INTERNATIONAL COURT OF JUSTICE

## **OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE**

# (REQUEST BY THE UNITED NATIONS GENERAL ASSEMBLY FOR AN ADVISORY OPINION)

# WRITTEN STATEMENT

# THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

18 MARCH 2024

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#### **CHAPTER I: INTRODUCTION**

- On 12 April 2023, the Secretary-General of the United Nations transmitted to the Court a request from the United Nations General Assembly ('the General Assembly') for an advisory opinion, as set out in Resolution 77/276 of 29 March 2023 ('Resolution 77/276').<sup>1</sup>
- 2. The terms of the General Assembly's request (**'the Request'**) are as follows:

"Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment ['the Chapeau'],

(a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations ['Question A'];

(b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:

(i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?

(ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change? ['Question B', together 'the Questions']"

3. By Order of 20 April 2023, the Court decided that the United Nations (**'the UN'**) and its Member States were likely to be able to furnish information on the Questions and

<sup>&</sup>lt;sup>1</sup> UNGA Res 77/276 (29 March 2023) UN Doc A/RES/77/276 (UN Dossier No. 2).

invited them to file written statements addressing them. Pursuant to that Order, the United Kingdom ('**the UK**') submits this Written Statement.

- 4. Before outlining the structure of this Written Statement, the UK makes seven preliminary observations relevant to the Questions:
  - 4.1. **First**, the UK recognises that climate change caused by anthropogenic greenhouse gas (**'GHG'**) emissions is one of the defining challenges of our time and that the urgency with which it needs to be addressed is only becoming greater.<sup>2</sup>
  - 4.2. Secondly, the UK refers to the scientific reports submitted as part of the UN Secretary-General's dossier for these proceedings. These include a selection of reports from the Intergovernmental Panel on Climate Change ('IPCC') of which the UK is a member.<sup>3</sup> The UK regards the IPCC's assessments as the most authoritative source of information on the science of climate change. Specifically, the UK accepts that the IPCC reports produced within the Sixth Assessment Cycle (2016-2023)<sup>4</sup> reflect current 'best available science' in the context of climate change.
  - 4.3. **Thirdly**, the UK emphasises the primary role of the specialised treaties within the UN climate change regime as the source of "*the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases"* and in creating fora for global cooperation on climate change. The UK refers in

<sup>&</sup>lt;sup>2</sup> See first recital to Resolution 77/276 (UN Dossier No. 2) ("Recognizing that climate change is an unprecedented challenge of civilizational proportions and that the well-being of present and future generations of humankind depends on our immediate and urgent response to it").

<sup>&</sup>lt;sup>3</sup> UN Dossier Part III(A) ('Reports of the Intergovernmental Panel on Climate Change (IPCC)').

<sup>&</sup>lt;sup>4</sup> This includes its three flagship Working Group (**'WG'**) reports, IPCC, *Climate Change 2021: The Physical Science Basis* (2021) (WGI) (see 'Summary for Policymakers' (**UN Dossier No. 75**)); IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability* (2022) (WGII) (see 'Summary for Policymakers' (**UN Dossier No. 76**)); IPCC, *Climate Change 2022: Mitigation of Climate Change* (2022) (WGIII) (see 'Summary for Policymakers' (**UN Dossier No. 77**)); and its three Special Reports: IPCC, *Global Warming of 1.5* °C (2018) (see 'Summary for Policymakers' (**UN Dossier No. 77**)); IPCC, *Climate Change and Land* (2019) (see 'Summary for Policymakers' (**UN Dossier No. 77**)); IPCC, *The Ocean and Cryosphere in a Changing Climate* (2019) (see 'Summary for Policymakers' (**UN Dossier No. 74**)). This cycle concluded with the Synthesis Report published in March 2023: IPCC, *Climate Change 2023: Synthesis Report* (2023) (see 'Summary for Policymakers' (**UN Dossier No. 74**)).

particular to the United Nations Framework Convention on Climate Change ('UNFCCC'),<sup>5</sup> the Kyoto Protocol<sup>6</sup> and its Doha Amendment,<sup>7</sup> and the Paris Agreement<sup>8</sup> (collectively, 'the Climate Change Treaties'). These are the treaties by which States have agreed that harm to the climate system caused by GHG emissions is to be addressed and the risk of future harm is to be lessened or avoided.

4.4. Fourthly, against that background, the UK recognises that it is critical that all States' GHG emission reductions should reflect their highest possible ambition, and that reductions should be progressive over time. The UK is firmly committed to continuing to take ambitious action to tackle climate change and to continuing to build opportunities for States to cooperate on this critical issue, keeping a temperature rise below 1.5°C in reach. The UK's leadership during its Presidency of COP26 and its culmination in the 2021 Glasgow Climate Pact demonstrate this.<sup>9</sup> Beyond that Presidency, the UK continues to lead and engage on climate change, taking concrete steps to meet its commitments, including by submitting an updated 2030 Nationally Determined Contribution ('NDC') under the Paris Agreement and in line with international best practice and the Paris Agreement Rulebook.<sup>10</sup> Notably, the UK was the first State to establish a

<sup>&</sup>lt;sup>5</sup> (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UN Dossier No. 4).

<sup>&</sup>lt;sup>6</sup> (adopted 11 December 1997, opened for signature 16 March 1998, entered into force 16 February 2005) 2303 UNTS 162 (UN Dossier No. 11).

<sup>&</sup>lt;sup>7</sup> (adopted 8 December 2012, entered into force 31 December 2020) 3377 UNTS No 30822 (UN Dossier No. 14).

<sup>&</sup>lt;sup>8</sup> (adopted 12 December 2015, opened for signature 22 April 2016, entered into force 4 November 2016) 3156 UNTS 79 (UN Dossier No. 16).

<sup>&</sup>lt;sup>9</sup> UNFCCC, Decision 1/CP.26 (13 November 2021) UN Doc FCCC/CP/2021/12/Add.1 (UN Dossier No. 163); UNFCCC, Decision 1/CMA.3 (13 November 2021) UN Doc FCCC/PA/CMA/2021/10/Add.1 (UN Dossier No. 173). See, more generally, UK Government, 'COP26 Presidency Outcomes' <a href="https://webarchive.nationalarchives.gov.uk/ukgwa/20230311031856mp\_/https://webarchive.com/wp-content/uploads/2022/11/COP26-Presidency-Outcomes.pdf">https://webarchive.nationalarchives.gov.uk/ukgwa/20230311031856mp\_/https://webarchive.nationalarchives.gov.uk/ukgwa/20230311031856mp\_/https://webarchive.nationalarchives.gov.uk/ukgwa/20230311031856mp\_/https://webarchive.nationalarchives.gov.uk/ukgwa/2022/11/COP26-Presidency-Outcomes.pdf</a>>.

<sup>&</sup>lt;sup>10</sup> UK Government, 'United Kingdom of Great Britain and Northern Ireland's Nationally Determined Contribution' (22 September 2022) <https://unfccc.int/sites/default/files/NDC/2022-09/UK%20NDC% 20ICTU%202022.pdf>. For the Paris Agreement Rulebook, see: UNFCCC, Decisions 3/CMA.1-12/CMA.1 (15 December 2018) UN Doc FCCC/PA/CMA/2018/3/Add.1 (UN Dossier No. 170); UNFCCC, Decisions 13/CMA.1-20/CMA.1 (15 December 2018) UN Doc FCCC/PA/CMA/2018/3/Add.2 (UN Dossier No. 171). See also UK Government, '2030 Strategic Framework for International Climate and Nature Action' (30 March 2023) <https://assets.publishing.service.gov.uk/media/642a9b717de82b000c313473/2030-strategic-framework-for-international-climate-and-nature-action.pdf>; UK Government, 'Together for People and Planet: UK International Climate Finance Strategy' (30 March 2023) <https://assets.publishing.service.gov.uk/media/6482f5aa5 f7bb7000c7fa775/tfpp-uk-international-climate-finance-strategy-2023.pdf>.

binding net zero emissions target in domestic law.<sup>11</sup> Between 1990 and 2022, the UK cut its GHG emissions by 50%, faster than any other major economy, while growing the economy by nearly 80%.<sup>12</sup>

- 4.5. **Fifthly**, the UK is acutely aware of the challenges faced by Small Island Developing States ('**SIDS**'), many of which are members of the Commonwealth. The UK recognises that SIDS are facing and are expected to continue to face some of the worst impacts of climate change.<sup>13</sup> It also recognises the specific vulnerabilities and challenges faced by Least Developed Countries ('**LDCs**') and supports the accommodations for LDCs within the climate change treaty framework. The UK remains dedicated to working with partners, including SIDS, to maintain the momentum on urgently keeping 1.5°C in reach. Consistent with the UK's focus on increasing climate ambition as described above, the UK works in partnership with SIDS to seek more ambitious climate change commitments.
- 4.6. **Sixthly**, the Climate Change Treaties and their operational elements (including the annual decisions of the Conferences of the Parties ('**COPs**') thereunder) are a dynamic system. That system is the product of complex negotiations resulting in careful compromise and balancing competing objectives and interests within and between States. Accordingly, the Court must pay particularly careful regard to the scope of its judicial function and recognise both the significance and the dynamic character of the UN legal regime concerning climate change, as well as the delicate balances inherent in and managed through that regime.
- 4.7. Lastly, in the context of the observations already made above, these proceedings will allow the Court an opportunity to provide guidance concerning States' existing legal obligations (i) to protect the climate system from the adverse

<sup>&</sup>lt;sup>11</sup> Climate Change Act 2008 (2050 Target Amendment) Order 2019 (UK) <https://www.legislation.gov.uk/ uksi/2019/1056/contents/made>.

<sup>&</sup>lt;sup>12</sup> UK Government, 'Press Release: UK First Major Economy To Halve Emissions' (6 February 2024) <a href="https://www.gov.uk/government/news/uk-first-major-economy-to-halve-emissions">https://www.gov.uk/government/news/uk-first-major-economy-to-halve-emissions</a>>.

<sup>&</sup>lt;sup>13</sup> See UK Government, 'UK Small Island Developing States Strategy 2022–2026' (January 2023) <a href="https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/1136259/SIDS-strategy-update-2022.pdf">https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/1136259/SIDS-strategy-update-2022.pdf</a>>.

effects of anthropogenic GHG emissions (the subject of Question A) and (ii) to address the harm caused to the climate system by GHG emissions (the subject of Question B). The UK shares Vanuatu's confidence that the Court's clarification of the existing legal framework will "greatly benefit our efforts" to address climate change and "further bolster global and multilateral cooperation".<sup>14</sup> It is the UK's considered and continuing view that intensifying and deepening global cooperation through the framework of the UN climate change regime and the Climate Change Treaties is the most effective means available by which to address climate change.

- 5. Following this introduction, the UK's Written Statement is organised as follows:
  - 5.1. **Chapter II** reviews the essential background to and context for the Request and the UK's answer to it.
  - 5.2. **Chapter III** identifies States' obligations to ensure the protection of the climate system from anthropogenic GHG emissions, in response to Question A.
  - 5.3. **Chapter IV** explains the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system, in response to Question B.

<sup>&</sup>lt;sup>14</sup> GAOR, 77<sup>th</sup> Session, 64<sup>th</sup> Plenary Meeting (29 March 2023) UN Doc A/77/PV.64 (UN Dossier No. 3), p. 2.

#### **CHAPTER II: BACKGROUND**

6. This Chapter sets out elements of the background to the Request, with a view to providing context for the Court's consideration of the issues engaged by the Request. The Chapter begins by addressing key concepts relevant to those issues (Section A below). The UK then turns to summarise the present scientific consensus on climate change and the adverse impact of anthropogenic GHG emissions (Section B below), before outlining the international response to date (Section C below). The Chapter then explains the UN climate change regime and its institutional structure (Section D below), before setting out the background to the Request itself (Section E below).

#### A. Key concepts

- 7. The Request refers to the "protection of the climate system" from "anthropogenic emissions of greenhouse gases" and to the "adverse effects of climate change". The UK sets out below the meaning of (i) climate change, (ii) the climate system, and (iii) anthropogenic emissions of GHGs.
- 1) <u>Climate change</u>
- 8. The IPCC defines climate change as "a change in the state of the climate that can be identified (e.g., by using statistical tests) by changes in the mean and/or the variability of its properties and that persists for an extended period, typically decades or longer".<sup>15</sup> Article 1(2) of the UNFCCC offers a more general definition, but distinguishes between climate change attributable to human activities altering atmospheric composition and climate variability attributable to natural causes. It refers to: "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods". Whilst the UK accepts the scientific elements of the IPCC definition, it proceeds on the basis that the Request is informed by the UNFCCC, to which the Request expressly refers in the Chapeau.

<sup>&</sup>lt;sup>15</sup> IPCC, 'Annex II: Glossary' in *Climate Change 2022: Impacts, Adaptation and Vulnerability* (2022) ('IPCC Glossary'), p. 2902 ('Climate change'). Further detail is included in the definitions set out in this Glossary.

#### 2) <u>Climate system</u>

9. Climate system is a defined term under the UNFCCC. Article 1(3) provides an expansive definition of this term as embracing "*the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions*". The IPCC's definition is materially equivalent but uses slightly different phrasing. It specifically refers to the cryosphere (the frozen part of the hydrosphere) and uses the term lithosphere in place of geosphere, as follows: "*the atmosphere, the hydrosphere, the cryosphere, the lithosphere and the biosphere and the interactions between them.*"<sup>16</sup> As with the meaning of climate change, the UK proceeds on the basis that the UNFCCC provides the relevant definition of climate system for the purposes of the Request.

#### 3) <u>Anthropogenic emissions of GHGs</u>

- 10. GHGs are "[g]aseous constituents of the atmosphere, both natural and anthropogenic, that absorb and emit radiation at specific wavelengths within the spectrum of radiation emitted by the Earth's ocean and land surface, by the atmosphere itself and by clouds. This property causes the greenhouse effect".<sup>17</sup> Put more simply, they are "those gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and reemit infrared radiation".<sup>18</sup>
- 11. The primary GHGs in the Earth's atmosphere are water vapour (' $H_2O'$ ), carbon dioxide (' $CO_2$ '), nitrous oxide (' $N_2O'$ ), methane (' $CH_4$ ') and ozone (' $O_3$ ').<sup>19</sup> GHGs that are not naturally occurring include sulphur hexafluoride (' $SF_6$ '), hydrofluorocarbons ('HFCs'), chlorofluorocarbons ('CFCs') and perfluorocarbons ('PFCs').<sup>20</sup> As discussed further below, emissions of different GHGs are regulated by different treaties.
- 12. In accordance with Article 1(4) of the UNFCCC, "*emissions*" refers to the release of those gases, along with their "*precursors*" (i.e., those substances that contribute to their creation). Anthropogenic GHG emissions are thus "*emissions of greenhouse gases*

<sup>&</sup>lt;sup>16</sup> IPCC Glossary, p. 2903 ('Climate system').

<sup>&</sup>lt;sup>17</sup> IPCC Glossary, p. 2911 ('Greenhouse gases').

<sup>&</sup>lt;sup>18</sup> UNFCCC (UN Dossier No. 4), Art. 1(5).

<sup>&</sup>lt;sup>19</sup> IPCC Glossary, p. 2911 ('Greenhouse gases').

<sup>&</sup>lt;sup>20</sup> IPCC Glossary, p. 2911 ('Greenhouse gases').

(GHGs), precursors of GHGs and aerosols caused by human activities".<sup>21</sup> This is consistent with the UNFCCC's focus on climate change caused by human activity.<sup>22</sup>

#### **B.** The scientific consensus

- 13. The conclusions from the IPCC's Sixth Assessment Cycle are clear and incontrovertible. The following are of particular relevance:<sup>23</sup>
  - 13.1. Human activities have caused global warming, with global surface temperature between 2011-2020 having risen to 1.1°C above 1850-1900 levels. This increase has principally resulted from anthropogenic GHG emissions.
  - 13.2. Human-caused climate change has led to widespread adverse impacts. Vulnerable communities, which have historically contributed the least to climate change, are disproportionately affected.
  - 13.3. Progress has been made in adaptation planning and implementation across all sectors and regions. Despite that progress, adaptation gaps exist and current global financing on adaptation is insufficient. Mitigation measures are similarly insufficiently ambitious: even if the NDCs announced before COP26 were immediately implemented, emission levels would fall substantially short of those required to limit warming to 1.5°C or even 2°C.
  - 13.4. Limiting global warming to 1.5°C or 2°C requires global CO<sub>2</sub> emissions to be reduced to at least net zero by the 2050s or 2070s respectively, alongside deep reductions in all other GHGs. Deep, rapid and in most cases immediate emissions reductions must be made in all sectors this decade to limit global warming to 1.5°C.
  - 13.5. There is a rapidly closing window of opportunity to secure a liveable and sustainable future for all. However, deep, rapid and sustained mitigation and

<sup>&</sup>lt;sup>21</sup> IPCC Glossary, p. 2907 ('Anthropogenic emissions').

<sup>&</sup>lt;sup>22</sup> UNFCCC, Art. 1(2). See para. 8 above.

<sup>&</sup>lt;sup>23</sup> See IPCC, 'Summary for Policymakers' in *Climate Change 2023: Synthesis Report* (2023) (UN Dossier No. 78), paras. A1, A2, A3, A4, B6, C1, C2, C6 and C7.

accelerated implementation of adaptation actions would reduce projected harm to both humans and ecosystems.

#### C. The response of the international community

- 14. The Request invites the Court to consider the existing legal obligations relevant to protecting the climate system from anthropogenic GHG emissions. However, the international community's long engagement in the development of those obligations and the underlying legal framework provide important relevant context for the Court's task. By way of overview:
  - 14.1. In 1961, the General Assembly recommended that the World Meteorological Organization ('WMO') "advance the state of atmospheric science and technology so as to provide greater knowledge of basic physical forces affecting climate".<sup>24</sup> This led to the establishment of research programmes including the WMO World Weather Watch and the Global Atmospheric Research Programme, which later became the World Climate Research Programme.
  - 14.2. In July 1968, the Economic and Social Council first recommended that the General Assembly include "*the problems of human environment*" on its agenda and consider the desirability of convening a UN conference to examine these issues.<sup>25</sup> This followed a proposal from the Swedish Government, which recognised the importance of "*international co-operation*" on such matters.<sup>26</sup>
  - 14.3. Later in 1968, the General Assembly decided to convene the United Nations Conference on the Human Environment,<sup>27</sup> which was held in Stockholm between 5-16 June 1972. The resulting Stockholm Declaration addressed "[t]he discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment

<sup>&</sup>lt;sup>24</sup> UNGA Res 1721 (XVI) (20 December 1961), Part C, para. 1.

<sup>&</sup>lt;sup>25</sup> ECOSOC Res 1346 (XLV) (30 July 1968) UN Doc E/4561, p. 8, paras. 1 and 3.

<sup>&</sup>lt;sup>26</sup> ECOSOC, 'Letter dated 20 May 1968 from the Permanent Representative of Sweden addressed to the Secretary-General of the United Nations' (22 May 1968) UN Doc E/4466/Add.1, p. 4, para. 6(d).

<sup>&</sup>lt;sup>27</sup> UNGA Res 2398 (XXIII) (3 December 1968).

to render them harmless".<sup>28</sup> The Conference also recommended the monitoring of "long-term global trends in atmospheric constituents and properties which may cause changes in meteorological properties, including climatic changes".<sup>29</sup>

- 14.4. In 1974, the General Assembly's sixth special session set up the WMO Executive Committee Panel of Experts on Climate Change, which produced a technical report concluding that the Earth was warming through the greenhouse effect. This led to the WMO convening the first World Climate Conference in Geneva from 12-23 February 1979. The Declaration following that Conference established the World Climate Programme.<sup>30</sup>
- 14.5. In that same year, the first multilateral treaty relating to the climate was adopted, the Convention on Long-Range Transboundary Air Pollution ('CLRTAP').<sup>31</sup> It was established under the auspices of the United Nations Economic Commission for Europe ('UNECE'). It created a regional framework applicable to Europe, North America, the Caucasus and Central Asia for reducing transboundary air pollution and better understanding air pollution science. It now has 51 Parties and eight protocols, most of which address specific pollutants.<sup>32</sup>

<sup>&</sup>lt;sup>28</sup> UN, 'Declaration of the United Nations Conference on the Human Environment' (1973) UN Doc A/CONF.48/14/Rev.1 (UN Dossier No. 136 (p. 3)), Principle 6.

<sup>&</sup>lt;sup>29</sup> UN, 'Action Plan for the Human Environment' (1973) UN Doc A/CONF.48/14/Rev.1 (UN Dossier No. 136 (p. 6)), Recommendation 79(a).

<sup>&</sup>lt;sup>30</sup> WMO, 'Declaration of the World Climate Conference' (1979) Doc No. IOC/SAB-IV/INF.3 <a href="https://library.wmo.int/idurl/4/54699">https://library.wmo.int/idurl/4/54699</a>>.

<sup>&</sup>lt;sup>31</sup> (adopted 13 November 1979, entered into force 16 March 1983) 1302 UNTS 217.

<sup>&</sup>lt;sup>32</sup> The 1985 Helsinki Protocol addresses sulphur emissions or their transboundary fluxes ((adopted 8 July 1985, entered into force 2 September 1987) 1480 UNTS 215); the 1988 Sofia Protocol addresses emissions of nitrogen oxides or their transboundary fluxes ((adopted 31 October 1988, opened for signature 1 November 1988, entered into force 14 February 1991) 1593 UNTS 287); the 1991 Geneva Protocol addresses emissions of volatile organic compounds or their transboundary fluxes ((adopted 18 November 1991, entered into force 29 September 1997) 2001 UNTS 187); the 1994 Oslo Protocol addresses the further reduction of sulphur emissions ((adopted 14 June 1994, entered into force 5 August 1998) 2030 UNTS 122); the two 1998 Aarhus Protocols address heavy metals and persistent organic pollutants, respectively (heavy metals: (adopted 24 June 1998, entered into force 23 October 2003) 2237 UNTS 4; persistent organic pollutants: (adopted 24 June 1998, entered into force 23 October 2003) 2230 UNTS 79); the 1999 Gothenburg Protocol addresses acidification, eutrophication (i.e., the process whereby a body of water becomes excessively enriched with nutrients) and ground-level ozone ((adopted 30 November 1999, entered into force 17 May 2005) 2319 UNTS 80). The UK has not ratified the Helsinki Protocol.

- 14.6. In 1985, a second multilateral climate-related treaty was negotiated and adopted, following the Governing Council of the United Nations Environment Programme ('UNEP') having expressed concern at the damage to the ozone layer and recommending measures to limit the production and use of certain CFCs. This was the Vienna Convention for the Protection of the Ozone Layer ('the Ozone Convention'),<sup>33</sup> which came into force in 1988 and achieved universal ratification in 2009. That Convention serves as a framework for international cooperation to protect the Earth's ozone layer. This cooperation resulted in the Montreal Protocol on Substances that Deplete the Ozone Layer ('the Montreal Protocol')<sup>34</sup> and its various amendments. Since the Montreal Protocol's entry into force, successful cooperative international action has reduced global consumption of ozone-depleting substances by 98%.<sup>35</sup>
- 14.7. By 1988, several governments had requested both the WMO and UNEP to establish the IPCC.<sup>36</sup> The IPCC's mandate was described as "provid[ing] internationally coordinated assessments of the magnitude, timing and potential environmental and socio-economic impact of climate change and realistic response strategies".<sup>37</sup> Its creation was endorsed by the General Assembly in the same year in a resolution recognising climate change as "a common concern of mankind".<sup>38</sup> On the basis of that resolution, the IPCC was asked to prepare, based on available scientific information, a report on all matters relevant to climate change and its impacts,<sup>39</sup> which then served as the foundation for negotiating the UNFCCC.
- 14.8. Following the calls of States (including the UK) for a framework convention on climate change at the second World Climate Conference from 29 October to 7

<sup>&</sup>lt;sup>33</sup> (adopted 22 March 1985, entered into force 22 September 1988) 1513 UNTS 293 (UN Dossier No. 25).

<sup>&</sup>lt;sup>34</sup> (adopted 16 September 1987, entered into force 1 January 1989), 1522 UNTS 3 (UN Dossier No. 26).

 <sup>&</sup>lt;sup>35</sup> UNEP, 'About Montreal Protocol' < https://www.unep.org/ozonaction/who-we-are/about-montreal-protocol>.
 <sup>36</sup> WMO, 'Thirty-Ninth Session of the Executive Council, Geneva, 1-5 June 1987: Abridged Report with Resolutions' (1987) WMO Doc 682, p. 7; UNEP, 'Report of the Governing Council on the Work of its Fourteenth Session: 8-19 June 1987' (1987) UN Doc A/42/25, pp. 71-72; see also WMO, 'Fortieth Session of the Executive

Council, Geneva, 7-16 June 1988: Abridged Report with Resolutions' (1988) WMO Doc 707, pp. 73-74.

<sup>&</sup>lt;sup>37</sup> UNGA Res 43/53 (6 December 1988) UN Doc A/RES/43/53 (UN Dossier No. 104), para. 5.

<sup>&</sup>lt;sup>38</sup> UNGA Res 43/5 (6 December 1988) UN Doc A/RES/43/53 (UN Dossier No. 104), para. 1.

<sup>&</sup>lt;sup>39</sup> UNGA Res 43/53 (6 December 1988) UN Doc A/RES/43/53 (UN Dossier No. 104), para. 10.

November 1990, the UNFCCC negotiation process formally began in December 1990, when the UN established the Intergovernmental Negotiating Committee and imposed a deadline of June 1992, designed to coincide with the United Nations Conference on Environment and Development in Rio de Janeiro. As ultimately recorded in Article 2 of the UNFCCC, its objective is to "achieve ... stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system". It was opened for signature at the Rio Conference in May 1992 and had 158 Parties by the end of that year. The UK was one of the States that signed the UNFCCC at the Rio Conference.

