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Fossil fuel feuds and the ICJ Advisory Opinion on Climate Change

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Abstract

The Advisory Opinion on *Obligations of States in Respect of Climate Change* by the International Court of Justice (ICJ) breaks new ground by clearly identifying fossil fuel production, licensing and subsidisation among the activities to which international climate change obligations apply, going as far as suggesting that such activities may constitute internationally wrongful acts. In this article, we examine the proceedings in the context of fossil fuels and offer an in-depth analysis of the ICJ's Advisory Opinion's findings. We discuss the scientific and legal background that led to the inclusion of the topics of fossil fuel production and fossil fuel subsidies in the proceedings. We then systematically analyse the written and oral proceedings, setting out the diverging ways in which States and other participants addressed these topics. Finally, we assess the Court's reasoning, identifying its key findings in relation to the material scope of the questions, States' obligations and the legal consequences arising out of their breach. We conclude that while it may be too early to declare that international law requires the phase-out of fossil fuels, the Advisory Opinion will likely have implications for domestic and international litigation, putting fossil fuel-producing States and companies on notice. Moreover, the Advisory Opinion's clarifications related to fossil fuel production may indirectly influence intergovernmental processes, including the international climate regime.

1 | INTRODUCTION

The Advisory Opinion on *Obligations of States in Respect of Climate Change* by the International Court of Justice (ICJ) is a landmark pronouncement in many respects. It clarifies what State obligations emerge from different sources of international law, including the climate change treaties and customary international law. It spells out that keeping global warming to 1.5°C below pre-industrial levels is the lodestar of the Paris Agreement[1] and that this goal informs related due diligence obligations. It acknowledges the existence of a human right to a clean, healthy and sustainable environment. And it clarifies that it is possible to attribute harm to the climate system to States or groups of States.[2] In addition to a very rich unanimous opinion and an equally informative set of separate opinions and declarations by the ICJ Judges, the proceedings leading up to the Advisory Opinion also generated a huge wealth of information, with an unprecedented

[1]Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 107, art 2(1)(a).

[2]*Obligations of States in Respect of Climate Change* (Advisory Opinion of 23 July 2025) <https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf> accessed 21 March 2026 (ICJ Advisory Opinion).

number of States presenting written and oral legal arguments related to the questions posed to the Court.[3]

One further reason for the significance of the Advisory Opinion in the further development of international law on climate change law concerns its implications for one of the primary economic activities driving climate change: fossil fuel production. Notwithstanding the clear relevance of fossil fuel development in exacerbating the climate crisis, the topic has for many years received scant attention in the international climate regime.[4] In recent years, this has begun to change with parties to the United Nations Framework Convention on Climate Change (UNFCCC) and its Paris Agreement adopting several decisions that have addressed the role of fossil fuels.[5]

The linkage between fossil fuel production and climate change has also come up in international climate litigation, including before the European Court of Human Rights (ECtHR)[6] and the Inter-American Court of Human Rights (IACtHR). In the latter's Advisory Opinion on *Climate Emergency and Human Rights*, released only 3 weeks before the ICJ's Advisory Opinion, the IACtHR found that 'it is the State's duty to monitor and control, at a minimum, *the exploration, extraction, transport and processing of fossil fuels*, cement manufacturing, agro-industrial activities, as well as other inputs used in such activities',[7] suggesting there are specific duties attached to the economic activity of fossil fuel production.

The issue of fossil fuel production was brought up in the written proceedings by various States and other organisations participating in the process. Indeed, it was deemed a matter sufficiently salient for the Court to address in a question by Judge Sarah Cleveland at the closing of the oral proceedings in December 2024:

> 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?[8]

Judge Cleveland's question moved the needle by confronting obligations concerning fossil fuel production head-on, even though the issue remains largely absent from climate treaty frameworks. The question hints at the possibility of *specific* obligations for fossil fuel-producing States in addition to their *general* obligations to address climate change. Moreover, whereas international climate change law has by and large developed as a system that imposes obligations on States with respect to territorial greenhouse gas (GHG) emissions, the question draws attention to the responsibility of upstream fossil fuel producers.

Perhaps unsurprisingly, participants' responses to this question spanned a range of views. Some States responded that no specific obligations exist, whereas others argued that not only do such obligations exist, but they have also already been breached by some States. So, what balance did the Court ultimately strike? In this article, we answer this question through an in-depth analysis of the ICJ's Advisory Opinion as well as the proceedings leading up to it.

To this end, the article is structured as follows. Section 2 sketches the scientific background on the relation between fossil fuel production and climate change. Section 3 discusses how participants in the ICJ proceedings approached the issue of fossil fuel production, drawing on an in-depth analysis of the written statements, written comments, oral proceedings and the responses to Judge Cleveland's question. Section 4 turns to the Advisory Opinion and assesses how the ICJ has sought to position itself on this contested issue. Section 5 reflects on the ripple effects of the Advisory Opinion in relation to the governance of fossil fuels and climate change. Section 6 concludes.

2 | FOSSIL FUEL PRODUCTION AND CLIMATE CHANGE

GHG emissions from fossil fuels are a root cause of the climate problem, with carbon dioxide (CO_2) emissions from the combustion of fossil fuels accounting for about three-quarters of global GHG emissions.[9] Addressing these emissions will be essential for achieving the temperature goal set out in the Paris Agreement of keeping warming well below 2°C and pursuing efforts to stay below 1.5°C.[10] Indeed, as the Intergovernmental Panel on Climate Change (IPCC) indicated in its Sixth Assessment Report, '[p]rojected CO_2 emissions from existing

[3]These documents can be found at <https://www.icj-cij.org/case/187> accessed 9 March 2026. Throughout this article, we refer to relevant written submissions as follows: participant; type of document – written statement (WS), written comments (WC), reply; and date (e.g., Samoa, WC, 15 August 2024).

[4]Georgia Piggot and others, 'Swimming Upstream: Addressing Fossil Fuel Supply Under the UNFCCC' (2018) 18 Clim Policy 1189, 1190.

[5]See notably UNFCCC, 'Decision 1/CMA.5, Outcome of the First Global Stocktake' (15 March 2024) UN Doc FCCC/PA/CMA/2023/16/Add.1, para 28(b), (d) and (h). See Harro van Asselt and Fergus Green, 'COP26 and the Dynamics of Anti-Fossil Fuel Norms' (2023) 14 WIREs Clim Change e816; Harro van Asselt, '"Historic" or "Historic Failure"? Fossil Fuels at COP28' (*EJIL:Talk!*, 28 December 2023) <https://www.ejiltalk.org/historic-or-historic-failure-fossil-fuels-at-cop28/> accessed 9 March 2026.

[6]States' inaction on fossil fuel exports was challenged in the *Duarte Agostinho* case, which was dismissed by the ECtHR. *Duarte Agostinho and Others v Portugal and Others App No 39371/20* (ECtHR, 9 April 2024) para 13. Obligations for fossil fuel-producing States were also at stake in *Greenpeace Nordic and Others v Norway App No 34068/21* (ECtHR, 28 October 2025).

[7]*Climate Emergency and Human Rights*, Advisory Opinion OC-32/25, IACtHR Series A No 32 (29 May 2025) para 353 (emphasis added).

[8]ICJ, 'Verbatim Record, Public Sitting Held on Friday 13 December 2024, at 3 p.m.' (CR 2024/54) 39 <https://www.icj-cij.org/sites/default/files/case-related/187/187-20241213-ora-02-00-bi.pdf> accessed 9 March 2026.

[9]Put slightly differently, fossil fuel emissions constitute 81%–91% of global anthropogenic CO_2 emissions. Josep G Canadell and others, 'Global Carbon and Other Biogeochemical Cycles and Feedbacks' in Valérie Masson-Delmotte and others (eds), *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP 2021) 674, 676.

[10]Paris Agreement (n 1) art 2(1)(a).

fossil fuel infrastructure without additional abatement would exceed the remaining carbon budget for 1.5°C (50%)'.[11] Whereas the IPCC's findings concern fossil fuel-*consuming* infrastructure, studies also underscore that the 'committed emissions' from fossil fuel-*producing* infrastructure by far exceed the remaining carbon budget associated with keeping warming below 1.5°C.[12]

Given that *existing* fossil fuel-producing infrastructure already undermines the Paris Agreement goals, studies have further found that any *new* fossil fuel-producing infrastructure is incompatible with these goals. Most notably, the International Energy Agency (IEA) in its Net Zero by 2050 report found that '[t]here are no new oil and gas fields approved for development in our [1.5°C] pathway, and no new coal mines or mine extensions are required'.[13] Ultimately, however, existing fossil fuel production will need to be phased down as well, although how fast this needs to happen depends very much on the assumptions one makes about the extent to which carbon capture and storage (CCS) and carbon dioxide removal (CDR) will be technically feasible and cost-effective. With optimistic assumptions about scaling up CCS and CDR, the supply of coal, oil and gas needs to be phased down by 95%, 62% and 42%, respectively, between 2020 and 2050.[14] More conservative—and arguably more realistic—assumptions about CCS and CDR suggest a more drastic phase-down of all fossil fuels will be needed (coal: 99%; oil: 70% and gas: 84%).[15]

Notwithstanding the scientific imperative to halt new and phase down existing fossil fuel production, the reality is that States plan to produce *more* fossil fuels. Specifically, the latest iteration of the *Production Gap Report* found that '[g]overnments still plan to produce more than double the amount of fossil fuels in 2030 than would be consistent with the median 1.5°C pathway'.[16]

States support fossil fuel production in various ways. One well-known support mechanism—also referenced by Judge Cleveland in her question—is that of fossil fuel subsidies, which stimulate both the production and consumption of fossil fuels through, for example, fixed market prices, tax breaks or the provision of governmental goods and services at below-market rates. Estimates of fossil fuel subsidies vary, but a conservative, yet sizeable, estimate is provided by the Organisation for Economic Co-operation and Development (OECD), which pegged subsidies at US$1.1 trillion in 2023.[17]

Government support goes beyond fossil fuel subsidies, however. Governments provide public finance for fossil fuels in other ways, for instance through capital expenditure by State-owned enterprises or international public finance for overseas fossil fuel development, including through bilateral financial institutions and multilateral development banks.[18] Moreover, governments can provide non-financial support in various ways, including by adopting plans and targets for fossil fuel production, fast-tracking production licenses, setting requirements for production licenses or environmental impact assessments (EIAs) that are easy to meet and using international diplomacy to facilitate export deals.[19]

This discussion has highlighted the imperative of phasing down fossil fuel production and the actions by which States instead facilitate fossil fuel expansion. However, any analysis—scientific or legal—of fossil fuel production in light of the Paris Agreement goals also needs to engage with its fairness and equity dimensions. This means dealing with difficult questions such as which State needs to phase down production by how much and by when (and on what grounds), whether and how to treat coal, oil and gas—which have different carbon contents and different end-uses—differently and how to ensure that a transition away from fossil fuels does not lead to adverse effects on lower-income and vulnerable communities and nations.

These are inherently normative questions that science can inform but cannot fully answer; the answers ought to be grounded in rigorous ethical analysis and democratic deliberation. Ethically informed analyses have set out relevant considerations,[20] though importantly not all of these are grounded in international legal principles. Some studies foreground historical responsibility for climate change[21] and

[11]IPCC, 'Summary for Policymakers' in Hoesung Lee and others (eds), *Climate Change 2023: Synthesis Report* (IPCC 2023) B.5. On the concept of fossil fuel 'abatement', see Christopher Bataille and others, 'Defining "Abated" Fossil Fuel and Industrial Process Emissions' (2025) 6 Energy Clim Change 100203.

