, at 3 p.m., at the Peace Palace, President Salam presiding, on the Obligations of States in respect of Climate Change (Request for advisory opinion submitted by the General Assembly of the United Nations), p. 47, para. 32.

⁶⁹ Ibid, p. 57, para. 37.

⁷⁰ Written statement of the Kingdom of Tonga, para. 244; Written comments of Australia, para. 4.18.

4. The Law of the Sea and States' Obligations in Respect of Climate Change

48. The UNGA resolution also refers to the UNCLOS as a source of international law relevant for identifying States' obligations in respect of climate change. On 21 May 2024, during the second round of filing written positions of States to the ICJ, the Tribunal issued an advisory opinion that analysed, as one of the aspects, the obligations of States under the UNCLOS with respect to climate change and its effects. Many States have expressed their reactions to the Tribunal's findings.
49. In this regard, States can be divided into those that fully support the Tribunal's conclusions and those that disagree with them on the interpretation of the provisions of the UNCLOS. For the purposes of this review, we will reflect the general attitude of States towards the Tribunal's findings.
50. The advisory opinion was criticized by **China, the Russian Federation, and Saudi Arabia**. **Saudi Arabia** notes:
- “UNCLOS - treaty that nowhere refers to climate change - cannot be read to override the careful balance struck in the specialized treaty regime on climate change... To interpret UNCLOS to impose obligations relating to greenhouse gas emissions which go beyond that treaty regime would undermine the balance carefully struck by States to address climate change...”⁷¹
51. **China** considers that anthropogenic GHG emissions have *sui generis* status and that their interpretation as pollution of the marine environment is contrary to the original intent of the States that participated in the creation of the UNCLOS.⁷²
52. Even before the Tribunal's advisory opinion, **the Russian Federation** noted that it is the UNCLOS that must be interpreted in accordance with climate change treaties (and not vice versa), and such interpretation cannot create new burdens for States to mitigate climate change beyond the UNFCCC and the Paris Agreement.⁷³ Commenting on the Tribunal's findings during oral hearings, **the Russian Federation** stated that in delivering the advisory opinion the Tribunal engaged in law-making and creation of new obligations for States Parties to the UNCLOS without having the authority to do so.⁷⁴
53. **The Nordic countries'** definition of marine pollution also differs substantially from the Tribunal's.⁷⁵ Their position is as follows. First, Part XII of the UNCLOS provides for specific activities and sources causing pollution of the marine environment (e.g., Articles 194(3), 195, and 196). The Nordic countries consider that this list does not expressly include anthropogenic GHG emissions and cannot be extended to encompass them within the notion of pollution of the marine environment.⁷⁶ Second, if it is recognized that the marine pollution can be caused by anthropogenic GHG emissions, fulfilling the obligations under the UNFCCC and the Paris

⁷¹ Written comments of the Kingdom Saudi Arabia, para. 2.18.

⁷² Verbatim record 2024/38. Public sitting held on Tuesday 3 December 2024, at 3 p.m., at the Peace Palace, President Salam presiding, on the Obligations of States in respect of Climate Change (Request for advisory opinion submitted by the General Assembly of the United Nations), p. 36, paras 45-48.

⁷³ Written statement of the Russian Federation, p. 13.

⁷⁴ Verbatim record 2024/40. Public sitting held on Wednesday 4 December 2024, at 3 p.m., at the Peace Palace, President Salam presiding, on the Obligations of States in respect of Climate Change (Request for advisory opinion submitted by the General Assembly of the United Nations), p. 58, para. 41.

⁷⁵ The following is the position expressed prior to the Tribunal rendered its advisory opinion. But the Nordic countries in the oral statement did not change their position regarding the definition of pollution of the marine environment.

⁷⁶ Joint written statement of Denmark, Finland, Iceland, Norway and Sweden, para. 92.