#### **D.** The UN climate change regime

- 15. The UN climate change regime, developed over the last 30 years, comprises the Climate Change Treaties, their supporting institutions and arrangements, and the successive COP decisions which have implemented, operationalised and developed the Treaties. In addition, a range of meetings and events are convened each year outside the COPs to strengthen climate action in advance of each COP. Each of these elements is briefly described below.
- 16. The Climate Change Treaties: The adoption of the UNFCCC in 1992 was a critical step in the development of the international community's response to climate change. It established the legal basis for the creation of the UN institutional framework for combating climate change. As will be described further below in Chapter III, States Parties have since agreed upon increasingly demanding commitments to combat climate change by the adoption of subsequent treaties: (i) the 1997 Kyoto Protocol to the UNFCCC; (ii) the 2012 Doha Amendment to the Kyoto Protocol; and (iii) the 2015 Paris Agreement.<sup>40</sup> Together with the UNFCCC, these form the 'Climate Change Treaties' referred to above.

<sup>&</sup>lt;sup>40</sup> Unlike the Kyoto Protocol, the Paris Agreement is not a protocol to the UNFCCC but a standalone treaty.

17. The three core goals of the UN climate change regime, as now reflected in Article 2(1) of the Paris Agreement, relate to mitigation, adaptation and finance. Article 2(1) provides that:

"This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:

(a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;

(b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and

(c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development."

- 18. **The institutional bodies and arrangements**: The institutional bodies and arrangements established by the UNFCCC and shared by the Kyoto Protocol and Paris Agreement comprise the following:
  - 18.1. COP/CMP/CMA: The COP is the UNFCCC's governing body at which all Parties are represented.<sup>41</sup> The Kyoto Protocol and the Paris Agreement have created equivalent governing bodies to the COP, known as the 'CMP' and the 'CMA' respectively.<sup>42</sup> Consistent with general practice in this field, this Written Statement refers to the governing bodies under the UNFCCC, Kyoto Protocol and Paris Agreement collectively as the 'COP', unless indicated otherwise.
  - 18.2. Annual COPs: The COP meets annually to consider and adopt decisions relating to the functioning and effective implementation of the Climate Change Treaties and is the largest annual UN conference.<sup>43</sup> It primarily serves as a forum

<sup>&</sup>lt;sup>41</sup> UNFCCC (UN Dossier No. 4), Art. 7.

<sup>&</sup>lt;sup>42</sup> Kyoto Protocol (**UN Dossier No. 11**), Arts. 13(1), 14(1) and 15; Paris Agreement (**UN Dossier No. 16**), Arts. 16(1), 17(1) and 18.

<sup>&</sup>lt;sup>43</sup> UN Climate Change, 'About the Secretariat' <a href="https://unfccc.int/about-us/about-the-secretariat">https://unfccc.int/about-us/about-the-secretariat</a>>.

for negotiations between the Parties to the respective treaties. It also provides an important forum to convene public, private and civil society representatives from around the world. This, in turn, facilitates other activities related to addressing climate change, including the launch and showcasing of climate initiatives, commitments and campaigns. The most recent COP took place between 30 November and 13 December 2023 under the Presidency of the United Arab Emirates ('**the UAE**') (known as COP28/CMP18/CMA5), at which the 'UAE Consensus' was adopted (discussed further below<sup>44</sup>).

- 18.3. SBSTA: The Subsidiary Body for Scientific and Technological Advice ('SBSTA')<sup>45</sup> assists the COP through the provision of information and advice on scientific and technological matters as they relate to the Climate Change Treaties. In addition, the SBSTA cooperates with relevant international organisations on scientific, technological and methodological questions.<sup>46</sup>
- 18.4. SBI: The Subsidiary Body for Implementation ('SBI')<sup>47</sup> supports the COP in the assessment and review of the implementation of the Climate Change Treaties.<sup>48</sup>
- 18.5. Bureau: The COP is also assisted by a Bureau, which provides advice and guidance regarding the ongoing work under the Climate Change Treaties, the organisation of each of the COP's sessions and the operation of the Secretariat.<sup>49</sup> The Bureau is elected from representatives of Parties nominated by each of the five UN regional groups and SIDS. It comprises a President, seven Vice-Presidents, the Chairs of the Subsidiary Bodies and a Rapporteur. It has overall responsibility for questions of process. The Bureau will typically meet on a

<sup>&</sup>lt;sup>44</sup> See para. 20.6 below.

<sup>&</sup>lt;sup>45</sup> UNFCCC (UN Dossier No. 4), Art. 9.

<sup>&</sup>lt;sup>46</sup> UN Climate Change, 'Subsidiary Body for Scientific and Technological Advice (SBSTA)' <https://unfccc.int/process/bodies/subsidiary-bodies/sbsta>.

<sup>&</sup>lt;sup>47</sup> UNFCCC (UN Dossier No. 4), Art. 10.

<sup>&</sup>lt;sup>48</sup> UN Climate Change, 'Subsidiary Body for Implementation (SBI)' <https://unfccc.int/process/bodies/subsidiary-bodies/sbi>.

<sup>&</sup>lt;sup>49</sup> The Bureau was established by Draft Rules of Procedure adopted under Art. 7 of the UNFCCC: UNFCCC, 'Organizational Matters: Adoption of the Rules of Procedure' (22 May 1996) UN Doc FCCC/CP/1996/2.

regular basis during COPs, once during the Subsidiary Body sessions<sup>50</sup> and in between these sessions as needed.

- 18.6. Secretariat: A permanent Secretariat serves the Climate Change Treaties. It is seated in Bonn and employs around 450 permanent staff.<sup>51</sup> Its functions include making arrangements for sessions of the COP, compiling and transmitting reports submitted to it, and facilitating assistance to the Parties, particularly developing country Parties, in the compilation and communication of information required in accordance with the Climate Change Treaties.<sup>52</sup>
- 18.7. **Constituted bodies**: In addition, the governing bodies have established a number of institutional arrangements and specialised bodies with limited membership to support Parties and the intergovernmental process. They are known as 'constituted bodies'. There are currently 16 such bodies.<sup>53</sup>
- 19. COP decisions under the Climate Change Treaties: To date, the governing bodies have adopted more than 800 decisions under the Climate Change Treaties.<sup>54</sup> Decisions cover a wide range of subject matter, from procedural and technical issues to substantive implementation.<sup>55</sup>

<sup>&</sup>lt;sup>50</sup> The Subsidiary Bodies traditionally meet in parallel, twice a year.

<sup>&</sup>lt;sup>51</sup> UN Climate Change, 'About the Secretariat' <a href="https://unfccc.int/about-us/about-the-secretariat">https://unfccc.int/about-us/about-the-secretariat</a>>.

<sup>&</sup>lt;sup>52</sup> UNFCCC (UN Dossier No. 4), Art. 8.

<sup>&</sup>lt;sup>53</sup> The Adaptation Committee, Adaptation Fund Board, Advisory Board of the Climate Technology Centre and Networks (CTCN), Art. 6.4 Supervisory Body, CDM EB – Executive Board of the Development Mechanism (CDM), Compliance Committee of the Kyoto Protocol, Consultative Group of Experts (CGE), Executive Committee of the Warsaw International Mechanism for Loss and Damage, Joint Implementation Supervisory Committee (JISC), Katowice Committee of Experts on the Impacts of Implementation of Response Measures (KCI), Least Developed Countries Expert Group (LEG), Facilitative Working Group (FWG) of the LCIPP (Local Communities and Indigenous Peoples Platform), Standing Committee on Finance (SCF), Technology Executive Committee (TEC), Paris Agreement Implementation and Compliance Committee (PAICC), Paris Committee on Capacity-building (PCCB), Transitional Committee. For a list of constituted bodies with a brief description of each and links to more detailed webpages, see UN Climate Change, 'Constituted Bodies' <https://unfccc.int/process-and-meetings/bodies/constituted-bodies>.

<sup>&</sup>lt;sup>54</sup> See UN Climate Change, 'Decisions' < https://unfccc.int/decisions>.

<sup>&</sup>lt;sup>55</sup> Art. 7(2) of the UNFCCC, Art. 13(4) of the Kyoto Protocol and Art. 16(4) of the Paris Agreement confer general decision-making powers on the COP, CMP and CMA, respectively, to promote the effective implementation of each of the Climate Change Treaties.

- 20. A number of COP decisions are regarded as crucial to the operation and implementation of the Climate Change Treaties, or as otherwise demonstrating a political consensus on key areas on which climate action is required. They include:
  - 20.1. the Marrakesh Accords, adopted at COP7 in 2001 and subsequently at CMP1 in 2005, implementing the Kyoto Protocol by, *inter alia*, making provision for the operation of the clean development, joint implementation and emissions trading mechanisms<sup>56</sup> and the accounting, reporting and review systems for the Kyoto Protocol;<sup>57</sup>
  - 20.2. the Cancun Agreements, adopted at COP16/CMP6 in 2010, which established the Cancun Adaptation Framework, a work programme on 'loss and damage', the Green Climate Fund ('GCF') and the Technology Mechanism;<sup>58</sup>
  - 20.3. Decision 1/CP.21, adopted at COP21 in 2015 adopting the Paris Agreement, setting mandates for extensive implementation work to be undertaken by the subsidiary bodies (the SBSTA and SBI, described above), and making provision for enhanced action prior to 2020;<sup>59</sup>
  - 20.4. the decisions adopted at COP24 in 2018, which are generally referred to as 'the Paris Agreement Rulebook' and contain 20 decisions implementing key elements of the Paris Agreement;<sup>60</sup>

<sup>&</sup>lt;sup>56</sup> Discussed further below at paras. 75-76.

<sup>&</sup>lt;sup>57</sup> UNFCCC, Decisions 2/CP.7–14/CP.7 (10 November 2001) UN Doc FCCC/CP/2001/13/Add.1.

<sup>&</sup>lt;sup>58</sup> UNFCCC, Decision 1/CP.16 (10 December 2010) UN Doc FCCC/CP/2010/7/Add.1 (UN Dossier No. 156).

<sup>&</sup>lt;sup>59</sup> UNFCCC, Decision 1/CP.21 (13 December 2015) UN Doc FCCC/CP/2015/10/Add.1 (UN Dossier No. 155).

<sup>&</sup>lt;sup>60</sup> UNFCCC, Decisions 3/CMA.1-12/CMA.1 (15 December 2018) UN Doc FCCC/PA/CMA/2018/3/Add.1 (UN Dossier No. 170); UNFCCC, Decisions 13/CMA.1-20/CMA.1 (15 December 2018) UN Doc FCCC/PA/CMA/2018/3/Add.2 (UN Dossier No. 171).

- 20.5. the two 'cover' decisions adopted by the COP and CMA at COP26 in 2021 which together comprise the Glasgow Climate Pact,<sup>61</sup> as well as other key decisions adopted at COP26;<sup>62</sup> and
- 20.6. most recently at COP28 in 2023, the 'UAE Consensus' was adopted by the COP and CMA, which is comprised of key decisions including (i) the outcome of the first Global Stocktake, (ii) the conclusion of the Glasgow/Sharm el-Sheikh work programme on the global goal on adaption, (iii) the adoption of the UAE Framework for Global Climate Resilience and (iv) the operationalisation of the new funding arrangements for responding to 'loss and damage' (including a Fund).<sup>63</sup>
- 21. **Meetings and events outside the annual COP**: The range of meetings and events convened on an annual basis outside the COPs to strengthen climate action in advance of each COP include, for example:
  - 21.1. Japan-Brazil Dialogue ('JBD'): Co-chairs Japan and Brazil have hosted an "Informal Meeting on Further Actions against Climate Change" annually since 2002. Negotiators from a representative group of countries use the meeting to look back on the outcome of the previous year's COP and begin initial discussions on that year's key negotiation issues. The 2024 iteration of the JBD took place in Tokyo from 29 February to 1 March 2024.
  - 21.2. **Petersberg Climate Dialogue** ('**PCD**'): The PCD is an annual high-level international political forum, which takes place before the annual COP, in an effort to facilitate negotiations. Its central goal is to strengthen trust both in

<sup>&</sup>lt;sup>61</sup> UNFCCC, Decision 1/CP.26 (13 November 2021) UN Doc FCCC/CP/2021/12/Add.1 (UN Dossier No. 163); UNFCCC, Decision 1/CMA.3 (13 November 2021) UN Doc FCCC/PA/CMA/2021/10/Add.1 (UN Dossier No. 173).

<sup>&</sup>lt;sup>62</sup> These key decisions establish guidance for operationalising the modalities, procedures and guidelines for the enhanced transparency framework (UNFCCC, Decision 5/CMA.3 (13 November 2021) UN Doc FCCC/PA/CMA/2021/10/Add.2), a new mechanism and standards for international carbon markets (UNFCCC, Decision 3/CMA.3 (13 November 2021) UN Doc FCCC/PA/CMA/2021/10/Add.1), and common timeframes for emissions reductions targets (UNFCCC, Decision 6/CMA.3 (13 November 2021) UN Doc FCCC/PA/CMA/2021/10/Add.3).

<sup>&</sup>lt;sup>63</sup> For advance versions of these decisions, see UN Climate Change, 'Outcomes of the Dubai Climate Change Conference – Advance Unedited Versions (AUVs)' <a href="https://unfccc.int/cop28/outcomes>">https://unfccc.int/cop28/outcomes</a>

multilateral negotiations and in bilateral relationships between States. The 2023 iteration of the PCD took place in Berlin from 2-3 May 2023.

- 21.3. Ministerial on Climate Action ('MOCA'): The MOCA is an annual meeting attended by ministers and high-level representatives from over 30 States. This includes ministers from the G20 and chairs of key party groupings in the UN climate negotiations. In 2023, the MOCA took place in Belgium from 13-14 July 2023.
- 21.4. Climate and Development Ministerial: Launched under the UK's COP26 Presidency, the Ministerial brings together States, institutions and other stakeholders to provide a platform for States vulnerable to climate change. The 2023 edition was co-chaired by the UK, UAE, Vanuatu and Malawi on 29 October 2023 in Abu Dhabi.
- 21.5. Climate weeks: There are regional climate weeks held on an annual basis to facilitate preparations for the annual COP. In 2023, they were scheduled in the lead-up to COP28 as follows: Africa Climate Week (Nairobi, 4-8 September 2023), Middle East and North Africa Climate Week (Riyadh, 9-12 October 2023), Latin America and Caribbean Climate Week (Panama City, 23-27 October 2023) and Asia-Pacific Climate Week (Johor, 13-17 November 2023).

#### E. The Request

22. Against the background of the international community's comprehensive response to climate change, Vanuatu built a coalition of States to request an advisory opinion from the Court on climate change. Vanuatu was joined by 17 other States, together known as the 'Core Group'.<sup>64</sup> Vanuatu described its objective as allowing<sup>65</sup>

"the International Court of Justice to clarify the rights and obligations of States under international law in relation to the adverse effects of climate change, especially with respect to small island developing States and other

<sup>&</sup>lt;sup>64</sup> Angola, Antigua and Barbuda, Bangladesh, Costa Rica, Germany, Liechtenstein, the Federated States of Micronesia, Morocco, Mozambique, New Zealand, Portugal, Romania, Samoa, Sierra Leone, Singapore, Uganda and Vietnam.

<sup>&</sup>lt;sup>65</sup> GAOR, 77<sup>th</sup> Session, 64<sup>th</sup> Plenary Meeting (29 March 2023) UN Doc A/77/PV.64 (UN Dossier No. 3), p. 2.

developing countries particularly vulnerable to the adverse effects of climate change ... ".

- 23. From Vanuatu's initial announcement of its campaign on 25 September 2021,<sup>66</sup> Vanuatu carried out "*intense and engaged negotiations*"<sup>67</sup> with the Core Group and the broader UN membership. Following the Core Group's presentation of the draft text of the resolution on 29 November 2022, Vanuatu led two rounds of informal consultations, as well as several informal expert consultations and engagements with the broader membership. Like any heavily negotiated text, the Request was the product of compromise. In the end, it was co-sponsored by 132 States, including the UK, and adopted without a vote, on 29 March 2023.
- 24. Several States made observations about the objectives of the Request and their understanding of the applicable legal framework following the adoption of the resolution. The UK notes and endorses the following explanations:
  - 24.1. Consistent with Vanuatu's observations when introducing the draft resolution and the positions of several States,<sup>68</sup> the Request invites the Court to "*clarify*" States' obligations under international law. The UK understands this to mean that the Court's task is to bring clarity to States as to the legal framework that applies to the protection of the climate system from anthropogenic GHG emissions.

<sup>&</sup>lt;sup>66</sup> Bernadette Carreon, 'Vanuatu to seek international court opinion on climate change rights' (The Guardian, 26 September 2021) <a href="https://www.theguardian.com/world/2021/sep/26/vanuatu-to-seek-international-court-opinion-on-climate-change-rights">https://www.theguardian.com/world/2021/sep/26/vanuatu-to-seek-international-court-opinion-on-climate-change-rights</a>.

<sup>&</sup>lt;sup>67</sup> GAOR, 77<sup>th</sup> Session, 64<sup>th</sup> Plenary Meeting (29 March 2023) UN Doc A/77/PV.64 (UN Dossier No. 3), p. 3.

<sup>&</sup>lt;sup>68</sup> See Micronesia ("need for legal <u>clarity</u>"); European Union ("identify and, to the extent possible, <u>clarify</u> the obligations of States under applicable international law and the legal consequences for all States for the breach of those obligations"); Costa Rica ("<u>clarifying</u> the legal obligations of States in addressing climate change"); New Zealand ("an advisory opinion can play a helpful role by bringing <u>clarity</u> and coherence to international climate law"); Australia ("Today's request for the International Court of Justice to <u>clarify</u> the obligations"); Germany ("<u>clarify</u> the rights and obligations of States under international law"); Romania ("entrusting the International Court of Justice with <u>clarifying</u> existing obligations in connection with climate change"); Austria ("<u>clarifying</u> the scope of States' obligations of all States in respect to climate change"); El Salvador ("<u>clarifying</u> the scope of States' obligations with regard to guaranteeing the protection of the climate system under international law, both conventional and customary"): GAOR, 77<sup>th</sup> Session, 64<sup>th</sup> Plenary Meeting (29 March 2023) UN Doc A/77/PV.64 (UN **Dossier No. 3**), pp. 6, 8, 10, 14, 17, 19, 32 (emphasis added).

- 24.2. The legal obligations at issue are States' "*existing*"<sup>69</sup> or "*current*"<sup>70</sup> obligations. This is to be contrasted with obligations that may have existed at a previous point in time or that may be developed in the future, which are outside the scope of the Request.
- 24.3. The sponsors of the Request intend that the Court's advisory opinion will enhance existing international cooperation and promote the ongoing processes within the framework of the UN climate change regime, not undermine them.<sup>71</sup> This is consistent with the emphasis that several States and the European Union have placed on the central importance of the Climate Change Treaties in the context of the Request.<sup>72</sup> The UK similarly affirms the primary importance of the Climate Change Treaties and the Court's

<sup>&</sup>lt;sup>69</sup> See Romania ("*clarifying <u>existing</u> obligations in connection with climate change*"); Republic of Korea ("*The applicable law in this case is meant to be <u>existing</u> international law rather than law in the making"); UN Secretary-General ("<i>[a]dvisory opinions can provide much-needed clarification on <u>existing</u> international legal obligations"): see GAOR, 77<sup>th</sup> Session, 64<sup>th</sup> Plenary Meeting (29 March 2023) UN Doc A/77/PV.64 (UN Dossier No. 3), pp. 1, 19, 22 (emphasis added).* 

<sup>&</sup>lt;sup>70</sup> See European Union ("answer the legal questions on the basis of the <u>current</u> state of international law"); Germany ("addresses the <u>current</u> obligations of all States on the basis of the <u>current</u> state of the law"); Norway ("<u>current</u> obligations of States under international law ... the greatest value of the resolution is in the elaboration it presents on <u>current</u> obligations"); Iceland ("expect the Court to answer the legal questions on the basis of the current obligations"): see GAOR, 77<sup>th</sup> Session, 64<sup>th</sup> Plenary Meeting (29 March 2023) UN Doc A/77/PV.64 (UN **Dossier No. 3**), pp. 8, 18, 23, 26 (emphasis added).

<sup>&</sup>lt;sup>71</sup> See Vanuatu ("We believe the clarity it will bring can greatly benefit our efforts to address the climate crisis and further bolster global and multilateral cooperation and State conduct in addressing climate change"); Germany ("Germany hopes that the initiative will contribute to further strengthening international cooperation, which is key for achieving the Paris Agreement objectives"); Singapore ("We are confident that the advisory opinion of the International Court of Justice will have a positive impact on the ongoing processes within the UNFCCC framework"); Norway ("Recognizing that the United Nations Framework Convention on Climate Change, together with the Paris Agreement on Climate Change, is the primary negotiating forum for developing and implementing international climate framework, it is our hope that the Court's consideration of the questions put to it through the resolution will contribute constructively to strengthening both global and national climate action and raising our ambitions"); Canada ("Canada hopes that the opinion rendered by the International Court of Justice will contribute to advancing the negotiations of the United Nations Framework Convention on Climate Change"): GAOR, 77<sup>th</sup> Session, 64<sup>th</sup> Plenary Meeting (29 March 2023) UN Doc A/77/PV.64 (**UN Dossier No. 3**), pp. 2, 15, 18, 26, 27.

<sup>&</sup>lt;sup>72</sup> European Union ("the pre-eminent role of the Paris Agreement on Climate Change and the regular meetings of the Conference of the Parties in reflecting the most recent and dynamic expression of States' understandings of their commitments and their nature, as well as their responsibilities in respect of climate change"); Australia ("the United Nations Framework Convention on Climate Change remains the central, indispensable forum for international cooperation on, and commitments to, climate action"); Singapore ("the resulting advisory opinion will therefore be complementary to the existing climate regime. That is very important for Singapore, as we fully support the multilateral framework of cooperation on climate change under the UNFCCC"); Iceland ("the primary role of the United Nations Framework Convention on Climate Change and the Paris Agreement"); Norway ("the primary negotiating forum for developing and implementing international climate framework"): GAOR, 77<sup>th</sup> Session, 64<sup>th</sup> Plenary Meeting (29 March 2023) UN Doc A/77/PV.64 (**UN Dossier No. 3**), pp. 8, 15, 24, 26.

advisory opinion will fortify multilateral cooperation under their auspices. As the UK's Representative explained at the General Assembly:<sup>73</sup>

"We recognize the United Nations Framework Convention on Climate Change (UNFCCC) as the primary intergovernmental negotiating forum for climate action. An advisory opinion of the International Court of Justice may help us refocus efforts to deliver on climate commitments in this critical decade, which would support the agenda of the UNFCCC. We are pleased to have sponsored resolution 77/276 today."

<sup>&</sup>lt;sup>73</sup> GAOR, 77<sup>th</sup> Session, 64<sup>th</sup> Plenary Meeting (29 March 2023) UN Doc A/77/PV.64 (UN Dossier No. 3), pp. 20-21.

# CHAPTER III: OBLIGATIONS OF STATES UNDER INTERNATIONAL LAW TO ENSURE PROTECTION FROM ANTHROPOGENIC GHG EMISSIONS

25. This Chapter identifies and explains States' obligations to protect the climate system from anthropogenic GHG emissions. Before turning to those obligations, the UK sets out its position on the scope of the Court's enquiry under Question A (Section A below) and on the applicable legal regime (Section B below). It then turns to consider States' obligations under the relevant treaties (Sections C-F below).

#### A. The scope of the Court's enquiry

26. As set out above, Question A reads as follows:

"What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations?"

- 27. The UK offers the following observations about the scope and meaning of Question A with a view to assisting the Court in the interpretative exercise it must conduct.
  - 27.1. First, Question A refers to the "climate system and other parts of the environment". As discussed above,<sup>74</sup> "climate system" is a defined term under Article 1(3) of the UNFCCC, referring to "the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions". Considering the breadth of that definition, it is not clear what "other parts of the environment" could add. The UK infers that the inclusion of that additional phrase was intended to ensure that no aspect of the environment affected by anthropogenic GHG emissions would be inadvertently omitted from the scope of the Court's enquiry. For ease of reference, the UK refers simply to 'the climate system' in the remainder of this Written Statement.
  - 27.2. Secondly, the reference to "anthropogenic emissions of greenhouse gases" should be understood in the same way that the IPCC employs the term, i.e.,

<sup>&</sup>lt;sup>74</sup> See para. 9 above.

emissions of GHGs caused by human activities, principally  $H_2O$ ,  $CO_2$ ,  $N_2O$ ,  $CH_4$  and  $O_3$ , but also including human-made GHGs such as SF<sub>6</sub>, HFCs, CFCs and PFCs. As explained above,<sup>75</sup> such emissions must be understood to encompass the precursors of GHGs. Naturally occurring emissions of GHGs are outside the scope of the question, even though such emissions fall within the parameters of the UNFCCC.<sup>76</sup>

- 27.3. **Thirdly**, Question A is framed in the present tense. This formulation is consistent with the shared understanding that the Questions posed by the General Assembly ask the Court to consider States' <u>present</u> obligations, rather than any obligations that previously existed or that may be developed in the future.<sup>77</sup>
- 27.4. Fourthly, Question A refers to "*obligations*" and expressly identifies the applicable law as "*international law*". The General Assembly has not asked the Court to opine on the content of any instruments or principles that do not constitute obligations under international law. Nor is the Court asked to seek to develop any rules of international law. Accordingly, the Court is to have regard only to existing rules of international law. The UK recognises that the Chapeau to the Questions identifies various instruments and principles. The UK's position is that, whilst such instruments and principles may be relevant to establishing the context of the Questions asked of the Court, their inclusion in the Chapeau does not pre-judge or even influence whether or not any such instrument or principle constitutes or contains an obligation under international law.
- 27.5. Fifthly, the obligations that the Court is invited to identify are specifically described. Question A refers to "obligations ... to ensure the protection of the climate system ... from anthropogenic emissions of greenhouse gases". This does not encompass any obligations of a more general character that could be engaged in a dispute to which climate change is relevant as a matter of fact.