[12]United Nations Environment Programme (UNEP), *Emissions Gap Report 2023: Broken Record—Temperatures Hit New Highs, yet World Fails to Cut Emissions (Again)* (UNEP 2023) 34–35; Kelly Trout and others, 'Existing Fossil Fuel Extraction Would Warm the World beyond 1.5 °C' (2022) 17 ERL 064010.

[13]IEA, *Net Zero by 2050: A Roadmap for the Global Energy Sector* (IEA 2021) 21. This finding is confirmed by Fergus Green and others, 'No New Fossil Fuel Projects: The Norm We Need' (2024) 384 Science 954. Green and others furthermore argue that focusing on new rather than existing fossil fuel infrastructure faces fewer economic, political and legal hurdles.

[14]Ploy Achakulwisut and others, 'Global Fossil Fuel Reduction Pathways Under Different Climate Mitigation Strategies and Ambitions' (2023) 14 Nat Commun 5425, 1; see also Trout and others (n 12).

[15]ibid. On the physical limits of carbon storage, see Matthew J Gidden and others, 'A Prudent Planetary Limit for Geologic Carbon Storage' (2025) 645 Nature 124.

[16]Stockholm Environment Institute (SEI) and others, *The Production Gap Report 2025* (SEI and others 2025) 4 <https://productiongap.org/> accessed 9 March 2026.

[17]OECD, *OECD Inventory of Support Measures for Fossil Fuels 2024: Policy Trends up to 2023* (OECD 2024) 4. Another estimate is given by the International Monetary Fund amounts to '[US]$7 Trillion in 2022 or 7.1 Percent of [Gross Domestic Product]'. Simon Black and others, *IMF Fossil Fuel Subsidies Data: 2023 Update* (International Monetary Fund 2023) 3. However, this number also includes 'implicit subsidies', that is, the costs of not pricing a range of social and environmental externalities, including not only GHG emissions but also local air pollution and road congestion.

[18]See Ivetta Gerasimchuk and others, 'The Cost of Fossil Fuel Reliance: Governments Provided USD 1.5 Trillion from Public Coffers in 2023' (International Institute for Sustainable Development [IISD] 2024) <https://www.iisd.org/articles/insight/cost-fossil-fuel-reliance-governments-provided-15-trillion-2023> accessed 9 March 2026.

[19]SEI and others, *The Production Gap: Governments' Planned Fossil Fuel Production Remains Dangerously Out of Sync with Paris Agreement Limits* (SEI and others 2021) 24ff; Richard Denniss and Allan Behm, 'Double Game: How Australian Diplomacy Protects Fossil Fuels' (2021) 12 Australian Foreign Affairs 49.

[20]See, eg, Sivan Kartha and others, 'Whose Carbon Is Burnable? Equity Considerations in the Allocation of a "Right to Extract"' (2018) 150 Clim Change 117; Georges A Lenferna, 'Can We Equitably Manage the End of the Fossil Fuel Era?' (2018) 35 ERSS 217; Greg Muttitt and Sivan Kartha, 'Equity, Climate Justice and Fossil Fuel Extraction: Principles for a Managed Phase Out' (2020) 20 Clim Policy 1024; Steve Pye and others, 'An Equitable Redistribution of Unburnable Carbon' (2020) 11 Nat Commun 3968; Dan Calverley and Kevin Anderson, 'Phaseout Pathways for Fossil Fuel Production Within Paris-Compliant Carbon Budgets' (IISD 2022) <https://www.iisd.org/publications/report/phaseout-pathways-fossil-fuel-production-within-paris-compliant-carbon-budgets> accessed 9 March 2026; Felipe Sanchez and Linus Linde, 'Turning Out the Light: Criteria for Determining the Sequencing of Countries Phasing Out Oil Extraction and the Just Transition Implications' (2023) 23 Clim Policy 1182; Lukas Slothuus, 'Who Should Phase Out Fossil Fuels First? A Geopolitical Approach to Determining the Sequencing of Fossil Fuel Phaseouts' (2026) 31 Geopolitics 764.

[21]Lenferna (n 20).

States' capacity to take action[22]—both of which are clearly associated with the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC).[23] Other studies instead emphasise economic efficiency (i.e., fossil fuel production would continue the longest where it is cheapest to do so),[24] the extent to which States are dependent on fossil fuel extraction[25] and development needs.[26] Various of these studies suggest not only that developed countries should take the lead in phasing down fossil fuel production (as even those that produce fossil fuels tend to be highly diversified, and have a high capacity to phase-out quickly) but also that developed countries should support less developed countries in their transition away from fossil fuels.[27] Moreover, several studies highlight the importance of intra-national equity, particularly the need to ensure a just transition for vulnerable communities.[28]

With this background in mind, we will now turn to the arguments about fossil fuel production in the proceedings before the ICJ.

3 | FOSSIL FUELS IN THE ICJ ADVISORY OPINION PROCEEDINGS

3.1 | Methodological introduction

To better understand how States and other participants addressed fossil fuel production in their submissions and to better contextualise the ICJ's resulting advice, we coded all written submissions and oral proceedings.[29] The resulting dataset comprised 221 coded entries, one for each document, including all written statements (March 2024), written comments (August 2024) and written replies to Judge Cleveland's question (December 2024), representing the unprecedented breadth of legal argumentation on fossil fuels before the ICJ. We employed structured coding as an organisational tool to identify and classify the legal positions advanced by different participants. Specifically, we developed a coding framework capturing multiple dimensions of fossil fuel argumentation, including positions, if any, on: fossil fuel production versus consumption; legal characterisations of fossil fuel activities; bodies of law invoked; differentiation arguments; and temporal dimensions. This systematic approach allowed us to map the spectrum of legal positions and identify patterns in how different actors framed the issue of fossil fuels in light of international climate obligations.

Our analysis thus reveals the legal tools participants deployed, the distinctions they drew and the arguments they advanced. Where possible, we note patterns in these submissions: for example, that fossil fuel-producing States clustered around sovereignty-based arguments or that climate-vulnerable States converged on human rights and urgency-based framings. These patterns are legally relevant because they illuminate the range of legal argumentation available within the framework of international law and show how different actors prioritised different legal doctrines and principles.

Importantly, this qualitative analysis of participant positions is distinct from claiming that such positions *determined* the Court's reasoning. Rather, by systematically documenting what participants submitted, we sketch the evidentiary record from which the Court drew. Where the Court explicitly references participant positions, as it does when discussing the view of 'most of the participants' on the material scope of the Advisory Opinion,[30] or in separate opinions citing specific submissions, we can point to direct linkages. The broader point is methodological: We show what the participants said, the patterns within those submissions, and can then assess how (or whether) the Court engaged with those positions.

Some methodological caveats merit attention. First, many submissions blur the distinction between fossil fuel production and consumption, reflecting broader ambiguities in international climate change law's treatment of supply-side measures. We addressed this by coding submissions for explicit references to both dimensions. Where positions addressed only consumption-side measures (e.g., coal-fired power phase-down through emissions limits), we coded this separately from explicit production-side arguments (e.g., moratoria on new licensing).

Second, legal positions were not always explicitly stated, particularly in written comments where some participants deferred substantive engagement until oral proceedings or replies to Judge Cleveland's question. To address this challenge, we extracted verbatim quotations from all submissions to preserve argumentative nuance and ensure that our characterisation of participant positions remained grounded in their actual language. Where participants employed indirect or qualified language, we captured this in its entirety. This approach proved particularly important for States employing ambiguous formulations. By presenting their exact language rather than paraphrasing, we allow the reader to distinguish between genuine commitment to a position and carefully calibrated diplomatic equivocation. The result is that our 'camps' are built not on inferred stances or implicit positions, but on documented, explicit language that participants actually used.

Third, positions shifted between the written statement phase (March 2024), written comments (August 2024) and the responses to Judge Cleveland's question (December 2024). Some States that initially said little on fossil fuels provided extensive engagement in later rounds, particularly following Judge Cleveland's targeted question. This temporal dimension means our analysis captures not static positions but positions as they evolved through the proceedings. Where significant shifts occurred, we note them.

This approach thus reveals how different actors sought to position the conduct of fossil fuel production and use within the language

[22]ibid; Calverley and Anderson (n 20).
[23]United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC) art 3(1).
[24]See Dan Welsby and others, 'Unextractable Fossil Fuels in a 1.5 °C World' (2021) 597 Nature 230.
[25]Muttitt and Kartha (n 20).
[26]Lenferna (n 20); Muttitt and Kartha (n 20); Pye and others (n 20).
[27]Muttitt and Kartha (n 20); Calverley and Anderson (n 20).
[28]Kartha and others (n 20); Lenferna (n 20).
[29]These data are available on file with the authors. The coding was done with an intent to cast a wide eye over all the arguments presented on fossil fuels and, as with coding methodologies generally, was limited by searchability issues. Coding was done using the official English/French versions of the submissions.
[30]ICJ Advisory Opinion (n 2) para 94.

of international law. As the analysis below reveals, these submissions guided the Court's groundbreaking treatment of three critical dimensions: the material scope of climate obligations extending beyond emissions to production activities, the legal characterisation of fossil fuel activities as potential internationally wrongful acts and the application of differentiated responsibilities to transition pathways. The spectrum of positions advanced by participants provided the Court with both the challenge and the opportunity to clarify international law's reach.

3.2 | The spectrum of legal positions on fossil fuels

The proceedings revealed three distinct camps regarding legal obligations for fossil fuel production and use, reflecting fundamentally different conceptions of how international law governs activities that drive climate change. These contested interpretations, ranging from assertions of unfettered sovereignty over natural resources to obligations signalling an immediate phase-out, illuminate the legal terrain the Court had to navigate.

3.2.1 | The 'no specific obligations' camp

Several major fossil fuel-producing States, including Saudi Arabia and other members of the Organization of the Petroleum Exporting Countries (OPEC), as well as Canada, China, India and the United States, advanced the most restrictive interpretation of international climate obligations and of the United Nations (UN) General Assembly Resolution seeking this Advisory Opinion. This camp's central argument rested on a formalist reading of treaty scope: that climate treaties govern emissions, not the underlying economic activities that produce them. As Saudi Arabia argued in its written comments, 'the questions put to the Court focus on anthropogenic greenhouse gas emissions, rather than fossil fuel production or export'.[31]

A majority of States in this camp invoked four mutually reinforcing legal arguments. First, they emphasised the principle of permanent sovereignty over natural resources, a cornerstone of international law that grants States exclusive authority over resource exploitation within their territories. Their key move, however, was to argue that such duties do not extend to regulating the upstream production of fossil fuels. Climate obligations, they contended, govern downstream emissions, not the economic activity that generates them. This framing allowed them to distinguish between accepting general environmental duties on the one hand and denying that fossil fuel production specifically falls within the material scope of climate obligations on the other. Second, they adopted a restrictive approach to treaty interpretation, noting the absence of explicit references to fossil fuel production in either the UNFCCC or Paris Agreement texts. Third, they argued that Conference of the Parties (COP) decisions, including Decision 1/CMA.5 on the outcome of the first global stocktake under the Paris Agreement, which included language on 'transitioning away from fossil fuels',[32] constitute political aspirations rather than legally binding obligations. Notably, these States' position contained an additional dimension: While asserting their sovereign right to produce fossil fuels, they simultaneously argued that other parties have obligations under Article 4(8) of the UNFCCC to minimise adverse effects of response measures on fossil fuel-dependent economies. States like Saudi Arabia and Kuwait emphasised that their economic vulnerability as major fossil fuel producers should be given special consideration in climate policy design.[33] This interpretive approach effectively sought to maintain a firewall between climate obligations and resource extraction decisions, preserving maximum State discretion over fossil fuel development.[34] Fourth, they invoked a *lex specialis* argument, contending that climate treaties constitute the exclusive legal framework for addressing climate-related matters, thereby precluding the application of other international law principles to fossil fuel production decisions.

