



PRIVILEGED & CONFIDENTIAL

INTERNATIONAL COURT OF JUSTICE

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

WRITTEN STATEMENT OF THE
KINGDOM OF SAUDI ARABIA

21 MARCH 2024



WRITTEN STATEMENT OF THE KINGDOM OF SAUDI ARABIA
TABLE OF CONTENTS

CHAPTER 1. INTRODUCTION	1
CHAPTER 2. THE KINGDOM'S CONSTRUCTIVE APPROACH TO COMBATTING CLIMATE CHANGE	11
I. Introduction	11
II. States Have Made Different Historical Contributions to Atmospheric Greenhouse Gas Accumulation	12
III. States Have Received Different Cumulative Benefits from Activities that Contributed to Atmospheric Greenhouse Gas Accumulation	14
IV. The Kingdom's Constructive Approach to Climate Action.....	15
V. The Emissions Transition Requires Innovative Solutions	17
VI. Conclusion.....	20
CHAPTER 3. SCOPE AND MEANING OF THE QUESTIONS PUT TO THE COURT	21
I. Introduction	21
II. Jurisdiction and Propriety	22
III. The Role and Approach of the Court.....	23
IV. Conclusion.....	27
CHAPTER 4. THE SPECIALIZED TREATY REGIME ON CLIMATE CHANGE	29
I. Introduction	29
II. The UNFCCC	30
A. The UNFCCC Governs the Questions Before the Court.....	30
B. The UNFCCC Includes Key Principles and Obligations Applicable to the Questions Before the Court.....	31
1. Differentiation	32
2. Sustainable Development and Poverty Eradication	33
3. Targets	37
4. Reporting	37
5. Financing and Means of Implementation	38



C.	The UNFCCC Includes Provisions on Compliance and the Settlement of Disputes.....	39
1.	Compliance	39
2.	Dispute Resolution	39
III.	The Kyoto Protocol.....	40
A.	The Kyoto Protocol Is a Related Legal Instrument Applicable to the Questions Before the Court.....	40
B.	The Kyoto Protocol Includes Key Principles and Obligations Applicable to the Questions Before the Court	41
1.	Differentiation	41
2.	Targets	42
3.	Reporting	42
4.	Financing and Means of Implementation	42
C.	The Kyoto Protocol Includes a Compliance Mechanism	43
IV.	The Paris Agreement.....	44
A.	The Paris Agreement Is a Related Legal Instrument Applicable to the Questions Before the Court.....	44
B.	The Paris Agreement Includes Key Principles and Obligations that are Applicable to the Questions Before the Court	46
1.	Differentiation	46
2.	Sustainable Development and Poverty Eradication	47
3.	Targets	48
4.	Nationally Determined Contributions	50
5.	Reporting	52
6.	Response Measures	52
7.	Finance and Means of Implementation	52
C.	The Paris Agreement Includes Implementation, Compliance, and Loss and Damage Mechanisms.....	54
1.	Compliance	54
2.	Compliance Mechanism	54
3.	Dispute settlement	55
4.	Loss and Damage	55
V.	Other International Norms To Which The Court Has Been Asked To Have Regard	58
VI.	Conclusion.....	63



CHAPTER 5. QUESTION (A) – THE OBLIGATIONS OF STATES TO PROTECT THE CLIMATE SYSTEM FROM ANTHROPOGENIC GREENHOUSE GASES.....	66
I. Obligations of States in Respect of Climate Change Are Set Out in the Specialized Treaty Regime on Climate Change.....	66
II. Obligations of States in Respect of Climate Change.....	68
III. Conclusion.....	71
CHAPTER 6. QUESTION (B) – LEGAL CONSEQUENCES FOR STATES WHERE THEY HAVE CAUSED SIGNIFICANT HARM TO THE CLIMATE SYSTEM	73



Chapter 1. INTRODUCTION

1.1. By resolution 77/276 of 29 March 2023, the United Nations General Assembly requested the International Court of Justice (the “Court”) to give an advisory opinion on the following questions:

“(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?

(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?”¹

1.2. The Kingdom of Saudi Arabia (“Kingdom”) submits the present Written Statement in accordance with the Court’s Orders of 4 August and 15 December 2023, so as to furnish information on the questions submitted to the Court, and to assist the Court in its consideration of the questions.

¹ UN General Assembly, Resolution A/RES/77/276, 4 Apr. 2023. The questions read as follows in French:
« a) Quelles sont, en droit international, les obligations qui incombent aux États en ce qui concerne la protection du système climatique et d’autres composantes de l’environnement contre les émissions anthropiques de gaz à effet de serre pour les États et pour les générations présentes et futures ?

b) Quelles sont, au regard de ces obligations, les conséquences juridiques pour les États qui, par leurs actions ou omissions, ont causé des dommages significatifs au système climatique et à d’autres composantes de l’environnement, à l’égard :

i) Des États, y compris, en particulier, des petits États insulaires en développement, qui, de par leur situation géographique et leur niveau de développement, sont lésés ou spécialement atteints par les effets néfastes des changements climatiques ou sont particulièrement vulnérables face à ces effets ?

ii) Des peuples et des individus des générations présentes et futures atteints par les effets néfastes des changements climatiques ? »