<sup>&</sup>lt;sup>75</sup> See para. 12 above.

<sup>&</sup>lt;sup>76</sup> UNFCCC (UN Dossier No. 4), Art. 1(5); see further para. 10 above.

<sup>&</sup>lt;sup>77</sup> See para. 24.2 above.

Again, the fact that treaties, instruments or principles that address broader or different subjects are referenced in the Chapeau is not determinative of the scope of Question A. To the extent that the treaties, instruments or principles referred to in the Chapeau do not contain "obligations ... to ensure the protection of the climate system ... from anthropogenic emissions of greenhouse gases", they should not form part of the Court's answer to Question A.

#### **B.** The applicable legal regime

- 28. Through their sustained efforts summarised in Chapter II above, States have developed a specific and detailed treaty regime establishing a series of obligations governing the protection of the climate system from anthropogenic GHG emissions. This constitutes the applicable law for the purposes of the Request. It is comprised as follows.
- 29. **First**, the <u>principal</u> obligations of States under existing international law to ensure the protection of the climate system from anthropogenic GHG emissions are found in the Climate Change Treaties, specifically the Paris Agreement. As the European Union explained in its statement following the adoption of Resolution 77/276 by the General Assembly, the Paris Agreement has a "*pre-eminent role*" and "*reflects the most recent and dynamic expression of States' understandings of their commitments and their nature, as well as their responsibilities in respect of climate change*".<sup>78</sup>
- 30. Secondly, there are several complementary treaties ('the Complementary Treaties') that address anthropogenic GHG emissions within more specific parameters. These comprise:
  - 30.1. Sector-specific regimes: Express provision was made in the Kyoto Protocol for GHG emissions from sectors aviation and shipping<sup>79</sup> to be addressed by the relevant specialist international organisations, namely the International Civil Aviation Organization ('ICAO') and the International Maritime Organization ('IMO'). For aviation, this has resulted in the creation of the Carbon Offsetting

<sup>&</sup>lt;sup>78</sup> See para. 24.3 above.

<sup>&</sup>lt;sup>79</sup> Kyoto Protocol (**UN Dossier No. 11**), Art. 2(2) ("The Parties included in Annex I shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation and marine bunker fuels, working through the International Civil Aviation Organization and the International Maritime Organization, respectively.")

and Reduction Scheme for International Aviation ('CORSIA') under the Convention on International Civil Aviation ('the Chicago Convention').<sup>80</sup> For shipping, it has resulted in amendments to Annex VI of the International Convention for the Prevention of Pollution from Ships ('MARPOL')<sup>81</sup> to address GHG emissions from merchant shipping.

- 30.2. **Pollutant-specific regimes**: States have also agreed air pollution treaties that are relevant to climate change. Whilst the abatement of air pollution has traditionally been treated separately from climate change mitigation, some of the obligations contained in these treaties directly concern certain GHGs and their precursors and seek to protect the climate system from their adverse effects. They accordingly warrant consideration together with the Climate Change Treaties and the sectoral regimes described immediately above. The relevant pollution treaties include:
  - 30.2.1. The Montreal Protocol: The gases that are captured by the Montreal Protocol were specifically excluded from the UNFCCC and Kyoto Protocol.<sup>82</sup> Since the entry into force of the Kigali Amendment in 2019, the Montreal Protocol has regulated certain GHGs for climate change reasons, alongside the primary objective of ozone depletion.
  - 30.2.2. The Gothenburg Protocol to CLRTAP: This Protocol imposes emission reduction obligations for several precursors to GHGs, principally non-methane volatile organic compounds ('NMVOCs'), nitrogen oxides ('NOx') and sulphur dioxide ('SO<sub>2</sub>').
- 30.3. The Climate Change Treaties and Complementary Treaties contain the principal obligations of States under international law to ensure the protection of the climate system from anthropogenic GHG emissions.

<sup>&</sup>lt;sup>80</sup> (signed 7 December 1944, entered into force 4 April 1947) 15 UNTS 295.

<sup>&</sup>lt;sup>81</sup> (adopted 2 November 1973, opened for signature 15 January 1974), as amended by Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships (adopted 17 February 1978, opened for signature 1 June 1978, entered into force 2 October 1983) 1340 UNTS 61.

<sup>&</sup>lt;sup>82</sup> UNFCCC (**UN Dossier No. 4**), Arts. 4(1)(a), (b), (c), (d), 4(2)(a), (b), (e), 4(6) and 12(1)(a); Kyoto Protocol (**UN Dossier No. 11**), Arts. 2(1)(a)(ii), 2(2), 5(1), 5(2), 7(1), and 10(a).

- 31. Thirdly, the United Nations Convention on the Law of the Sea ('UNCLOS')<sup>83</sup> contains additional relevant obligations. By virtue of the definitional provision in Article 1(1)(4) of UNCLOS, the introduction of anthropogenic GHG emissions into the atmosphere constitutes "*pollution of the marine environment*" for the purposes of Part XII of UNCLOS. Specific provisions within Part XII oblige Parties to protect elements of the climate system from anthropogenic GHG emissions, as explained in more detail below.
- 32. The UK's position is that each of these **three** categories of sources of relevant obligations falls within the scope of Question A.
- 33. In addition, the UK recognises that other branches of international law may have a bearing on climate change-related issues and disputes. International human rights law is one such area of law. As explained further below,<sup>84</sup> some rules of international human rights law are being invoked by claimants in cases concerning particular factual circumstances related to climate change. However, human rights treaties are not directly responsive to, and do not provide an answer to, the question posed by the General Assembly in Question A. States have created specific legal regimes that address States' obligations to ensure the protection of the climate system from anthropogenic GHG emissions. It is these regimes that should form the basis of the Court's answer to Question A.
- 34. These submissions are expanded below, as follows: Section C addresses the provisions of the Climate Change Treaties relevant to Question A; Section D addresses the Complementary Treaties; Section E addresses the law of the sea, specifically UNCLOS; and Section F addresses international human rights law.

#### C. Climate Change Treaties

- 1) <u>Introduction</u>
- 35. The mitigation provisions under the Paris Agreement are the starting point for answering Question A. It is these provisions that set out "the obligations under

<sup>&</sup>lt;sup>83</sup> (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UN Dossier No. 45).

<sup>&</sup>lt;sup>84</sup> See paras. 122-130 below.

international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of [GHGs]".

36. 'Mitigation' is the term used to describe "measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks<sup>[85]</sup> of all greenhouse gases not controlled by the Montreal Protocol".<sup>86</sup> As explained by the IPCC:<sup>87</sup>

"[c]limate change mitigation is achieved by limiting or preventing greenhouse gas emissions and by enhancing activities that remove these gases from the atmosphere. Greenhouse gases can come from a range of sources and climate mitigation can be applied across all sectors and activities. These include energy, transport, buildings, industry, waste management, agriculture, forestry, and other forms of land management."

- 37. Mitigation is the first of the three goals (sometimes described as 'pillars') of the UN climate change regime set out in Article 2(1) of the Paris Agreement.<sup>88</sup>
- 38. The other two goals reflected in Article 2(1) of the Paris Agreement, adaptation and finance, are addressed in response to Question B below. The adaptation provisions of the Climate Change Treaties do not fall within the scope of Question A because adaptation focuses on measures to <u>adjust to</u> the effects of climate change, rather than to ensure that the climate system is protected from GHG emissions. They are, however, relevant to Question B, as more fully explained in Chapter IV below. The finance provisions support the implementation of both mitigation and adaptation. Their content and implementation are, accordingly, relevant to both Questions A and B and, for convenience, will also be addressed in Chapter IV below.
- 39. Against that background, the rest of this Chapter focuses on mitigation. It is organised as follows: (i) the development and present content of States' mitigation-related obligations are addressed in **sub-section 2 below**; (ii) the provisions facilitating

<sup>&</sup>lt;sup>85</sup> "Sinks" are "any process, activity or mechanism which removes a greenhouse gas, an aerosol or a precursor of a greenhouse gas from the atmosphere" (UNFCCC (UN Dossier No. 4), Art. 1(8)).

<sup>&</sup>lt;sup>86</sup> UNFCCC (**UN Dossier No. 4**), Art. 4(1)(b). Art. 4(2)(a) further refers to "*measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs*". The relevance of the Montreal Protocol is addressed below, at paras. 100-102.

<sup>&</sup>lt;sup>87</sup> IPCC, 'Working Group III: Mitigation of Climate Change' < https://ipcc.ch/working-group/wg3/>.

<sup>&</sup>lt;sup>88</sup> See para. 17 above.

implementation of the mitigation provisions are briefly explained in **sub-section 3 below**; and (iii) the implementation of the mitigation provisions is addressed in **sub-section 4 below**.

#### 2) <u>Existing mitigation commitments</u>

#### Introduction

- 40. As already noted, the existing mitigation commitments under the UN climate change regime are now found in the Paris Agreement.<sup>89</sup>
- 41. The adoption of the Paris Agreement in 2015 represented an important landmark in the UN climate change regime. The Parties agreed for the first time that they are <u>all</u> obliged to take steps to reduce their GHG emissions, rather than just some of them, as was previously the case under the UNFCCC and the Kyoto Protocol. These provisions thus mark a progression from the earlier approach to mitigation in those instruments.
- 42. The reason for the paradigm shift in the Paris Agreement is best understood by an appreciation of the evolution of the mitigation provisions across successive Climate Change Treaties and the Kyoto Protocol's failure to secure ongoing support from States.<sup>90</sup> The mitigation provisions in the Kyoto Protocol and their accompanying COP decisions also represent critical steps in the operationalisation of mitigation under the UN climate change regime.<sup>91</sup> Given the important context that these developments provide to the mitigation provisions in the Paris Agreement, the evolution of the mitigation pillar is briefly described before the mitigation provisions of the Paris Agreement are addressed at paragraphs 62-71 below.

#### Evolution of the mitigation pillar

43. **The UNFCCC**: The "*ultimate objective*" of the UNFCCC, set out in Article 2, was to "achieve, in accordance with the relevant provisions of the Convention, stabilization of

<sup>&</sup>lt;sup>89</sup> See para. 35 above.

<sup>&</sup>lt;sup>90</sup> As matters stand, 195 out of 198 Parties to the UNFCCC are party to the Paris Agreement.

<sup>&</sup>lt;sup>91</sup> For example, the evaluation and accounting methodology for measuring reductions in emissions from sources and removals by carbon sinks and the operation of the market mechanisms developed under the Kyoto Protocol continue to be applied under the Paris Agreement.

greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." To realise that objective, the UNFCCC Parties committed to take steps to mitigate GHG emissions. Those steps were identified in Article 4.

44. Article 4(1)(b), which applied to all Parties, provided that:

"<u>All Parties</u>, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall:...

(b) Formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change". (emphasis added)

- 45. To facilitate transparency and the measurement and accounting of GHG emissions, reductions and removals, all Parties were required to communicate national inventories of anthropogenic GHG emissions to the COP through the Secretariat.<sup>92</sup> However, there was no obligation *to reduce* GHG emissions.
- 46. Stronger mitigation obligations were set out in Article 4(2) for the developed country Parties and economies in transition listed in Annex I.<sup>93</sup> Article 4(2), by contrast to Article 4(1), provided in paragraph (a) that:

"Each of these [Annex I] Parties <u>shall adopt national policies and take</u> <u>corresponding measures on the mitigation of climate change</u>, <u>by limiting its</u> <u>anthropogenic emissions of greenhouse gases</u> and protecting and enhancing its greenhouse gas sinks and reservoirs. These policies and measures will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions consistent with the objective of the Convention...". (emphasis added)

<sup>&</sup>lt;sup>92</sup> UNFCCC (UN Dossier No. 4), Art. 12.

<sup>&</sup>lt;sup>93</sup> Paragraph 3 of the Preamble to the UNFCCC records the Parties' appreciation that "*the largest share of historical and current global emissions of greenhouse gases has originated in developed countries*", and that "*per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs*". For an account of the negotiations on this issue, see Daniel Bodansky, 'The United Nations Framework Convention on Climate Change: A Commentary' (1993) 18 YJIL 451, pp. 478-480, 505-508.

- 47. Even though Annex I Parties had an obligation *to limit* GHG emissions, the UNFCCC did not set down any specific content, target or timescales for the performance or implementation of these obligations.<sup>94</sup>
- 48. As a consequence, by the time of the first session of the COP in Berlin in March-April 1995, the UNFCCC Parties had already concluded that Article 4(2) was "not adequate".<sup>95</sup> The COP consequently agreed in Decision 1/CP.1 to begin a process to enable the COP to "take appropriate action for the period beyond 2000, including the strengthening of the commitment of the Parties listed in Annex I to the Convention through the adoption of a protocol or another legal instrument".<sup>96</sup> This process led to the conclusion of the Kyoto Protocol to the UNFCCC in 1997.
- 49. **The Kyoto Protocol**: The Kyoto Protocol strengthened the obligations of Annex I Parties in Article 4(2) of the UNFCCC by setting binding emissions reduction targets for specified 'commitment periods' from its entry into force in February 2005.<sup>97</sup>
- 50. The first commitment period was to run between 2008 and 2012 ('CP1'). The first emissions reduction target was set in Annex B to the Kyoto Protocol as being at least five per cent below the 1990 levels of the GHG emissions specified for each Annex I Party. By 2005, each Annex I Party was to "*have made demonstrable progress in achieving its commitments*" under the Protocol.<sup>98</sup>
- 51. In contrast, no new mitigation commitments were introduced for non-Annex I Parties. In Article 10 of the Kyoto Protocol, those Parties simply "reaffirm[ed] existing commitments" under Article 4(1) of the UNFCCC.

<sup>&</sup>lt;sup>94</sup> Rather, the ultimate objective in Article 2 of the UNFCCC "should be achieved <u>within a time-frame sufficient</u> <u>to allow ecosystems to adapt naturally</u> to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner" (UNFCCC (**UN Dossier No. 4**), Art. 2).

<sup>&</sup>lt;sup>95</sup> UNFCCC, Decision 1/CP.1 (7 April 1995) UN Doc FCCC/CP/1995/7/Add.1, preamble para. 2.

<sup>&</sup>lt;sup>96</sup> UNFCCC, Decision 1/CP.1 (7 April 1995) UN Doc FCCC/CP/1995/7/Add.1. The UNFCCC was designed to operate as a framework treaty, Article 2 making express provision for the COP to adopt "*legal instruments*" to achieve the "*stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system*" (UNFCCC (**UN Dossier No. 4**), Art. 2; see also the chapeau to Art. 7(2) and Art. 17).

<sup>&</sup>lt;sup>97</sup> The signatories had before then applied it informally and worked towards their targets for the first commitment period.

<sup>&</sup>lt;sup>98</sup> Kyoto Protocol (UN Dossier No. 11), Art. 3(2).

- 52. Annex I Parties' mitigation obligations were lengthy, detailed and onerous, requiring economy-wide measures. In summary:
  - 52.1. Annex I Parties were to use the "net changes" in GHG emissions "by sources and removals by sinks resulting from direct human-induced land-use change and forestry activities, limited to afforestation, reforestation and deforestation since 1990, measured as verifiable changes in carbon stocks in each commitment period" to meet their Article 3 commitments.<sup>99</sup>
  - Each Annex I Party was required to "[i]mplement and/or further elaborate 52.2. policies and measures in accordance with its national circumstances, such as": the "[e]nhancement of energy efficiency in relevant sectors of the national economy"; the "[p]rotection and enhancement of sinks and reservoirs of [GHGs] not controlled by the Montreal Protocol"; the "[p]romotion of sustainable forest management practices, afforestation and reforestation"; the "[p]romotion of sustainable forms of agriculture"; "[r]esearch on, and promotion, development and increased use of, new and renewable forms of energy, of carbon dioxide sequestration technologies and of advanced and innovative environmentally sound technologies"; the "*[p]rogressive reduction* or phasing out of market imperfections, fiscal incentives, tax and duty exemptions and subsidies in all [GHG] emitting sectors that run counter to the objective of the Convention and application of market instruments";<sup>100</sup> the "[e]ncouragement of appropriate reforms in relevant sectors aimed at promoting policies and measures which limit or reduce emissions of [GHGs] not controlled by the Montreal Protocol"; "[m]easures to limit and/or reduce emissions of [GHGs] not controlled by the Montreal Protocol in the transport sector"; and "[l]imitation and/or reduction of methane emissions through recovery and use in waste management, as well as in the production, transport and distribution of energy".<sup>101</sup>

<sup>&</sup>lt;sup>99</sup> Kyoto Protocol (UN Dossier No. 11), Art. 3(3).

<sup>&</sup>lt;sup>100</sup> The reference to market instruments was to the new carbon trading mechanisms introduced by the Kyoto Protocol: see further para. 75 below.

<sup>&</sup>lt;sup>101</sup> Kyoto Protocol (UN Dossier No. 11), Arts. 2(1)(a)(i)-(viii).

- 52.3. The GHGs and "Sectors/source categories" encompassed by the mitigation obligations were listed in Annex A, and included (i) energy (fuel combustion from energy industries, including manufacturing and construction and transport and fugitive emissions from fuels, including solid fuels and oil and natural gas), (ii) industrial processes (including mineral products, the chemical industry, metal and other production, and production and consumption of halocarbons and sulphur hexafluoride), (iii) solvent and other product use, (iv) agriculture (including enteric fermentation, manure management, rice cultivation, agricultural soils, prescribed burning of savannas, field burning of agricultural residues) and (v) waste (including solid waste disposal on land, wastewater handling and waste incineration).
- 53. The Kyoto Protocol specified that further commitment periods for Annex I Parties would be established in subsequent amendments to Annex B to the Protocol.<sup>102</sup>
- 54. At the first session of the CMP in 2005, negotiations were accordingly launched under the Protocol for a second commitment period (**'CP2'**) to commence after CP1 ended in 2012.<sup>103</sup> However, for the reasons which follow, support for the Kyoto Protocol from Annex I Parties was falling away, and talks began under the auspices of the UNFCCC on the future of the UN climate change regime.
- 55. **Talks on the future of the UN climate change regime**: The talks on the wider future of the regime proceeded in parallel with the CP2 negotiations. They were prompted by changes in patterns of GHG emissions and the evolving scientific understanding of risks posed by climate change.<sup>104</sup>
- 56. As regards the first of these factors, the UNFCCC required the COP to consider amendments to the list of Parties in Annex I "*as may be appropriate*".<sup>105</sup> Despite this requirement, and despite many developing country Parties having begun to industrialise

<sup>&</sup>lt;sup>102</sup> Kyoto Protocol (UN Dossier No. 11), Art. 3(9).

<sup>&</sup>lt;sup>103</sup> UNFCCC, Decision 1/CMP.1 (10 December 2005) UN Doc FCCC/KP/CMP/2005/8/Add.1.

<sup>&</sup>lt;sup>104</sup> E.g., climate tipping points, as identified in the IPCC's 2001 Report: IPCC, 'Summary for Policymakers' in *Climate Change 2001: Synthesis Report* (2001), p. 14.

<sup>&</sup>lt;sup>105</sup> See UNFCCC (**UN Dossier No. 4**), Arts. 4(2)(f) and 16(2). Annex II, addressed below at para. 155, was subject to the same revision provision and similarly remained largely unchanged from its original 1992 version.

rapidly and become significant emitters of GHGs,<sup>106</sup> the Annex remained largely unchanged from its original 1992 version.<sup>107</sup>

- 57. In March 2001, the United States announced it would not ratify the Kyoto Protocol. President George W. Bush explained that he "oppose[d] the Kyoto Protocol because it exempts 80 percent of the world, including major population centers such as China and India, from compliance, and would cause serious harm to the U.S. economy. The Senate's vote, 95-0, shows that there is a clear consensus that the Kyoto Protocol is an unfair and ineffective means of addressing global climate change concerns."<sup>108</sup>
- 58. Other Annex I Parties also resiled from binding emissions reduction targets and timescales. Canada withdrew from the Kyoto Protocol in December 2011. Japan, Russia and New Zealand indicated that they did not intend to assume obligations for a second commitment period under the Kyoto Protocol.<sup>109</sup>
- 59. The discussions on the future of the UN climate change regime led in 2011 to the establishment of the Ad Hoc Working Group on the Durban Platform for Enhanced Action ('Ad Hoc Working Group') at COP17 in Decision 1/CP.17. It acknowledged in the decision "*that the global nature of climate change calls for the widest possible cooperation by <u>all countries</u>".<sup>110</sup> The Ad Hoc Working Group was accordingly*

<sup>&</sup>lt;sup>106</sup> Andreas Fischlin and Maria Ivanova, 'Introduction: Scientific and Political Drivers for the Paris Agreement' in Daniel Klein and others (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (OUP 2017), p. 19. For brief discussion of the shifts in the world economy, see Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, *International Climate Change Law* (OUP 2017), pp. 122-123.

<sup>&</sup>lt;sup>107</sup> A handful of relatively uncontroversial amendments have been made to the Annexes, for example: Türkiye was removed from Annex II in 2002 (UNFCCC, Decision 26/CP.7 (9 November 2001) UN Doc FCCC/CP/2001/13/Add.4); changes have been made to Annex I to reflect the accession of Croatia, Cyprus and Malta to the European Union (see UNFCCC, Decision 4/CP.3 (11 December 1997) UN Doc FCCC/CP/1997/7/Add.1; UNFCCC, Decision 10/CP.17 (11 December 2011) UN Doc FCCC/CP/2001/19/Add.2; UNFCCC, Decision 3/CP.15 (19 December 2009) UN Doc FCCC/CP/2009/11/Add.1); and Belarus was added to Annex I as an EIT.

<sup>&</sup>lt;sup>108</sup> The White House (President George W. Bush), 'Text of a Letter from the President to Senators Hagel, Helms, Craig, and Roberts' (13 March 2001) <a href="https://georgewbush-whitehouse.archives.gov/news/releases/2001/03/20010314.html">https://georgewbush-whitehouse.archives.gov/news/releases/2001/03/20010314.html</a>. See further the Byrd-Hagel Resolution: United States Senate, 105th Congress, 1st Sess., Byrd-Hagel Resolution, S. RES. 98 (25 July 1997) <a href="https://www.congress.gov/105/bills/sres98/BILLS-105sres98ats.pdf">https://www.congress.gov/105/bills/sres98/BILLS-105sres98ats.pdf</a>>.

<sup>&</sup>lt;sup>109</sup> UNFCCC, Decision 1/CMP.8 (8 December 2012) UN Doc FCCC/KP/CMP/2012/13/Add.1, pp. 9-10, fns. 13, 14, 15 and 16. New Zealand said it would be taking a quantified economy-wide emission reduction target under the UNFCCC, not the Kyoto Protocol, in the period 2013-2020 (fn. 15).

<sup>&</sup>lt;sup>110</sup> UNFCCC, Decision 1/CP.17 (11 December 2011) UN Doc FCCC/CP/2011/9/Add.1 (UN Dossier No. 148), preamble para. 1 (emphasis added).

mandated "to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties".<sup>111</sup> The process was to "raise the level of ambition"<sup>112</sup> and a workplan was launched "on enhancing mitigation ambition to identify and to explore options for a range of actions that can close the ambition gap with a view to ensuring the highest possible mitigation efforts by <u>all</u> <u>Parties</u>".<sup>113</sup> The core object was to formulate new mitigation commitments which, unlike the Kyoto Protocol, could attract universal agreement, ratification and implementation.

- 60. **The Doha Amendment to the Kyoto Protocol**: Meanwhile, the CP2 negotiations continued. They concluded in 2012 with the adoption of the Doha Amendment to the Kyoto Protocol,<sup>114</sup> in which Parties to the Kyoto Protocol agreed a second commitment period for Annex I Parties to run from 2013-2020.<sup>115</sup> However, at 142 ratifications, the Doha Amendment attracted a significantly lower number of Parties than the Kyoto Protocol itself.<sup>116</sup> Moreover, as already noted, not all Annex I Parties that had made CP1 commitments made CP2 commitments.<sup>117</sup> The Parties chose not to pursue a third commitment period under the Kyoto Protocol upon the expiry of CP2 in 2020.
- 61. **Conclusion of the Paris Agreement**: In December 2015, the text of the Paris Agreement was adopted at COP21 in Paris. With 195 Parties, the Paris Agreement attracted widespread support from States. As set out below, States have largely implemented its mitigation provisions by producing successive NDCs containing measures demonstrating increased ambition on the mitigation of GHG emissions.

<sup>&</sup>lt;sup>111</sup> UNFCCC, Decision 1/CP.17 (11 December 2011) UN Doc FCCC/CP/2011/9/Add.1 (UN Dossier No. 148), paras. 2 and 4.

<sup>&</sup>lt;sup>112</sup> UNFCCC, Decision 1/CP.17 (11 December 2011) UN Doc FCCC/CP/2011/9/Add.1 (UN Dossier No. 148), para. 6.

<sup>&</sup>lt;sup>113</sup> UNFCCC, Decision 1/CP.17 (11 December 2011) UN Doc FCCC/CP/2011/9/Add.1 (UN Dossier No. 148), para. 7 (emphasis added).

<sup>&</sup>lt;sup>114</sup> The Doha Amendment (UN Dossier No. 14) was adopted on 8 December 2012, see: UNFCCC, Decision 1/CMP.8 (8 December 2012) UN Doc FCCC/KP/CMP/2012/13/Add.1.

<sup>&</sup>lt;sup>115</sup> See Art. 3(1)bis and Annex B.

<sup>&</sup>lt;sup>116</sup> Art. 2 of the Doha Amendment provided it would enter into force in accordance with Arts. 20 and 21 of the Kyoto Protocol, which require deposit of an instrument of acceptance by at least three quarters of the Parties to the Kyoto Protocol.

<sup>&</sup>lt;sup>117</sup> Canada, Japan, New Zealand and the Russian Federation did not.