3.2.2 | The 'urgent phase-out' camp

At the opposite end of the spectrum, small island developing States (SIDS) and several African nations articulated a maximalist position demanding an immediate fossil fuel phase-out grounded in custom and treaty obligations. The African Union's submission exemplified this approach, asserting that 'States therefore have a due diligence duty to urgently phase out fossil fuels and ensure a "just transition" to sustainable energy sources'.[35] This camp rejected the production-consumption distinction as artificial, arguing that States cannot claim ignorance about the climate impacts of resources they deliberately extract for combustion.

Vanuatu went yet further, invoking State responsibility principles to challenge the legality of fossil fuel infrastructure development itself. Its submission argued that 'the obligation not to render aid or assistance in maintaining the breach calls into question the lawfulness of all newly concluded or future infrastructure (e.g. pipelines) and supply agreements'.[36] This innovative argument suggested that financing or facilitating fossil fuel projects could constitute complicity in internationally wrongful acts—a position that, if accepted, would fundamentally reshape international energy governance.

This maximalist position was reflected in institutional calls for a Fossil Fuel Non-Proliferation Treaty. Tuvalu explicitly stated it 'has joined Vanuatu and other nations in calling for a fossil-fuels non-proliferation treaty to guide a just transition away from fossil fuels',[37]

[31]Kingdom of Saudi Arabia, WC, 15 August 2024, para 4.38.

[32]Decision 1/CMA.5 (n 5) para 28(d).

[33]For a discussion of this obligation, see Hojjat Salimi Turkamani, 'The Challenge of Phasing Out Fossil Fuels for Highly Fossil Fuel-Dependent Countries in International Law' (2025) 38 LJIL 861.

[34]These States reconciled this position with emissions-focused obligations by emphasising technological solutions, particularly arguing that future deployment of CCS and CDR technologies would enable continued fossil fuel production while meeting emissions targets.

[35]African Union, WS, 22 March 2024, para 107.

[36]Vanuatu, WS, 21 March 2024, para 642.

[37]Tuvalu, WS, 22 March 2024, para 7. See also <https://fossilfueltreaty.org/> accessed 9 March 2026.

with Colombia distinguishing itself as 'the first Latin American country to lend its support to the global initiative calling for a treaty to phase out the world's dependence on fossil fuels'.[38] Sri Lanka went further, calling for 'multilateral cooperation to phase out fossil fuels, especially by expediting the process of concluding the Fossil-Fuel Non-Proliferation Treaty'.[39]

These States grounded their arguments in multiple, overlapping bodies of law. They invoked the customary duty to prevent transboundary environmental harm, arguing that the certain climate impacts of fossil fuel combustion trigger heightened due diligence obligations. They cited the Paris Agreement's 1.5°C temperature goal as establishing a quantifiable benchmark against which fossil fuel activities must be assessed. Several submissions also incorporated human rights law, arguing that continued fossil fuel expansion violates rights to life, health and a clean environment. This use of varied legal sources sought to construct a comprehensive web of obligations that would constrain fossil fuel development regardless of gaps in climate treaty texts.

3.2.3 | The 'managed transition' camp

Between these poles, a substantial number of States—including European Union Member States, Norway and several Latin American countries—advocated for what might be termed a 'managed transition'. This camp acknowledged the need to transition away from fossil fuels while emphasising national discretion over pathways and timelines. States based this on the text of Decision 1/CMA.5, which not only calls on Paris Agreement parties to 'transition[] away from fossil fuels in energy systems' but also calls for 'accelerating efforts towards the phase-down of unabated coal power' and 'phasing out inefficient fossil fuel subsidies'.[40] This argument was based on the careful use of qualified language in the decision—including terms such as 'unabated', 'inefficient' and 'efforts towards'—which was said to preserve space for continued fossil fuel use and subsidisation under certain conditions.

This middle position also drew heavily on the Paris Agreement's architecture of nationally determined contributions (NDCs) and the CBDR-RC principle. These States argued that while the direction of travel towards decarbonisation is legally mandated, the specific measures and timelines remain within sovereign discretion, subject to national circumstances and development priorities. Several submissions by European States emphasised technology-neutral approaches focused on emissions outcomes rather than fuel types, implicitly preserving space for fossil fuels with CCS.

3.3 | Specific obligations identified

Beyond broad positions on phasing out fossil fuels, many participants articulated detailed obligations that they argued flow from international law. These ranged from procedural requirements for environmental assessment to substantive duties regarding subsidy reform and infrastructure development. The specificity of these arguments revealed sophisticated legal thinking about how general climate obligations translate into concrete requirements for fossil fuel activities.

3.3.1 | Procedural obligations

Environmental impact assessments

Multiple submissions argued that existing EIA obligations under customary international law must encompass the full climate impacts of fossil fuel projects, including downstream combustion emissions. Belize explicitly invoked the UK Supreme Court's *Finch* decision, which held that environmental assessments for oil extraction must consider 'Scope 3' emissions from the eventual burning of extracted fuel.[41] From the perspective of customary international law, such domestic judgments play a dual role. They can be taken as evidence of State practice and *opinio juris* regarding the content of due diligence obligations in the EIA context, while at the same time serving as reasoned analyses that may assist in identifying a customary rule in line with the International Law Commission's (ILC) treatment of judicial decisions.[42] This position challenges the traditional territorial boundaries of environmental assessment under customary international law, which has historically focused on harm caused by activities *within* the territory of a given State.[43] By requiring assessment of downstream combustion emissions that may take place outside of a State's territory, Belize suggests that States cannot artificially limit their analysis to extraction-phase impacts when the purpose of fossil fuel production is combustion.[44]

Seychelles reiterates this position, stating that 'all EIA, …, of any planned extracting activity, must assess the impact in taking into account not only of Scope 1 and 2 emissions, but also of Scope 3 emissions'.[45] While some jurisdictions have already recognised duties to assess indirect and transboundary effects,[46] the inclusion of Scope 3 emissions in transboundary EIA obligations would reflect an interpretation of evolving customary obligations in light of contemporary climate science and the realities of fossil fuel supply chains. This argument builds on the principle that States must exercise due diligence to prevent significant environmental harm is well-established in customary law; however, its application to fossil fuel production must now

[38]Colombia, WS, 22 March 2024, 32.
[39]Sri Lanka, Reply, 20 December 2024, 3.
[40]Decision 1/CMA.5 (n 5) para 28(b), (d) and (h).
[41]*R (Finch) v Surrey County Council* (2024) UKSC 20 (*Finch*).
[42]International Law Commission (ILC), 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (2018) UN Doc A/73/10, Conclusions 4–6, 13 and accompanying commentaries.
[43]Nicolas Bremer, 'Post-Environmental Impact Assessment Monitoring of Measures or Activities with Significant Transboundary Impact: An Assessment of Customary International Law' (2017) 28 RECIEL 23; Neil Craik, 'The Duty to Cooperate in the Customary Law of Environmental Impact Assessment' (2020) 69 ICLQ 239.
[44]On the inclusion of such indirect impacts in EIAs, see Benoit Mayer, *Environmental Assessment as a Tool for Climate Change Mitigation* (OUP 2025) 140–78.
[45]Seychelles, Reply, 20 December 2024, para 9.
[46]See, eg, Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the Assessment of the Effects of Certain Public and Private Projects on the Environment [2011] OJ L26/1, Annex IV, para 5.

account for the inevitable downstream emissions. This approach would require authorities to justify new fossil fuel development against both local environmental impacts and contributions to global climate change. As demonstrated by the New South Wales Court of Appeal decision in *Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd*, handed down the day after the ICJ Advisory Opinion, this dual-scale assessment is increasingly being recognised as necessary for meaningful environmental review of fossil fuel projects.[47]

Notification and consultation

Drawing on customary duties of notification and consultation for transboundary environmental impacts, several participants argued these obligations extend to major fossil fuel decisions given their global climate effects. The OACPS stressed that 'States have a duty to cooperate with each other to address the causes—including anthropogenic GHG emissions but also the production of fossil fuels—and adverse impacts of climate change'.[48] This interpretation would internationalise decision-making for major fossil fuel projects, creating procedural rights for climate-vulnerable States in other nations' energy planning.[49]

3.3.2 | Substantive obligations

Subsidy reform

The legal status of fossil fuel subsidy reform generated significant debate, with participants expressing diverging views on whether removal of such subsidies constitutes a hard legal obligation or aspirational policy goal. Myanmar argued that 'production and subsidizing the production of fossil fuels should be interpreted as an outright breach of international obligation imposed by general international law, international human rights law and relevant treaties'.[50] By contrast, several oil-producing States as well as India maintained that subsidy policies remain within sovereign discretion, with references to 'inefficient' subsidies in COP decisions preserving space for 'efficient' support measures.

The temporal dimension proved equally contentious. Drawing from Vanuatu's submissions, Cook Islands demanded immediate cessation, which it takes to mean States are obliged 'to immediately take all necessary steps to repeal all legislation and regulatory acts and measures that subsidize fossil fuels'.[51] Others, however, proposed timelines linked to development status. Ecuador suggested that '[t]his obligation entails for States within whose jurisdiction fossil fuels are produced that they must curtail their finance flows in support of the production of fossil fuels, in particular by phasing out related subsidies. They may indeed do so gradually—especially if they are developing countries whose economies are highly dependent on income generated from fossil fuel production—but within a clear timeframe'.[52] This debate reveals diverging views on the question whether phasing out fossil fuel subsidies is either a binding legal obligation for States, meaning that the failure to do so would constitute an internationally wrongful act requiring cessation under the law of State responsibility, or simply a policy choice subject to progressive adjustment.

No new fossil fuel infrastructure

Numerous submissions invoked scientific literature, particularly the IEA's Net Zero by 2050 report, to argue that new fossil fuel projects are incompatible with the 1.5°C goal and therefore legally impermissible. The IUCN, for instance, argued that '[s]upporting new fossil fuel production therefore is clearly not aligned with the due diligence obligation to do the utmost to avoid the harmful effects of climate change'.[53] Similarly, Antigua and Barbuda posited that 'a diligent developed [State within whose jurisdiction fossil fuels are produced] must … [n]ot approve new fossil fuel projects, or to [sic] provide an extension for, or expansion of, existing fossil fuel projects'.[54] The carbon lock-in dimension featured prominently, with Switzerland arguing that avoiding 'carbon lock-in through new investments in carbon infrastructure or fossil fuels … is thus becoming part of the standard of due diligence required to prevent significant harm to the environment through GHG emissions'.[55]

Regulation of private actors

Participants extensively debated States' obligations to regulate private fossil fuel companies, including potential extraterritorial duties. The Cook Islands argued that States should '[c]ease continuing underregulating greenhouse gas emissions … from both public and private sources under their jurisdiction or control'.[56] This position would extend State responsibility beyond territorial emissions to encompass the global activities of nationally domiciled companies.[57] Several submissions also addressed transboundary implications of fossil fuel finance, with Palau asserting that 'international law also prohibits

[47] *Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd* [2025] NSWCA 163.