- 1.3. The request for an advisory opinion by the Court on the legal obligations of States to protect the climate and environment from anthropogenic greenhouse gas emissions, and on the related consequences for States that caused significant harm to the climate and environment, attests both to the importance of climate change and to the universal recognition of its importance by States.
- 1.4. As a developing country with vulnerability to climate change, the Kingdom recognizes the urgency and seriousness of climate change. As a State with a resource-dependent economy and historically low greenhouse gas emissions, the Kingdom appreciates the importance of international cooperation to advance climate action.
- 1.5. These words are backed up by specific actions. The Kingdom is implementing ambitious programs to reduce, reuse, recycle and remove carbon dioxide emissions, both nationally and regionally, through the Saudi Green Initiative and the Middle East Green Initiative.
- 1.6. The Kingdom welcomes the opportunity to have the Court clarify the legal obligations of States in this crucial area. It notes that the advisory opinion request² to clarify the legal obligations of States to ensure the protection of the climate system. Those obligations are properly understood as *existing* legal obligations (*lex lata*).
- 1.7. The relevant existing legal obligations are set forth in the specialized treaty regime on climate change, which is made up of the United Nations Framework Convention on Climate Change (“UNFCCC”) and its implementing agreements, in particular the Kyoto Protocol and Paris Agreement. Article 2 of the Paris Agreement sets down its central aim “to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty” by, amongst other things, setting a target of “holding the increase in the global average temperature to well below 2 degrees Celsius above pre-industrial levels and pursuing efforts to limit the

² Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change, A/RES/77/276, 29 Mar. 2023.



temperature increase even further to 1.5 degrees Celsius above pre-industrial levels”. Article 3 goes on to recognize that “as nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts... with the view to achieving the purpose of this Agreement as set out in Article 2”.

- 1.8. At the core of this regime is the obligation on States to prepare, communicate and maintain nationally determined contributions (“NDCs”) as set out in Article 4. Article 4.3 provides that each Party’s successive NDC will present a progression beyond the Party’s then current NDC and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances. This regime enjoys nearly universal participation by States, including the Kingdom.
- 1.9. In formulating its request for an advisory opinion, the United Nations General Assembly invites the ICJ to have “particular regard” to a number of specific instruments and principles when considering the legal questions before it. However, for the reasons that follow (and as explained in more detail elsewhere in this Written Statement), the ICJ need look no further than the specialized treaty regime on climate change when determining what the legal obligations on States are in respect of climate change.
- 1.10. Climate change presents a multifaceted challenge, and the obligations of States to take climate action within this specialized treaty regime on climate change are shaped by complex economic and social considerations. Recognizing these complexities, States institutionalized climate action within a treaty framework, defining objectives and processes for adopting obligations with respect to climate change through continuous negotiation. The specialized treaty regime on climate change serves as the platform for negotiating international policies concerning climate change, notably during the annual Conference of the Parties (“COP”) to the UNFCCC. Consequently, the greenhouse gas reduction targets and procedures within this regime have been established through extensive negotiations among States.



- 1.11. The specialized treaty regime on climate change adopts a bottom-up approach and does not mandate specific measures for countries to implement at the national level in order to achieve the objectives of the treaty regime. Instead, the means of implementation are left to national governments, leaving flexibility to States Parties to determine the domestic measures implemented to participate in the achievement of the collective goal.
- 1.12. In developing the specialized treaty regime on climate change, States Parties agreed that there should be differentiation among them concerning their obligations regarding climate change. States Parties that participated in the Industrial Revolution, along with historical contributions from the agricultural, industrial, energy, and transport sectors, accounted for the bulk of cumulative greenhouse gas emissions in the atmosphere. States Parties that industrialized early and engaged in these activities also gained early advantages and accelerated welfare, infrastructure and economic development. These States Parties, identified in Annex I to the UNFCCC, accept that they have greater climate change mitigation responsibilities than other States Parties as well as financial obligations to the latter.
- 1.13. At the same time, the specialized treaty regime on climate change recognizes that mitigating climate change requires taking into consideration national circumstances such as economic and social development priorities and poverty eradication, energy security in the developing world, and the importance of fossil fuels to certain economies³. Indeed, it recognizes that the energy trilemma of energy security, equity (accessibility and affordability), and sustainability is central to the emissions transition. States Parties have to balance these three dimensions to prosper and meet growing energy demands while reducing the global carbon footprint. The specialized treaty regime, in providing a flexible approach to climate action based on varying national circumstances reflects that different countries face different challenges in dealing with the energy trilemma. At the 28th COP in December 2023 (“COP28”), States Parties reiterated the importance of responding to climate change “in a nationally determined

³ As outlined in Article 4, paragraph 8, of the UNFCCC and reaffirmed in the preamble to the Paris Agreement.



manner, taking into account the Paris Agreement and their different national circumstances, pathways and approaches.”⁴

- 1.14. From the outset, and up to the present, the negotiated outcomes recognize that the important global goal of combatting climate change must be addressed in the “broader context” of also achieving sustainable development,⁵ including the eradication of poverty⁶, safeguarding food production and ending hunger⁷, economic development⁸, protecting livelihoods⁹, ensuring decent work and quality jobs¹⁰, addressing socioeconomic impacts¹¹, promoting economic diversification¹², minimizing adverse effects on the economy¹³, and protecting economies¹⁴, including those “most affected by the impacts of response measures, particularly developing country Parties.”¹⁵ Most recently, in December 2023, COP28 reaffirmed the need to develop the response to the threat of climate change “in the context of sustainable development and efforts to eradicate poverty.”¹⁶ COP28 reaffirmed¹⁷ the need to balance combatting climate change, on the one hand, and sustainable development on the other¹⁸.

⁴ Draft decision -/CMA.5, Outcome of the first global stocktake, FCCC/PA/CMA/2023/L.17, 13 Dec. 2023, para. 28.

⁵ Draft decision -/CMA.5, Outcome of the first global stocktake, FCCC/PA/CMA/2023/L.17, 13 Dec. 2023, preamble, para. 8 (emphasis added); see also *ibid.*, preamble, paras. 2, 6, 8.

⁶ Paris Agreement to the United Nations Framework Convention on Climate Change (“Paris Agreement”), 12 Dec. 2015, preamble (emphasis added).

⁷ UNFCCC, Article 2; Paris Agreement, preamble, paras. 8-9 and Article 2(1)(b).

⁸ *Ibid.*

⁹ Draft decision -/CMA.5, Outcome of the first global stocktake, FCCC/PA/CMA/2023/L.17, 13 Dec. 2023, para. 61.

¹⁰ *Ibid.*, paras. 140, 143.