Agreement would also mean fulfilling the obligations outlined in Part XII of the UNCLOS in relation to the adverse effects of climate change.⁷⁷

54. The **majority of States**, however, support the Tribunal’s advisory opinion, especially in the part where the Tribunal recognized that pollution of the marine environment includes anthropogenic emissions of greenhouse gases, and that the fulfilment of the obligations set forth in Part XII of the UNCLOS is determined by, but not limited to, the standards of conduct and obligations under the Paris Agreement.⁷⁸ The Tribunal noted that the Paris Agreement is not *lex specialis* to the UNCLOS.⁷⁹ **New Zealand** “welcomes the Tribunal’s helpful guidance on the obligations owed by States under UNCLOS to protect the marine environment from pollution”.⁸⁰ **Cameroon** encourages the ICJ to take into account the findings of the Tribunal.⁸¹ **Latvia** considers the Tribunal’s advisory opinion as a “...well-reasoned unanimous judicial decision rendered by a specialised international tribunal, which the Court should take into account when replying to question (a)”.⁸²

⁷⁷ Ibid, para. 95; Written comments of the Kingdom of Saudi Arabia, paras 2.15-2.18.

⁷⁸ ITLOS Climate Change AO, paras 222-224.

⁷⁹ Ibid.

⁸⁰ Written comments of New Zealand, para. 16.

⁸¹ Written comments of Cameroon, paras 6-9.

⁸² Written comments of Latvia, para. 23.

II. Consequences of Causing Significant Harm to the Climate System and Other Parts of the Environment

55. In addition to determining the applicable law and the scope of States' obligations to address climate change, the ICJ is requested to determine the legal consequences under these obligations in the event of causing significant harm to the climate system and the environment as a whole. In this regard, the positions of States differ in defining these consequences: the majority considers them to be the international responsibility (therefore, their positions are focused on the applicability of customary rules governing the invocation of international responsibility in the context of climate change), while some States refer only to treaty-based compliance mechanisms.
56. To clarify, in these advisory proceedings the international responsibility mainly refers to the rules of customary international law on responsibility of States, as reflected by the International Law Commission in the Articles on Responsibility of States for Internationally Wrongful Acts (**ARSIWA**).⁸³ In addition, the climate change treaty regime provides mechanisms aimed at monitoring compliance with obligations and compensating for the adverse effects of climate change. However, the application of these mechanisms does not imply international responsibility.⁸⁴ These include the dispute settlement procedure under Article 14 of the UNFCCC, the Warsaw International Mechanism for Loss and Damage (Article 8 of the Paris Agreement), Global Stocktake (Article 14 of the Paris Agreement), and the mechanism to facilitate implementation and promote compliance with the provisions of the Paris Agreement (Article 15).
57. On the issue of international responsibility for causing harm resulting from the effects of climate change, the positions of States can be summarized as follows:
- causing significant harm to the climate system and other parts of the environment entails international responsibility. In this sense, it includes not only the violation of treaty obligations but also the previously discussed rules of customary international law applicable to State's efforts to address climate change. This view is shared by the **majority of States**, including the most vulnerable, developing, as well as some developed States (e.g., **the Netherlands, Portugal, and Switzerland**);
 - invocation of international responsibility for harm caused by the effects of climate change under the rules of customary international law is not possible. This position is further developed along several lines:
 - the UNFCCC and Paris Agreement compliance, compensation, and dispute resolution mechanisms are *lex specialis* in relation to the customary rules of international responsibility, and therefore exclude the application of the latter. This is the view of **the European Union and Kuwait**;
 - in principle, the invocation of international responsibility under the rules of customary international law is possible, but the specificity of the States' obligations in the field of climate change makes the application of *certain of these rules* impossible and leads to ineffective result (for instance, to the establishment of an internationally wrongful

⁸³ UNGA. Responsibility of States for Internationally Wrongful Acts. Resolution adopted by the General Assembly. A/RES/56/83. [URL](#)
It is worth noting that not all articles contained in the work of the International Law Commission reflect customary law.