[48] Organisation of African Caribbean and Pacific States (OACPS), WS, 22 March 2024, para 92.

[49] This position goes beyond existing transboundary consultation frameworks. In *Finch*, the UK Supreme Court noted that while the Espoo Convention requires transboundary consultation for projects with significant adverse transboundary environmental impacts, it does not currently mandate consultation for global climate effects from individual projects; see *Finch* (n 41) paras 95–100, especially para 99.

[50] Myanmar, Reply, 20 December 2024, 2.

[51] Cook Islands, WC, 15 August 2024, para 106.

[52] Ecuador, Reply, 20 December 2024, para 6.

[53] IUCN, Reply, 20 December 2024, para 8.

[54] Antigua and Barbuda, Reply, 20 December 2024, para 24.

[55] Switzerland, WC, 7 August 2024, para 36.

[56] Cook Islands, Reply, 20 December 2024, para 4.

[57] The law of State responsibility requires an internationally wrongful act to be attributable to a State. Some private conduct can be attributed to the State, notably if a private actor is 'empowered by the law of that State to exercise elements of the governmental authority' and if it 'is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'. ILC, 'Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its 53rd Session' (2001) UN Doc A/56/10(Supp) arts 5 and 8. In some cases—eg, extraterritorial human rights violations by private actors that meet these requirements—State responsibility can be incurred. See Robert McCorquodale and Penelope Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 MLR 598, 624. Moreover, as noted by the Court (see Section 4), the failure to regulate private actors can also constitute a violation of the obligation to exercise due diligence.

every State from knowingly subsidizing fossil fuels that are then used in another State that is in breach of the latter State's obligation under the Transboundary Harm principle'.[58]

3.4 | Differentiation and equity arguments

The question of how fossil fuel obligations should vary across States generated extensive debate, with participants invoking multiple differentiation frameworks rooted in climate law, human rights and development principles. These arguments revealed fundamental tensions between universal climate imperatives and divergent national circumstances, challenging the Court to reconcile scientific urgency with equity considerations.

3.4.1 | Capacity-based differentiation

Many submissions invoked differential capacities as a basis for asymmetric fossil fuel obligations, arguing that States with greater technological and financial resources must lead transition efforts. Côte d'Ivoire articulated this principle, asserting a 'duty under Article 4 (3) of such States with "high socio-economic indicators" to "transition away" from reliance on the production of fossil fuels for national income deeper and faster than fossil-fuel-producing States with low indicators'.[59] This capacity-based approach extends beyond simple developed/developing country binaries, with several States proposing more nuanced categorisations based on technological readiness, institutional capacity and economic diversification potential.

Technology transfer emerged as a recurring theme, with developing countries arguing that their fossil fuel obligations remain contingent on receiving adequate technological support. Cameroon contended that 'developed countries, or any State with relevant technology or know-how, would have an obligation to cooperate with States where the production of fossil fuels needs the relevant technology and/or know-how to exploit fossil fuels in the manner least harmful for the environment'.[60]

3.4.2 | Development needs

The tension between climate action and development imperatives pervaded discussions of fossil fuel obligations. Several African and Asian States emphasised energy access as a human rights issue that constrains possible transition pathways. Timor-Leste argued that 'special consideration should be given to developing States whose economies are highly dependent on fossil fuels with a very low rate of domestic greenhouse gas emissions'.[61] Gambia similarly asserted that '[d]eveloping States retain the right to exploit fossil fuels, especially in the absence of support from developed States to transition to clean energy, but only to the extent necessary to achieve sustainable development'.[62] Submissions along these lines highlighted the energy trilemma of simultaneously achieving energy security, affordability, and sustainability.[63]

Just transition financing emerged as a critical prerequisite for developing country action. The African Union stated that 'the level of due diligence required of fossil fuel producing developing States is conditional upon receiving assistance to move away from fossil fuel production used for internal demand as well as exports' and that developed countries should offer 'support towards a just transition', including by 'providing targeted support to the poorest and most vulnerable in line with national circumstances'.[64] This formulation links differentiated obligations to concrete support mechanisms, suggesting that transition timelines must account for available international finance.

3.5 | Breach and legal consequences

Several participants moved beyond prospective obligations to argue that major fossil fuel producers are already in breach of international law, demanding immediate cessation and reparation. These arguments, extending the logic of the subsidy prohibition, infrastructure moratorium and regulatory duties discussed above, sought to reframe fossil fuel production from a policy choice to an internationally wrongful act with attendant legal consequences.

3.5.1 | Arguments for existing breach

Vanuatu and AOSIS members advanced the most forceful breach arguments, contending that continued fossil fuel expansion by major producers constitutes an ongoing internationally wrongful act. Vanuatu's oral submission was particularly direct: 'States which have significantly contributed to climate change were and are required to achieve deep cuts of their greenhouse gas emissions, as well as of their production of fossil fuels. But they have not. For decades, what we have seen from large emitting and producing States is delay, low ambition and, in practice, concrete plans to expand the extraction and use of fossil fuels'.[65] The Melanesian Spearhead Group and Vanuatu further argued in their reply that '[l]imited reduction of production and, a fortiori, no action or even action to increase the production of fossil fuels (through subsidies to production and/or consumption) constitutes, as a matter of principle, a breach of all State obligations requiring the exercise of due diligence not to cause harm to the

[58]Palau, Reply, 20 December 2024, 3–4.
[59]Côte d'Ivoire, Reply, 20 December 2024, para 3.
[60]Cameroon, Reply, 20 December 2024, 2.
[61]Timor-Leste, WS, 21 March 2024, para 146.
[62]Gambia, Reply, 20 December 2024, para 1.3.
[63]The 'trilemma' is that the pursuit of the three main goals of energy policy involves trade-offs between them.
[64]African Union, Reply, 20 December 2024, para 15.
[65]See, ICJ, 'Verbatim Record, Public Sitting Held on Monday 2 December 2024, at 10 a.m.' (CR 2024/35) 108–09, paras 8–9 <https://www.icj-cij.org/sites/default/files/case-related/187/187-20241202-ora-01-00-bi.pdf> accessed 9 March 2026.

climate system'.[66] This framing positions fossil fuel expansion not as future risk but as present violation.

As shown in the sections above, multiple States argued that approving new fossil fuel projects while possessing scientific knowledge of climate impacts violates the duty of due diligence. Several submissions also invoked the duty to cooperate, arguing that unilateral fossil fuel expansion undermines collective climate efforts and thus breaches obligations of good faith cooperation under customary international law. The Organisation of African, Caribbean and Pacific States argued that 'supporting financially or through administrative measures the emissions of greenhouse gases is antithetic to States' duty to negotiate in good faith to address the problem climate change', particularly given scientific knowledge about emission reduction needs.[67]

3.5.2 | Cessation and reparation

Regarding remedies, affected States demanded both cessation of ongoing breaches and reparation for accumulated harm. The Cook Islands provided detailed specifications for cessation, arguing that States must 'immediately take all necessary steps to repeal all legislation and regulatory acts and measures that subsidize fossil fuels, and enact legislation and regulatory acts and measures that prohibit the subsidizing of fossil fuels',[68] as well as 'cease expanding fossil fuel production, by immediately taking all necessary steps to repeal all of laws and policies that expand fossil fuel production'.[69] Saint Lucia similarly called for comprehensive dismantling, stating that 'fossil fuel production causing ongoing harm must stop, that subsidies intensifying emissions must end, and that systems enabling continued large-scale emissions must be dismantled'.[70]

On reparation, Kenya invoked principles of unjust enrichment, arguing that 'the principle of "unjust enrichment" would apply in determining the reparation due by a "fossil fuel-producing State" in breach of its obligations'.[71] The African Union connected reparation to the polluter pays principle, stating that '[i]n application of the polluter pays principle, developed countries producing fossil fuels are under a duty to repair and compensate for the damage suffered'.[72] The Melanesian Spearhead Group emphasised the scale of required action, noting that States with heightened obligations who engage in 'no action or even action to increase the production of fossil fuels' are in breach of their due diligence obligations, with such 'breaches aggravated where a State actively supports fossil fuel production and consumption through subsidies'.[73]

[66]Melanesian Spearhead Group and Vanuatu, Reply, 20 December 2024, para 6.
[67]OACPS, WS, 22 March 2024, para 95.
[68]Cook Islands, WC, 15 August 2024, para 106.
[69]ibid.
[70]Saint Lucia, Reply, 20 December 2024, 1.
[71]Kenya, Reply, 20 December 2024, 9.
[72]African Union, Reply, 20 December 2024, para 16.
[73]Melanesian Spearhead Group and Vanuatu, Reply, 20 December 2024, para 15.

3.6 | Interim conclusions

Judge Cleveland's targeted question catalysed more precise legal argumentation. Over 20 States and organisations provided supplementary responses with substantially greater legal detail, prompting a notable shift from political rhetoric to legal reasoning. The fossil fuel focus itself intensified dramatically across submission rounds, driven by Vanuatu and the Melanesian Spearhead Group's forceful framing of fossil fuel production as giving rise to State responsibility.

Three distinct camps of argumentation were placed before the Court: sovereignty-focused resisters, urgent phase-out advocates and managed transition proponents. While these positions echo familiar negotiation dynamics, the ICJ proceedings forced participants to ground political claims in specific legal doctrines. Even reluctant participants—such as Russia, acknowledging that 'measures may be taken in the energy sector that do not involve the abandonment of hydrocarbons'—engaged substantively with legal frameworks. Differentiation emerged as the central fault line, with all camps grappling with how obligations should vary across States.

The sophisticated legal argumentation across written and oral submissions assisted the ICJ in articulating in concrete terms the legal issues surrounding fossil fuel production and related activities—rendering them more susceptible to judicial determination and implementation by States and other relevant actors, rather than merely surfacing novel legal questions. As Section 4 demonstrates, the Court navigated the contested positions by acknowledging fossil fuel production within the scope of climate obligations while maintaining space for differentiated implementation.

4 | THE ICJ ADVISORY OPINION AND FOSSIL FUELS

This section discusses the Court's findings of relevance for fossil fuels, distinguishing three distinct parts of the Advisory Opinion, namely, those related to the scope of the questions posed to the Court, States' obligations and the legal consequences arising from any breach of those obligations. This is followed by a discussion of some of the areas where the Court could have offered greater clarity.