¹¹ *Ibid.*, paras. 136, 138, 141, 147.

¹² *Ibid.*, para. 140.

¹³ UNFCCC, Article 4(1)(f).

¹⁴ Draft decision -/CMA.5, Outcome of the first global stocktake, FCCC/PA/CMA/2023/L.17, 13 Dec. 2023, paras. 61, 137.

¹⁵ *Ibid.*, para. 141.

¹⁶ *Ibid.*, preamble, para. 1.

¹⁷ *Ibid.*, preamble, paras. 1-2, 6, 8, 11.

¹⁸ *Ibid.*, paras. 6, 9, 26, 32, 34, 43, 65, 101, 121, 129, 146, 151, 157, 163.



- 1.15. No other environmental treaties address climate change related to anthropogenic greenhouse gas emissions such that they cannot and do not override the specialized treaty regime on climate change. The same can be said for the United Nations Convention on the Law of the Sea (“UNCLOS”) and any environmental or human rights treaty.
- 1.16. In explaining the Kingdom’s decision to join the consensus request of the United Nations General Assembly for an advisory opinion, the Kingdom’s representative observed, after the adoption of the resolution, that the international legal obligations of States with respect to climate change are primarily contained in the UNFCCC and Paris Agreement, stating in particular:

“We recognize the importance of uniting efforts to implement the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement. We attach great importance to climate issues and are making every effort to limit the causes of climate change. . . .

[W]e stress the need for having multifaceted solutions to address the problem of climate change and climate issues in accordance with the international climate conventions, foremost among which are the UNFCCC and the Paris Agreement. The principle of common but differentiated responsibilities and capabilities among States requires that we take into consideration the special circumstances of the least developed countries when implementing the aforementioned international principles and conventions, as noted in the seventh preambular paragraph of [the] resolution.

We must work together to support States in addressing the negative effects of climate-change policies. We must also take into account historical responsibility for emissions which should not adversely affect the efforts of States to achieve development.”¹⁹

¹⁹ UN General Assembly, 65th Plenary Meeting (A/77/PV.65), 29 Mar. 2023, p. 4.



1.17. Resolution 77/276 was introduced in the General Assembly by the Prime Minister of Vanuatu, on behalf of a ‘core group’ of States responsible for its drafting. The Prime Minister of Vanuatu was explicit as to his objective in promoting the request for an advisory opinion. He explained that in his view the request could “make an important contribution to climate action, including by catalysing much higher ambition under the Paris Agreement.”²⁰ He went on to refer to his “desire to further strengthen [] collective efforts to deal with climate change, give climate justice the importance it deserves and bring *the entirety of international law* to bear on this unprecedented challenge.”²¹ Similar statements were made by other States, effectively inviting the Court to increase the obligations accepted by States in carefully negotiated treaties and agreements that enjoy universal support among States, in particular the UNFCCC. But that is not the role of the Court. Others suggested an entirely different approach, stressing that it was not the function of the Court to impose additional obligations on States. For example, the European Union and its 27 Member States welcomed “the explanation provided by Vanuatu that its intention in leading this effort has been that the Court ‘will not place additional obligations or responsibilities’ on States. . .”²². The European Union and its Member States continued:

“Thus, in line with the aim and the content of the resolution, we expect the advisory opinion to, first, answer the legal questions on the basis of the current state of international law and with regard to all States; secondly, identify and, to the extent possible, clarify the obligations of States under applicable international law and the legal consequences for all States for the breach of those obligations. The resolution does not prejudge whether and when breaches have occurred, are occurring or will occur in the future but rather focuses on the consequences thereof for all States”²³.

1.18. Others expressing similar views included Australia²⁴, Germany²⁵, the United Kingdom²⁶, the Republic of Korea²⁷, Iceland²⁸, Norway²⁹, Canada³⁰, the United States

²⁰ Ibid., p. 3.

²¹ Ibid., p. 3 (emphasis added).

²² Ibid., p. 8.



- ²³ Ibid., p. 8.
- ²⁴ Ibid., p. 15 (Australia): “we note that the United Nations Framework Convention on Climate Change remains the central, indispensable forum for international cooperation on, and commitments to, climate action.”
- ²⁵ Ibid., p. 18 (Germany): “The aim was to produce a text that clearly addresses the current obligations of all States on the basis of the current state of the law with regard to future developments on the issue of climate change.”
- ²⁶ Ibid., p. 20 (United Kingdom): “By looking at the obligations as they are today, the questions are clearly focused on assisting States in understanding their obligations under international law so that they are able to comply with them in the future and understand the consequences if they breach them. In particular, we are pleased to make the following four observations on the questions. First, they are not determinative of whether there are obligations or where they flow from. Secondly, they do not prejudge whether breaches have occurred, are occurring or will occur, but look at the consequences if and when they do. Thirdly, they are not limited to considering the obligations and legal consequences for any specific State or States. Fourthly and lastly, they are not determinative of whether any States have been specially affected or injured.”
- ²⁷ Ibid., p. 22: (Republic of Korea): “First, just as the questions in the resolution we have just adopted are framed in terms of law, the opinion that the resolution seeks from the Court is firmly based on law. The applicable law in this case is meant to be existing international law rather than law in the making. My delegation is of the view that the established distinction between *lex lata* and *lex ferenda* still remains valid in this evolving area of international law. We therefore expect the Court to maintain a clear legal focus and uphold judicial integrity, distancing itself from any legislative moves.” See also the Republic of Korea’s second and third points.
- ²⁸ Ibid., pp. 23-24 (Iceland): “We expect the Court to answer the legal questions on the basis of the current obligations of all States to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases. . . . [W]e note that the preambular part refers to a number of matters that are not related to legal obligations, and as such would not be expected to have any bearing on the Court’s advisory opinion. . . . We remain committed to climate action and recall the primary role of the United Nations Framework Convention on Climate Change and the Paris Agreement, in that regard.”
- ²⁹ Ibid., p. 26 (Norway): “Responding to climate change will require both practical and legal solutions. Discussions about the legal consequences of climate change must therefore be conducted in tandem with our political determination to address this pressing issue, and must not overshadow it. 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.”
- ³⁰ Ibid., p. 27 (Canada): “In Canada’s view, it is important that the Court look at States’ obligations in the context of the instruments and principles mentioned in the resolution. Due regard needs to be given to whether the instruments mentioned are binding or not, the fact that States are bound only by those treaties to which they are parties and the specific temporal and territorial limits of certain obligations. Canada would also like to note that there is currently no common, internationally agreed understanding of a number of concepts referred to in the resolution, such as the right to a clean, healthy and sustainable environment.”