⁸⁴ UNFCCC. Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015. Addendum. Part two: Action taken by the Conference of the Parties at its twenty-first session. Adoption of the Paris Agreement. Decision 1/CP.21. FCCC/CP/2015/10/Add.1. (2015). [URL](#)

act without the possibility of making full reparation). In this regard, attention must be paid to the mechanisms under the UNFCCC and the Paris Agreement, which were created specifically to consider this specificity and effectively respond to non-compliance with obligations in respect of climate change. This position is held by **Australia, Canada, China, France, Kuwait, Saudi Arabia, the Russian Federation, the Nordic countries, and the USA.**

58. In the following, the positions of States in relation to the most debated aspects of invocation of international responsibility will be outlined.

5. Breach of International Obligations

59. In order to establish an internationally wrongful act of a State, the conduct in question must consist of an act or omission that is attributable to the State and constitutes a breach of an international obligation of the State.⁸⁵ The second element (breach) is directly related to the States' position on the question (a) raised before the Court.
60. Those States that favour the applicability of customary international law in the context of climate change⁸⁶ consider a breach of international obligations to include the violation not only treaty-based obligations (the UNFCCC and the Paris Agreement) but also of customary obligations (the prevention principle and the duty of due diligence). As **the Netherlands** notes:

“If a State, however, does not act in compliance with its due diligence obligations to protect the atmosphere and to prevent significant (transboundary) harm resulting from the anthropogenic emissions of GHGs into the atmosphere, it will be responsible under international law for the resulting significant harm to the climate system and other parts of the environment”.⁸⁷

The same position is held by the **majority of States**.

61. Here, it is important to address the position of States regarding the timing of the commitment of an internationally wrongful act. As a general rule, an act of State constitutes a breach of an international obligation only if the State is bound by this obligation at the time the act occurs. Many countries refer to the customary rules of international law to invoke so-called “historical responsibility”, since a significant effect of anthropogenic GHG emissions results from States' activities long before the adoption of climate change treaties. **Egypt** believes that States cannot escape responsibility for environmental damage by referring to the fact that international obligations to reduce anthropogenic GHG emissions have only arisen since the UNFCCC entered into force.⁸⁸ **Egypt** adds that the prevention principle dates back to the mid-twentieth century, the same time period when States became aware of the impact of anthropogenic GHG emissions on the environment.⁸⁹
62. Some developed States and major emitters among developing countries object to this. For example, **Japan** considers that prior to the entry into force of the UNFCCC on 21 March 1994,

⁸⁵ ARSIWA, art. 2.

⁸⁶ It should be recalled that this group constitutes the **majority** of States participating in the advisory opinion procedure. These include the most vulnerable to climate change countries, SIDS, African countries, developing States, as well as some developed ones. See **para. 18 above**.

⁸⁷ Written statement of the Kingdom of Netherlands, para. 5.8.

⁸⁸ Written comments of Egypt, paras 56-67.

⁸⁹ Ibid.

there were no obligations for States to reduce anthropogenic GHG emissions, and pre-existing customary law did not prescribe specifically for such reduction.⁹⁰ **Canada** also states:

“As there does not yet exist a norm protecting against the effects of climate change that carries sufficient practice and *opinio juris* to be considered a part of customary international law, the earliest international obligations that directly arise in the context of climate change are those found in the Convention and the Paris Agreement”.⁹¹

63. It should be noted that no State considers anthropogenic GHG emissions *per se* to constitute a violation of international law.