4.1 | Material scope

The international legal response to climate change is often constructed as being centred around (territorial) GHG emissions.[74] Although this focus is not proscribed in any of the climate treaties as such, some of the key provisions are framed in terms of GHG emissions.[75] Moreover, one of the core obligations in both the UNFCCC

[74]For a critical discussion, see Julia Dehm, 'One Tonne of Carbon Dioxide Equivalent ($1tCO_2e$)' in Jessie Hohmann and Daniel Joyce (eds), *International Law's Objects* (OUP 2018) 305.
[75]Among many examples see, eg, UNFCCC (n 23) arts 4(1)(b) and 4(2)(a)–(b); Paris Agreement (n 1) arts 4(4) and 4(13).

and the Paris Agreement is to publish a regular GHG inventory, which, following IPCC guidelines, focuses on emissions generated from the combustion of fossil fuels and other sources within the territory of the reporting country (as well as their removal by sinks).[76] However, solely focusing on emissions—as opposed to other activities that may directly or indirectly lead to significant harm to the climate system—would be to narrowly 'assume that the role of law is to tackle the negative externalities of transactions (e.g. their environmental or social implications) rather than the core of the underlying transactions (i.e. the organisation of production and consumption processes)'.[77] The implication of the sole focus on emissions is that these underlying activities without which emissions would not take place—including fossil fuel production—remain outside the scope of international legal obligations related to the climate crisis. The upshot is what von Bernstorff and Venzke refer to as 'fossil sovereignty', that is, a situation in which 'fossil interests have become legally entrenched in a way that has, to date, largely withstood pressure for change'.[78]

As discussed in Section 3, this framing strategy was employed by fossil fuel-producing nations that argued that the Court could not consider obligations related to the production or export of fossil fuels. However, in an unambiguous rejection of this narrow framing, the ICJ stated that the material scope of the questions posed by the General Assembly:

> is not limited to conduct that, itself, directly results in GHG emissions, but rather comprises all actions or omissions of States which result in the climate system and other parts of the environment being adversely affected by anthropogenic GHG emissions. The Court considers that the material scope of its inquiry encompasses the full range of human activities that contribute to climate change as a result of the emission of GHGs, *including both consumption and production activities*.[79]

To make it crystal clear that the Court had in mind that such conduct includes actions and omissions in relation to fossil fuel production, the Court stated that its interpretation was informed by the responses to Judge Cleveland's question (discussed in Section 3). These responses, the Court indicates, confirm that 'obligations pertaining to the protection of the climate system do not rest exclusively with consumers and end users, but also include activities such as ongoing production, licensing and subsidizing of fossil fuels'.[80]

4.2 | Obligations

In its exposition on the legal obligations of States, the Court came to several findings that are highly relevant in the context of fossil fuel production. These findings include its pronouncements on the 1.5°C goal, the content of NDCs and the requirements flowing from customary international law. Before we discuss each of these in turn, however, it is interesting to note that the Court does not directly discuss obligations *owed to* highly fossil fuel dependent countries. Although the Court mentions the existence of obligations related to 'response measures', it does so only briefly, and in a section that focuses more on States' *adaptation* obligations.[81]

4.2.1 | The 1.5°C goal

The Court's finding that 1.5°C is the 'parties' agreed primary temperature goal for limiting the global average temperature increase under the Paris Agreement' also has reverberations for phasing out fossil fuels, particularly given that the Court emphasises in this regard that mitigation measures must be based on the 'best available science'.[82]

As discussed in Section 2, several studies suggest that keeping below 1.5°C means that there is no more space for new fossil fuel development and requires a drastic phasing down of fossil fuel production. Having said that, the Court does not elaborate on appropriate pathways to stay below 1.5°C. For instance, it does not indicate with what probability States need to keep warming below 1.5°C (e.g., >50% or >66%); it does not express views on whether—and if so, how much—overshooting of 1.5°C is allowed[83]; and it does not discuss the extent to which States can rely on negative emissions technologies such as CCS and CDR.[84] Even so, it is clear that 1.5°C implies greater restrictions on fossil fuel production than keeping global warming below 2°C.[85] Moreover, in another part of the Advisory Opinion, the Court refers to a specific pathway—one that is mentioned in Decision 1/CMA.5—that suggests no or limited overshoot.[86] This pathway arguably should also inform decisions related to fossil fuel production. In addition, the Court's explicit endorsement of precaution can also be

[76]See IPCC, '2006 IPCC Guidelines for National Greenhouse Gas Inventories: Vol. 1: General Guidance and Reporting' (2006) <https://www.ipcc-nggip.iges.or.jp/public/2006gl/pdf/1_Volume1/V1_1_Ch1_Introduction.pdf> accessed 9 March 2026. These Guidelines were updated in 2019: See IPCC, '2019 Refinement to the 2006 IPCC Guidelines for National Greenhouse Gas Inventories' (IPCC 2019) <https://www.ipcc-nggip.iges.or.jp/public/2019rf/pdf/0_Overview/19R_V0_00_Cover_Foreword_Preface_Dedication.pdf> accessed 9 March 2026. Parties to the UNFCCC and Paris Agreement have agreed to apply the IPCC Guidelines to their inventories. See UNFCCC, 'Decision 24/CP.19, Revision of the UNFCCC Reporting Guidelines on Annual Inventories for Parties included in Annex I to the Convention' (31 January 2014) UN Doc FCCC/CP/2013/10/Add.3; UNFCCC, 'Decision 18/CMA.1, Modalities, Procedures and Guidelines for the Transparency Framework for Action and Support Referred to in Article 13 of the Paris Agreement' (19 March 2019) UN Doc FCCC/PA/CMA/2018/3/Add.2 para 20.

[77]Jorge E Viñuales, *The Organisation of the Anthropocene: In Our Hands?* (Brill 2018) 2.

[78]Jochen von Bernstorff and Ingo Venzke, 'The Struggle Against Fossil Sovereignty: The International Court of Justice in the Climate Crisis' (*Verfassungsblog*, 6 August 2025) <https://verfassungsblog.de/icj-climate-advisory-opinion-fossil-fuels/> accessed 21 March 2026.

[79]ICJ Advisory Opinion (n 2) para 94 (emphasis added).

[80]ibid.

[81]ibid paras 212–13.

[82]ibid para 224.

[83]See Susanne Baur and others, *The Science of Temperature Overshoots: Impacts, Uncertainties and Implications for Near-Term Emissions Reductions* (Climate Analytics 2021).

[84]For a critical discussion of the Court's treatment of 1.5°C, see Stephen Humphreys, '1.5 at the ICJ' (*EJIL:Talk!*, 25 August 2025) <https://www.ejiltalk.org/1-5-at-the-icj/> accessed 9 March 2026.

[85]Compare, for example, the findings in Welsby and others (n 24) to Christophe McGlade and Paul Ekins, 'The Geographical Distribution of Fossil Fuels Unused When Limiting Global Warming to 2 °C' (2015) 517 Nature 18.

[86]ICJ Advisory Opinion (n 2) para 243, referring to Decision 1/CMA.5 (n 5) para 27.

seen to imply a need to minimise risk by adopting a more stringent probability and lower risk of overshooting 1.5°C.[87]

4.2.2 | The content of NDCs

The Court also makes important observations on the content of NDCs under the Paris Agreement. Significantly, the Court finds that 'parties do not enjoy unfettered discretion in the preparation of their NDCs' and that '[e]ach party has a due diligence obligation to do its utmost to ensure that the NDCs it puts forward represent its highest possible ambition in order to realize the objectives of the Agreement'.[88] Parties' leeway is thus qualified by the normative expectations that NDCs progress over time and that they reflect a party's 'highest possible ambition'[89]—what Rajamani has called 'regime-specific markers for due diligence'[90]—and that parties' NDCs should be prepared with a view to meeting the temperature goal of the Paris Agreement.[91] This finding on the contents of NDCs speaks directly to the debates in the proceedings about whether fossil fuel production falls within treaty scope (Section 3.2.1), with the Court effectively rejecting the narrow emissions-only interpretation advanced by major producers. Although the Court does not spell out the implications of this finding for fossil fuel production, Judges Bhandari and Cleveland suggest that '[t]hese obligations … require that States' NDCs address all fossil fuel production, licensing and subsidy activities in a manner consistent with achieving the 1.5°C temperature goal'.[92]

What 'addressing' such activities in NDCs looks like will vary across countries, in line with the Court's consideration of the principle of CBDR-RC in this context.[93] For some developed countries that are major fossil fuel producers, given their greater contribution to the climate problem as well as their greater capacity to address the problem, NDCs arguably must include targets and/or pathways for phasing down fossil fuel production and/or a specification of measures to restrict fossil fuel production in line with the Paris Agreement's temperature goal. At present, however, the NDCs of fossil fuel-producing countries rarely include such information.[94] Indeed, as Jones and Yanguas Parra note, 'an increasing number of countries are signalling, implicitly or explicitly, a continuation or even an increase in fossil fuel production'.[95] The implication of the Court's ruling, as suggested by Judges Bhandari and Cleveland, is that doing so in future rounds of NDCs would be incompatible with States' legal obligations.

Their view is reinforced by the requirement that parties' NDCs shall 'be informed by the outcomes of the global stocktake referred to in Article 14',[96] which the Court also underscores.[97] In this regard, it is interesting to briefly revisit the Court's reasoning on the 1.5°C threshold. In its reasoning, the Court drew on Decision 1/CMA.5, which is the formal outcome of the global stocktake under Article 14. As noted in Section 3, that decision also calls on Paris Agreement parties:

> to contribute to the following global efforts, in a nationally determined manner, taking into account the Paris Agreement and their different national circumstances, pathways and approaches:
> …
> (d) Transitioning 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;
> …
> (h) Phasing out inefficient fossil fuel subsidies that do not address energy poverty or just transitions, as soon as possible; … .[98]

This call is couched in hortatory language and includes several caveats, which makes it hard to infer a clear legal obligation from it,[99] an argument also made by several fossil fuel-producing States. Nevertheless, referring to this call, Judges Bhandari and Cleveland in their Joint Declaration suggest that '[a]ctions by States that reinforce continuing dependence on fossil fuels run directly contrary to these obligations'.[100]

In their reasoning, Judges Bhandari and Cleveland follow the Court's consideration of certain COP decisions as constituting a 'subsequent agreement' within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties regarding the interpretation of Articles 2 and 4 of the Paris Agreement.[101] The Court, in turn, follows the ILC, which suggests that such decisions constitute subsequent agreements 'in so far as [a decision] expresses agreement in substance between the parties regarding the interpretation of a treaty'.[102] However, the ICJ does not offer any guidance on what 'agreement in substance' entails. Though the weight of subsequent agreement depends, among others, on its 'clarity and specificity',[103] it remains uncertain whether the Decision 1/CMA.5 text related to fossil fuels would qualify as subsequent agreement.[104]

[87] ICJ Advisory Opinion (n 2) paras 293–94.
[88] ibid para 270.
[89] ibid paras 241–42.
[90] Lavanya Rajamani, 'Due Diligence in International Climate Change Law' in Heike Krieger and others (eds), *Due Diligence in the International Legal Order* (OUP 2020) 163, 169.
[91] ICJ Advisory Opinion (n 2) para 245.
[92] ICJ Advisory Opinion (n 2) Joint Declaration of Judges Bhandari and Cleveland <https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-06-en.pdf> para 19 (Bhandari and Cleveland Joint Declaration).
[93] ICJ Advisory Opinion (n 2) para 247.
[94] Natalie Jones and Paola Yanguas Parra, *How the Transition Away from Fossil Fuel Production Can Be Included in New Climate Commitments and Plans* (IISD 2024) 8–11.
[95] ibid 11 (referring to an earlier version of their report).
[96] Paris Agreement (n 1) art 4(9); see also ibid art 14(3).
[97] ICJ Advisory Opinion (n 2) para 243.
[98] Decision 1/CMA.5 (n 5) para 28.
[99] See van Asselt (n 5).
[100] Bhandari and Cleveland Joint Declaration (n 92) para 20.
[101] ICJ Advisory Opinion (n 2) para 224.
[102] ibid para 184, referring to ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, Report of the International Law Commission on the Work of Its 73rd Session' (2018) UN Doc A/73/10, Conclusion 11(3).
[103] ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, Report of the International Law Commission on the Work of Its 73rd Session' (n 102) Conclusion 9(1).
[104] See also Sebastián Rioseco and Tejas Rao, 'From Sidelines to Center Stage: Conferences of the Parties (COPs) as Legal Playmakers' (*Verfassungsblog*, 12 September 2025) <https://verfassungsblog.de/icj-climate-advisory-opinion-conferences-of-the-parties/> accessed 9 March 2026.