of America³¹, the Russian Federation³², China³³, the United Arab Emirates³⁴, and South Africa.³⁵

- 1.19. In light of the ongoing negotiations among States of their respective obligations regarding climate change, the Court should take a cautious approach in answering the questions put to it. In particular, the Court should take care to limit itself to exercising its judicial function, which is to render an opinion on the law as it presently stands. The Court should avoid seeking to formulate new or additional legal rules or obligations that go beyond what States already have agreed to in the specialized treaty regime on climate change. This is a matter for States through the ongoing negotiations among the Parties to the specialized treaty regime on climate change.

³¹ Ibid., pp. 27-28 (USA): “the United States reaffirms its fundamental view that diplomacy is the best pathway for achieving our shared climate goals. . . . We believe that launching a judicial process, especially given the broad scope of the questions, will likely accentuate disagreements and not be conducive to advancing ongoing diplomatic and other processes. In the light of those concerns, the United States disagrees that the initiative is the best approach to achieving our shared goals and takes this opportunity to reaffirm our view that diplomatic efforts are the best means by which to address the climate crisis. . . with respect to the preambular paragraphs, we note that several of them, such as those related to *non-binding goals*, address matters that are not related to legal obligations, and therefore are not relevant to the questions posed.”

³² Ibid., p. 16 (Russian Federation): “We are confident that its advisory opinion on this question cannot and should not lead to a revision of climate instruments, such as the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement on Climate Change, as well as the outcomes of the sessions of the Conference of the Parties to the UNFCCC.”

³³ Ibid., p. 17 (China): “China believes that the International Court of Justice, when discussing the issue of climate change, should respect the status of the Convention as the main channel, safeguard the principles and institutional arrangements established by the Convention and the Paris Agreement, and assist in advancing the implementation of the Convention rather than interfering with the global climate governance process. In particular, it is important to respect the principle of common but differentiated responsibilities, highlight the historic responsibility of developed countries and require them to earnestly fulfil their commitments by helping developing countries to meet the climate challenges while further reducing their own emissions.”

³⁴ Ibid., p. 18 (UAE): “In line with the principle of State sovereignty, the position of the United Arab Emirates in support of resolution 77/276 recognizes that the obligations of States rest in applicable international law and vary based on the instruments in respect of which they have consented to be bound. In addition, the United Arab Emirates hopes and expects that the principle of equity and common but differentiated responsibilities, as well as the special needs and special circumstances of developing countries, will be fully taken into account by the Court when it considers its response to the questions posed.”

³⁵ Ibid., p. 18 (South Africa): “We base our climate actions on the agreed multilateral outcomes under the United Nations Framework Convention on Climate Change and its Kyoto Protocol and the Paris Agreement, which contain clear and specific legal obligations that are directed in particular at the developed parties. As developing countries, we undertake our climate actions in the context of sustainable development, the inalienable right to development enshrined under international law and just transitions.”



1.20. The remainder of this Written Statement is organized as follows:

- **Chapter 2** provides the factual background that contextualizes the Kingdom's positions in these advisory proceedings.
- **Chapter 3** considers the questions posed to the Court, and the Court's role in these proceedings.
- **Chapter 4** describes the specialized treaty regime on climate change.
- **Chapter 5** provides the Kingdom's observations on the first question put to the Court. Section I explains that the international legal obligations of States to ensure the protection of the climate system are contained in the specialized treaty regime on climate change. Section II summarizes the obligations of States in respect of climate change.
- **Chapter 6** provides the Kingdom's observations on the second question put to the Court. This chapter explains how the specialized treaty regime on climate change addresses the legal consequences if significant harm occurs.



Chapter 2. THE KINGDOM'S CONSTRUCTIVE APPROACH TO COMBATTING CLIMATE CHANGE

I. Introduction

- 2.1. The challenge of climate change is complex. It is rooted in the asymmetry of States' historic industrialization and development. Certain States, beginning in the 18th century, largely contributed to atmospheric greenhouse gas concentrations. These States cleared forests, produced livestock, consumed mass quantities of hydrocarbons, engaged in intense manufacturing, and otherwise exploited resources, both within their borders and in territories under their control.
- 2.2. The States that industrialized early disproportionately reaped benefits from the emissions that contributed to atmospheric greenhouse gas accumulation. The challenge of climate change is therefore linked to the unequal economic burdens States carry today because of what occurred over past centuries.
- 2.3. The Kingdom was not one of the States that industrialized early. The Kingdom only recently harnessed the benefits of resources within its territory. The majority of the Kingdom's natural resources is untapped. In addition, the Kingdom has yet to diversify fully its economy and is only at the early stages of promoting domestic industry and privatization.
- 2.4. Given its position as a developing State with what is effectively still a single-source economy and high vulnerability to climate change, the Kingdom has adopted a pragmatic approach to climate change mitigation, which involves economic diversification, energy efficiency and sustainability. Simultaneously, the Kingdom recognizes that innovative solutions have the potential to enhance significantly the trajectory of climate change mitigation.
- 2.5. Climate change obligations must be considered in this context of historic emissions, development aspirations and the need for innovative solutions. From its inception and up to the present, the specialized treaty regime on climate change, namely the UNFCCC



and its implementing agreements, has consistently provided a framework that allows States to negotiate international policies related to climate change within a set of agreed-upon principles, of common but differentiated responsibilities, historical responsibility for greenhouse gas emissions, equity and sustainable development. These principles fundamentally reflect the diverse positions that States hold regarding their responsibility and approach to addressing climate change.