- 62. **Temperature goal**: For the first time, a temperature goal was established in the Climate Change Treaties, in Article 2(1)(a) of the Paris Agreement. This identifies the goal of "[h]olding the increase in the global average temperature to well below 2°C above preindustrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change".<sup>118</sup>
- 63. All Parties to the Paris Agreement reaffirmed the Article 2 temperature goal at COP26 in 2021 in the 'Glasgow Climate Pact',<sup>119</sup> but also recognised that "the impacts of climate change will be much lower at the temperature increase of 1.5 °C compared with 2 °C" and "resolve[d] to pursue efforts to limit the temperature increase to 1.5 °C".<sup>120</sup> Parties were requested "to revisit and strengthen the 2030 targets in their nationally determined contributions as necessary to align with the Paris Agreement temperature goal by the end of 2022, taking into account different national circumstances".<sup>121</sup> This was reiterated at COP27 in paragraph 23 of Decision 1/CMA.4 and at COP28 in paragraph 37 of Decision -/CMA.5.<sup>122</sup>
- 64. **NDCs**: The central mechanism in the Paris Agreement to achieve the temperature goal is the "*nationally determined contribution*" or 'NDC' mechanism. NDCs are the essential way in which the Parties are collectively to achieve this particular purpose of the Paris Agreement. NDCs provide information on a Party's target and specify policies and measures directed at reducing national emissions and adapting to climate change

<sup>&</sup>lt;sup>118</sup> Paris Agreement (UN Dossier No. 16), Art. 2 builds on COP and CMP decisions dating back to 2010.

<sup>&</sup>lt;sup>119</sup> UNFCCC, Decision 1/CP.26 (13 November 2021) UN Doc FCCC/CP/2021/12/Add.1 (UN Dossier No. 163), para. 15 and UNFCCC, Decision 1/CMA.3 (13 November 2021) UN Doc FCCC/PA/CMA/2021/10/Add.1 (UN Dossier No. 173), para. 20

<sup>&</sup>lt;sup>120</sup> UNFCCC, Decision 1/CP.26 (13 November 2021) UN Doc FCCC/CP/2021/12/Add.1 (UN Dossier No. 163), para. 16 and UNFCCC, Decision 1/CMA.3 (13 November 2021) UN Doc FCCC/PA/CMA/2021/10/Add.1 (UN Dossier No. 173), para. 21.

<sup>&</sup>lt;sup>121</sup> UNFCCC, Decision 1/CMA.3 (13 November 2021) UN Doc FCCC/CP/2021/12/Add.1 (UN Dossier No. 173), para. 29.

<sup>&</sup>lt;sup>122</sup> UNFCCC, Decision 1/CMA.4 (20 November 2022) UN Doc FCCC/PA/CMA/2022/10/Add.1 (UN Dossier No. 174); Decision -/CMA.5 is attributed to CMA agenda item 4 (Outcome of the first global stocktake) on the UNFCCC website (https://unfccc.int/cop28/outcomes).

impacts. They also contain information concerning a Party's need for or provision of finance, technology and capacity-building as relevant to the Party's proposed actions.<sup>123</sup>

65. According to Article 3:

"As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in Article 2. The efforts of all Parties will represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of this Agreement."

- 66. Article 4 is the core mitigation provision. As foreshadowed above, this provision applies to all Parties, in contrast to the Annex structure in the UNFCCC and Kyoto Protocol. This change was critical to securing States' agreement to the Paris Agreement, as well as to establishing the international cooperation necessary to address climate change.<sup>124</sup>
- 67. Article 4 runs to 19 paragraphs. The key elements are found in the first three, which refer to (i) the Parties' aim to "*undertake rapid reductions*" of GHG emissions, (ii) the two principal means of achieving such reductions, i.e., reducing anthropogenic GHG emissions by their source and removing them by carbon sinks and (iii) the Parties' procedural obligation to prepare, communicate and maintain NDCs and to pursue related domestic mitigation measures. Article 4(1)-(3) provides as follows:

"1. In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.

2. Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue

<sup>&</sup>lt;sup>123</sup> UNFCCC, '2023 NDC Synthesis Report' < https://unfccc.int/ndc-synthesis-report-2023>.

<sup>&</sup>lt;sup>124</sup> Bodansky et al observe that "Notwithstanding long-standing and seemingly intractable differences, parties harnessed the political will necessary to arrive at an agreement that is long-term, rules-based, and applicable to all": Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, *International Climate Change Law* (OUP 2017), p. 249.

domestic mitigation measures, with the aim of achieving the objectives of such contributions.

3. Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."

- 68. Mitigation-related measures are also contained in Article 5, which contains additional provisions concerning GHG removals by sinks. The Parties agree that they "*should take action to conserve and enhance, as appropriate, sinks and reservoirs of greenhouse gases*" in accordance with Article 4(1)(d) of the UNFCCC. They are also "*encouraged to take action to implement and support … the existing framework*" concerning reducing emissions from deforestation and forest degradation.<sup>125</sup>
- 69. Article 4 also sets out the Parties' obligations as regards the preparation, submission and publication of NDCs. In summary:
  - 69.1. NDCs are to be communicated every five years.<sup>126</sup>
  - 69.2. Parties are encouraged to communicate their five-yearly NDCs on a common timeframe.<sup>127</sup>
  - 69.3. NDCs must be prepared in a standardised way to facilitate clarity, transparency and understanding, and to enable meaningful comparison.<sup>128</sup>

<sup>&</sup>lt;sup>125</sup> The existing framework is set out in related guidance and decisions agreed under the UNFCCC, in the "REDD+", the Warsaw Framework and Cancun Safeguards. These are contained in the Decision booklet REDD+ produced by the Secretariat: see UNFCCC Secretariat, 'Key Decisions Relevant for Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (REDD+)' (February 2016) <a href="https://unfccc.int/files/land\_use\_and\_climate\_change/redd/application/pdf/compilation\_redd\_decision\_booklet\_v1.2.pdf">https://unfccc.int/files/land\_use\_and\_climate\_change/redd/application/pdf/compilation\_redd\_decision\_booklet\_v1.2.pdf</a>>.

<sup>&</sup>lt;sup>126</sup> Paris Agreement (UN Dossier No. 16), Art. 4(9).

<sup>&</sup>lt;sup>127</sup> Paris Agreement (UN Dossier No. 16), Art. 4(10) required the CMA to consider common timeframes for NDCs. Decision 6/CMA.3 "*Encourages Parties to communicate in 2025 a nationally determined contribution with an end date of 2035, in 2030 a nationally determined contribution with an end date of 2040, and so forth every five years thereafter*": UNFCCC, Decision 6/CMA.3 (13 November 2021) UN Doc FCCC/PA/CMA/2021/10/Add.3, para. 2.

<sup>&</sup>lt;sup>128</sup> Paris Agreement (UN Dossier No. 16), Art. 4(8).

- 69.4. The Paris Agreement has introduced an enhanced and robust transparency system. To facilitate transparency, NDCs are held on a public register available online and maintained by the Secretariat.<sup>129</sup>
- 70. Detailed requirements relating to the provision of information in NDCs (see Article 4(8)) and relating to the accounting for NDCs (see Article 4(13)) is set out in Decision 4.CMA/1.<sup>130</sup> Specifically, Parties are required to:
  - 70.1. provide the detailed information specified in Annex I to Decision 4.CMA/1;<sup>131</sup>
  - 70.2. when meeting their obligation under Article 4(13) to account for their NDCs, apply the guidance in Annex II to Decision 4.CMA/1 "[i]n accounting for anthropogenic emissions and removals [of GHGs] corresponding to their [NDCs]";<sup>132</sup>
  - 70.3. avoid double counting of GHG emissions and removals when preparing NDCs;<sup>133</sup> and
  - 70.4. account for their NDCs and progress towards NDCs in their biennial transparency reports, against which progress made will be tracked by the Parties.<sup>134</sup>
- 71. Enhanced transparency framework: The NDC process is complemented by the enhanced transparency framework established by Article 13 of the Paris Agreement and finalised at COP26, along with the Modalities, Procedures and Guidelines ('MPGs') for that framework agreed in 2018 at COP24. Article 13(7) of the Paris Agreement

<sup>&</sup>lt;sup>129</sup> In accordance with Paris Agreement (**UN Dossier No. 16**), Art. 4(12) and Decision 5/CMA.1: UNFCCC, Decision 5/CMA.1 (15 December 2018) UN Doc FCCC/PA/CMA/2018/3/Add.1 (in **UN Dossier No. 170**). See also UN Climate Change, 'NDC Registry' <a href="https://unfccc.int/NDCREG">https://unfccc.int/NDCREG</a>>.

<sup>&</sup>lt;sup>130</sup> UNFCCC, Decision 4/CMA.1 (15 December 2018) UN Doc FCCC/PA/CMA/2018/3/Add.1 (in UN Dossier No. 170).

<sup>&</sup>lt;sup>131</sup> UNFCCC, Decision 4/CMA.1 (15 December 2018) UN Doc FCCC/PA/CMA/2018/3/Add.1 (in UN Dossier No. 170), para. 7.

<sup>&</sup>lt;sup>132</sup> UNFCCC, Decision 4/CMA.1 (15 December 2018) UN Doc FCCC/PA/CMA/2018/3/Add.1 (in UN Dossier No. 170), para. 13.

<sup>&</sup>lt;sup>133</sup> UNFCCC, Decision 4/CMA.1 (15 December 2018) UN Doc FCCC/PA/CMA/2018/3/Add.1 (in UN Dossier No. 170), para. 15.

<sup>&</sup>lt;sup>134</sup> UNFCCC, Decision 4/CMA.1 (15 December 2018) UN Doc FCCC/PA/CMA/2018/3/Add.1 (in UN Dossier No. 170), para. 17.

requires each Party to regularly provide a national inventory report of anthropogenic GHG emissions by sources and removals by sinks and the "*information necessary to track progress made in implementing and achieving its [NDC] under Article 4*". That information must undergo a technical expert review.<sup>135</sup> The practical requirements of the framework and its reporting requirements are explained in more detail below.<sup>136</sup>

## 3) <u>Provisions facilitating mitigation</u>

- 72. **Financial resources**: Parties' financial commitments in the financial resources provisions support the implementation of the mitigation provisions of the Paris Agreement. In this way, these provisions form part of "*the obligations under international law to ensure the protection of the climate system … from anthropogenic emissions of [GHGs]*", or are at least ancillary to them. The financial aspects of the Paris Agreement are equally relevant to Question B.<sup>137</sup> Given their relevance to both Questions A and B, the financial resources provisions are addressed once, in Chapter IV below.
- 73. **Carbon markets**: Another mechanism within the UN climate change regime to facilitate the implementation of Parties' mitigation commitments are "*carbon markets*".<sup>138</sup>
- 74. The term "*carbon markets*" refers to the generation and trade in units (also referred to as credits) representing GHG emissions savings. Because GHG emissions have different global warming potentials, the emissions savings are standardised so that each unit traded represents a tonne of carbon dioxide. In overview, carbon markets can allow mitigation to be achieved more cost-effectively and generate social and environmental

<sup>&</sup>lt;sup>135</sup> As required by Paris Agreement (UN Dossier No. 16), Art. 13(11)-(12). The MPGs for the transparency framework for action and support referred to in Art. 13 of the Paris Agreement are contained in Decision 18/CMA.1: UNFCCC, Decision 18/CMA.1 (15 December 2018) UN Doc FCCC/PA/CMA/2018/3/Add.2 (in UN Dossier No. 171). Technical experts are nominated to the UNFCCC Roster of Experts by Parties and, as appropriate, intergovernmental organisations and are to complete the training programme established under the decision. Each report is assigned to one expert review team.

<sup>&</sup>lt;sup>136</sup> See para. 81 below.

<sup>&</sup>lt;sup>137</sup> See paras 139.1 and 154-161 below.

 $<sup>^{138}</sup>$  The term comes from the fact that CO<sub>2</sub> is the predominant GHG, and other GHGs are measured in units called CO<sub>2</sub> equivalents (UN-REDD Programme, 'Carbon Market' < https://www.un-redd.org/glossary/carbon-market>).

benefits.<sup>139</sup> Where resulting cost savings are reinvested into climate action, they can also facilitate Parties' higher ambition.<sup>140</sup>

- 75. Article 12 of the Kyoto Protocol introduced the Clean Development Mechanism ('CDM'). This mechanism allowed Parties not included in Annex I to sell their emission reductions to Annex I Parties to assist those Parties in meeting their commitments under Article 3 of the Protocol. Together with Articles 6 and 17 of the Protocol, the CDM in Article 12 formed the basis for the emissions trading market mechanisms introduced by the Kyoto Protocol into the UN climate change regime.
- 76. The CDM has been the main UN carbon market to date, but Article 6 of the Paris Agreement contains new provisions on carbon markets to support mitigation and adaptation actions. The new global carbon crediting mechanism established under Article 6(4) of the Paris Agreement will replace the CDM. Participating in Article 6 is voluntary, but if a Party chooses to participate, it must adhere to the rules and guidance established by decisions of the COP/CMP/CMA.

### 4) <u>Implementation of mitigation commitments</u>

#### Achievements in reducing GHG emissions under the Kyoto Protocol and Doha Amendment

77. The Kyoto Protocol was successful in achieving reductions of GHG emissions. The total emissions of the Annex I Kyoto Protocol Parties in 2012, after the end of CP1, were more than 22.5% below their base-year levels,<sup>141</sup> according to figures published

<sup>&</sup>lt;sup>139</sup> Daniel Nachtigall and others, 'The Economic and Environmental Benefits from International Co-ordination on Carbon Pricing: Insights from Economic Modelling Studies' (OECD Environment Working Paper No 173, 2021) <https://www.oecd-ilibrary.org/environment/the-economic-and-environmental-benefits-from-international-co-ordination-on-carbon-pricing\_d4d3e59e-en>.

<sup>&</sup>lt;sup>140</sup> See generally, IETA and Center for Global Sustainability, University of Maryland, 'Modelling the Economic Benefits of Article 6' (2023) <a href="https://www.ieta.org/initiatives/modelling-the-economic-benefits-of-article-6/">https://www.ieta.org/initiatives/modelling-the-economic-benefits-of-article-6/</a>.

 $<sup>^{141}</sup>$  1990 was the base year defined under the Kyoto Protocol for CO<sub>2</sub>, CH<sub>4</sub> and N<sub>2</sub>O, and either 1990 or 1995 was the base year for HFCs, PFCs and SF<sub>6</sub>. See Kyoto Protocol (**UN Dossier No. 11**), Art. 3(7)-(8).

in the Annual Compilation and Accounting Report for Annex B Parties under the Kyoto Protocol for 2015.<sup>142</sup>

78. As to CP2 (2013-2020), Annex I Parties with commitments in Annex B of the Kyoto Protocol have conducted a 'true-up' under the expert review process in Article 8.<sup>143</sup> According to the Annual Compilation and Accounting Report for Annex B Parties under the Kyoto Protocol for 2023, total GHG emissions of Annex I Parties with commitments provided for in Annex B to the Protocol were 33.9% lower than the base-year level of 1990 and 7.9% lower than the 2019 level.<sup>144</sup>

### Implementation of the Paris Agreement mitigation commitments

- 79. Implementation of the Paris Agreement is assessed in three principal ways: (i) the NDC Synthesis Report; (ii) the enhanced transparency framework; and (iii) the Global Stocktake. The process and recent outcomes for each are summarised in turn below.
- 80. **NDC Synthesis Report**: Information within Parties' NDCs is collated by the Secretariat in an NDC Synthesis Report. That report identifies what progress is being made and what more needs to be done. It is updated annually.<sup>145</sup> As to its outcomes:
  - 80.1. 2021: The information from NDCs was first synthesised and published by the Secretariat in 2021.<sup>146</sup> Based on the 2021 NDC Synthesis Report, the Glasgow Climate Pact (i) "[e]mphasize[d] the urgent need for Parties to increase their

<sup>&</sup>lt;sup>142</sup> UNFCCC, 'Annual Compilation and Accounting Report for Annex B Parties under the Kyoto Protocol for 2015' (25 November 2015) UN Doc FCCC/KP/CMP/2015/6, para. 24. The CMP decided in December 2014 that the expert review process under Art. 8 of the Kyoto Protocol for the last year of CP1 would be completed by 10 August 2015 and the end of the true-up period for CP1 would be 18 November 2015: UNFCCC, Decision 3/CMP.10 (12 December 2014) UN Doc FCCC/KP/CMP/2014/9/Add.1.

<sup>&</sup>lt;sup>143</sup> The true-up process takes into account emission reduction units, certified emission reductions, assigned amount units and removal units transferred under Arts. 6 (carbon trading), 12 (the CDM) and 17 (emissions trading) of the Kyoto Protocol (**UN Dossier No. 11**).

<sup>&</sup>lt;sup>144</sup> UNFCCC, 'Annual Compilation and Accounting Report for Annex B Parties under the Kyoto Protocol for 2023' (19 September 2023) UN Doc FCCC/KP/CMP/2023/4, para. 20.

<sup>&</sup>lt;sup>145</sup> UNFCCC, Decision 1/CMA.3 (13 November 2021) UN Doc FCCC/PA/CMA/2021/10/Add.1 (UN Dossier No. 173), para. 30.

<sup>&</sup>lt;sup>146</sup> UNFCCC, 'Nationally Determined Contributions under the Paris Agreement: Revised Synthesis Report by the Secretariat' (25 October 2021) UN Doc FCCC/PA/CMA/2021/8/Rev.1 (UN Dossier No. 176). In the Glasgow Climate Pact, Parties noted the findings of the 2021 NDC Synthesis Report, according to which "*the aggregate greenhouse gas emission level, taking into account implementation of all submitted nationally determined contributions, is estimated to be 13.7 per cent above the 2010 level in 2030*": UNFCCC, Decision 1/CMA.3 (13 November 2021) UN Doc FCCC/PA/CMA/2021/10/Add.1 (UN Dossier No. 173), para. 25.

*efforts to collectively reduce emissions*",<sup>147</sup> (ii) decided to establish a work programme to urgently scale up mitigation ambition and implementation in this critical decade,<sup>148</sup> and (iii) "*request[ed] Parties to revisit and strengthen the 2030 targets in their nationally determined contributions as necessary to align with the Paris Agreement temperature goal by the end of 2022*".<sup>149</sup> This led to the UK revisiting its 2030 NDC. The UK has maintained its target<sup>150</sup> (i.e., to reduce all GHG emissions by at least 68% by 2030 relative to 1990 levels) and strengthened its NDC by making updates to the accompanying information to facilitate clarity, transparency and understanding, in line with international best practice and the Paris Agreement Rulebook.

80.2. **2022**: The 2022 NDC Synthesis Report published on 26 October 2022 recorded that "[*m*]ost of the Parties (74 per cent) that submitted new or updated NDCs have strengthened their commitment to reducing or limiting GHG emissions by 2025 and/or 2030, demonstrating increased ambition in addressing climate change".<sup>151</sup> In respect of projected GHG emission levels, it reported that the "Parties to the Paris Agreement are increasing the ambition of their climate action".<sup>152</sup> However, the 2022 Report also observed that, despite some progress, the information implied an urgent need for either a significant increase in the level of ambition of NDCs between 2022-2030, a significant overachievement of the latest NDCs, or a combination of both, in order to attain the cost-effective emission levels suggested in many of the scenarios considered by the IPCC for keeping warming likely below 2°C or limiting it to 1.5°C.<sup>153</sup>

<sup>&</sup>lt;sup>147</sup> UNFCCC, Decision 1/CMA.3 (13 November 2021) UN Doc FCCC/PA/CMA/2021/10/Add.1 (UN Dossier No. 173), para. 26.

<sup>&</sup>lt;sup>148</sup> UNFCCC, Decision 1/CMA.3 (13 November 2021) UN Doc FCCC/PA/CMA/2021/10/Add.1 (UN Dossier No. 173), para. 27.

<sup>&</sup>lt;sup>149</sup> UNFCCC, Decision 1/CMA.3 (13 November 2021) UN Doc FCCC/PA/CMA/2021/10/Add.1 (UN Dossier No. 173), para. 29.

<sup>&</sup>lt;sup>150</sup> See para. 4.4 above.

<sup>&</sup>lt;sup>151</sup> UNFCCC, 'Nationally Determined Contributions under the Paris Agreement: Synthesis Report by the Secretariat' (26 October 2022) UN Doc FCCC/PA/CMA/2022/4, para. 4(e).

<sup>&</sup>lt;sup>152</sup> UNFCCC, 'Nationally Determined Contributions under the Paris Agreement: Synthesis Report by the Secretariat' (26 October 2022) UN Doc FCCC/PA/CMA/2022/4, para. 13.

<sup>&</sup>lt;sup>153</sup> UNFCCC, 'Nationally Determined Contributions under the Paris Agreement: Synthesis Report by the Secretariat' (26 October 2022) UN Doc FCCC/PA/CMA/2022/4, para. 19.

- 80.3. 2023: The 2023 NDC Synthesis Report was published on 14 November 2023.<sup>154</sup>
   According to the 2023 Report:
  - 80.3.1. NDCs have been submitted by or in respect of <u>all</u> Parties to the Paris Agreement.<sup>155</sup>
  - 80.3.2. <u>All</u> Parties provided information on mitigation targets or mitigation cobenefits resulting from adaptation actions and/or economic diversification plans.<sup>156</sup>
  - 80.3.3. Parties' implementation of their NDCs has resulted in lower projected 2030 emissions compared with the previous reports, due to an increase in aggregate NDC ambition level and updated emission data.<sup>157</sup>
  - 80.3.4. The projected total global GHG emission level (assuming full implementation of all latest NDCs) implies an even stronger chance of global emissions peaking before 2030 than estimated in 2022.<sup>158</sup>
- 81. Enhanced Transparency Framework: As set out above, the enhanced transparency framework was established by Article 13 of the Paris Agreement. The framework provides a standardised set of reporting metrics for all Parties, guiding them on how to report their GHG emissions, progress in meeting their NDC target, on actions taken to address climate change impacts and adaptation and on support (related to finance, technology transfer and capacity-building) provided or received. This information is captured in Parties' biennial transparency reports, which in turn will inform the Global Stocktakes.

<sup>&</sup>lt;sup>154</sup> UNFCCC, 'Nationally Determined Contributions under the Paris Agreement: Synthesis Report by the Secretariat' (14 November 2023) UN Doc FCCC/PA/CMA/2023/12.

<sup>&</sup>lt;sup>155</sup> According to the 2023 NDC Synthesis Report, there are 168 available NDCs, representing 195 Parties to the Paris Agreement, including 153 new or updated NDCs communicated by 180 Parties, recorded in the NDC registry as at 25 September 2023. A total of 20 Parties have communicated new or updated NDCs since 22 September 2022 (see UN Climate Change, '2023 NDC Synthesis Report' <a href="https://unfccc.int/ndc-synthesis-report-2023">https://unfccc.int/ndc-synthesis-report-2023</a>).

<sup>&</sup>lt;sup>156</sup> UNFCCC, 'Nationally Determined Contributions under the Paris Agreement: Synthesis Report by the Secretariat' (14 November 2023) UN Doc FCCC/PA/CMA/2023/12, para. 4.

<sup>&</sup>lt;sup>157</sup> UNFCCC, 'Nationally Determined Contributions under the Paris Agreement: Synthesis Report by the Secretariat' (14 November 2023) UN Doc FCCC/PA/CMA/2023/12, para. 9.

<sup>&</sup>lt;sup>158</sup> UNFCCC, 'Nationally Determined Contributions under the Paris Agreement: Synthesis Report by the Secretariat' (14 November 2023) UN Doc FCCC/PA/CMA/2023/12, para. 10.

82. Global Stocktake: Article 14(1) of the Paris Agreement requires the Parties periodically to take stock of its implementation, so as to "assess the collective progress towards achieving the purpose of this Agreement and its long-term goals." Article 4(9) stipulates that Parties shall "be informed by the outcomes of the global stocktake referred to in Article 14". The conclusions of the first Global Stocktake<sup>159</sup> at COP28 are intended to inform and enhance Parties' implementation of mitigation commitments. Those conclusions focus on revisiting and strengthening NDCs and increasing ambition in their subsequent iterations. They invited Parties to take steps including: (i) strengthening their 2030 targets in their NDCs by the end of 2024 to align with the Paris Agreement temperature goal if they have not already done so; (ii) coming forward with ambitious targets covering all GHGs, sectors and categories and aligned with limiting global warming to 1.5°C in line with best available science and according to capabilities; (iii) aligning their next NDCs with long-term low GHG emission development strategies; and (iv) providing information on how preparation of their NDCs has been informed by the outcomes of the Global Stocktake.<sup>160</sup>

# **D.** Complementary Treaties

83. As explained above, anthropogenic GHGs and their precursors are also addressed in sector-specific and pollutant-specific regimes. The UK considers those regimes also to contain obligations to protect the climate system from anthropogenic emissions of GHGs. They are, accordingly, relevant to answering Question A. In the sections that follow, the UK identifies the key relevant obligations imposed on States under each of the CORSIA initiative (sub-section 1), Annex VI of MARPOL (sub-section 2), the Montreal Protocol (sub-section 3) and the Gothenburg Protocol (sub-section 4). It then explains their relationship with the Climate Change Treaties (sub-section 5).

# 1) <u>The CORSIA initiative</u>

84. ICAO is a specialised agency of the UN, in which the UK has played a key leadership role. ICAO was established in 1944 upon the signing of the Chicago Convention. It

<sup>&</sup>lt;sup>159</sup> Decision -/CMA.5. For an advance version of this decision, see UN Climate Change, 'Outcomes of the Dubai Climate Change Conference – Advance Unedited Versions (AUVs)' <a href="https://unfccc.int/cop28/outcomes>">https://unfccc.int/cop28/outcomes</a>

<sup>&</sup>lt;sup>160</sup> Decision -/CMA.5 ('Outcome of the First Global Stocktake'), paras. 37, 39, 40 and 165.

assists the 193 Parties to the Chicago Convention to adopt standards, practices and policies for international civilian flight. This includes the development of policies relating to the reduction of  $CO_2$  emissions.