The Joint Declaration by Judges Bhandari and Cleveland speaks not only to the contents of NDCs but also to the domestic mitigation measures that States ought to adopt to achieve their NDCs, which is a separate obligation (and treated as such by the Court[105]) under Article 4(2) of the Paris Agreement. With regard to such domestic measures, the Court finds that States are required 'to be proactive and pursue measures that are reasonably capable of achieving the NDCs set by them'.[106] Moreover, the Court takes inspiration from the Advisory Opinion issued a year earlier by the International Tribunal for the Law of the Sea (ITLOS), when it suggests that '[t]hese measures may include putting in place a national system, including legislation, administrative procedures and an enforcement mechanism, and exercising adequate vigilance to make such a system function effectively, with a view to achieving the objectives in their NDCs'.[107]

Applying the obligation to adopt domestic mitigation measures in pursuance of NDCs to fossil fuel production suggests that States have both positive and negative obligations. Their positive obligations include the adoption of measures to transition away from fossil fuels, as appropriate to their context. Their negative obligations include refraining from adopting measures that, in Judges Bhandari and Cleveland's words, 'reinforce continuing dependence on fossil fuels'. This would comprise some of the support measures discussed in Section 2, including fossil fuel subsidies, other public finance for fossil fuels, as well as non-financial support (e.g., licences for new or expanded production).

4.2.3 | Custom

The Court's analysis of customary obligations represents another significant contribution to climate law jurisprudence.

The Court affirms that the customary duty to prevent significant environmental harm applies to the climate system beyond cross-border harm.[108] More significantly, the Court characterises the standard of due diligence for preventing harm to the climate system as 'stringent', owing to multiple factors, including the 'seriousness of the threat posed by climate change', the 'high risks of serious and irreversible harm' and the scientific certainty regarding the consequences of continued GHG emissions.[109]

The normative content of this 'stringent' due diligence obligation finds clearest expression in the Court's advice on States' procedural obligations.[110] First, it confirms that EIAs are required under customary international law for activities that may cause significant harm to the climate system.[111] Second, following the ITLOS Advisory Opinion, the Court holds that States must conduct assessments that account for cumulative effects, potentially through 'general procedures covering different forms of activities'.[112] Moreover, 'possible specific climate-related effects must be assessed as part of EIAs at the level of proposed individual activities, e.g. for the purpose of assessing their possible downstream effects'.[113]

This reference to 'downstream effects' is particularly significant in the fossil fuel context. As Judges Bhandari and Cleveland elaborate, States must account for 'the foreseeable "downstream" consequences' of fossil fuel production and licensing activities.[114] They note that '[f]ossil fuels are produced in order to be burned' and that States 'know the destination and intended final use of the coal, oil and gas that they export'.[115] Following the submissions from some participants, such as Belize, their reasoning expressly aligns with recent national court decisions, including the UK Supreme Court's *Finch* ruling, which the judges cite.[116]

The Court also addresses procedural obligations of notification and consultation, finding these 'particularly warranted when an activity significantly affects collective efforts to address harm to the climate system', including situations involving 'the implementation of policy changes in relation to the exploitation of resources linked to GHG emissions'.[117] While the Court does not elaborate extensively on these obligations, their inclusion suggests that States may need to notify and consult with others before undertaking major fossil fuel projects or implementing significant changes to climate-relevant policies. This could include new fossil fuel licensing rounds, major infrastructure projects, or significant policy reversals on climate action.[118] Not doing so could also be read as a breach of the customary duty to cooperate and 'make good faith efforts to arrive at appropriate forms of collective action', an obligation 'applicable to all States'.[119]

[105]ICJ Advisory Opinion (n 2) paras 250–54.
[106]ibid para 253.
[107]ibid. This language draws from *Request for Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (Advisory Opinion) (21 May 2024) ITLOS Case No 31, para 235.
[108]ICJ Advisory Opinion (n 2) para 134.
[109]ibid paras 138, 254, 343. The Court's articulation of a 'stringent' due diligence standard reflects the ILC's 2018 Draft Conclusions on Customary International Law Identification, which emphasise that the content of customary obligations can vary depending on contextual factors. See ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (n 42) Conclusion 5 (noting that general obligations may take on specific content based on circumstances). The Court's approach here illustrates how customary norms adapt to reflect the gravity of the harm at stake, a principle consistent with the ILC's framework recognising that State practice and *opinio juris* operate within a nuanced, context-sensitive interpretive space.
[110]ibid para 295.
[111]ibid para 296.
[112]ibid para 298.
[113]ibid.
[114]Bhandari and Cleveland Joint Declaration (n 92) para 13.
[115]ibid para 14.
[116]ibid para 16. Note, however, that Bhandari and Cleveland do not explicitly draw on *Finch* to infer the formation of a particular customary rule. Rather, their reference to domestic case law appears to be more modest: they seemingly treat such decisions as illustrative of an emerging practice and *opinio juris* concerning the need to account for downstream emissions, in line with the ILC's view that domestic judicial decisions may serve as evidence of both elements of customary international law, rather than as 'subsidiary means' in the same sense as international judicial decisions.
[117]ICJ Advisory Opinion (n 2) para 299.
[118]While the Court does not specify here the threshold for triggering notification and consultation obligations, in international environmental law, this remains centred on the potential for 'significant transboundary harm'. See *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14, paras 101–22 (establishing that notification must occur when activities carry 'a risk of significant transboundary harm'). The distinction between activities requiring notification and those that do not turns on scale and directness of transboundary impacts. Major fossil fuel licensing rounds authorise extraction activities with inherent potential for significant cumulative climate effects, particularly given the ICJ's recognition that States must exercise 'stringent due diligence' regarding climate harm from fossil fuel activities. See Benoit Mayer, 'Climate Assessment as an Emerging Obligation Under Customary International Law' (2019) 68 ICLQ 271, 286–90 (arguing that major fossil fuel projects require assessment of climate impacts as a matter of customary law).
[119]ibid para 305. See also IUCN, WS, 19 March 2024, paras 429–38.

The Court's emphasis on stringent due diligence obligations extends to States' duties to regulate private actors engaged in fossil fuel activities. As both treaty and customary law impose obligations on States to prevent climate harm, States must exercise effective control over private entities operating within their jurisdiction or under their control. This includes regulating companies' extraction activities, investment decisions and potentially their global operations when headquartered within State territory.

Perhaps most importantly for non-parties to climate treaties, the Court clarifies the relationship between customary and treaty obligations. While 'compliance in full and in good faith by a State with the climate change treaties … suggests that this State substantially complies with the general customary duties',[120] the reverse is more demanding. A non-party that does not cooperate equivalently with treaty parties 'has the full burden of demonstrating that its policies and practices are in conformity with its customary obligations'.[121] This creates a de facto presumption: States outside the treaty frameworks must affirmatively prove their compliance with customary obligations, which the Court has already characterised as 'stringent'. Given the scientific consensus on necessary emission reductions, this burden may prove difficult for States continuing to expand fossil fuel production or maintaining high per capita emissions. This has heightened relevance in light of the withdrawal by one of the world's largest fossil fuel producers, the United States, from the Paris Agreement, as well as, for all intents and purposes, the UNFCCC.[122]

In making these observations on custom, the Court clarifies that States cannot escape climate obligations by remaining outside treaty frameworks. The stringent due diligence standard, combined with the duty to assess downstream and cumulative effects, creates substantial legal constraints on fossil fuel expansion. As Judges Bhandari and Cleveland conclude, 'irreversible harm to the environment is inevitable if the current pace of fossil fuel production, licensing and subsidization continues unchecked'.[123]

4.3 | Internationally wrongful acts

The Court's treatment of question (b)—concerning legal consequences for States causing significant harm to the climate system—marks a fundamental shift in how international law views fossil fuel activities. As von Bernstorff and Venzke observe, the ICJ 'raises the spectre of illegality for high emitters' continued support of fossil fuels'.[124] This section examines the implications of the Court's findings for fossil fuel-producing States.

The Court reframes the conduct responsible for climate change through the prism of internationally wrongful acts.[125] This reframing is explicit: the Court states that '[f]ailure of a State to take appropriate action to protect the climate system from GHG emissions—including through fossil fuel production, fossil fuel consumption, the granting of fossil fuel exploration licences or the provision of fossil fuel subsidies—may constitute an internationally wrongful act'.[126] This finding directly addresses what had hitherto been a legal grey area. As noted above, States expanding fossil fuel production have long claimed their activities were lawful, particularly when licensed under domestic law. Leaving open the question of responsibility of specific States or groups of States for an *in concreto* assessment, and whilst not referring to any particular primary obligation,[127] the Court nonetheless dismantles this defence.

As discussed in Section 3, several major emitters sought refuge in *lex specialis*, contending that the climate treaties, particularly Article 8 of the Paris Agreement on loss and damage and paragraph 51 of the decision adopting the Agreement (stating it 'does not involve or provide a basis for any liability or compensation'),[128] excluded the application of general rules on State responsibility.[129] The Court emphatically rejected this argument. It found 'no evidence in Articles 8 and 15, or in the procedural mechanisms thereunder, of any discernible intention on the part of the parties to the Paris Agreement to derogate from the customary international law rules on State responsibility'.[130] The Court thus confirms that 'responsibility for breaches of obligations under the climate change treaties, and in relation to the loss and damage associated with the adverse effects of climate change, is to be determined by applying the well-established rules on State responsibility under customary international law'.[131]

The Court confronted head-on the argument that climate change's diffuse and cumulative nature makes attribution and causation impossible to establish. On attribution, the Court clarified that what matters is not the emission itself but the State's failure to regulate: 'attribution in this context involves attaching to a State its own actions or omissions that constitute a failure to exercise regulatory due diligence'.[132] Crucially, the Court addressed the plurality problem—multiple States contributing to climate harm over time. It held that 'the rules on State responsibility under customary