- 2.6. The present chapter provides factual background that contextualizes the Kingdom's position with respect to climate change, illustrating the complexities of identifying the State obligations with respect to climate change that underpin the specialized treaty regime on climate change.

II. States Have Made Different Historical Contributions to Atmospheric Greenhouse Gas Accumulation

- 2.7. Climate change is influenced by several factors, including the cumulative total of greenhouse gases in the atmosphere. This is because greenhouse gases, especially carbon dioxide, can remain in the atmosphere for centuries.
- 2.8. During their atmospheric lifespan, greenhouse gases trap heat that factors into a warming effect on the planet. While atmospheric greenhouse gases occur naturally, anthropogenic activities such as the consumption of fossil fuels, deforestation, livestock production, fertilization, waste management, and industrial processes increase their concentrations.
- 2.9. Compared to atmospheric greenhouse gas emissions attributable to States that industrialized early, the contributions of emissions within the Kingdom's borders are fractional and relate only to recent history, as opposed to centuries.



- 2.10. Numerous datasets track global cumulative greenhouse gas emissions since the 1750s or 1850s³⁶. These datasets estimate global emissions based on aggregated data from energy consumption and other activities³⁷. While each State's greenhouse gas emissions vary slightly per dataset, all of the datasets show the stark contrast between the cumulative greenhouse gas emissions attributable to States that industrialized early and those that did not³⁸. The cumulative total of carbon dioxide in the atmosphere attributable to anthropogenic emissions in the Kingdom amounts to less than 1% of the total amount of carbon dioxide in the atmosphere³⁹. The Kingdom's small contribution to global atmospheric carbon dioxide concentrations is unsurprising given that (i) more than half of global net anthropogenic carbon dioxide emissions occurred before 1989⁴⁰,

³⁶ The "most important" global emissions datasets today include: the dataset hosted by the Carbon Dioxide Information Analysis Center ("CDIAC"), which estimates anthropogenic emissions since year 1751 and is used by the IPCC to report cumulative emissions (see Dennis Gilfillan & Gregg Marland, *Global, Regional, and National Fossil-Fuel CO₂ Emissions: 1751-2017* (2021), available at <https://essd.copernicus.org/articles/13/1667/2021/>); the Global Carbon Project ("GCP") cumulative carbon dioxide emissions, which includes cumulative carbon dioxide emissions estimates since 1750 (see Friedlingstein, et al. Global Carbon Budget 2022, *Earth Syst. Sci. Data*, 14, pp. 4811-4900 (2022), available at <https://essd.copernicus.org/articles/15/5301/2023/>); the Community Emissions Data System ("CEDS") for Historical Emissions, which tracks anthropogenic emissions of reactive gases and aerosols from year 1750 (see Hoesly et al., *Historical (1750–2014) anthropogenic emissions of reactive gases and aerosols from the CEDS*, *Geosci. Model Dev.* (2018.), available at <https://gmd.copernicus.org/articles/11/369/2018/>); The Potsdam Real-time Integrated Model for probabilistic Assessment of emissions Paths historical emissions dataset ("PRIMAP"), which currently includes cumulative emissions since year 1850 (see Johannes Gütschow & Mika Pflüger, *The PRIMAP-hist national historical emissions time series (1750-2021)* (2023), available at <https://primap.org/primap-hist/>). The IPCC refers to each of these datasets in its Sixth Report.

³⁷ See Robbie M. Andrew, *A comparison of estimates of global carbon dioxide emissions from fossil carbon sources*, *EARTH SYST. SCI. DATA*, p. 1458 (2020), available at <https://essd.copernicus.org/articles/12/1437/2020/essd-12-1437-2020.pdf>.

³⁸ Differences in emissions may stem from variations in system boundaries and methodological approaches. Some datasets include certain emissions while others omit them. When system boundaries are harmonised, deviation between datasets may drop to less than 5%. See Robbie M. Andrew, *A comparison of estimates of global carbon dioxide emissions from fossil carbon sources*, *EARTH SYST. SCI. DATA* (2020), available at <https://essd.copernicus.org/articles/12/1437/2020/essd-12-1437-2020.pdf>.

³⁹ Friedlingstein, et al. Global Carbon Budget 2022, *Earth Syst. Sci. Data*, 14, pp. 4811-4900 (2022), available at <https://essd.copernicus.org/articles/15/5301/2023/>.

⁴⁰ IPCC Climate Change 2023 Synthesis Report, pp. 4, 446; see also Dennis Gilfillan & Gregg Marland. *Global, Regional, and National Fossil-Fuel CO₂ Emissions: 1751-2017* (2021), available at <https://essd.copernicus.org/articles/13/1667/2021/>; P. Friedlingstein et al.: Global Carbon Budget 2022, *Earth Syst. Sci. Data*, 14, pp. 4811-4900 (2022), available at <https://essd.copernicus.org/articles/15/5301/2023/> ("In this period, 46 % of fossil [carbon dioxide] emissions came from coal, 35% from oil, 15 % from natural gas, 3 % from decomposition of carbonates, and 1 % from flaring"); Johannes Gütschow & Mika Pflüger, *The*



and (ii) nearly half of the cumulative anthropogenic carbon dioxide emissions related to fossil fuels originate from coal⁴¹.

- 2.11. The divergent historical contributions to atmospheric greenhouse gas concentrations are even more pronounced when contributions from emissions within colonies and territories under the control of the early industrializers are considered. Historical contributions to atmospheric greenhouse gas accumulation underscore the complexity of addressing climate change.