- 85. In 2010, the ICAO Assembly adopted global emissions goals of improving fuel efficiency by 2% annually and achieving carbon-neutral growth from 2020.<sup>161</sup> It also requested the ICAO Council to explore the feasibility of a framework for market-based measures in international aviation for consideration at the 38<sup>th</sup> Assembly in 2013.<sup>162</sup> This led to the ICAO Assembly itself resolving to develop a global scheme of market-based measures at the 38<sup>th</sup> Assembly<sup>163</sup> and subsequently to the ICAO Assembly implementing such a scheme in the form of CORSIA at the 39<sup>th</sup> Assembly in 2016.<sup>164</sup>
- 86. ICAO describes CORSIA as "the first global market-based measure for any sector [which] represents a cooperative approach that moves away from a 'patchwork' of national or regional regulatory initiatives".<sup>165</sup> In broad outline, CORSIA establishes a CO<sub>2</sub> emissions scheme with two principal elements:
  - 86.1. Offsetting: Qualifying aeroplane operators<sup>166</sup> are obliged to offset any growth in CO<sub>2</sub> emissions above the CORSIA baseline<sup>167</sup> from flights between participating States. This is done by purchasing and cancelling "CORSIA Eligible Emissions Units" in the carbon market in a quantity equal to the amount of emissions that an aeroplane operator is obliged to offset (known as "total final

<sup>&</sup>lt;sup>161</sup> ICAO Assembly Resolution A37-19, in ICAO, 'Assembly Resolutions in Force (as of 8 October 2010)' (2011) ICAO Doc 9958, p. 70, paras. 4 and 6.

<sup>&</sup>lt;sup>162</sup> ICAO Assembly Resolution A37-19, in ICAO, 'Assembly Resolutions in Force (as of 8 October 2010)' (2011) ICAO Doc 9958, p. 71, para. 13.

<sup>&</sup>lt;sup>163</sup> ICAO Assembly Resolution A38-18, in ICAO, 'Assembly Resolutions in Force (as of 4 October 2013)' (2014) ICAO Doc 10022, p. 72, para. 18.

<sup>&</sup>lt;sup>164</sup> ICAO Assembly Resolution A39-3, in ICAO, 'Assembly Resolutions in Force (as of 6 October 2016)' (2017) ICAO Doc 10075, p. 81, para. 5.

<sup>&</sup>lt;sup>165</sup> ICAO, 'Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA)' <https://icao.int/environmental-protection/CORSIA/Pages/default.aspx>.

<sup>&</sup>lt;sup>166</sup> CORSIA's offsetting requirements apply to an aeroplane operator with international flights between States defined in ICAO's 'CORSIA States for Chapter 3 State Pairs': Annex 16 to the Chicago Convention, Volume IV, Part II, Chapter 3, para. 3.1.1.

<sup>&</sup>lt;sup>167</sup> The baseline is presently set at the volume of 2019 CO<sub>2</sub> emissions from international aviation covered by CORSIA and drops to 85% of 2019 emissions in 2024: ICAO Assembly Resolution A41-22, in ICAO, 'Assembly Resolutions in Force (as of 7 October 2022)' (2022) ICAO Doc 10184, p. 93, para. 11(b).

offsetting requirements for a given compliance period").<sup>168</sup> The State to which an aeroplane operator is attributed<sup>169</sup> shall calculate offsetting requirements for a particular year based on specific data (including factors reflecting the growth of CO<sub>2</sub> emissions in the aviation sector and emissions reductions from the use of CORSIA-eligible fuels), which is then fed into the calculation of the requirements for the whole compliance period.<sup>170</sup> This offsetting regime is intended to operate in parallel with other ICAO initiatives to reduce CO<sub>2</sub> emissions.

- 86.2. **Monitoring and reporting**: Qualifying aeroplane operators<sup>171</sup> are also required to monitor fuel use on international flights (subject to exemption thresholds) and calculate CO<sub>2</sub> emissions, in accordance with a State-approved "*Emissions Monitoring Plan*".<sup>172</sup> The necessary data is then reported to the State authority, which in turn reports the data to ICAO,<sup>173</sup> for purposes including calculating the aviation sector growth factor referenced above. The aeroplane operator's monitoring and reporting processes are subject to verification by an independent accredited body to ensure accuracy.<sup>174</sup> These elements of the scheme are known as the "*monitoring, reporting and verification (MRV)*" regime.<sup>175</sup>
- 87. CORSIA is presently a voluntary scheme.<sup>176</sup> The UK, along with 125 other Parties to the Chicago Convention, are presently participating in CORSIA (as of 1 January

<sup>&</sup>lt;sup>168</sup> Annex 16 to the Chicago Convention, Volume IV, Part II, Chapter 4, para. 4.2.1; see also para. 3.4 for formulae for total final offsetting requirements for a given compliance period.

<sup>&</sup>lt;sup>169</sup> For details of the attribution process, see Annex 16 to the Chicago Convention, Volume IV, Part II, Chapter 1, paras. 1.1-1.2 and Attachment A.

<sup>&</sup>lt;sup>170</sup> Annex 16 to the Chicago Convention, Volume IV, Part II, Chapter 3, paras. 3.1-3.4; ICAO Assembly Resolution A41-22, in ICAO, 'Assembly Resolutions in Force (as of 7 October 2022)' (2022) ICAO Doc 10184, pp. 93-94, para. 11.

<sup>&</sup>lt;sup>171</sup> CORSIA applies to any aeroplane operator that produces annual CO<sub>2</sub> emissions greater than 10,000 tonnes from the use of an aeroplane, or aeroplanes, with a maximum certificated take-off mass greater than 5,700 kg conducting international flights, on or after 1 January 2019: Annex 16 to the Chicago Convention, Volume IV, Part II, Chapter 2, para. 2.1.1.

<sup>&</sup>lt;sup>172</sup> Annex 16 to the Chicago Convention, Volume IV, Part II, Chapter 2, para. 2.2.2 and Appendix 4.

<sup>&</sup>lt;sup>173</sup> Annex 16 to the Chicago Convention, Volume IV, Part II, Chapter 2, paras. 2.3.2.2-2.3.2.3.

<sup>&</sup>lt;sup>174</sup> Annex 16 to the Chicago Convention, Volume IV, Part II, Chapter 2, para. 2.4.

<sup>&</sup>lt;sup>175</sup> Annex 16 to the Chicago Convention, Volume IV, Part II, Chapter 2.

<sup>&</sup>lt;sup>176</sup> CORSIA's 'pilot phase' (2021-2023) has concluded. It is now in its first phase (which remains voluntary) which runs until 2026. The second phase (where participation is voluntary and/or determined based on criteria using the Parties' Revenue Tonne Kilometres ('**RTKs**') in 2018) is from 2027-2035. See further fn. 178 below.

2024).<sup>177</sup> From 2027, the CORSIA scheme will apply to all 193 Member States of ICAO, subject to the application of two categories of exemptions based on aviation-related and socio-economic criteria.<sup>178</sup>

- 88. CORSIA is implemented by a package of standards and recommended practices ('the SARPs'), which are principally established in Annex 16, Volume IV to the Chicago Convention.<sup>179</sup> ICAO adopted that Annex on 27 June 2018 and subsequently amended it on 20 March 2023.<sup>180</sup> It became applicable on 1 January 2019 to the first group of volunteer States, including the UK.
- 89. In general terms, the Parties to the Chicago Convention are obliged to comply with the mandatory aspects of the SARPs, i.e., the "*standards*", as opposed to the "*recommendations*". Those standards are set out in the Annexes to the Convention. The Parties are also obliged to notify ICAO of any non-compliance with those standards, or any inability to bring their domestic laws into full accord with the SARPs. The relevant obligations are set out in Articles 37 and 38 of the Chicago Convention in the following material terms:

Article 37

"Each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation. ..."

<sup>&</sup>lt;sup>177</sup> ICAO, 'CORSIA States for Chapter 3 State Pairs' (July 2022) <a href="https://icao.int/environmental-protection/CORSIA/Documents/CORSIA%20States%20for%20Chapter%203%20State%20Pairs\_3Ed\_web.pdf">https://icao.int/environmental-protection/CORSIA%20States%20for%20Chapter%203%20State%20Pairs\_3Ed\_web.pdf</a>; ICAO, 'Who Participates in CORSIA?' <a href="https://icao.int/environmental-protection/CORSIA/Pages/state-pairs.aspx">https://icao.int/environmental-protection/CORSIA%20States%20for%20Chapter%203%20State%20Pairs\_3Ed\_web.pdf</a>; ICAO, 'Who Participates in CORSIA?' <a href="https://icao.int/environmental-protection/CORSIA/Pages/state-pairs.aspx">https://icao.int/environmental-protection/CORSIA/Pages/state-pairs.aspx</a>).

<sup>&</sup>lt;sup>178</sup> ICAO Assembly Resolution A41-22, in ICAO, 'Assembly Resolutions in Force (as of 7 October 2022)' (2022) ICAO Doc 10184, p. 92, para. 9(e). For <u>aviation-related criteria</u>, there are two thresholds: (i) States whose individual share of international aviation activities in RTKs in year 2018 is below 0.5% of total RTKs; and (ii) States that are not part of the list of States that account for 90% of total RTKs when sorted from the highest to the lowest amount of individual RTKs. For <u>socio-economic criteria</u>, States that are defined as LDCs, SIDS and landlocked developing countries, regardless of their level of international aviation RTK share, are exempted from offsetting requirements in the second phase of CORSIA. Nevertheless, these States can voluntarily participate.

<sup>&</sup>lt;sup>179</sup> See also the Environmental Technical Manual (3rd edn, 2023) ICAO Doc 9501, Volume IV, which provides the guidance on the process of implementing CORSIA and the five "*CORSIA Implementation Elements*", which are reflected in 14 ICAO documents approved by the ICAO Council and referenced in Annex 16.

<sup>&</sup>lt;sup>180</sup> Annex 16 to the Chicago Convention, Volume IV, Amendment No. 1.

#### Article 38

"Any State which finds it impracticable to comply in all respects with any such international standards or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the international standard. In the case of amendments to international standards, any State which does not make the appropriate amendments to its own regulations or practices shall give notice to the Council within sixty days of the adoption of the amendment to the international standard, or indicate the action which it proposes to take. In any such case, the Council shall make immediate notification to all other States of the difference which exists between one or more features of an international standard and the corresponding national practice of that State."

- 90. Accordingly, those States that have volunteered to participate in CORSIA (or that will be subject to its mandatory application from 2027 onwards) must adhere to the standards set out in Annex 16, Volume IV.<sup>181</sup>
- 91. The principal obligations under Annex 16, Volume IV are as follows:
  - 91.1. **First**, there are certain "*administration*" requirements set out in Chapter 1 of Annex 16 that are imposed both on States<sup>182</sup> and aeroplane operators. Most notably, a State is obliged to approve the aeroplane operator's compliance based on satisfactory evidence that the operator meets the relevant standards in Volume IV.<sup>183</sup> It must also submit to ICAO a list of verification bodies accredited in the State<sup>184</sup> and a list of aeroplane operators attributed to it.<sup>185</sup>
  - 91.2. Secondly, under Chapter 2 of Annex 16, the State has certain monitoring, reporting and verification ('MRV') obligations to support the principal

<sup>&</sup>lt;sup>181</sup> For the avoidance of doubt, this does not include those provisions of Annex 16, Volume IV that are specifically described as recommendations.

<sup>&</sup>lt;sup>182</sup> Annex 16 to the Chicago Convention, Volume IV, Part II, Chapter 1, paras. 1.2.2, 1.2.7, 1.3.1, 1.3.2, 1.3.3, 1.3.5, 1.3.6, 1.3.7 and 1.4.3.

<sup>&</sup>lt;sup>183</sup> Annex 16 to the Chicago Convention, Volume IV, Part II, Chapter 1, para. 1.3.1.

<sup>&</sup>lt;sup>184</sup> Annex 16 to the Chicago Convention, Volume IV, Part II, Chapter 1, para. 1.3.7.

<sup>&</sup>lt;sup>185</sup> Annex 16 to the Chicago Convention, Volume IV, Part II, Chapter 1, para. 1.2.7.

obligations of the aeroplane operator. Its key obligations include: (i) considering the aeroplane operator's Emissions Monitoring Plan<sup>186</sup> and the verified Emissions Report<sup>187</sup> for approval; (ii) calculating and informing aeroplane operators attributed to it of their average total annual CO<sub>2</sub> emissions during 2019 and 2020;<sup>188</sup> (iii) submitting a report to ICAO setting out the required data;<sup>189</sup> and (iv) in cases where the annual Emissions Report is not provided to the State, engaging with the aeroplane operator to obtain the necessary information, and if necessary, estimating the aeroplane operator's annual emissions.<sup>190</sup>

- 91.3. **Thirdly**, a State is obliged to calculate the aeroplane operator's final CO<sub>2</sub> offsetting requirements based on the data reported under the MRV regime and in accordance with the formula in Chapter 3.<sup>191</sup> It then must inform each aeroplane operator both of its annual offsetting requirements and its total final offsetting requirements for a given compliance period according to a specific timeline.<sup>192</sup>
- 91.4. **Fourthly**, the State has reporting and verification obligations in respect of aeroplane operators' use of CORSIA Eligible Emissions Units. Once the aeroplane operator has reported its cancellation of such units to the State via a verified Emissions Unit Cancellation Report, the State must report it to ICAO in accordance with a specific timeline<sup>193</sup> and perform an "*order of magnitude check*" on that Report.<sup>194</sup>

<sup>&</sup>lt;sup>186</sup> Annex 16 to the Chicago Convention, Volume IV, Part II, Chapter 2, para. 2.2.2.1 and Appendix 4.

<sup>&</sup>lt;sup>187</sup> Annex 16 to the Chicago Convention, Volume IV, Part II, Chapter 2, para. 2.3.1.1 and Appendix 1.

<sup>&</sup>lt;sup>188</sup> Annex 16 to the Chicago Convention, Volume IV, Part II, Chapter 2, para. 2.3.2.1 and Appendix 1.

<sup>&</sup>lt;sup>189</sup> Annex 16 to the Chicago Convention, Volume IV, Part II, Chapter 2, para. 2.3.2.2, Appendices 1 and 5.

<sup>&</sup>lt;sup>190</sup> Annex 16 to the Chicago Convention, Volume IV, Part II, Chapter 2, para. 2.5.2.1.

<sup>&</sup>lt;sup>191</sup> Annex 16 to the Chicago Convention, Volume IV, Part II, Chapter 3, paras. 3.1.4, 3.2.1-3.2.4 and 3.4.1.

<sup>&</sup>lt;sup>192</sup> Annex 16 to the Chicago Convention, Volume IV, Part II, Chapter 3, paras. 3.2.6, 3.4.5 and Appendix 1.

<sup>&</sup>lt;sup>193</sup> Annex 16 to the Chicago Convention, Volume IV, Part II, Chapter 4, para. 4.3.2 and Appendix 1.

<sup>&</sup>lt;sup>194</sup> Annex 16 to the Chicago Convention, Volume IV, Part II, Chapter 4, para. 4.4.1.6 and Appendix 1.

### 2) <u>Annex VI of MARPOL</u>

92. The IMO was established by treaty in 1948 and is headquartered in London.<sup>195</sup> Like ICAO, it is a specialised agency of the UN and seeks to facilitate international cooperation and technical standard-setting in its area of specialism. Its purposes include the following:<sup>196</sup>

"to provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and the prevention and control of marine pollution from ships...".

- 93. One of the IMO's most important achievements was the negotiation and adoption of MARPOL in 1973. MARPOL is a significant multilateral environmental treaty that seeks to protect the marine environment from pollution from ships. It covers not only accidental and operational oil pollution but also pollution by chemicals, goods in packaged form, sewage, garbage and air pollution, with its technical requirements set out in Annexes relating to those different categories of pollution.
- 94. MARPOL was modified by a Protocol signed in 1978 in response to a number of tanker accidents in 1976–1977.<sup>197</sup> The 1978 Protocol was absorbed into MARPOL, which had not entered into force at that time. A combined instrument (often referred to as 'MARPOL 73/78' but cited herein simply as 'MARPOL') entered into force in 1983.<sup>198</sup>
- 95. MARPOL has since been regularly modified, both by resolutions of the IMO's Marine Environment Protection Committee and by treaty amendment. This has included the adoption of a further Protocol in 1997, which both amended the Convention and

<sup>&</sup>lt;sup>195</sup> Convention on the International Maritime Organization (adopted 6 March 1948, entered into force 17 March 1958) 289 UNTS 3.

<sup>&</sup>lt;sup>196</sup> Convention on the International Maritime Organization, Art. 1(a) (as amended by IMO Res A.358(IX) (14 November 1975)).

<sup>&</sup>lt;sup>197</sup> Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships (adopted 17 February 1978, opened for signature 1 June 1978, entered into force on 2 October 1983) 1340 UNTS 61 (original form).

<sup>&</sup>lt;sup>198</sup> This included Annexes I and II to MARPOL, but Annexes III, IV and V entered into force at later dates (1 July 1992, 27 September 2003 and 31 December 1988 respectively).

adopted a new Annex VI on the Prevention of Air Pollution from Ships. From its entry into force on 19 May 2005, that Annex set limits on sulphur oxide ('**SOx**') and NOx emissions from ship exhausts and prohibited deliberate emissions of ozone-depleting substances ('**ODS**'). It also established designated emission control areas setting more stringent standards for SOx, NOx and particulate matter.<sup>199</sup>

- 96. In 2011, the Parties to MARPOL adopted an amendment to Annex VI to address GHG emissions from international shipping.<sup>200</sup> In doing so, the Parties adopted the first sector-based mandatory measures aimed at reducing GHG emissions, which were supplemented in 2016 by a mandatory data collection system for fuel oil consumption of ships,<sup>201</sup> and further developed and extended in 2021.<sup>202</sup> The goal of the Annex VI amendments was to "*reduce carbon intensity of international shipping*", aiming towards the targets set in the "*Initial IMO Strategy on reduction of GHG emissions from ships*".<sup>203</sup> That GHG Strategy was agreed in 2018 and revised in July 2023.<sup>204</sup> The UK played a key role in the negotiation of significantly more ambitious targets in the revised GHG Strategy. The Strategy sets out the Parties' common ambition to reach net-zero GHG emissions from international shipping close to 2050 and a commitment to ensure an uptake of alternative zero and near-zero GHG fuels by 2030.
- 97. Annex VI contains mandatory technical and operational energy efficiency measures aimed at reducing GHG emissions from ships. In general terms, these measures apply to ships (i) which are flagged to a MARPOL Party or that otherwise operate under the authority of a MARPOL Party;<sup>205</sup> (ii) which have a gross tonnage of 400 or above

<sup>&</sup>lt;sup>199</sup> In general terms, 'particulate matter' is everything in the air that is not a gas and therefore consists of a huge variety of chemical compounds and materials, some of which can be toxic. More specifically, it is defined by the IPCC as "*Atmospheric aerosol involved in air pollution issues*": see IPCC Glossary, p. 2917 ('Particulate matter'). <sup>200</sup> Resolution MEPC.203(62) (15 July 2011) IMO Doc MEPC 62/24/Add.1.

<sup>&</sup>lt;sup>201</sup> Resolution MEPC.278(70) (28 October 2016) IMO Doc MEPC 70/18/Add.1.

<sup>&</sup>lt;sup>202</sup> Resolution MEPC.328(76) (17 June 2021) IMO Doc MEPC 76/15/Add.1, Annex ('2021 Revised MARPOL Annex VI').

<sup>&</sup>lt;sup>203</sup> Resolution MEPC.328(76) (17 June 2021) IMO Doc MEPC 76/15/Add.1, preamble paras. 3-4. For the Initial IMO Strategy on Reduction of GHG Emissions from Ships, see: Resolution MEPC.304(72) (13 April 2018) IMO Doc MEPC 72/17/Add.1, referred to in 2021 Revised MARPOL Annex VI, Chapter 4, reg. 20.

<sup>&</sup>lt;sup>204</sup> Resolution MEPC.377(80) (7 July 2023) IMO Doc MEPC 80/17/Add.1. It was unanimously supported by all Member States.

<sup>&</sup>lt;sup>205</sup> MARPOL, Art. 3(1).

('**400+GT**'); and (iii) while they are carrying out international voyages.<sup>206</sup> The Parties must also apply Annex VI to the ships of non-Parties to MARPOL insofar as necessary to ensure that no more favourable treatment is given to such ships.<sup>207</sup>

- 98. In order to achieve the GHG emission goal identified in the IMO GHG Strategy,<sup>208</sup> qualifying ships are obliged to comply with two categories of efficiency measures aimed at reducing CO<sub>2</sub> emissions:
  - 98.1. Technical carbon intensity requirements (relating to ship design): These are: (i) the Energy Efficiency Design Index ('EEDI') for new ships (adopted in 2011 and applicable from 2013);<sup>209</sup> and (ii) the Energy Efficiency Existing Ship Index ('EEXI') for existing ships (adopted in 2021 and applicable from 2023).<sup>210</sup> These requirements apply to specified types of ships of 400+GT.
  - 98.2. **Operational carbon intensity requirements**: These are: (i) the Ship Energy Efficiency Management Plan ('**SEEMP**') for ships of 400+GT (adopted in 2011 and applicable from 2013,<sup>211</sup> and updated in 2021);<sup>212</sup> (ii) the requirement on ships which have a gross tonnage of 5,000 or above ('**5,000+GT**') to collect and report data on fuel consumption (adopted in 2016 and applicable from 2019);<sup>213</sup> and (iii) the requirements (for specified types of ships of 5,000+GT) to determine their carbon intensity rating and for ships rated E, or rated D for 3

<sup>&</sup>lt;sup>206</sup> 2021 Revised MARPOL Annex VI, Chapter 4, reg. 19. Cf regs. 27 ('Collection and reporting of ship fuel oil consumption data') and 28 ('Operational carbon intensity') which apply only to ships which have a gross tonnage of 5,000 or above: see further para. 98.2 below.

<sup>&</sup>lt;sup>207</sup> MARPOL, Art. 5(4).

<sup>&</sup>lt;sup>208</sup> See para. 96 above.

<sup>&</sup>lt;sup>209</sup> 2021 Revised MARPOL Annex VI, Chapter 4, regs. 22 and 24; EEDI introduced by Resolution MEPC.203(62) (15 July 2011) IMO Doc MEPC 62/24/Add.1.

<sup>&</sup>lt;sup>210</sup> 2021 Revised MARPOL Annex VI, Chapter 4, regs. 23 and 25; EEXI introduced by Resolution MEPC.328(76) (17 June 2021) IMO Doc MEPC 76/15/Add.1.

<sup>&</sup>lt;sup>211</sup> 2021 Revised MARPOL Annex VI, Chapter 4, reg. 26; SEEMP introduced by Resolution MEPC.203(62) (15 July 2011) IMO Doc MEPC 62/24/Add.1.

<sup>&</sup>lt;sup>212</sup> Amended by Resolution MEPC.328(76) (17 June 2021) IMO Doc MEPC 76/15/Add.1.

<sup>&</sup>lt;sup>213</sup> 2021 Revised MARPOL Annex VI, Chapter 4, reg. 27; introduced by Resolution MEPC.278(70) (28 October 2016) IMO Doc MEPC 70/18/Add.1.

consecutive years, to develop a corrective action plan (adopted in 2021 and applicable from 2023).<sup>214</sup>

- 99. The following obligations are specifically imposed on the Parties to MARPOL:
  - 99.1. **First**, Parties undertake to give effect to the provisions of Annex VI (like any other Annex), with the aim of preventing pollution of the marine environment.<sup>215</sup>
  - 99.2. Secondly, Parties are obliged to prohibit and apply sanctions to violations of requirements of Annex VI which are occasioned within their jurisdiction and by ships carrying their flag or otherwise operating under their authority. They are also required to cause proceedings to be taken in accordance with domestic law, or to furnish any information or evidence in its possession to the appropriate State Party.<sup>216</sup> In performing these obligations, the Parties must apply no more favourable treatment to ships that are not flagged to a MARPOL State Party.<sup>217</sup>
  - 99.3. Thirdly, Parties must cooperate in the detection of violations of Annex VI and the enforcement of its provisions, which requires the use of "*all appropriate and practicable measures of detection and environmental monitoring, adequate procedures for reporting and accumulation of evidence*".<sup>218</sup> They must also promote technical cooperation, consulting with the IMO and with the assistance of and coordination by the UNEP Executive Director.<sup>219</sup> These provisions are complemented by the specific provisions on cooperation in Annex VI. In particular:
    - 99.3.1. Regulation 11 of Annex VI sets out the Parties' obligation to cooperate in the detection of violations and in the enforcement of Annex VI.<sup>220</sup> It

<sup>&</sup>lt;sup>214</sup> 2021 Revised MARPOL Annex VI, Chapter 4, reg. 28; introduced by Resolution MEPC.328(76) (17 June 2021) IMO Doc MEPC 76/15/Add.1.

<sup>&</sup>lt;sup>215</sup> MARPOL, Art. 1(1).

<sup>&</sup>lt;sup>216</sup> MARPOL, Art. 4(1)-(2).

<sup>&</sup>lt;sup>217</sup> MARPOL, Art. 5(4).

<sup>&</sup>lt;sup>218</sup> MARPOL, Art. 6(1).

<sup>&</sup>lt;sup>219</sup> MARPOL, Art. 17.