6. Causality Between the Wrongful Act and the Damage Caused

64. The establishment of a causal link is relevant for the reparation of the damage caused by an internationally wrongful act. As noted by **developed States** and **major emitters among developing ones**, such a link cannot be established in the context of climate change. **China** says: “Not only is it difficult to identify the emitters that caused the adverse effects of climate change, but it is also difficult to prove the particular State that caused the loss and damage”.⁹²

65. **Saudi Arabia** also attributes the difficulty of defining causality to the multiple sources of anthropogenic GHG emissions, which makes it impossible to establish a link between emissions emanating from a particular State and the concrete harm caused.⁹³ **The United Kingdom** refers to the lack of methodology:

“There is currently no single or agreed scientific methodology to attribute climate change to the emissions of individual States or to attribute extreme events leading to harm for particular States caused by climate change to the GHG emissions of any particular State”.⁹⁴

66. Characterizing anthropogenic GHG emissions in general, **the USA** highlights:

“The emission of GHGs is a diffuse, universal activity, with countless sources in every country and every part of the world, and with emissions coming from an extremely wide range of activities that include the combustion of fossil fuels; certain industrial processes; and human-induced land use, land-use change, and deforestation”.⁹⁵

67. However, the position of the majority is that the difficulties in determining causality do not mean that it is completely impossible to identify the damage and to invoke international responsibility. **Sierra Leone** notes: “The difficulties in establishing a precise causal link between a particular climate change event and a particular State’s GHG emissions do not eliminate the consequences of the State’s breach and obligation to make full reparation”.⁹⁶ **The Democratic Republic of the Congo** emphasizes that it is more important to establish the

⁹⁰ Written comments of Japan, para. 26.

⁹¹ Verbatim record 2024/38. Public sitting held on Tuesday 3 December 2024, at 3 p.m., at the Peace Palace, President Salam presiding, on the Obligations of States in respect of Climate Change (Request for advisory opinion submitted by the General Assembly of the United Nations), p. 18, para. 42.

⁹² Written statement of China, para. 136.

⁹³ Written comments of the Kingdom of Saudi Arabia, para. 1.5

⁹⁴ Written comments of the United Kingdom of Great Britain and Northern Ireland, para. 67.

⁹⁵ Written statement of the United States of America, para. 4.17.

⁹⁶ Written statement of Sierra-Leone, para. 3.145.

causal link in principle (which is scientifically possible)⁹⁷ than to attempt to prove specific harm down to quantitative levels. In this context, **Japan**⁹⁸ and **Belize**⁹⁹ refer to the Tribunal's advisory opinion of 21 May 2024, where it confirmed that the difficulty of determining the impact of anthropogenic GHG emissions on the territory of another State affects the question of establishing the precise harm for the purposes of reparation rather than the question of establishing a breach of obligations itself.¹⁰⁰

7. Reparation for the Damage Caused

68. One of the consequences of international responsibility is the obligation to make full reparation for the damage caused by an internationally wrongful act. The forms of reparation are restitution (re-establishment of the situation that existed before the wrongful act was committed), compensation, and satisfaction.¹⁰¹
69. According to some States, restitution in the sphere of climate change is impossible because already released GHG emissions cannot be returned; the same logic applies for the consequences of climate change (e.g., natural disasters, sea-level rise). **The USA** notes:

“While restitution most closely conforms to the general principle that the responsible State should ‘wip[e] out the consequences of its wrongful act’, this is not always possible to achieve, in which case other forms of reparation should be considered”.¹⁰²

India supports this point of view:

“Restitution involves the re-establishment as far as possible of the situation which existed prior to the commission of the internationally wrongful act. As it may take several decades to bring anthropogenic climate change under control, as envisaged under international law, restitution may seem unsuitable, in the case of climate change”.¹⁰³

70. However, States vulnerable to climate change suggest new ways of making restitution. For example, **the Democratic Republic of the Congo** considers as partial restitution the construction of sea walls and other artificial structures to resist sea-level rise and coastal flooding,¹⁰⁴ assistance in establishing more resistant crops;¹⁰⁵ **Tuvalu** proposes land reclamation;¹⁰⁶ **Kenya** suggests forest and wetland restoration;¹⁰⁷ **the Federated States of Micronesia** and the **Solomon Islands** submit the restoration of destroyed habitats and territories;¹⁰⁸ **Namibia** offers the creation and enhancement of carbon sinks to remove carbon

⁹⁷ Written comments of the Democratic Republic of Congo, para. 59.