III. States Have Received Different Cumulative Benefits from Activities that Contributed to Atmospheric Greenhouse Gas Accumulation

- 2.12. States that industrialized early enjoyed significant economic advancement throughout the 18th and 19th centuries, and most of the 20th century, while deforestation, livestock production, fertilisation, and hydrocarbon consumption was unrestricted. These States gained advantages such as accelerated welfare and economic development due to the pivotal role that such activities played in this period of transformative and enduring change. And these States continue to benefit from those advantages.
- 2.13. As described above, certain States had early access to abundant resources such as timber, coal and other hydrocarbons. The consumption of these resources enabled those States more effective production methods, which increased economic output, lowered costs, and boosted domestic economic growth. As their economies grew, job opportunities increased for the inhabitants of those States, as did incomes, living standards, public health benefits, life expectancy and overall development levels.

PRIMAP-hist national historical emissions time series (1750-2021) (2023), available at <https://primap.org/primap-hist/>.

⁴¹ Friedlingstein, et al. Global Carbon Budget 2022, *Earth Syst. Sci. Data*, 14, p. 4826 (2022), available at <https://essd.copernicus.org/articles/15/5301/2023/>.



IV. The Kingdom's Constructive Approach to Climate Action

- 2.14. The Kingdom's approach to its energy transition is pragmatic given its position as a developing State with a single-source economy that only recently was able to harness the benefits of natural resources within its territory. Therefore, the Kingdom's approach emphasizes the fact that energy security enables economic growth, and economic growth provides the means for investment in the energy transition. As such, the Kingdom attaches great importance to the protection of the global climate system.⁴²
- 2.15. The Kingdom believes the energy trilemma of energy security, equity (accessibility and affordability), and sustainability is central to the emissions transition. The Kingdom's approach to emissions transition emphasizes the fact that energy security enables economic growth, and economic growth provides the means for investment in the emissions transition. The Kingdom is making strides to diversify its economy and accelerate domestic industry and economic growth, and aims to implement systematic changes over the long-term towards achieving sustainability goals. Economic diversification is recognized as a key component of climate change action in the specialized treaty regime on climate change discussed in Chapter 4 below. To support these endeavours, hydrocarbon revenues are essential to the national economy.
- 2.16. The Kingdom's 2021 updated first NDC aims to remove, avoid, and reduce greenhouse gases amounting to 278 million tons of carbon dioxide equivalent annually by 2030. Notably, this is a two-fold increase in the Kingdom's ambition to reduce atmospheric greenhouse gas emissions when compared to the Kingdom's earlier NDC.
- 2.17. The Kingdom has historically prioritized fossil fuel production that involves releasing a lower rate of carbon dioxide into the atmosphere when compared to fossil fuel production in other States. For example, the Kingdom has the lowest carbon intensity among major producers (except for Denmark) for extracting, processing, and

⁴² See UN General Assembly, Resolution A/RES/77/276, 4 Apr. 2023, preamble, para. 1.



transporting crude oil to the refinery gate⁴³. The Kingdom has also prioritized reducing emissions of methane, one of the most potent greenhouse gases. Upon taking control of its own extraction and production in the 1980s, the Kingdom implemented an ambitious and unprecedented system to collect methane from oil fields, rather than allowing it to burn off into the atmosphere. Today, this system has all but eliminated flaring of gas associated with production in the Kingdom, removing 100 million metric tons of carbon dioxide equivalent every year since it was established. Consequently, the Kingdom has signed the Global Methane Pledge at the 26th Session of the COP, aiming to limit global methane emissions by 30% compared with 2020 levels.

2.18. The Saudi Green Initiative, which the Kingdom inaugurated in 2021, unites environmental protection, emissions transition and sustainability programs with the overarching aims of reducing, recycling, reusing, and removing greenhouse gas emissions and addressing climate change⁴⁴. Since the launch of the Saudi Green Initiative in 2021, 77 initiatives have been activated, including the Kingdom's aim to achieve net-zero emissions by 2060 through the Circular Carbon Economy approach⁴⁵. Key components of the Initiative are reducing emissions by increasing public transportation, renewable energy capacity, carbon dioxide capture and removal technologies' deployment, and energy efficiency.

2.19. The Saudi Green Initiative aims to increase to 50% the Kingdom's local power generation capacity from renewable sources by 2030. To that end, the Kingdom implemented a National Renewable Energy Plan, through which it develops regulations and policies to stimulate private sector investment, research, and development of renewable energy. Specific technologies for deployment include solar photovoltaic systems, concentrated solar power, wind power, geothermal energy, waste to energy

⁴³ See Mohammad S. Masnadi et al., *Global Carbon Intensity of Crude Oil Production*, 361 SCIENCE 851 (2018).

⁴⁴ *SGI: steering Saudi Arabia towards a green future*, SAUDI & MIDDLE EAST GREEN INITIATIVES, available at <https://www.greeninitiatives.gov.sa/about-sgi/> (last visited 5 Dec. 2023).

⁴⁵ See *SGI: steering Saudi Arabia towards a green future*, SAUDI & MIDDLE EAST GREEN INITIATIVES, available at <https://www.greeninitiatives.gov.sa/about-sgi/> (last visited 5 Dec. 2023).



and green hydrogen. The Saudi Energy Efficiency Program, launched in 2012, includes 100 energy efficiency initiatives.

- 2.20. In addition, the Kingdom supports climate change action efforts in other countries, including through leading the Middle East Green Initiative. This initiative focuses on encouraging Middle Eastern countries to implement circular carbon economy activities to boost clean energy use and reduce regional greenhouse gas emissions, including through nature-based carbon dioxide removal solutions and facilitating access to clean energy⁴⁶.
- 2.21. The Kingdom used its presidency of the G20 in 2020 to promote the Circular Carbon Economy framework, with the goal of reducing, reusing, recycling and removing carbon emissions from the system. This initiative received the endorsement of the G20, signaling the Kingdom's global leadership in this area⁴⁷.