<sup>&</sup>lt;sup>220</sup> 2021 Revised MARPOL Annex VI, Chapter 2, reg. 11(1).

specifically requires the Parties to furnish evidence (if any) that a ship has emitted substances in violation of Annex VI to the Administration, i.e., the government of the State under whose authority the ship is operating.<sup>221</sup> The State receiving such evidence then has investigative obligations.<sup>222</sup>

- 99.3.2. More generally, under Regulation 29, the Parties must "promote and provide support, as appropriate, directly or through the [IMO] to States that request technical assistance, especially developing States" and "cooperate actively with other Parties, subject to its national laws, regulations and policies, to promote the development and transfer of technology and exchange of information to States which request technical assistance, particularly developing States" to satisfy the relevant requirements of Annex VI.<sup>223</sup>
- 99.4. Fourthly, Parties shall ensure certain reporting and verification requirements under Annex VI are met.<sup>224</sup>
- 99.5. Fifthly, Parties "should ensure, by the adoption of appropriate measures" that ships undertaking voyages within the Parties' jurisdictions "are constructed and act in a manner consistent with the [GHG emission regulations in Annex VI], so far as is reasonable and practicable".<sup>225</sup>
- 3) <u>Montreal Protocol</u>
- 100. As explained above,<sup>226</sup> the Montreal Protocol was made under the framework Ozone Convention, the objective of which was to protect human health and the environment against adverse effects resulting or likely to result from modifications of the ozone

<sup>&</sup>lt;sup>221</sup> 2021 Revised MARPOL Annex VI, Chapter 2, reg. 11(3). See MARPOL, Art. 2(5) for the definition of "Administration".

<sup>&</sup>lt;sup>222</sup> 2021 Revised MARPOL Annex VI, Chapter 2, reg. 11(4).

<sup>&</sup>lt;sup>223</sup> 2021 Revised MARPOL Annex VI, Chapter 4, reg. 29(1)-(2).

<sup>&</sup>lt;sup>224</sup> 2021 Revised MARPOL Annex VI, Chapter 4, regs. 22(3), 23(1), 27(7), 27(9), 28(6), 28(8) and 31. See also MARPOL, Art. 11.

<sup>&</sup>lt;sup>225</sup> 2021 Revised MARPOL Annex VI, Chapter 4, reg. 19(2)(1).

<sup>&</sup>lt;sup>226</sup> See para. 14.6 above.

layer.<sup>227</sup> The Protocol is a universal agreement to protect the Earth's ozone layer by phasing out ozone-depleting substances, or ODS, with 198 Parties<sup>228</sup> having ratified it. It was signed in 1987 and entered into force in 1989.<sup>229</sup> The Protocol has been amended on five occasions.<sup>230</sup>

- 101. The Montreal Protocol does not have specific obligations concerning the reduction or phase-down of anthropogenic GHG emissions. Instead, it is concerned with the phasedown (and ultimately the phase-out) of the production and consumption of ODS (and more recently, the phase-down of HFCs, as explained below). The Montreal Protocol nonetheless has obvious relevance to the protection of the climate system from anthropogenic GHG emissions:
  - 101.1. First, States have taken wider climate impacts into account in their decisionmaking under the Montreal Protocol, even if ozone depletion has been their focus. Specifically, in 2007, they did so in deciding upon an adjustment to the Protocol to accelerate the phase-out schedules for hydrochlorofluorocarbons ('HCFCs') by ten years.<sup>231</sup> Increased knowledge of the wider climate impacts of substances used to replace ODS then led to the Kigali Amendment to the Protocol,<sup>232</sup> by means of which 156 Parties (including the UK) have specifically agreed to phase down a group of GHGs that did not constitute ODS (namely, 18 HFCs). This phase-down had become necessary because HFCs were

<sup>&</sup>lt;sup>227</sup> Ozone Convention (UN Dossier No. 25), Art. 2(1) and preamble para. 8; Montreal Protocol (UN Dossier No. 26), preamble para. 1.

<sup>&</sup>lt;sup>228</sup> This number is comprised of 197 States and the European Union.

<sup>&</sup>lt;sup>229</sup> (adopted 16 September 1987, entered into force 1 January 1989), 1522 UNTS 3 (UN Dossier No. 26).

<sup>&</sup>lt;sup>230</sup> The London Amendment in 1990 ((adopted 29 June 1990, entered into force 10 August 1992) 1684 UNTS 315 (UN Dossier No. 29)); the Copenhagen Amendment in 1992 ((adopted 25 November 1992, entered into force 14 June 1994) 1785 UNTS 517 (UN Dossier No. 31)); the Montreal Amendment in 1997 ((adopted 17 September 1997, entered into force 10 November 1999) 2054 UNTS 522 (UN Dossier No. 35)); the Beijing Amendment in 1999 ((adopted 3 December 1999, entered into force 25 February 2002) 2173 UNTS 183 (UN Dossier No. 36)); and the Kigali Amendment in 2016 ((adopted 15 October 2016, entered into force 1 January 2019) 3288 UNTS No 26369 (UN Dossier No. 40)).

<sup>&</sup>lt;sup>231</sup> Decision XIX/6, 'Adjustments to the Montreal Protocol with Regard to Annex C, Group I, Substances (Hydrochlorofluorocarbons)' (adopted 21 September 2007, entered into force 14 May 2008) 2518 UNTS 63 (UN **Dossier No. 39**), paras. 9 and 11(b).

<sup>&</sup>lt;sup>232</sup> Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 15 October 2016, entered into force 1 January 2019) 3288 UNTS No 26369 (UN Dossier No. 40). See Decision XXVIII/1: Further Amendment of the Montreal Protocol.

increasingly being used as non-ozone depleting alternatives to certain ODS being phased out under the Montreal Protocol.

- 101.2. Secondly, beyond HFCs, the Montreal Protocol applies to many gases that contribute to global warming. Many of those ODSs are potent GHGs. They include CFCs, HCFCs, chlorocarbons, bromocarbons and halons.
- 101.3. Thirdly, reductions in ODS have resulted in significant benefits for the climate system. From 1990-2010, the Montreal Protocol's control measures are estimated to have reduced GHG emissions by the equivalent of 135 gigatons of CO<sub>2</sub>, the equivalent of 11 gigatons a year.<sup>233</sup>
- 102. The provisions of the Montreal Protocol are detailed and technical. They are also subject to adjustment or amendment at the annual Meeting of the Parties.<sup>234</sup> The key provisions include the following:<sup>235</sup>
  - 102.1. Articles 2 to 2J and 5 (Control measures):<sup>236</sup> Under Articles 2 to 2J, Parties must reduce their annual production and consumption of each group of controlled substances (both ODS and HFCs) in percentage phase-down steps according to phasedown provisions in the Montreal Protocol. Article 5 (Special situation of developing countries) then sets out details for the implementation of control measures by developing country Parties covered by Article 5(1). Such implementation is supported by financial and technical cooperation through the Multilateral Fund established under Article 10.
  - 102.2. Article 4 (Control of trade with non-Parties): Parties must ban the trade of controlled substances with non-Parties to the Protocol or its amendments. This obligation already applies to ODS. By operation of the Kigali Amendment, it

<sup>&</sup>lt;sup>233</sup> UNEP, 'About the Montreal Protocol' <a href="https://unep.org/ozonaction/who-we-are/about-montreal-protocol">https://unep.org/ozonaction/who-we-are/about-montreal-protocol</a>>.

<sup>&</sup>lt;sup>234</sup> Montreal Protocol (UN Dossier No. 26), Arts. 2(9) and 11(4)(b) and (h).

<sup>&</sup>lt;sup>235</sup> See further UNEP, 'Handbook for the Montreal Protocol on Substances that Deplete the Ozone Layer' (14<sup>th</sup> edn, 2020) <https://ozone.unep.org/sites/default/files/Handbooks/MP-Handbook-2020-English.pdf>.

<sup>&</sup>lt;sup>236</sup> See further Art. 2A (CFCs), Art. 2B (Halons), Art. 2C (Other fully halogenated CFCs); Art. 2D (Carbon tetrachloride); Art. 2E (1,1,1-trichloroethane (methyl chloroform)); Art. 2F (HCFCs); Art. 2G (Hydrobromofluorocarbons); Art. 2H (Methyl bromide); Art 2I (Bromochloromethane); Art. 2J (HFCs).

applies to HFCs from 2033.<sup>237</sup> In practice, this obligation has limited relevance other than in respect of the Kigali Amendment, as the ratification of the Protocol and its other Amendments is so widespread.<sup>238</sup>

- 102.3. Article 4B (Licensing): Parties must establish and implement systems for licensing the import and export of controlled substances.
- 102.4. Article 7 (Reporting of data): Parties must report annually to the Ozone Secretariat, including on their production, imports, exports and destruction of ODS and HFCs.
- 4) <u>Gothenburg Protocol</u>
- 103. As set out above,<sup>239</sup> the CLRTAP is a regional treaty set up in 1979 under the auspices of UNECE. Like the Montreal Protocol, its principal objective was not to mitigate the effects of climate change. Rather, it was adopted to address and manage the transboundary aspects of anthropogenic air pollution affecting human health and the natural environment across UNECE regions.<sup>240</sup> Like the Montreal Protocol, it nonetheless also contains obligations relevant to the protection of the climate system from anthropogenic emissions of GHGs.
- 104. The 1999 Gothenburg Protocol is the principal protocol to the CLRTAP.<sup>241</sup> As its full title suggests, its purpose is to "*abate acidification, eutrophication and ground-level ozone*". In its 2012 amended form,<sup>242</sup> it sets binding national emission reduction commitments in relation to five key air pollutants: particle pollution from fine particulates, SO<sub>2</sub>, NOx, ammonia and NMVOCs.<sup>243</sup> Several of these pollutants

<sup>&</sup>lt;sup>237</sup> Kigali Amendment (UN Dossier No. 40), Art. IV(2).

<sup>&</sup>lt;sup>238</sup> There are 197 Parties to the London, Copenhagen, Montreal and Beijing Amendments, whereas there are presently 156 Parties to the Kigali Amendment.

<sup>&</sup>lt;sup>239</sup> See para. 14.5 above.

<sup>&</sup>lt;sup>240</sup> See generally CLRTAP, Art. 2.

<sup>&</sup>lt;sup>241</sup> It was adopted by the CLRTAP's Executive Body on 30 November 1999 and entered into force on 17 May 2005.

<sup>&</sup>lt;sup>242</sup> It was amended by the Executive Body through Decisions 2012/1 and 2012/2, adopted 4 May 2012: UNECE, Decision 2012/1 (4 May 2012) UN Doc ECE/EB.AIR/111/Add.1, p. 2; UNECE, Decision 2012/2 (4 May 2012) UN Doc ECE/EB.AIR/111/Add.1, p. 5.

<sup>&</sup>lt;sup>243</sup> 1999 Gothenburg Protocol, Art. 3.

(principally SO<sub>2</sub>, NOx and NMVOCs) are precursors to GHGs, as they contribute to the creation of ground-level tropospheric ozone (which is itself a GHG). These commitments entered into force on 7 October 2019 for the Parties to the amended Gothenburg Protocol (including the UK), which are now 28 in number.<sup>244</sup>

- 105. The key obligations under the amended Gothenburg Protocol (as relevant to those precursors) include the following:
  - 105.1. Emission reduction: The primary emission reduction obligations are set out in Article 3 of the Gothenburg Protocol. The detail of those obligations is set out in the Annexes to the Protocol. Annex II (Tables 2-6) identifies emission reduction commitments for each of the five pollutants for 2020 and beyond, which are expressed as a percentage reduction from 2005 emission levels. The commitments are tailored to individual Parties in Tables 2-6 and the timeframe for compliance under Article 3 is set out in Annex VII. Annexes IV-VI, VIII and X set the "*limit values*" for emissions from particular sources.
  - 105.2. Exchange of information and technology: Under Article 4, the Parties must create "favourable conditions to facilitate the exchange of information, technologies and techniques", with the objective of reducing emissions. This is subject to the proviso that the State Party acts "in a manner consistent with its laws, regulations and practices and in accordance with its obligations in the present Protocol".
  - 105.3. Public awareness: Under Article 5 (and subject to the same proviso), the Parties must promote the provision of information to the general public, including on national annual emissions and progress towards compliance with the State's Article 3 obligations.
  - 105.4. **Strategies, policies and measures**: The Parties have specific obligations to facilitate the implementation of their principal Article 3 obligation, which are set out in detail in Article 6 of the Protocol. These include: (i) adopting *"supporting strategies, policies and programmes"*; (ii) applying *"measures to*

<sup>&</sup>lt;sup>244</sup> There are 31 Parties to the unamended version of the Protocol.

*control and reduce* ... *emissions*" of the five pollutants; (iii) applying "*measures* to encourage the increase of energy efficiency and the use of renewable energy"; and (iv) applying "*measures to decrease the use of polluting fuels*", among other measures.

105.5. **Reporting**: The Parties also have detailed reporting obligations under Article 7 of the Protocol.

# 5) <u>Relationships with the UN climate change regime</u>

- 106. The relationship between the four Complementary Treaties discussed above and the UN climate change regime can be summarised as follows:
  - 106.1. ICAO and IMO: The legal relationship between the ICAO and IMO treaties and the UN climate change regime is clear. As noted above, Article 2(2) of the Kyoto Protocol specifically directed Annex I parties to address emissions arising from international aviation and international shipping through those specialised agencies. Anthropogenic GHG emissions arising from those activities are outside the scope of both the UNFCCC and the Kyoto Protocol. Insofar as Article 4(1) of the Paris Agreement<sup>245</sup> is concerned, GHG emissions from domestic aviation and shipping are calculated as part of the UNFCCC national GHG inventories and are included in national totals (part of the NDCs), whereas GHG emissions from international aviation and shipping are reported separately and are not included in NDCs.
  - 106.2. **Gothenburg Protocol**: The relationship between the Gothenburg Protocol and the UN climate change regime is less direct. It is clear that the drafters of the Protocol were conscious of the UNFCCC's terms. The Protocol's Preamble specifically confirms that its Parties are "*[a]ware ... of the commitments that Parties have assumed under the [UNFCCC]*". However, the Protocol and the UNFCCC regime establish separate and distinct legal regimes which are largely treated separately in practice.

<sup>&</sup>lt;sup>245</sup> See para. 67 above.

106.3. **Montreal Protocol**: The Montreal Protocol, the UNFCCC and the Kyoto Protocol expressly address the question of overlap in two ways: (i) the gases that are covered by the Montreal Protocol were specifically excluded from the UNFCCC and Kyoto Protocol;<sup>246</sup> and (ii) insofar as the Kigali Amendment's application to HFCs is concerned, Article III of that Amendment expressly states that it "*is not intended to have the effect of excepting hydrofluorocarbons from the scope of the commitments contained in Articles 4 and 12 of the [UNFCCC] or in Articles 2, 5, 7 and 10 of its Kyoto Protocol*". More broadly, the treaties establish distinct regimes with distinct objects: the Climate Change Treaties concern controls on emissions of specific GHGs, whereas the Montreal Protocol provisions concern controls on the consumption and production of ODS and HFCs.

# E. UNCLOS

- UNCLOS was opened for signature in 1982 and entered into force in 1994. It presently has 169 Parties.
- 108. Climate change was not expressly addressed in UNCLOS, or 'on the agenda' during its drafting. However, UNCLOS is a framework convention, which can be applied to meet subsequent challenges such as climate change, on the basis of good faith interpretation of its terms under the well-established rules of treaty interpretation.
- 109. Part XII of UNCLOS is where the principal relevant obligations are contained. It is entitled "*Protection and Preservation of the Marine Environment*". Its provisions focus primarily on measures to prevent, reduce and control pollution of the marine environment (e.g., Article 194(1)). However, there are specific provisions that address protection and preservation of the marine environment more generally, beyond pollution (most notably Articles 192 and 194(5)).
- 110. Against that background, the starting point in determining the extent to which Part XII is engaged is assessing whether climate change caused by the introduction of

<sup>&</sup>lt;sup>246</sup> UNFCCC (**UN Dossier No. 4**), Arts. 4(1)(a), (b), (c), (d), 4(2)(a), (b), (e), 4(6) and 12(1)(a); Kyoto Protocol (**UN Dossier No. 11**), Arts. 2(1)(a)(ii), 2(2), 5(1), 5(2), 7(1), and 10(a).

anthropogenic GHG emissions into the atmosphere constitutes "*pollution of the marine environment*" within the meaning of Article 1(1)(4) of UNCLOS. Like the vast majority of participants in the pending ITLOS advisory proceedings on climate change,<sup>247</sup> the position of the UK is that they do. The UK summarises the key reasons in support of that position below.

- 1) <u>Pollution of the marine environment</u>
- 111. Article 1 is located in Part I of UNCLOS and is entitled "Use of terms and scope".Article 1(1)(4) provides:

"'pollution of the marine environment' means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities".

- 112. Article 1(1)(4) is comprised of three elements: (i) there must be a "substance" or "energy"; (ii) it must be introduced by man, directly or indirectly, into the "marine environment"; and (iii) such introduction must result in, or be likely to result in, "deleterious effects" such as those set out in Article 1(1)(4). Each of these elements is satisfied by the introduction of anthropogenic GHG emissions into the atmosphere.
- 113. **First**, interpreted in good faith in accordance with the ordinary meaning of its terms, Article 1(1)(4) includes within its scope GHGs (as each such gas is a "*substance*") and the heat ("*energy*") radiated by GHGs. This is consistent with the context of Article 1(1)(4), including Articles 194(1) and (3), which refer to "*any source*" of pollution and "*all sources*" of pollution, respectively. It is also consistent with the object and purpose of UNCLOS, which is *inter alia* to "*promote the protection and preservation of the marine environment*".<sup>248</sup> If that object and purpose are to be met, the Parties must aim

<sup>&</sup>lt;sup>247</sup> The only exceptions were India, China and Indonesia: see India Oral Submissions, ITLOS/PV.23/C31/8, p. 17 (lines 40-49) (Rangreji); China Oral Submissions, ITLOS/PV.23/C31/10, pp. 28 (lines 1-50) - 29 (lines 1-9) (Ma); see further Indonesia Written Statement, paras. 58 and 81.

<sup>&</sup>lt;sup>248</sup> The preamble para. 4 provides: "Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and <u>will promote the</u> peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, <u>protection and preservation of the marine environment</u>" (emphasis added).

to protect the marine environment from *all* pollutants. Other relevant rules of international law (in particular the Montreal Protocol, which treats GHGs under its ambit as "*substances*"), the *travaux préparatoires*<sup>249</sup> and relevant commentaries<sup>250</sup> confirm this approach.

114. **Secondly**, the "*substance*" or "*energy*" must be introduced by man, directly or indirectly, into the marine environment. Interpreted in good faith in accordance with the ordinary meaning to be given to the terms in their context,<sup>251</sup> "*marine environment*" in Article 1(1)(4) includes within its scope the seabed and ocean floor and subsoil thereof,<sup>252</sup> the water column, estuaries,<sup>253</sup> and the coastline.<sup>254</sup> It also includes in its scope all (marine) living resources and marine life<sup>255</sup> (i.e., flora and fauna),<sup>256</sup> and the ecosystems and the habitats of marine life.<sup>257</sup> This interpretation is consistent with the object and purpose of UNCLOS (which is in part to address "*the problems of ocean space*"<sup>258</sup>), subsequent agreements regarding UNCLOS's interpretation (specifically

<sup>&</sup>lt;sup>249</sup> The *travaux préparatoires* indicate that States took into account a definition endorsed by the Joint Group of Experts on the Scientific Aspects of Marine Pollution and broadened its scope: see 'Results of Consideration of Proposals and Amendments Relating to the Preservation of the Marine Environment' (15 August 1974) CRP/MP/14, in: Renate Platzöder (ed), *Third United Nations Conference on the Law of the Sea: Documents*, Volume X (Oceana Publications 1982-1988), p. 194. The Informal Group of Juridical Experts (Evensen Group) proposed a revised version of the definition in March 1976 which was adopted in UNCLOS (with minor formatting changes): Renate Platzöder (ed), *Third United Nations Conference on the Law of the Sea: Documents*, Volume XI (Oceana Publications 1982-1988), p. 525.

<sup>&</sup>lt;sup>250</sup> See Detlef Czybulka, 'Article 192: General Obligation' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck 2017) ('**Proelss Commentary**'), pp. 1278 and 1282; James Harrison, *Saving the Oceans Through Law* (OUP 2017), p. 255; Rozemarijn J Roland Holst, 'Taking the Current When It Serves: Prospects and Challenges for an ITLOS Advisory Opinion on Oceans and Climate Change' (2023) 32 *RECIEL* 217, p. 221; Guilfoyle (Oral evidence to the House of Lords International Relations and Defence Committee on 24 November 2021) <<u>https://committees.parliament.uk/oralevidence/3126/html/></u>; Advisory Committee on Protection of the Seas (Written evidence to the House of Lords International Relations and Defence Committee dated 11 November 2021), p. 3 <<u>https://committees.parliament.uk/writtenevidence/40828/pdf/></u>.

<sup>&</sup>lt;sup>251</sup> See Vienna Convention on the Law of Treaties (adopted 22 May 1969, opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 ('VCLT'), Art. 31(1) (reflecting customary international law).

<sup>&</sup>lt;sup>252</sup> UNCLOS (UN Dossier No. 45), Art. 145 read with Art. 1(1)(1).

<sup>&</sup>lt;sup>253</sup> UNCLOS (UN Dossier No. 45), Art. 1(1)(4).

<sup>&</sup>lt;sup>254</sup> UNCLOS (UN Dossier No. 45), Arts. 145(a) and 211(1). See the discussion of the term "shoreline" in the Virginia Commentary: Myron H Nordquist (ed), United Nations Convention on the Law of the Sea, 1982: A Commentary (Dordrecht 1985-) ('Virginia Commentary'), para. 211.15(c), fn. 22.

<sup>&</sup>lt;sup>255</sup> UNCLOS (UN Dossier No. 45), Art. 1(1)(4).

<sup>&</sup>lt;sup>256</sup> UNCLOS (UN Dossier No. 45), Art. 145(b).

<sup>&</sup>lt;sup>257</sup> UNCLOS (UN Dossier No. 45), Art. 194(5).

<sup>&</sup>lt;sup>258</sup> UNCLOS (UN Dossier No. 45), preamble para. 3.

regulations approved by the Assembly of the International Seabed Authority<sup>259</sup>), and the views expressed in the jurisprudence<sup>260</sup> and relevant commentary.<sup>261</sup>

- 115. It follows that humans introduce GHGs into the marine environment when human activities (e.g., the burning of fossil fuels, deforestation, land use and land use changes, livestock production, fertilisation, waste management and industrial processes) emit GHGs into the atmosphere and those anthropogenic GHG emissions are absorbed into the ocean. In addition, anthropogenic GHGs radiate heat that enters the surface of the ocean and the water column.
- 116. Thirdly, the "substance" or "energy" introduced must result in, or be likely to result in, "deleterious effects", such as those set out in Article 1(1)(4).<sup>262</sup> It is clear that the introduction of anthropogenic GHGs and heat into the marine environment results in, and is likely to result in further, deleterious effects including ocean warming, sea level rise and ocean acidification.<sup>263</sup> The UK refers in this respect to the IPCC's special report on the ocean and cryosphere.<sup>264</sup>

# 2) <u>Consequences for Part XII obligations</u>

117. The consequence of climate change caused by anthropogenic GHG emissions falling within the meaning of "*pollution of the marine environment*" for the purposes of

<sup>&</sup>lt;sup>259</sup> International Seabed Authority (**'ISA'**), 'Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area' (13 July 2000) UN Doc ISBA/6/A/18, Annex; ISA, 'Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area' (7 May 2010) UN Doc ISBA/16/A/12/Rev.1, Annex; ISA, 'Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area' (27 July 2012) UN Doc ISBA/18/A/11, Annex. Each of these Regulations defines the marine environment as including "*the physical, chemical, geological and biological components, conditions and factors which interact and determine the productivity, state, condition and quality of the marine ecosystem, the waters of the seas and oceans and the airspace above those waters, as well as the seabed and ocean floor and subsoil thereof".* 

<sup>&</sup>lt;sup>260</sup> Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan) (Provisional Measures) [1999] ITLOS Rep 280, para. 70; Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (Advisory Opinion) [2015] ITLOS Rep 4, paras. 120, 216; South China Sea Arbitration (Philippines v China), PCA Case No 2013-19, Award (12 July 2016), paras. 945, 960 and 970.

<sup>&</sup>lt;sup>261</sup> Virginia Commentary, para. 1.23; Alan Boyle, 'Climate Change, Ocean Governance and UNCLOS' in Jill Barrett and Richard Barnes (eds), *Law of the Sea: UNCLOS as a Living Treaty* (BIICL 2016), p. 217; Yoshifumi Tanaka, 'Article 1: Use of Terms and Scope' in Proelss Commentary, p. 23.

 $<sup>^{262}</sup>$  Use of the language "such ... as" in Art. 1(1)(4) indicates that the "deleterious effects" listed therein are illustrative only.

<sup>&</sup>lt;sup>263</sup> See, e.g., UK Government, 'Marine Strategy Part One' (October 2019), pp. 43-44 <https://assets.publishing. service.gov.uk/media/5f6c8369d3bf7f7238f23151/marine-strategy-part1-october19.pdf>.

<sup>&</sup>lt;sup>264</sup> IPCC, *The Ocean and Cryosphere in a Changing Climate* (2019) (see 'Summary for Policymakers' (UN Dossier No. 74).

Article 1(1)(4) of UNCLOS is that States' obligations to prevent, reduce and control pollution of the marine environment as set forth throughout Part XII (in particular sections 1, 5 and 6) apply in respect of such emissions.

- 118. However, even if the Court takes a contrary view on the application of Article 1(1)(4), Part XII provisions not relating specifically to pollution would nonetheless apply to anthropogenic GHGs. Specifically, the general obligation to protect and preserve the marine environment recognised in Article 192 would remain relevant to anthropogenic GHGs in any event.
- 3) <u>Relevant aspects of the Part XII regime</u>
- 119. The key relevant obligations are as follows:
  - 119.1. **Article 192**: The "general" obligation to protect and preserve the marine environment, which is elaborated in (i) other relevant provisions of UNCLOS (notably the remainder of Part XII),<sup>265</sup> (ii) specific obligations assumed by States under other relevant conventions<sup>266</sup> and (iii) other relevant norms of international law.<sup>267</sup>
  - 119.2. Article 194(1): Article 194(1) specifies that States must "take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment". Reduction of anthropogenic GHG emissions is evidently a context in which it is joint measures that are appropriate. Article 194(1) requires States to use "for this purpose the best practicable means at their disposal and in accordance with their capabilities". This provision also obliges States to "endeavour to harmonize their policies in this connection".