[120]ibid para 314.
[121]ibid para 315.
[122]At the time of writing, the United States has not formally notified its withdrawal, though the Administration has announced that it will 'ceas[e] participation in or funding' the UNFCCC. White House, 'Withdrawing the United States from International Organizations, Conventions, and Treaties That Are Contrary to the Interests of the United States' (7 January 2026) <https://www.whitehouse.gov/presidential-actions/2026/01/withdrawing-the-united-states-from-international-organizations-conventions-and-treaties-that-are-contrary-to-the-interests-of-the-united-states/> accessed 9 March 2026.
[123]Bhandari and Cleveland Joint Declaration (n 92) para 10.
[124]von Bernstorff and Venzke (n 78).
[125]Margaretha Wewerinke-Singh and Jorge E Viñuales, 'The Great Reset: The ICJ Reframes the Conduct Responsible for Climate Change Through the Prism of Internationally Wrongful Acts' (*EJIL:Talk!*, 4 August 2025) <https://www.ejiltalk.org/the-great-reset-the-icj-reframes-the-conduct-responsible-for-climate-change-through-the-prism-of-internationally-wrongful-acts/> accessed 9 March 2026.
[126]ICJ Advisory Opinion (n 2) para 427.
[127]This is important, since—as the Court notes itself—the ICJ can, in exercising its judicial function, only identify existing obligations, and not will new rules into being *sub specie legis ferendae*; ibid para 100. The Court does not determine, for instance, that there is a primary obligation to phase out fossil fuel subsidies, but it leaves open the possibility that such an obligation exists.
[128]UNFCCC, 'Decision 1/CP.21, Adoption of the Paris Agreement' (29 January 2016) UN Doc FCCC/CP/2015/10/Add.1 para 51.
[129]ibid para 415.
[130]ibid para 418.
[131]ibid para 420.
[132]ibid para 428.

international law are capable of addressing a situation in which there exists a plurality of injured or responsible States'.[133] Each injured State may 'separately invoke the responsibility of every State which has committed an internationally wrongful act resulting in damage to the climate system'.[134]

On causation, the Court acknowledged complexity but rejected impossibility. While requiring a 'sufficiently direct and certain causal nexus' for reparation claims, it emphasised this standard is 'flexible enough to address the challenges arising in respect of the phenomenon of climate change'.[135] The Court distinguished between scientific attribution (linking climatic events to anthropogenic climate change) and legal causation (linking damage to specific State conduct), noting both can be established through careful assessment.[136]

Perhaps most significantly, the Court characterised obligations to protect the climate system as *erga omnes* under customary law and *erga omnes partes* under the climate treaties.[137] Consequently, any State, not just those directly harmed, may invoke the responsibility of States breaching climate obligations.[138] This finding fundamentally alters the enforcement landscape. As Auz notes, it 'opens the door to multilateral climate litigation and further legal development in areas such as joint and several liability and equitable apportionment of liability'.[139] States continuing fossil fuel expansion face potential claims not just from vulnerable States suffering climate impacts, but from any State concerned with protecting the global climate system.

The Court confirms that breaches of climate obligations 'may give rise to the entire panoply of legal consequences provided for under the law of State responsibility'.[140] This includes cessation and non-repetition, restitution, compensation and satisfaction. As Judge Bhandari notes in his separate opinion, cessation obligations may require 'immediate action to halt ongoing emissions-intensive activities'.[141] While acknowledging evidentiary challenges for reparations, the Court permits flexible valuation methods and equitable considerations in calculating damages.[142]

The Advisory Opinion effectively reverses the presumption that has long governed fossil fuel activities. For States continuing to expand fossil fuel production, the implications are stark: The 'spectre of illegality' has materialised into concrete legal risk. While, as noted in Section 3, States did make submissions about ongoing breaches, the Court has not declared all fossil fuel activities illegal per se. However, the stringent due diligence standards it articulates arguably place fossil fuel-producing States in a position where they must affirmatively justify their activities against international obligations. Whether this argumentative shift translates into an evidentiary burden in actual litigation, however, remains to be determined through a case-by-case analysis in domestic and international courts.

4.4 | Missed opportunities

The previous sub-sections demonstrate how the Court has offered greater clarity on the relevant international obligations and the possible legal consequences of breaching those obligations. At the same time, there are some areas where the Court could have provided further guidance.

First, although the best available science does not necessarily provide an unequivocal answer to the question of how fast fossil fuel production should be phased down to stay below 1.5°C, the scientific message that doing so implies no *new* fossil fuel production, discussed in Section 2, is much clearer.[143] Domestic litigation also suggests that obligations related to new fossil fuel production are more straightforward to identify. In the *Milieudefensie v Shell* case in the Netherlands, the Court of Appeal in The Hague found itself unable to impose an absolute emission reduction obligation on Royal Dutch Shell, but at the same time it did suggest that Shell's investments in new oil and gas fields could be in violation of its duty of care.[144] Accordingly, Milieudefensie is launching a new case focused specifically on Shell's new oil and gas investments.[145] Having said that, as discussed above, even absent a clear statement by the Court, obligations related to new fossil fuel production can already be inferred from the Court's emphasis on the 1.5°C goal and its statements regarding the content of States' duties in relation to fossil fuel production and their consequences.

Second, the Court could have further explored the relevance of human rights law and international economic law. As highlighted by participants in the written proceedings,[146] human rights law is an area where normative guidance can be found on fossil fuel production, particularly in the reports by several UN-mandated independent human rights experts, as well as human rights treaty bodies that have raised climate change considerations in their communications to States.[147] For instance, shortly before the ICJ released its Advisory Opinion, the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change, Professor Elisa Morgera, published a report on 'The Imperative of Defossilizing Our Economies', in which she included various recommendations related to fossil fuel production and fossil fuel subsidies.[148] Given that the preamble to the General Assembly Resolution calling for the Advisory Opinion specified

[133]ibid para 430.
[134]ibid para 431.
[135]ibid para 436.
[136]ibid para 437.
[137]ibid para 440.
[138]ibid para 442.
[139]Juan Auz, 'The Legal Consequences of Climate Harm' (*Völkerrechtsblog*, 8 August 2025) <https://voelkerrechtsblog.org/the-legal-consequences-of-climate-harm/> accessed 9 March 2026.
[140]ICJ Advisory Opinion (n 2) para 445.
[141]ICJ Advisory Opinion (n 2) Separate Opinion of Judge Bhandari <https://icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-05-en.pdf> para 5.
[142]ICJ Advisory Opinion (n 2) para 454.
[143]See n 13.
[144]The Hague Court of Appeal, *Shell plc* et al *v Milieudefensie* et al (12 November 2024), ECLI:NL:GHDHA:2024:2099, para 7.61.
[145]Milieudefensie, 'Notice of Liability and Announcement of New Legal Proceedings' (13 May 2025) <https://en.milieudefensie.nl/news/this-is-our-letter-to-shell> accessed 9 March 2026.
[146]IUCN, Reply (n 53) paras 18–23; Vanuatu and Melanesian Spearhead Group, Reply, 20 December 2024, paras 19–28.
[147]See, for a discussion, Harro van Asselt, 'Governing Fossil Fuel Production in the Age of Climate Disruption: Towards an International Law of "Leaving It in the Ground"' (2021) 9 Earth System Governance 100118.
[148]UN Human Rights Council, 'The Imperative of Defossilizing Our Economies. Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change, Elisa Morgera' (15 May 2025) UN Doc A/HRC/59/42, paras 54ff.

several human rights instruments[149] and that the Court otherwise expounded on States' obligations emanating from human rights law,[150] the Court missed an opportunity to link the issue of fossil fuel production to human rights. At a minimum, it could have more clearly indicated that human rights law may limit States' support for fossil fuel production, and that any just transition away from fossil fuels requires safeguarding human rights,[151] adding specificity to its general finding that 'States must … take their obligations under international human rights law into account when implementing their obligations under the climate change treaties and other relevant environmental treaties and under customary international law …'.[152]

Concerning international economic law, several participants pointed to the relevance of international investment law, arguing that obligations under investment treaties and the associated risk of investor-State dispute settlement may lead to a 'chilling effect' on fossil fuel phase-out policies.[153] That this risk is not hypothetical was confirmed just a few weeks after the Advisory Opinion was published, with investors suing the UK because a High Court had blocked the development of a coal mine in Cumbria.[154] Although the Court noted the potential relevance of international investment law for States' obligations on climate change, it decided not to consider it in detail.[155] By contrast, the issue was picked up by Judge Cleveland in her Declaration, in which she suggested that 'the interpretation of investment instruments must be informed by States' obligations in respect of climate change under international law, including the stringent due diligence standard to which States are bound in implementing such obligations'.[156] This single sentence offers an indication of the direction the Court could have taken—a direction that would have more clearly considered the implications of States' obligations to address climate change and how those obligations may interact with the international investment regime.[157] Still, Judge Cleveland's view only scratches the surface with regard to the implications of climate change for investment law, and it is notable that the Inter-American Court in its Advisory Opinion addressed the issue in more detail.[158] Likewise, the ICJ also omitted a discussion of the role of international trade law, including how trade disciplines should be interpreted to support climate action, or how trade law could lead to synergies, for instance by regulating fossil fuel subsidies.[159]

At the same time, one should arguably not have expected the Court to say more than it already has. As the Court notes in its closing reflection, it has an 'important but ultimately limited role in resolving this problem',[160] and more detailed normative guidance can be left to either further litigation or the international political process, two issues that we will touch upon in our concluding remarks.

5 | THE POTENTIAL IMPACTS OF THE ADVISORY OPINION

In the wake of the Advisory Opinion, some have suggested that the Court 'declares the era of fossil fuel impunity over'.[161] The Court does not go that far—certainly not explicitly—but it is undeniable that the Advisory Opinion has major implications for fossil fuel production. The very fact that the Court thought it fitting to single out the economic activities of fossil fuel production, licensing and subsidisation in several parts of the Advisory Opinion is telling in this regard. A key implication of the Advisory Opinion concerns the *presumption of lawfulness* attaching to State facilitation of fossil fuel-producing activities. Absent the Advisory Opinion, such activities—licensing, subsidies, production planning—have often been treated as exercises of sovereign prerogative lying outside the material scope of climate obligations. The Advisory Opinion disrupts this by confirming that fossil fuel production falls within the due diligence obligations arising from climate treaties and customary law. This creates a *rebuttable presumption* that State measures facilitating fossil fuel expansion are subject to international legal scrutiny: Producing States must now demonstrate that such activities are compatible with their obligations to protect the climate system. This presumption operates independently of whether fossil fuels were previously viewed as a 'policy' rather than 'legal' domain, though the two issues overlap insofar as sovereign prerogative presumes an absence of applicable law.

At the same time, it will only be through other processes that the Advisory Opinion will bring about effects. These other processes include domestic and international litigation and international policy processes.

Impacts on domestic litigation against fossil fuel production can already be observed. To give some examples: A few weeks after the publication of the Advisory Opinion, an environmental organisation in South Africa drew on the Court's findings on EIAs in an appeal against the environmental authorisation of an offshore oil well developed by Shell.[162] In August 2025, a Brazilian judge—in a ruling that was

[149]UNGA, 'Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change' (4 April 2023) UN Doc A/RES/77/276, preamble.

[150]ICJ Advisory Opinion (n 2) paras 369–404.

[151]See Mohammad Hazrati, 'The ICJ Advisory Opinion and the Energy Transition Mandate' (*National University of Singapore Centre for International Law Blog*, 14 August 2025) <https://cil.nus.edu.sg/blogs/the-icj-advisory-opinion-and-the-energy-transition-mandate> accessed 9 March 2026.

[152]ICJ Advisory Opinion (n 2) para 404.

[153]See Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2018) 7 TEL 229.

[154]Damian Carrington, 'UK Taxpayers on Hook as Failed Cumbria Coalmine Investors Sue Government' (*The Guardian*, 11 August 2025).

[155]ICJ Advisory Opinion (n 2) para 173.

[156]ICJ Advisory Opinion (n 2) Declaration by Judge Cleveland <https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-10-en.pdf> para 22. This can be seen as a call for systemic integration, with reference to Article 31(3)(c) of the Vienna Convention on the Law of Treaties. See further Campbell McLachlan, *The Principle of Systemic Integration in International Law* (OUP 2024).