V. The Emissions Transition Requires Innovative Solutions

- 2.22. Providing energy to the inhabitants of the planet and mitigating the adverse effects of climate change involves reducing greenhouse gas emissions. This is why the specialized treaty regime on climate change is primarily focussed on greenhouse gas emissions from all sources⁴⁸. However, solving an emissions transition does not allow for an immediate end to supplying global consumers with energy and other hydrocarbon based products. Ensuring energy security, , equity (accessibility and affordability), and sustainability, the energy trilemma, instead requires a multitude of solutions and

⁴⁶ Kingdom of Saudi Arabia, *Updated First Nationally Determined Contribution*, 2021 Submission to UNFCCC, p. 11, available at <https://unfccc.int/sites/default/files/resource/202203111154---KSA%20NDC%202021.pdf>; see also, *About SGI: steering Saudi Arabia towards a green future*, SAUDI GREEN INITIATIVE, available at <https://www.greeninitiatives.gov.sa/about-sgi/> (last visited 5 Dec. 2023).

⁴⁷ *Circular Carbon Economy National Program*, <https://www.cce.org.sa/Pages/Home.aspx> (last visited 30 Nov. 2023)

⁴⁸ See Chapter 4 below.



- investment in new technologies that mitigate greenhouse gas emissions into the atmosphere.
- 2.23. Despite a focus on reducing greenhouse gas emissions, energy exporting States continue to face rising demands for their exports from global population growth. Current investment levels in oil and gas, even if unchanged, will create large gaps between supply and demand in the present decade. Sustained investments in traditional energy sources alongside ongoing efforts to reduce emissions, including through scaling up renewables and carbon dioxide capture and removal technologies, are therefore necessary to ensure an orderly transition that preserves both economic prosperity and energy security. Recent geopolitical events underline the importance of energy security.
- 2.24. Global energy consumption patterns do not allow States that supply energy to the world immediately to stop exporting oil and gas to their customers. Throughout the world, States that supply energy to customers abroad cannot diversify overnight the components of their economies that rely on international trade to become less reliant on international energy exports. This is because international energy consumers continue to rely on energy exporting States for basic necessities such as heating, cooking and electricity, despite significant efforts to increase the use of renewables. If States that supply oil and gas internationally were to attempt to instantly stop supplying their international customers with energy, then these customers would not have energy for these basic necessities. States that supply hydrocarbon products internationally therefore have a responsibility to the global community to support global energy markets.
- 2.25. Some of the most pressing energy demands are in areas where populations remain without access to energy. Despite accounting for two-thirds of the global population, developing States presently receive only one-fifth of global investment in clean energy. Energy poverty rates remain high in the developing world with more than 675 million people lacking access to electricity and 2.3 billion people lacking access to clean



VI. Conclusion

- 2.29. As discussed in the present chapter, addressing climate change is notoriously complex and is rooted in asymmetry of States' historic industrialization and development.
- 2.30. While the Kingdom did not play a significant role in early industrialization, it is nonetheless susceptible to the adverse impacts of climate change given its location, topography, and climate.
- 2.31. The Kingdom's vulnerability is unique because the Kingdom today supplies energy to many parts of the developing world. Therefore, the Kingdom's success at mitigating climate change has been driven by, and will continue to be driven by, what the Kingdom can do to address greenhouse gas emissions from activities that occur within the Kingdom's national borders. This includes economic diversification, capturing methane and carbon dioxide, displacing the use of liquid fuels domestically, and increasing public transportation, renewable energy capacity, and energy efficiency.



Chapter 3. SCOPE AND MEANING OF THE QUESTIONS PUT TO THE COURT

I. Introduction

- 3.1. This Chapter examines the scope and meaning of the legal questions addressed to the Court, and suggests how the Court might best approach the questions given their apparent breadth and their complexity.
- 3.2. The questions put to the Court are set out in General Assembly resolution 77/276, adopted on 29 March 2023. While the resolution was adopted without a vote, concerns were expressed on a number of grounds. It was even suggested that seeking an advisory opinion might have adverse repercussions on ongoing climate change negotiations⁵¹. And the particular terms of the resolution were criticized as being unclear and potentially prejudicial. Iceland, for example, noted “that the preambular part refers to a number of matters that are not related to legal obligations, and as such would not be expected to have any bearing on the Court’s advisory opinion”⁵².
- 3.3. The chapeau to the questions does indeed list a number of instruments outside the specialized treaty regime on climate change⁵³, which cannot and do not purport to override the obligations specialized treaty regime on climate change⁵⁴. Those other instruments were not negotiated to address climate change, and do not refer to legally binding rights or obligations in respect of climate change. Such instruments do not

⁵³ The chapeau to the questions reads: “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 . . .”. UNGA Res. 77/276, 29 Mar. 2023.

⁵⁴ UN General Assembly, 77th Session, 64th Plenary Meeting (A/77/PV.64), 29 Mar. 2023, p. 28 (USA) (“[W]ith respect to the chapeau of the question, while the Paris Agreement sets forth a number of climate change obligations, as well as many non-binding provisions, the reference to other treaties should not be understood to imply that each of those treaties contains obligations to ensure the protection of the climate system. In addition, we emphasize that references to certain principles and duties should not be understood as reflecting any conclusion about the nature, scope or application of any such principles or duties to the question at hand”).



override or alter rights and obligations under the specific treaty regime on climate change agreed by the Parties to the treaties.

- 3.4. This chapter is divided into the following sections. **Section II** considers questions of jurisdiction and propriety. **Section III** then turns to the role and approach of the Court. **Section IV** concludes the chapter.