<sup>&</sup>lt;sup>265</sup> See generally *South China Sea Arbitration (Philippines v China)*, PCA Case No 2013-19, Award (12 July 2016), paras. 941-942; UNGA, 'Protection and Preservation of the Marine Environment: Report of the Secretary-General' (18 September 1989) UN Doc A/44/461, para. 30; Virginia Commentary, para. 192.1; Detlef Czybulka, 'Article 192: General Obligation' in Proelss Commentary, pp. 1278-1284; James Harrison, *Saving the Oceans Through Law* (OUP 2017), p. 23.

<sup>&</sup>lt;sup>266</sup> UNCLOS (UN Dossier No. 45), Art. 237.

<sup>&</sup>lt;sup>267</sup> See South China Sea Arbitration (Philippines v China), PCA Case No 2013-19, Award (12 July 2016), para. 941. See more generally UNCLOS (**UN Dossier No. 45**), preamble para. 8 ("Affirming that matters not regulated by this Convention continue to be governed by the rules and principles of general international law").

- 119.3. Article 194(2): This provision relatedly requires States to "take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment". This focuses on the transboundary consequences of activities under States' own jurisdiction or control.
- 119.4. Sections 5 and 6 of Part XII: These provisions provide further particularity as to the measures that States must take to prevent, reduce and control pollution of the marine environment and their enforcement. They treat different categories of pollution separately. The UK's position is that Article 212 is the relevant source of the obligation to take measures specifically targeting anthropogenic GHG emissions, but the UK recognises the application of Article 207 in the alternative.<sup>268</sup> Under these provisions, the Parties are obliged to:
  - 119.4.1. "adopt laws and regulations to prevent, reduce and control pollution of the marine environment" from those sources "taking into account internationally agreed rules, standards and recommended practices and procedures" (see Articles 207(1) and 212(1));
  - 119.4.2. endeavour to establish global and regional legal frameworks for the same purpose (i.e., "global and regional rules, standards and recommended practices and procedures"), under the auspices of "competent international organizations or diplomatic conference" (see Articles 207(4)<sup>269</sup> and 212(3));

<sup>&</sup>lt;sup>268</sup> See further Frank Wacht, 'Article 207: Pollution from Land-based Sources' in Proelss Commentary, p. 1383; Frank Wacht, 'Article 212: Pollution from or through the Atmosphere' in Proelss Commentary, p. 1447; Virginia Commentary, para. 212.9(a); James Harrison, *Saving the Oceans Through Law* (OUP 2017), pp. 255-256; Tim Stephens, 'Warming Waters and Souring Seas: Climate Change and Ocean Acidification' in Donald Rothwell and others (eds), *The Oxford Handbook on the Law of the Sea* (OUP 2015), p. 783.

<sup>&</sup>lt;sup>269</sup> The obligation in Art. 207(4) concerning global and regional cooperation contains additional text as follows: "taking into account characteristic regional features, the economic capacity of developing States and their need for economic development. Such rules, standards and recommended practices and procedures shall be reexamined from time to time as necessary". Art. 207 contains an additional obligation in Art. 207(5), which states that "Laws, regulations, measures, rules, standards and recommended practices and procedures referred to in paragraphs 1, 2 and 4 shall include those designed to minimize, to the fullest extent possible, the release of toxic, harmful or noxious substances, especially those which are persistent, into the marine environment".

- 119.4.3. adopt laws and regulations, as well as taking "other measures necessary" to implement any rules or standards established through that process (see Article 213 as regards land-based pollution and Article 222 as regards pollution from or through the atmosphere); and
- 119.4.4. take measures beyond just establishing domestic legal frameworks, namely those that "*may be necessary to prevent, reduce and control such pollution*" (see Articles 207(2) and 212(2)).
- 120. There are other obligations under Part XII of UNCLOS that apply to anthropogenic GHGs regardless of whether the definitional provision in Article 1(1)(4) is satisfied (such as Articles 197-206). Whilst those provisions are at issue in the ITLOS advisory proceedings,<sup>270</sup> they do not fall within the scope of Question A.
- 4) <u>Relationship with the Climate Change Treaties</u>
- 121. Consistent with its recognition of the primary importance of the UNFCCC and Paris Agreement more generally, the UK's position is that the provisions of those treaties inform the content of States' general obligations under Part XII of UNCLOS in this context. There are several legal grounds to have recourse to these treaties, one of which is that the UNFCCC and the Paris Agreement contain relevant rules of international law to be taken into account in the interpretation of Part XII of UNCLOS.<sup>271</sup>

# F. International human rights law

122. International human rights treaties do not contain obligations concerning anthropogenic emissions of GHGs. The obligations under international law to protect the climate system from anthropogenic GHG emissions are found in the Climate Change Treaties and the Complementary Treaties, as explained above. Those treaties are the applicable

<sup>&</sup>lt;sup>270</sup> See further UK oral submissions in the ITLOS advisory proceedings: ITLOS/PV.23/C31/18/Rev.1, pp. 42 (lines 15-21, 38-39), 43 (lines 1-35), 44 (lines 1-2, 27-46), 45 (lines 1-41) 46 (lines 1-44), 47 (lines 1-37) (Sander).
<sup>271</sup> VCLT, Art. 31(3)(c). See further UK oral submissions in the ITLOS advisory proceedings: ITLOS/PV.23/C31/18/Rev.1, pp. 37 (lines 20-28), 38 (lines 31-37) (Juratowitch).

law designed to address the protection of the climate system from anthropogenic GHG emissions.<sup>272</sup>

- 123. More specifically, the human rights treaties referred to in the Chapeau to the Questions, the International Covenant on Civil and Political Rights 1966 ('ICCPR')<sup>273</sup> and the International Covenant on Economic, Social and Cultural Rights 1966 ('ICESCR')<sup>274</sup> (together 'the Covenants'),<sup>275</sup> do not contain in the words of Question A "obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations".
- 124. Some rules of international human rights law are being invoked by claimants in cases concerning particular factual circumstances related to climate change. The UK makes three observations in this respect.
- 125. **First**, claims of breach of rules of international human rights law arising in the context of climate change are to be approached in the same way as other claims of breach of human rights brought under the Optional Protocols to the Covenants.
- 126. Individuals may bring claims under human rights treaties in connection with environmental damage and a State may be responsible for breach if, on the facts of the particular case, the requirements of jurisdiction, application and breach are all satisfied. However, as recognised by the UN High Commissioner for Human Rights, satisfying these requirements in the case of climate change poses "*a series of difficulties*".<sup>276</sup> These include that it is not possible to establish causation linking the GHG emissions of a

<sup>&</sup>lt;sup>272</sup> Cf. *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para. 25; see also paras. 30 and 33.

<sup>&</sup>lt;sup>273</sup> (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (UN Dossier No. 49).

<sup>&</sup>lt;sup>274</sup> (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (UN Dossier No. 52).

<sup>&</sup>lt;sup>275</sup> As a non-binding General Assembly resolution, the Universal Declaration on Human Rights, also mentioned in the Chapeau to the Questions, does not impose obligations on States under international law. Accordingly, the UK confines its submissions to the ICCPR and ICESCR.

<sup>&</sup>lt;sup>276</sup> Human Rights Council, 'Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights' (15 January 2009) UN Doc A/HRC/10/61 (UN **Dossier No. 283**), para. 70. See also the discussion at para. 137.4 below.

particular country, or its failure to adopt mitigation measures, with either climate change itself or with a specific climate change impact, such as a severe weather event.<sup>277</sup>

- 127. A recent example of particular facts relating to climate change giving rise to a finding of liability under a human rights treaty is the view of the Human Rights Committee ('the Committee') in *Billy v Australia*, adopted on 21 July 2022.<sup>278</sup> This is the only view adopted to date under either of the Optional Protocols to the Covenants in response to a complaint of failure to take sufficient mitigation and adaptation measures in response to climate change.<sup>279</sup> In summary:
  - 127.1. The Committee upheld the authors' complaint that the State Party had breached Articles 17 (their right to privacy and family life) and 27 (their rights as members of indigenous, religious or linguistic minorities). The relevant conduct was the Party's failure to adopt adaptation measures (i.e., the construction of sea walls) on the islands on which the authors lived to prevent reasonably foreseeable adverse damage from climate change. Such damage had direct repercussions on the authors' enjoyment of the relevant rights and serious adverse consequences for them (i.e., flooding from sea level rise causing inundation of villages and ancestral burial lands, loss of fruit trees and crops through salinification, anxiety and distress).<sup>280</sup>
  - 127.2. The Committee, however, dismissed the claim of breach of the right to life (Article 6). This was because the authors had not established that the State

<sup>&</sup>lt;sup>277</sup> Human Rights Council, 'Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights' (15 January 2009) UN Doc A/HRC/10/61 (UN **Dossier No. 283**), para. 70.

<sup>&</sup>lt;sup>278</sup> UN Doc CCPR/C/135/D/3624/2019, adopted under Art. 5(4) of the Optional Protocol (**UN Dossier No. 50**). The Committee on Economic, Social and Cultural Rights (**'CESCR'**) has not adopted any views concerning climate change complaints. Nor do there appear to be any such complaints pending under its Optional Protocol procedure.

<sup>&</sup>lt;sup>279</sup> The UK is a not a party to the Optional Protocol to the ICCPR. As set out in the Comments of the Government of the UK on General Comment 33 (17 October 2008) <https://ohchr.org/en/calls-for-input/general-comment-no-33-obligations-states-parties-under-optional-protocol>, the UK's position is that the Committee's views do not constitute legally binding decisions: the Optional Protocol does not provide that views are legally binding and the UK would not regard them as such. That is not to say that the Committee's views do not carry weight and influence: they should be seriously taken into account by the State Party concerned. Similarly, the UK is not a party to the Optional Protocol to the ICESCR (UN Dossier No. 53) and it takes the same position as regards the legal status of the CESCR's views on individual complaints.

<sup>&</sup>lt;sup>280</sup> Para. 8.12. These facts, together with the evidence that the authors could not practise their culture and maintain their way of life on mainland Australia, supported the finding of breach of Art. 27 (para. 8.14).

Party's alleged failures caused the authors to face adverse impacts to their own health, or a real and reasonably foreseeable risk of being exposed to a situation of physical endangerment or extreme precarity that could threaten their right to life.<sup>281</sup> The Committee considered that the predicted time frame of 10-15 years for the islands to become uninhabitable could allow for intervening acts by the State Party to protect the islands and, where necessary, relocate the authors.<sup>282</sup>

- 127.3. The claims of breach by failures to mitigate climate change by reducing GHG emissions and ceasing fossil fuel extraction and use also failed. No reasons were given for the rejection of this claim. However, it may reasonably be inferred that the requirements for establishing responsibility could not be satisfied on the facts, due to the impossibility of establishing that any State Party's failure adequately to reduce GHG emissions and cease fossil fuel extraction had caused the sea level rise that in turn gave rise to the damage.
- 127.4. The Committee also affirmed that State Parties' obligations under the ICCPR are primarily territorial.<sup>283</sup> The Committee observed that it was required "to contemplate whether ... a State party may be considered to have committed a violation of the rights of an individual under the Covenant, where the harm to the individual allegedly resulted from the failure of the State party to implement adaptation and/or mitigation measures to combat adverse climate change

<sup>&</sup>lt;sup>281</sup> Para. 8.6.

<sup>&</sup>lt;sup>282</sup> Para. 8.7. See also Human Rights Committee, *Teitiota v New Zealand* (24 October 2019) UN Doc CCPR/C/127/D/2728/2016, para. 9.12.

<sup>&</sup>lt;sup>283</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136, paras. 109, 111. The Court considered that the ICCPR "*is applicable in respect of acts done* by a State in the exercise of jurisdiction outside its own territory", giving the examples of where a State is in occupation of the territory, its agents have carried out arrests on the territory of another State or its consulate has confiscated a passport.

*impacts within its territory*".<sup>284</sup> The same is true under the ICESCR, as the Parties' obligations are similarly territorial.<sup>285</sup>

128. The **second** observation concerns the link drawn in the preamble of the Paris Agreement between action to address climate change and human rights. Paragraph 11 provides that:

"[a]cknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity".

- 129. There are three notable aspects to this formulation: (i) it addresses only issues of human rights arising for States "*when taking action to address climate change*"; (ii) it recommends only that Parties "*respect, promote and consider*" human rights, and the numerous other matters that it lists, when taking such action; and (iii) it is limited to Parties' <u>existing human rights obligations.<sup>286</sup></u>
- 130. The **third** observation concerns the respective roles of courts and governments. It is plain that the mitigation, adaptation and finance measures required to protect the climate system from anthropogenic emissions of GHGs and climate change impacts are economy-wide, involve all sectors and touch all members of all societies. The adoption by different States of such measures, and the strengthening of them over time, necessarily involves weighing and balancing different and sometimes competing rights, interests, advantages and disadvantages. This is an exercise that properly falls to national governments, which are best placed to evaluate the facts and evidence,

<sup>&</sup>lt;sup>284</sup> Para.7.6. Art. 2(1) of the ICCPR (UN Dossier No. 49) provides that, "[*e*]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

<sup>&</sup>lt;sup>285</sup> The ICESCR, unlike the ICCPR, does not contain a scope of application provision. As explained by the Court in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, this is because the ICESCR guarantees rights which are primarily territorial (para. 112). The Court did not exclude that the obligations under the ICESCR apply to both territories over which a State party has sovereignty and to those over which it exercises territorial jurisdiction as an occupying power, which is consistent with territorial jurisdiction. See also VCLT, Art. 29.

<sup>&</sup>lt;sup>286</sup> Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, *International Climate Change Law* (OUP 2017), pp. 227-228. A full account of the negotiations of this recital is given at pp. 310-313.

determine the optimum use of their resources and adopt the measures suited to their specific circumstances to meet the obligations they have undertaken.

# **CHAPTER IV: LEGAL CONSEQUENCES UNDER THESE OBLIGATIONS**

132. In this Chapter, the UK sets out its position on the scope of the Court's enquiry under Question B (Section A below) and identifies the legal regime responsive to this Question, which is the Climate Change Treaties (Section B below).

## A. The scope of the Court's enquiry

133. Question B of the Request asks:

"What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:

(i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?

(ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?"

- 134. The UK recognises that a breach of a State's international obligation which is attributable to that State results in its international responsibility. This is well-established under international law.<sup>287</sup> So, too, are the secondary rules of international law that are engaged if a State is responsible for an internationally wrongful act. In summary, the State is obliged:<sup>288</sup>
  - 134.1. to cease the internationally wrongful act, if that act is continuing;
  - 134.2. to offer appropriate assurances and guarantees of non-repetition, where the circumstances require it; and
  - 134.3. to make full reparation for the injury caused by the internationally wrongful act, in the form of restitution, compensation and/or satisfaction.

 <sup>&</sup>lt;sup>287</sup> International Law Commission ('ILC'), 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) UN Doc A/56/10 ('ARSIWA'), Arts. 1-2.
 <sup>288</sup> ARSIWA, Arts. 30, 31 and 34.

- 135. The UK also recognises that many States and international organisations participating in these advisory proceedings are likely to focus their response to Question B on the law of State responsibility. However, the question for the Court is what Question B means on an objective interpretation of its terms.
- 136. The UK's position is that Question B, objectively interpreted, invites the Court to identify the obligations responsive to Question A that apply specifically to "*States where they ... have caused significant harm to the climate system and other parts of the environment*". That is not a matter addressed by secondary rules of international law concerning State responsibility. It is addressed by the Climate Change Treaties, which identify the legal consequences of such conduct in the form of primary treaty obligations. It is those specific treaty obligations which are responsive to Question B.
- The UK makes several observations in support of this approach to the interpretation of Question B.
  - 137.1. The "legal consequences" set out in Part Two of the ILC's ARSIWA are relevant only to the extent that an internationally wrongful act is found to exist. Part Two of the ARSIWA identifies "the legal consequences which responsibility for an internationally wrongful act involves".<sup>289</sup> State responsibility addresses the "new legal relationship which arises upon the commission by a State of an internationally wrongful act".<sup>290</sup> It does not address the consequences that may be provided for in primary treaty obligations.
  - 137.2. Question B does not refer, explicitly or implicitly, to a State's <u>breach</u> of the obligations addressed in Question A. Nor does it otherwise refer to or identify the commission of any internationally wrongful act, or international responsibility for any such act. Question B asks the Court to identify "the legal consequences <u>under these obligations</u> for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment". The General Assembly's use of the expression "legal consequences under these obligations" is important. Interpreted in accordance

<sup>&</sup>lt;sup>289</sup> ARSIWA, Art. 28, Commentary, para. 1.

<sup>&</sup>lt;sup>290</sup> ARSIWA, Part Two, Commentary, para. 1; see also Art. 1, Commentary, para. 1.

with the VCLT, that expression directs the Court towards a particular subset of the primary obligations identified in response to Question A:

- 137.2.1. The use of the term "these obligations" directs the Court to the obligations referenced in the previous sentence of the Request, in Question A. That sentence refers to "obligations of States under international law to ensure the protection of the climate system ... from anthropogenic greenhouse gases ...".
- 137.2.2. The use of the word "*under*" indicates that it is the applicable legal regime identified in response to Question A that contains the legal consequences relevant to Question B. The "*legal consequences*" are the primary obligations from within that regime that apply specifically to "*States where they … have caused significant harm to the climate system*".
- 137.3. Crucially, the applicable legal regime identified in Question A in particular, the Climate Change Treaties contains primary obligations responsive to the question of relative historic, current and anticipated levels of GHG emissions. It is those obligations (set out below) that are the subject of Question B.
- 137.4. Moreover, an interpretation of Question B which treats the Court's task as requiring the determination of State responsibility for activities that have caused significant harm to the climate system would face three significant impediments:
  - 137.4.1. **First**, harm from GHG emissions is indirect. GHG emissions contribute to climate change, which in turn contributes to the extreme events which may be attributed to climate change. Furthermore, it is the totality of GHG emissions that have caused and continue to cause climate change impacts, not the GHG emissions of any one State.
  - 137.4.2. Secondly, the relevant obligations under Question A were not in existence over much of the period in which human activities have resulted in GHG emissions. The IPCC has observed increases in GHG concentrations that have unequivocally resulted from human activities

since 1750.<sup>291</sup> This means that if Question B were asking about the responsibility of States for breaches of the obligations identified in Question A, the Court's enquiry under Question B would be extremely narrow in scope. It would deal with only the most recent GHG emissions and only those in breach of rules of international law binding on the State the responsibility of which was in question. It would not deal with the totality of anthropogenic GHG emissions that have caused harm to the climate system over time.

- 137.4.3. **Thirdly**, there is currently no single or agreed scientific methodology to attribute<sup>292</sup> climate change to the emissions of individual States or to attribute extreme events caused by climate change to the GHG emissions of any particular State.<sup>293</sup> This means that, even if an internationally wrongful act were to be established, it would not be possible to establish the causal nexus required to trigger the obligation to make reparation.
- 138. For all of those reasons, the UK's position is that Question B, objectively characterised, invites the Court to identify the obligations within the Climate Change Treaties that can

<sup>&</sup>lt;sup>291</sup> IPCC, 'Summary for Policymakers' in *Climate Change 2021: The Physical Science Basis* (2021) (WGI) (UN **Dossier No. 75**), p. 4, para. A.1.1.

<sup>&</sup>lt;sup>292</sup> The IPCC defines "attribution" as "the process of evaluating the relative contributions of multiple causal factors to an observed change in climate variables (e.g., global surface temperature, global mean sea level), or to the occurrence of extreme weather or climate-related events. Attributed causal factors include human activities (such as increases in greenhouse gas concentration and aerosols, or land-use change) or natural external drivers (solar and volcanic influences), and in some cases internal variability": IPCC, 'Technical Summary' in Climate Change 2021: The Physical Science Basis (2021) (WGI), p. 39.

<sup>&</sup>lt;sup>293</sup> See e.g. the studies discussed in Rachel A James and others, 'Attribution: How Is It Relevant for Loss and Damage Policy and Practice?', in Reinhard Mechler and others (eds), *Loss and Damage from Climate Change: Concepts, Methods and Policy Options* (Springer 2018), Chapter 5, pp. 136-137. They conclude in summary, *inter alia*, that "some uncertainties will not be eliminated. Uncertainty is common in science, and does not prevent useful applications in policy, but might determine which applications are appropriate. It is important to highlight that in attribution studies, the strength of evidence varies substantially between different kinds of slow onset and extreme weather events, and between regions. Policy-makers should not expect the later emergence of conclusive evidence about the influence of climate variability and change on specific incidences of losses and damages; and, in particular, should not expect the strength of evidence to be equal between events, and between countries." (at p. 114). See also Andrew D King and others, 'Event Attribution is Not Ready for a Major Role in Loss and Damage' (2023) 13 *Nature Climate Change* 415. Cf. Friederike E. L. Otto and others, 'Assigning Historic Responsibility for Extreme Weather Events' (2017) 7 *Nature Climate Change* 757; Myles Allen, 'Liability for Climate Change' (2003) 421 *Nature* 891; Fraser C Lott and others, 'Quantifying the Contribution of an Individual to Making Extreme Weather Events More Likely' (2021) 16 *Environmental Research Letters* 104040.

be characterised as applicable where States "have... caused significant harm to the climate system".

### **B.** Climate Change Treaties

- 139. The Climate Change Treaties represent the collectively agreed approach to responding to climate change and the consequences of its adverse effects. They are responsive to Question B in the following ways:
  - 139.1. **First**, as explained above in response to Question A, the Climate Change Treaties require <u>all</u> Parties to take steps to address the adverse effects of anthropogenic emissions of GHGs. This is reflected in the increased commitments of all Parties under the Paris Agreement to mitigate their GHG emissions and to adopt adaptation measures. However, the Treaties also apply a differentiated approach to the implementation of certain obligations. These obligations apply to some States (including developed country Parties) who will, as a matter of fact, have collectively "*caused significant harm to the climate system*".<sup>294</sup>
  - 139.2. Secondly, the Climate Change Treaties recognise and account for "States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change" (subparagraph (i) of Question B).
  - 139.3. Thirdly, the Climate Change Treaties reflect that peoples and individuals are the intended beneficiaries of the Climate Change Treaties (subparagraph (ii) of Question B).
- 140. Each of these elements is addressed in turn below.

<sup>&</sup>lt;sup>294</sup> For the avoidance of doubt, the UK does not accept that such harm can be attributed to any particular State or particular group of States for the purposes of the law of State responsibility, including for the reasons already explained at para. 137.4 above.

#### 1) The enhanced regime of commitments for particular Parties

- 141. The UNFCCC expressly recognises that "the largest share of historical and current global emissions of greenhouse gases has originated in developed countries".<sup>295</sup> In the context of that historical reality, the UNFCCC and the Kyoto Protocol established an approach that adjusted the intensity of obligations depending on whether a State was included in Annex I or Annex II to the UNFCCC or categorised as a "developed" or a "developing country Party". This was in part in recognition of the fact that, as matters stood in 1992 and 1997 (the years of adoption of the UNFCCC and Kyoto Protocol respectively), developed States had made a greater historic contribution to GHG emissions and were, at that time, still the major emitters of GHGs.
- 142. The Paris Agreement represents the most recent expression of its Parties' commitments in relation to climate change. That Agreement does not apply the Annex-based approach that governs the performance of Parties' obligations under the UNFCCC. The UNFCCC Annexes no longer accurately reflect States' emission levels (past, present and projected).<sup>296</sup> Instead, the Paris Agreement applies a more dynamic approach to the level and nature of commitments as applicable to the Parties, which requires Parties to take action commensurate with their capabilities and national circumstances. The focus is thus on the capability of Parties, rather than States' status under the Annex framework.
- 143. The Paris Agreement nonetheless acknowledges "*the specific needs and special circumstances of developing country Parties*"<sup>297</sup> in several different ways. In particular, the Paris Agreement recognises the priorities and needs of developing country Parties that are particularly vulnerable to the adverse effects of climate change and have significant capacity constraints (for example, LDCs and SIDS). In that specific context, it establishes certain obligations on developed country Parties for the benefit of developing country Parties.<sup>298</sup> That there are different permitted levels of

<sup>&</sup>lt;sup>295</sup> UNFCCC (**UN Dossier No. 4**), preamble para. 3. See further Daniel Bodansky, 'The United Nations Framework Convention on Climate Change: A Commentary' (1993) 18 YJIL 451, pp. 478-480, 505-508.

<sup>&</sup>lt;sup>296</sup> See paras. 55-56 above.

<sup>&</sup>lt;sup>297</sup> Paris Agreement (UN Dossier No. 16) preamble para. 5.

<sup>&</sup>lt;sup>298</sup> See in particular, Paris Agreement (UN Dossier No. 16), Arts. 4(4), 9(1), 9(3), 9(5), 9(7), 11(3) and 13(9).

implementation for different Parties' commitments under the Paris Agreement is further reflected in the concept of "*equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances*" (**'CBDR-RC'**).<sup>299</sup>

144. The key provisions of the Paris Agreement that record commitments for the benefit of developing country Parties concern (i) mitigation, (ii) financial resources for mitigation and adaptation, as well as (iii) several provisions requiring other means of support. Each is considered in turn.

### Mitigation

- 145. The Paris Agreement obliges <u>all</u> Parties to communicate successive NDCs that reflect each State's "*highest possible ambition*", as explained above.<sup>300</sup> Whilst this obligation applies universally to all Parties, the Paris Agreement nonetheless recognises that the CBDR-RC principle must be considered in setting that "*ambition*".<sup>301</sup> It also recognises that "*enhanced support for developing country Parties will allow for higher ambition in their actions*",<sup>302</sup> as well as the need, more generally, "*to support developing country Parties for the effective implementation of [the Paris] Agreement*".<sup>303</sup> None of these provisions, however, allows developing country Parties to avoid complying with their mitigation obligations.
- 146. Against this background, Article 4(4) of the Paris Agreement places a specific emphasis on the emission reduction targets of developed country Parties. First, it provides that "[d]eveloped country Parties should continue taking the lead by undertaking economywide absolute emission reduction targets", whereas developing country Parties "should continue enhancing their mitigation efforts, and are encouraged to move over time

<sup>&</sup>lt;sup>299</sup> Paris Agreement (**UN Dossier No. 16**), preamble para. 3 and Arts. 2(2), 4(3) and 4(19). See further Lavanya Rajamani and Emmanuel Guérin, 'Central Concepts in the Paris Agreement and How They Evolved' in Daniel Klein and others (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (OUP 2017), p. 84; Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, *International Climate Change Law* (OUP 2017), pp. 219-221.