⁹⁸ Written comments of Japan, para. 96.

⁹⁹ Written comments of Belize, para. 27.

¹⁰⁰ ITLOS Climate Change AO, para. 252.

¹⁰¹ ARSIWA, art. 34.

¹⁰² Written statement of the United States of America, para. 5.11.

¹⁰³ Written statement of India, para. 90.

¹⁰⁴ Written statement of the Democratic Republic of Congo, para. 336.

¹⁰⁵ Ibid.

¹⁰⁶ Written statement of Tuvalu, paras 136-138.

¹⁰⁷ Written statement of Kenya, para. 6.94.

¹⁰⁸ Written statement of the Federated States of Micronesia, para. 129; Written statement of Solomon Islands, para. 239.

dioxide;¹⁰⁹ **Sierra Leone** puts forward investing in healthcare for communities impacted by the effects of climate change,¹¹⁰ recognizing the sovereignty, statehood, territory and maritime spaces of low-lying small island States if any of these elements is lost because of climate change.¹¹¹ **Vanuatu** also lists numerous restitution options. In addition to those already mentioned, they include provision of equivalent territory and properties where restoration is not possible; provision of finance and technological assistance; return and/or reclamation of land, territory, persons or property; non-monetary redress for human mobility caused by the adverse effects of climate change, including displacement and migration; and enhancement of mitigation measures and adaptive capacities.¹¹²

71. Despite all these proposals, many States that rely on customary rules of international responsibility consider compensation to be the best-suited form of reparation. In order to determine the compensation, it is necessary to establish a causal link between the act and the damage done, which is extremely difficult in the context of climate change (**para. 64 above**). However, States interested in receiving additional financial support base their positions on the ICJ's findings on compensation in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, where the Court, in valuating environmental damage, noted that the absence of adequate evidence as to the extent of material damage does not, in all situations, preclude the award of compensation; in the absence of such evidence, compensation can be determined on the basis of equitable considerations.¹¹³ In the view of these States, compensation should cover both losses (irreparable harm) (e.g., disappearance of elements of environment, territory of States) and damage (reparable and economically determinable harm) (e.g., destruction of roads, natural habitats as a result of natural disasters and other extreme events related to climate change, costs of population relocation).¹¹⁴
72. Satisfaction is applied in cases and to the extent that the harm cannot be compensated by restitution or compensation. The most common methods of satisfaction are acknowledgement of the breach, expression of regret, and formal apology.¹¹⁵ The positions of **the Cook Islands** and **Vanuatu** suggest the following measures as satisfaction: conducting various joint initiatives and activities to study climate change, its causes and consequences; fostering public awareness about climate change, the most vulnerable States, the suffering and resilience of the affected peoples and individuals.¹¹⁶
73. Lastly, some States propose combining treaty-based compliance and compensation mechanisms and customary rules of international responsibility for making effective reparation. **Barbados, the Dominican Republic, India, Kiribati, Namibia, Peru, Saint Lucia, Sierra Leone, Tonga, Vanuatu, and Vietnam** suggest providing compensation through the Warsaw International Mechanism for Loss and Damage, as well as to allocate some portion of compensation to adaptation measures.

¹⁰⁹ Written statement of Namibia, para. 136.

¹¹⁰ Written comments of Sierra Leone, para. 4.18.

¹¹¹ Ibid; Written comments of Cook Islands, para. 111(c).

¹¹² Written comments of Vanuatu, para. 197.

¹¹³ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation, Judgment, I.C.J. Reports 2018, p. 15, para. 35.

¹¹⁴ Written comments of Cook Islands, paras 115-116; Written statement of Vanuatu, para. 590.

¹¹⁵ ARSIWA, art. 37.

¹¹⁶ Written comments of Cook Islands, para. 121; Written statement of Vanuatu, para. 599.