[157]For a discussion, see Oliver Hailes, 'Fossil Fuel Abolition in International Law and Arbitration' (2026) JEL eqaf039.

[158]Advisory Opinion OC-32/25 (n 7) paras 162–64.

[159]See Saint Lucia, Reply, 20 December 2024, pointing to efforts within the World Trade Organization to develop disciplines for fossil fuel subsidies, as well as the plurilateral Agreement on Climate Change, Trade and Sustainability, which is the first international legally binding agreement regulating fossil fuel subsidies.

[160]ICJ Advisory Opinion (n 2) para 456.

[161]Center for International Environmental Law, 'The Era of Climate Impunity Is Over—By Order of the World's Highest Court' (23 July 2025) <https://www.ciel.org/news/icj-climate-opinion-ends-fossil-fuel-impunity/> accessed 9 March 2026.

[162]The Green Connection and Natural Justice, 'Annex B' (2025) para 50 <https://thegreenconnection.org.za/wp-content/uploads/2025/07/Annex-B-Shell-NCUD-Appeal-Final-29-July-2025.pdf> accessed 9 March 2026.

subsequently overturned—quashed a licence for a coal mine and coal-fired power plant, drawing extensively on the ICJ's and IACtHR's advisory opinions.[163] And in October 2025, the ECtHR referred, among others, to the ICJ Advisory Opinion to support its finding that '[i]n the context of petroleum production projects, the [EIA] must include, at a minimum, a quantification of the GHG emissions anticipated to be produced (including the combustion emissions both within the country and abroad)'.[164]

Similarly, one can expect the new case by Milieudefensie against Shell in the Netherlands, as well as its appeal to the Supreme Court in its first case, to refer to the ICJ's findings, particularly given the monist tradition of incorporating international law in the Netherlands.[165] Moreover, litigants will likely be emboldened by the Court's findings to further challenge the failure to regulate fossil fuel industries as part of strategic litigation.[166]

Whether the Advisory Opinion will lead to contentious litigation at the international level is as much a political as it is a legal question, but the Court's findings on *erga omnes* and *erga omnes partes* obligations have expanded the potential number of States that can launch a dispute. The Court's findings on *erga omnes (partes)* obligations need to be seen in light of other recent instances of international litigation before the ICJ in which non-injured States drew on the nature of *erga omnes partes* obligations as a basis for standing (including, for some States, to intervene in proceedings), including *The Gambia v Myanmar*,[167] *Canada and the Netherlands v Syria*[168] and *South Africa v Israel*.[169] These cases have demonstrated a willingness by States to resort to litigation before the ICJ to enforce obligations in the common interest enshrined in treaty law (on genocide and torture). Whether such a willingness extends to climate-related obligations remains to be seen, but climate-vulnerable States and States seeking to ramp up global climate action that are simultaneously parties to the climate treaties would likely be able to argue they have standing.[170]

In terms of States that could be targeted, the Advisory Opinion could be read to suggest that developed countries that are also major fossil fuel producers are at greater risk. This would include countries such as Australia, Canada and Norway, all of which have issued declarations accepting the compulsory jurisdiction of the ICJ.[171] Targeting the world's largest fossil fuel producer—the United States—before the ICJ would not be possible except for the very unlikely case that the country would consent to the ICJ's jurisdiction.[172] Likewise, unless the United States ratifies the Law of the Sea Convention—again, something that seems highly unlikely in the foreseeable future—ITLOS would not have jurisdiction.[173] Having said that, the Court's findings have already been drawn upon in petition to the Inter-American Commission on Human Rights against the United States, in which a group of youth activists argue that the country has violated their human rights, among others, by promoting fossil fuel production and subsidising fossil fuels.[174]

Aside from litigation, the Advisory Opinion could influence the international climate change policy processes. In this regard, there has been no discernible influence on the NDCs submitted by major fossil fuel producers. This is not too surprising given that some of these States argued in the ICJ proceedings that no specific obligations for fossil fuel-producing States could be identified. Some parties do refer to the ICJ Advisory Opinion but not in relation to fossil fuel production,[175] whereas others address fossil fuel production or subsidies in their NDC but do not refer to the Advisory Opinion.[176] Nevertheless, the Advisory Opinion, along with the broad guidance on fossil fuels in Decision 1/CMA.5, increases the chances that (some) States will feature measures addressing fossil fuel production in future NDCs.

The transition away from fossil fuels became a key topic at COP30 in Belém, Brazil in November 2025, as the Brazilian COP30 Presidency sought to launch a global roadmap to transition away from fossil fuels.[177] Ultimately, parties at COP30 did not adopt such a roadmap, nor did they refer to either fossil fuels or the ICJ's Advisory Opinion in any of the decisions adopted. However, Brazil pledged to take the initiative on a fossil fuel roadmap forward outside of the

[163] *Associacao Gaucha de Protecao ao Ambiente Natural* et al *v Agência Nacional de Energia Elétrica* et al, Public Civil Complaint No. 5050920-75.2023.4.04.7100/RS (25 August 2025) (on file with the authors). The ruling was overturned a few weeks later: Federal Regional Court of the 4th Region, 'TRF4 autoriza retomada das Operações da Usina Candiota III: conheça a fundamentação' (8 September 2025) <https://www.trf4.jus.br/trf4/controlador.php?acao=noticia_visualizar&id_noticia=29503> accessed 9 March 2026.

[164] *Greenpeace Nordic and Others v Norway* (n 6) para 319 (see also para 324).

[165] Evert A Alkema, 'Netherlands' in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011) 407.

[166] See Phillip Paiement and Corina Heri, 'Strengthening International Climate Obligations Beyond Paris: Situating the ICJ's Opinion Within a Comparative Legal Context' (*Völkerrechtsblog*, 14 August 2025) <https://voelkerrechtsblog.org/strengthening-international-climate-obligations-beyond-paris/> accessed 9 March 2026.

[167] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Provisional Measures, Order of 23 January 2020) [2020] ICJ Rep 3, para 41.

[168] *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and Netherlands v Syrian Arab Republic)* (Provisional Measures, Order of 16 November 2023) [2023] ICJ Rep 587, para 51.

[169] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Provisional Measures, Order of 26 January 2024) [2024] ICJ Rep 3, paras 33–34.

[170] It is less clear whether the ICJ would grant standing based on customary international norms owed *erga omnes*. See Priya Urs, 'Obligations *Erga Omnes* and the Question of Standing Before the International Court of Justice' (2021) 34 LJIL 505.

[171] ICJ, 'Declarations Recognizing the Jurisdiction of the Court as Compulsory' <https://www.icj-cij.org/declarations> accessed 9 March 2026. Rather than targeting such States individually, a plaintiff State could also challenge multiple countries simultaneously, as for instance the Marshall Islands did in 2016 against three nuclear weapons States.

[172] For instance, by issuing a declaration pursuant to UNFCCC (n 23) art 14(2).

[173] See Rebecca Elizabeth Jacobs, 'Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice' (2005) 14 Pac Rim Law Policy J 103, 115–17.

[174] Petition Alleging Violations of Human Rights by the United States of America with Requests for Precautionary Measures and Relief (23 September 2025) paras 138–39 <https://static1.squarespace.com/static/655a2d016eb74e41dc292ed5/t/68d465d4eef58977dff35980/1758750164528/_2025.09.23+Juliana-IACHR+Petition.pdf> accessed 9 March 2026.

[175] The NDC by Mexico, a major oil and gas producer, refers to the advisory opinions by the ICJ and IACtHR, but only to confirm its adherence to its international legal obligations. See SEMARNAT, 'Actualización de la Contribución Determinada a nivel Nacional 3.0 de México' (2025) 37 <https://unfccc.int/sites/default/files/2025-11/NDC%203.0%20Me%CC%81xico_spanish.pdf> accessed 9 March 2026.

[176] For instance, Australia's NDC includes some references to measures restricting support for fossil fuels, but it cannot be established whether this is in any way due to the Advisory Opinion. See Australian Government, 'Australia's 2035 Nationally Determined Contribution' (2025) 29 <https://unfccc.int/sites/default/files/2025-09/Australias%20Second%20NDC.pdf> accessed 9 March 2026.

[177] See, eg, Fiona Harvey and others, 'Have Courage to Create Fossil Fuel Phaseout Roadmap at Cop30, Brazilian Minister Urges' (*The Guardian*, 16 November 2025).

UNFCCC context. One potential venue for doing so is the International Conference for the Phase-Out of Fossil Fuels in April 2026 co-hosted by Colombia and the Netherlands.[178]

The ICJ's findings may also bolster existing cooperative initiatives targeting fossil fuels and fossil fuel subsidies, such as the Powering Past Coal Alliance, the Beyond Oil and Gas Alliance, and the Coalition on Phasing Out Fossil Fuel Incentives Including Subsidies,[179] as well as civil society-driven initiatives such as the Fossil Fuel Non-Proliferation Treaty. These initiatives have emerged as complements to the Paris Agreement, allowing 'first-mover' countries with phase-out policies in place and climate-vulnerable countries to cooperate in groups with limited membership. The Advisory Opinion reinforces the *raison d'être* of such initiatives and could even be an incentive for States to join them.

6 | CONCLUSIONS

Feuds over fossil fuels will thus proceed both in courtrooms and in conference halls, and the divergences on display in the advisory proceedings will continue to be on show. However, the ICJ proceedings have increased the legal sophistication of the debate on phasing out fossil fuels. Moreover, through its Advisory Opinion, the ICJ has handed advocates for a fossil fuel phase-out important tools and arguments that can strengthen their legal cases. While the Court stopped short of declaring a legal obligation to phase out fossil fuels, it has fundamentally altered the legal landscape by establishing that there are legal constraints on fossil fuel production. These constraints include (1) treaty law in the form of the Paris Agreement's obligations of conduct, seen in light of the due diligence markers of highest possible ambition and progression as well as the overall objective to keep warming below 1.5°C, and (2) customary international law, notably the prevention principle and its associated procedural requirements (e.g., a transboundary EIA that considers downstream emissions). The contents of these obligations are in turn calibrated by the principle of CBDR-RC.

The Court casts the conduct responsible for climate change through the prism of internationally wrongful acts, directly addressing what had hitherto been a legal grey area in fossil fuel governance. This finding, approached through our analysis tracing argumentation from participant submissions to the advisory opinion, demonstrates the value of qualitative methods for showcasing how, from a range of possible interpretations, legal doctrines can crystallise in practice without overstating empirical determinism.

The era of presumed legality for fossil fuel activities has ended. The Advisory Opinion has helped to shift the burden to States to demonstrate that their production, licensing and subsidisation of fossil fuels complies with international law. In this sense, the Advisory Opinion marks a critical inflection point in the international legal governance of fossil fuels—one that transforms what was considered by some as a sovereign prerogative into conduct subject to heightened legal scrutiny and potential liability.

[178] <https://transitionawayconference.com/> accessed 9 March 2026.

[179] See Florentine Koppenborg, 'Phase-Out Clubs: An Effective Tool for Global Climate Governance?' (2025) Environ Politics (forthcoming); Harro van Asselt and Peter Newell, 'Pathways to an International Agreement to Leave Fossil Fuels in the Ground' (2022) 22 GEP 28.

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DATA AVAILABILITY STATEMENT

The data that support the findings of this study are available from the corresponding author upon reasonable request.

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