<sup>&</sup>lt;sup>300</sup> Paris Agreement (UN Dossier No. 16), Art. 4(3). See para. 67 above.

<sup>&</sup>lt;sup>301</sup> Paris Agreement (UN Dossier No. 16), Art. 4(3).

<sup>&</sup>lt;sup>302</sup> Paris Agreement (UN Dossier No. 16), Art. 4(5).

<sup>&</sup>lt;sup>303</sup> Paris Agreement (UN Dossier No. 16), Art. 3.

towards economy-wide emission reduction or limitation targets in the light of different national circumstances".

147. Whilst the more flexible approach to the differentiation of obligations between Parties in the Paris Agreement represents a departure from the Annex-based approach in the UNFCCC and the Kyoto Protocol, it nevertheless reflects the appreciation, acknowledged in Article 4(2)(a) of the UNFCCC, of "the differences in these Parties" starting points and approaches, economic structures and resource bases" and "the need for equitable and appropriate contributions by each of these Parties to the global effort".

## Adaptation

...

- 148. As outlined above, adaptation is the second goal of the UN climate change regime reflected in Article 2(1)(b) of the Paris Agreement.
- 149. 'Adaptation' is not defined in the Climate Change Treaties. However, it refers to measures that allow systems to adjust to climate change or the impacts of climate change. According to the description on the UNFCCC website:<sup>304</sup>

"Adaptation refers to adjustments in ecological, social or economic systems in response to actual or expected climatic stimuli and their effects. It refers to changes in processes, practices and structures to moderate potential damages or to benefit from opportunities associated with climate change."

150. Article 4(1) of the UNFCCC (affirmed in Article 10 of the Kyoto Protocol) established that:

<u>All Parties</u>, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall:

<sup>&</sup>lt;sup>304</sup> UN Climate Change, 'Introduction: Adaptation and Resilience' <a href="https://unfccc.int/topics/adaptation-and-resilience/the-big-picture/introduction">https://unfccc.int/topics/adaptation-and-resilience/the-big-picture/introduction</a>>.

(b) Formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing ... measures to facilitate adequate adaptation to climate change;

•••

(e) Cooperate in preparing for adaptation to the impacts of climate change; develop and elaborate appropriate and integrated plans for coastal zone management, water resources and agriculture, and for the protection and rehabilitation of areas, particularly in Africa, affected by drought and desertification, as well as floods".

- 151. As the chapeau to Article 4(1) indicates, the CBDR-RC principle is also relevant to the implementation of adaptation obligations and, as set out below, differentiation is reflected in the finance commitments under the UNFCCC and the Paris Agreement, which apply to both mitigation and adaptation.
- 152. The Paris Agreement acknowledges the significance of the adaptation pillar in several different ways.
  - 152.1. First, Article 2(1)(b) expressly identifies "[i]ncreasing the ability to adapt to the adverse effects of climate change" as one of three means to "strengthen the global response to the threat of climate change", alongside the Paris Agreement's temperature goal and improved financial resources.
  - 152.2. Secondly, Article 4(7) acknowledges that Parties' adaptation actions "*can contribute to mitigation outcomes*".
  - 152.3. Thirdly, against that background, the Paris Agreement established a standalone adaptation provision in Article 7. Most notably:
    - 152.3.1. Article 7(1) set out "the global goal on adaptation of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change, with a view to contributing to sustainable development and ensuring an adequate response in the context of the temperature goal referred to in Article 2".

- 152.3.2. Article 7(9) of the Paris Agreement obliges all Parties, as appropriate, to "engage in adaptation planning processes and the implementation of actions, including the development or enhancement of relevant plans, policies and/or contributions".
- 152.3.3. Article 7(14) then provides that those efforts are to be assessed as part of the Global Stocktake Mechanism.
- 153. Since the entry into force of Article 7 of the Paris Agreement, Parties have made significant advances in enhancing adaptive capabilities, including by providing adaptation finance for developing country Parties. For example, from April 2011 to March 2023, it is estimated that UK International Climate Finance programmes have directly supported over 100 million people to adapt to the effects of climate change.<sup>305</sup> The UK will provide USD 2 billion to the GCF for 2024-2027, which will help developing States adapt to climate change.<sup>306</sup> At COP27, the Prime Minister announced that the UK will triple funding for climate adaptation from £500 million in 2019 to £1.5 billion in 2025, in addition to the UK's ongoing commitment to ensure a balanced split between mitigation and adaptation finance.<sup>307</sup>

#### Financial resources

- 154. As foreshadowed above, the finance provisions of the Climate Change Treaties facilitated, and continue to facilitate, the implementation of both the mitigation and adaption pillars of the Climate Change Treaties. Accordingly, they are relevant to both Questions A and B.
- 155. The historical starting point is Article 4 of the UNFCCC, which provided in relevant part that:

<sup>&</sup>lt;sup>305</sup> UK Government, 'UK International Climate Finance Results 2023' (6 October 2023) <a href="https://gov.uk/government/publications/uk-international-climate-finance-results-2023/uk-international-climate-finance-results-2023">https://gov.uk/government/publications/uk-international-climate-finance-results-2023/uk-internatio-climate-finance-results-2023/uk-internatio-climate-finance-resul

<sup>&</sup>lt;sup>306</sup> UK Government, 'Prime Minister Announces Record Climate Aid Commitment as G20 in India Concludes' (10 September 2023) <a href="https://www.gov.uk/government/news/prime-minister-announces-record-climate-aid-commitment-as-g20-in-india-concludes">https://www.gov.uk/government/news/prime-minister-announces-record-climate-aid-commitment-as-g20-in-india-concludes</a>>.

<sup>&</sup>lt;sup>307</sup> UK Government, 'UK International Climate Finance Results 2023' (6 October 2023) <<u>https://gov.uk/government/publications/uk-international-climate-finance-results-2023/uk-international-climate-finance-results-2023/uk-international-climate-finance-results-2023.</u>

"3. The developed country Parties and other developed Parties included in Annex II shall provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties in complying with their obligations under Article 12, paragraph 1 [<sup>308</sup>]. They shall also provide such financial resources, including for the transfer of technology, needed by the developing country Parties to meet the agreed full incremental costs of implementing measures that are covered by paragraph 1 of this Article and that are agreed between a developing country Party and the international entity or entities referred to in Article 11, in accordance with that Article. The implementation of these commitments shall take into account the need for adequacy and predictability in the flow of funds and the importance of appropriate burden sharing among the developed country Parties.

••••

5. The developed country Parties and other developed Parties included in Annex II shall take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other Parties, particularly developing country Parties, to enable them to implement the provisions of the Convention. In this process, the developed country Parties shall support the development and enhancement of endogenous capacities and technologies of developing country Parties. Other Parties and organizations in a position to do so may also assist in facilitating the transfer of such technologies.<sup>309</sup>

- 156. The Kyoto Protocol further required the Annex II Parties to provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties in advancing the implementation of their commitments under Article 4(1) of the UNFCCC and Article 10(a) of the Kyoto Protocol.<sup>310</sup>
- 157. The Paris Agreement recognises the "global effort"<sup>311</sup> that is required to mobilise sufficient finance to meet mitigation and adaptation objectives. The third core goal of the Paris Agreement is "making finance flows consistent with a pathway towards low greenhouse gas emissions and climate resilient development" which requires action by

<sup>&</sup>lt;sup>308</sup> The obligation in Art. 12(1) is, in accordance with Art. 4(1), to, *inter alia*, communicate a national inventory of anthropogenic emissions by sources and removals by carbon sinks of all GHGs not controlled by the Montreal Protocol and a general description of the steps taken or envisaged by the Party to implement the Convention.

<sup>&</sup>lt;sup>309</sup> Annex II to the UNFCCC lists Australia, Austria, Belgium, Canada, Denmark, the European Union, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, the UK and the United States. Türkiye was removed from Annex II in 2002, by: UNFCCC, Decision 26/CP.7 (9 November 2001) UN Doc FCCC/CP/2001/13/Add.4.

<sup>&</sup>lt;sup>310</sup> Kyoto Protocol (**UN Dossier No. 11**), Art. 11(2)(a). See also UNFCCC (**UN Dossier No. 4**), Arts. 4(3) and 11. <sup>311</sup> Paris Agreement, Art. 9(3).

all Parties and non-state actors. The finance provisions in Article 9 are a key aspect of the Parties' efforts to achieve this goal. As with the mitigation provisions, the finance provisions of the Paris Agreement represent a departure from the Annex-based approach.

- 158. As to the detail of those provisions, the UK observes as follows:
  - 158.1. Article 9(1) of the Paris Agreement imposes a binding obligation on developed country Parties to "provide financial resources to assist developing country Parties with respect to both mitigation and adaptation".
  - 158.2. Article 9(2) makes clear that financing is not limited to developed country Parties. "Other Parties" are "encouraged" in Article 9(2) to "provide or continue to provide such support voluntarily". The inclusion of this provision signalled the desire to expand the providers' base and to capture the reality that certain emerging economies were already providing financial resources to other developing countries or to the financial institutions serving the Climate Change Treaties.<sup>312</sup>
  - 158.3. Article 9(3) expressly recognises the role that developed country Parties play in climate finance. It states that: "[a]s part of a global effort, developed country Parties should continue to take the lead in mobilizing climate finance from a wide variety of sources, instruments and channels, noting the significant role of public funds, through a variety of actions, including supporting country-driven strategies, and taking into account the needs and priorities of developing country Parties". The Paris Agreement also encourages developed country Parties (along with other Parties who provide financial resources) to communicate certain information on past and future delivery of such financing, including a biennial report.<sup>313</sup>

<sup>&</sup>lt;sup>312</sup> Jorge Gastelumendi and Inka Gnittke, 'Climate Finance (Article 9)' in Daniel Klein and others (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (OUP 2017), pp. 243-244.

<sup>&</sup>lt;sup>313</sup> Paris Agreement (UN Dossier No. 16), Arts. 9(5) and 9(7). See further UNFCCC, Decision 12/CMA.1 (15 December 2018) UN Doc FCCC/PA/CMA/2018/3/Add.1 (in UN Dossier No. 170), p. 35.

- 159. Parties' finance obligations are the subject of continued negotiation at the annual COPs, with a view to reaching more detailed and ambitious finance commitments. Indeed, they are being implemented through various specific mechanisms. In particular:
  - 159.1. The main financial institution supporting measures to combat climate change is the Financial Mechanism (**'FM'**) established under Article 11 of the UNFCCC, which also serves as the financial mechanism of the Paris Agreement.<sup>314</sup> The FM provides financial resources on a grant or concessional basis, including for the transfer of technology. It functions under the guidance of, and is accountable to the COP, which decides on its policies and programme priorities as well as the eligibility criteria.<sup>315</sup>
  - 159.2. The operation of the FM is, in accordance with Article 11(1) of the UNFCCC, entrusted to the Global Environment Facility ('**GEF**')<sup>316</sup> and the GCF.<sup>317</sup> The GEF ensures that all actions on climate change are fully transparent with a mechanism for helping countries meet financial goals. The GCF assists developing countries in mitigation and adaptation practices.<sup>318</sup>
  - 159.3. Two special funds were established in 2001, managed by the GEF: the Special Climate Change Fund ('SCCF')<sup>319</sup> and the Least Developed Countries Fund ('LDCF').<sup>320</sup>

<sup>&</sup>lt;sup>314</sup> Paris Agreement (UN Dossier No. 16), Art. 9(8). See also UNFCCC, Decision 1/CP.21 (13 December 2015) UN Doc FCCC/CP/2015/10/Add.1 (UN Dossier No. 155), para. 58.

<sup>&</sup>lt;sup>315</sup> UNFCCC (**UN Dossier No. 4**), Art. 11(3).

<sup>&</sup>lt;sup>316</sup> The GEF was established in 1991 ahead of the 1992 UN Conference on the Environment and Development under the umbrella of the World Bank. Art. 21(3) of the UNFCCC entrusted the operation of the FM on an interim basis to the GEF. Decision 3/CP.4 determined that the GEF would be an entity entrusted with operation of the FM on an ongoing basis: UNFCCC, Decision 3/CP.4 (14 November 1998) UN Doc FCCC/CP/1998/16/Add.1, p. 8.

<sup>&</sup>lt;sup>317</sup> Established within the UN climate framework by a COP decision in 2010: UNFCCC, Decision 1/CP.16 (10 December 2010) UN Doc FCCC/CP/2010/7/Add.1 (UN Dossier No. 156), para. 102.

<sup>&</sup>lt;sup>318</sup> The GCF became an operating entity of the FM via Decisions 1/CP.16 and 3/CP.17: UNFCCC, Decision 1/CP.16 (10 December 2010) UN Doc FCCC/CP/2010/7/Add.1 (UN Dossier No. 156), para. 102; UNFCCC, Decision 3/CP.17 (11 December 2011) UN Doc FCCC/CP/2011/9/Add.1, p. 55, para. 3.

<sup>&</sup>lt;sup>319</sup> By Decision 7/CP.7: UNFCCC, Decision 7/CP.7 (10 November 2001) UN Doc FCCC/CP/2001/13/Add.1, p. 43, para. 1.

<sup>&</sup>lt;sup>320</sup> UNFCCC, Decision 7/CP.7 (10 November 2001) UN Doc FCCC/CP/2001/13/Add.1, p. 43, para. 1. See also Decision 1/CP.21, where it is decided that the GCF and the GEF, the entities entrusted with the operation of the FM of the UNFCCC, as well as the LDCF and the SCCF, administered by the GEF, shall also serve the Paris Agreement: UNFCCC, Decision 1/CP.21 (13 December 2015) UN Doc FCCC/CP/2015/10/Add.1 (UN Dossier No. 155), para. 58.

- 159.4. An adaptation fund was established in 2001 for adaptation projects and programmes in developing country Parties that are particularly vulnerable to the adverse effects of climate change.<sup>321</sup>
- 160. At COP27, the UK Prime Minister announced that the UK will triple funding for climate adaptation from £500 million in 2019 to £1.5 billion in 2025. This is in addition to the UK's ongoing commitment to ensure a balanced split between mitigation and adaptation finance.<sup>322</sup> The UK is also a strong supporter of the GCF. In September 2023, the UK Prime Minister pledged USD 2 billion (£1.62 billion) to the Fund's next period of operation (2024-2027), the biggest single funding commitment the UK has made to help the world tackle climate change.<sup>323</sup> Further, the UK, alongside key partners, is pursuing a set of reforms to the GCF to enhance developing countries' access to it and to accelerate the GCF's effectiveness for the poorest and most vulnerable countries, LDCs and SIDS.
- 161. In addition to the financial obligations assumed under the Climate Change Treaties, States have made voluntary financial commitments at successive COPs and established a Fund:
  - 161.1. At COP15 in Copenhagen in 2009, developed country Parties committed "in the context of meaningful mitigation actions and transparency on implementation ... to a goal of mobilizing jointly USD 100 billion dollars per year by 2020 to address the needs of developing countries".<sup>324</sup>
  - 161.2. At COP21 in Paris in 2015, the COP decided that, in accordance with Article9(3) of the Paris Agreement, "*developed countries intend[ed] to continue their*

<sup>&</sup>lt;sup>321</sup> Decision 10/CP.7, "Funding under the Kyoto Protocol".

<sup>&</sup>lt;sup>322</sup> UK Government, 'UK Announces Major New Package of Climate Support at COP27' (7 November 2022) <a href="https://gov.uk/government/news/uk-announces-major-new-package-of-climate-support-at-cop27">https://gov.uk/government/news/uk-announces-major-new-package-of-climate-support-at-cop27</a>.

<sup>&</sup>lt;sup>323</sup> UK Government, 'Prime Minister Announces Record Climate Aid Commitment as G20 in India Concludes' (10 September 2023) <a href="https://gov.uk/government/news/prime-minister-announces-record-climate-aid-commitment-as-g20-in-india-concludes">https://gov.uk/government/news/prime-minister-announces-record-climate-aid-commitment-as-g20-in-india-concludes</a>.

<sup>&</sup>lt;sup>324</sup> UNFCCC, Decision 2/CP.15 (19 December 2009) UN Doc FCCC/CP/2009/11/Add.1, para. 8; see also UNFCCC, Decision 1/CP.16 (10 December 2010) UN Doc FCCC/CP/2010/7/Add.1 (UN Dossier No. 156), para. 98.

*existing collective mobilization goal through 2025*",<sup>325</sup> and to commit to a New collective quantified goal in 2025.<sup>326</sup>

- 161.3. At COP26 in 2021 a USD 100 billion Delivery Plan (the 'Delivery Plan') was drawn up.<sup>327</sup> In the Delivery Plan, 95% of developed countries came forward with ambitious new commitments, with some doubling or even quadrupling their commitments. According to the most recent figures prepared by the OECD, USD 89.6 billion was provided and mobilised in 2021 and the USD 100 billion goal looks likely to have been met in 2022.<sup>328</sup>
- 161.4. At COP28 in Dubai in 2023, the COP and CMA adopted Decision CP -/.28/-/CMA.5 operationalising new funding arrangements, including a new fund to assist developing countries that are particularly vulnerable to the adverse effects of climate change in responding to economic and non-economic loss and damage associated with those adverse effects ('the Fund').<sup>329</sup> The Fund aims to be a new channel for multilateral finance to provide that assistance.<sup>330</sup> The Fund complements and includes sources, funds, processes and initiatives under and outside the UNFCCC and Paris Agreement.<sup>331</sup> It is able to receive contributions

<sup>&</sup>lt;sup>325</sup> UNFCCC, Decision 1/CP.21 (13 December 2015) UN Doc FCCC/CP/2015/10/Add.1 (UN Dossier No. 155), para. 53.

<sup>&</sup>lt;sup>326</sup> UNFCCC, Decision 1/CP.21 (13 December 2015) UN Doc FCCC/CP/2015/10/Add.1 (UN Dossier No. 155), para. 53.

<sup>&</sup>lt;sup>327</sup> As recorded in a press release dated 25 October 2021, issued by the UK in its role as President of COP26: see UK Government, 'UK COP26 Presidency Publishes Climate Finance Delivery Plan Led by German State Secretary Flasbarth and Canada's Minister Wilkinson Ahead of COP26' (25 October 2021) <a href="https://gov.uk/government/news/uk-cop26-presidency-publishes-climate-finance-delivery-plan-led-by-german-state-secretary-flasbarth-and-canadas-minister-wilkinson-ahead-of-cop26">https://gov.uk/government/news/uk-cop26-presidency-publishes-climate-finance-delivery-plan-led-by-german-state-secretary-flasbarth-and-canadas-minister-wilkinson-ahead-of-cop26</a>>.

<sup>&</sup>lt;sup>328</sup> OECD, 'Climate Finance Provided and Mobilised by Developed Countries in 2013-2021' (2023), p. 3 <a href="https://oecd.org/climate-change/finance-usd-100-billion-goal/">https://oecd.org/climate-change/finance-usd-100-billion-goal/</a>. These figures are always two years behind (a standard data reporting delay), as the OECD takes this time to ensure there is no double-counting.

<sup>&</sup>lt;sup>329</sup> Decision CP -/.28 and -/CMA.5, Annex I, para. 2. See also para. 42: "Developing countries that are particularly vulnerable to the adverse effects of climate change are eligible to receive resources from the Fund." For an advance version, see UN Climate Change, 'Outcomes of the Dubai Climate Change Conference – Advance Unedited Versions (AUVs)' <a href="https://unfccc.int/cop28/outcomes">https://unfccc.int/cop28/outcomes</a>>.

<sup>&</sup>lt;sup>330</sup> Decision CP -/.28 and -/CMA.5, Annex I, para. 3.

<sup>&</sup>lt;sup>331</sup> Decision CP -/.28 and -/CMA.5, Annex II, paras. 1-3. These include the Warsaw International Mechanism referred to in Article 8 of the Paris Agreement (UN Dossier No. 16) and the Santiago network (Decision CP -/.28 and -/CMA.5, Annex II, para. 6).

from a wide variety of sources of funding including grants and concessional loans from public, private and innovative sources.<sup>332</sup>

### Other means of support

- 162. The Paris Agreement includes specific provisions on capacity-building, which seek to "enhance the capacity and ability of developing country Parties ... to take effective climate change action ... and should facilitate technology development, dissemination and deployment, access to climate finance, relevant aspects of education, training and public awareness, and the transparent, timely and accurate communication of information".<sup>333</sup> It expressly recognises the role of developed country Parties in capacity-building, providing that: "Developed country Parties should enhance support for capacity-building actions in developing country Parties".<sup>334</sup>
- 163. In addition, Article 10 of the Paris Agreement establishes means for cooperative action on technology development and transfer (including the establishment of a Technology Mechanism and supporting technology framework). The principal aims of that cooperation are to improve resilience to climate change and to reduce GHG emissions.<sup>335</sup> The goal of "*facilitating access to technology ... to developing country Parties*" is also specifically identified.<sup>336</sup>
- 2) <u>The position of SIDS</u>
- 164. The Climate Change Treaties recognise the particular position of SIDS and of those Parties that are particularly vulnerable to the effects of climate change. The preambular parts of the treaties do so expressly:
  - 164.1. The Preamble to the UNFCCC recognises that "low-lying and other small island countries, countries with low-lying coastal, arid and semi-arid areas or areas liable to floods, drought and desertification, and developing countries with

<sup>&</sup>lt;sup>332</sup> Decision CP -/.28 and -/CMA.5, Annex I, para. 54.

<sup>&</sup>lt;sup>333</sup> Paris Agreement (UN Dossier No. 16), Art. 11(1).

<sup>&</sup>lt;sup>334</sup> Paris Agreement (UN Dossier No. 16), Art. 11(3).

<sup>&</sup>lt;sup>335</sup> Paris Agreement (UN Dossier No. 16), Art. 10(1).

<sup>&</sup>lt;sup>336</sup> Paris Agreement (UN Dossier No. 16), Art. 10(5).

fragile mountainous ecosystems are particularly vulnerable to the adverse effects of climate change". Article 3(2) of the UNFCCC further specifies that "specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, ... should be given full consideration".

- 164.2. Consistent with this, the Preamble to the Paris Agreement recognises "the specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, as provided for in the Convention". Recognition of SIDS' vulnerability to the effects of climate change is also recorded in multiple provisions of the Paris Agreement.<sup>337</sup>
- 165. The Climate Change Treaties make provision for the needs of SIDS and other vulnerable Parties to be taken into account in implementing various provisions. By way of illustration:
  - 165.1. Article 4(8) of the UNFCCC provides that "In the implementation of their commitments in this Article, the Parties shall give full consideration to what actions are necessary under the Convention, including actions related to funding, insurance and the transfer of technology, to meet the specific needs and concerns of developing country Parties arising from the adverse effects of climate change and/or the impact of the implementation of response measures, especially on", inter alia, "Small island countries" and other categories of countries with specific vulnerabilities to the effects of climate change (e.g., those "[c]ountries with areas prone to natural disasters") (emphasis added).
  - 165.2. Article 4(6) of the Paris Agreement also states that "<u>small island developing</u> <u>States</u> may prepare and communicate strategies, plans and actions for low greenhouse gas emissions development reflecting their special circumstances" (emphasis added).

<sup>&</sup>lt;sup>337</sup> Paris Agreement (UN Dossier No. 16), Arts. 9(4), 11(1) and 13(3).

- 165.3. The financial resources provisions in Article 9 of the Paris Agreement also expressly contemplate the particular vulnerabilities of SIDS and other vulnerable Parties. In particular, Article 9(4) states that "[t]he provision of scaled-up financial resources should aim to achieve a balance between adaptation and mitigation, taking into account country-driven strategies, and the priorities and needs of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change and have significant capacity constraints, such as the least developed countries and small island developing States, considering the need for public and grant-based resources for adaptation" (emphasis added).
- 165.4. The capacity-building commitments in Article 11 of the Paris Agreement (discussed at paragraph 162 above) refer to enhancing the capacity and ability of "those that are particularly vulnerable to the adverse effects of climate change, such as small island developing States, to take effective climate change action" (emphasis added).
- 3) <u>The position of peoples and individuals</u>
- 166. "Peoples and individuals of the present and future generations affected by the adverse effects of climate change" are not owed obligations under the Climate Change Treaties. However, they are the intended beneficiaries of the Climate Change Treaties. The object of those treaties is the protection of the climate system for present and future generations. This is reflected in several provisions of the treaties:
  - 166.1. The preamble to the UNFCCC says in its final recital that "<u>The Parties to this</u> <u>Convention</u>" are "<u>Determined</u> to protect the climate system for present and future generations" (emphasis in original).
  - 166.2. In Article 7(2) of the Paris Agreement, the Parties "recognize that adaptation is a global challenge faced by all with local, subnational, national, regional and international dimensions, and that it is a key component of and makes a contribution to the long-term global response to climate change to protect people, livelihoods and ecosystems, taking into account the urgent and

*immediate needs of those developing country Parties that are particularly vulnerable to the adverse effects of climate change*" (emphasis added).

166.3. Article 7(9) of the Paris Agreement provides that "Each Party shall, as appropriate, engage in adaptation planning processes and the implementation of actions, including the development or enhancement of relevant plans, policies and/or contributions, which may include", inter alia, "(c) The assessment of climate change impacts and vulnerability, with a view to formulating nationally determined prioritized actions, <u>taking into account vulnerable people</u>, places and ecosystems" (emphasis added).

Jay Longrin

Sally Langrish Representative of the United Kingdom of Great Britain and Northern Ireland 18 March 2024