II. Jurisdiction and Propriety

- 3.5. The Kingdom does not question the Court’s jurisdiction to give the advisory opinion requested by the General Assembly. The Court has jurisdiction under Article 96, paragraph 1 of the Charter of the United Nations and Article 65, paragraph 1, of its Statute to render an advisory opinion at the request of the General Assembly on “any legal question”. The questions are framed as legal questions. However, the Court should take care in exercising its jurisdiction because of the political nature of ongoing negotiations on the international law of climate change, and because the primary international obligations of States in relation to climate change are laid out in the universally accepted set of international agreements consisting of the UNFCCC, the Kyoto Protocol, and the Paris Agreement.
- 3.6. The Court’s mandate under Article 38 of its Statute is “to decide [the questions put to it] in accordance with international law”. As the Court has repeatedly made clear, the basic requirement of the judicial function applies to advisory proceedings as it does to contentious cases:

“Article 65, paragraph 1, of the Statute, which establishes the power of the Court to give an advisory opinion, is permissive and, under it, that power is of a discretionary character. In exercising this discretion, the International Court of Justice, like the Permanent Court of International Justice, has always been guided by the principle that, as a judicial body,



it is bound to remain faithful to the requirements of its judicial character even in giving advisory opinions”⁵⁵.

- 3.7. The Court will need to exercise caution in determining how to respond to the two questions put to it. This is because of the complexity of the underlying circumstances and the highly political nature of the ongoing negotiations on climate change.
- 3.8. The specialized treaty regime on climate change comprises the legal instruments that are relevant to answering the questions put to the Court, namely the UNFCCC, the Kyoto Protocol, and the Paris Agreement. In keeping with its judicial function and given the highly political nature of the ongoing policy negotiations, the Court should be cautious not to upset the agreement struck among States.

III. The Role and Approach of the Court

- 3.9. As the Court has consistently acknowledged, it cannot seek to make policy choices, to make new law, or to establish new obligations by re-interpreting existing law that was carefully and specifically negotiated⁵⁶. In the context of climate change those are matters for States, and multilateral negotiations in the framework of the UNFCCC are ongoing⁵⁷. Effective action on climate change will only be achieved through

⁵⁵ *Western Sahara, Advisory Opinion of 16 October 1975, I.C.J. Reports 1975*, p. 21, para. 23 (citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, I.C.J. Reports 1950*, p. 72; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971*, p. 27). See also *Status of Eastern Carelia, Advisory Opinion of 23 July 1923, P.C.I.J. Series B, No. 5*, p. 29 (“The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court.”); *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion of 8 June 1960, I.C.J. Reports 1960*, p. 153 (“The Statements submitted to the Court have shown that linked with the question put to it there are others of a political nature. The Court as a judicial body is however bound, in the exercise of its advisory function, to remain faithful to the requirements of its judicial character.”).

⁵⁶ See *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland), Judgment, I.C.J. Reports 1974*, pp. 23-24, para. 53 (“[T]he Court, as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down.”).

⁵⁷ See below, Chapter 4, Section II.A, and Chapter 5 [setting out ongoing COP negotiation process].



international cooperation, which requires negotiation and decisions made by States individually and collectively.

- 3.10. The role of courts in advisory proceedings, if they are to remain within their judicial function, is to apply the existing law. Indeed, in its previous advisory opinions, the Court has taken great care to distinguish between determining existing rules of law and legislating. Thus, the Court has defined the requirement of a “legal question” in Article 96 of the UN Charter and Article 65 of the Court’s Statute to mean that the question is “by [its] very nature susceptible of a reply based on law”⁵⁸. Further, in *Legality of the Threat or Use of Nuclear Weapons*, the Court stated that “[i]t is clear that the Court cannot legislate. . . . Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons”⁵⁹. The Court “states the existing law and does not legislate”⁶⁰. In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court explained it would “only have to do what it has often done in the past, namely ‘identify the existing principles and rules, interpret them and apply them . . . , thus offering a reply to the question posed based on law’”⁶¹.
- 3.11. States are currently engaged in negotiations regarding legal obligations with respect to climate change. The development of new international law is a political matter, requiring often difficult negotiations. This is especially true for effectively combatting the global phenomenon of climate change, which requires active participation, cooperation, and thus agreement by virtually all States. Many different interests and

⁵⁸ *Western Sahara, Advisory Opinion of 16 October 1975, I.C.J. Reports 1975*, p. 18, para. 15; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 2010, I.C.J. Reports 2010*, pp. 414-415, para. 25.

⁵⁹ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996*, p. 237, para. 18.

⁶⁰ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996*, p. 237, para. 18.

⁶¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004*, p. 154, para. 38 (quoting *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996*, p. 234, para. 13).



circumstances are at stake. Negotiations with respect to implementation of the specialized climate treaty regime and State obligations with respect to climate change are ongoing, including at each annual session of the COP to the UNFCCC, intersessional meetings and negotiations involving UNFCCC subsidiary bodies that occur throughout each year, and through constant bilateral and multilateral discussions among States outside formal UNFCCC negotiations. Although the existence of ongoing negotiations does not legally prevent the Court from exercising its *judicial* function, as the Court has recognized⁶², it is not the role of the Court to exercise a *political* function by establishing new legal rules or obligations. In any event, the Court is in no position to weigh all the relevant political, economic, environmental, and scientific factors related to climate change to impose upon States obligations and legal consequences based on rules or principles that have not been negotiated and agreed in the existing specialized climate treaty regime. Were the Court to re-interpret existing rules or obligations in a manner contrary to the Parties' specific intentions, this could jeopardize the ability of States to rely on the carefully negotiated texts of existing agreements as well as their willingness to negotiate further agreements to address climate change.

- 3.12. The difficult and detailed negotiation of the UNFCCC, the Kyoto Protocol, and the Paris Agreement have resulted in a highly nuanced set of treaty provisions, which recognize differentiated national circumstances through NDCs and an asymmetrical allocation of climate change mitigation roles between high greenhouse gas emitting countries that industrialized early and other countries as well as financial obligations on developed countries⁶³. This specialized treaty regime also contains a mechanism to

⁶² *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment, *I.C.J. Reports 2011*, p. 664, para. 57 (“[T]he fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function.”) (quoting *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, *I.C.J. Reports 1987*, p. 12, para. 29).

⁶³ See Paris Agreement, Article 4 (“2. Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions. 3. Each Party’s successive



ensure compliance with States' common but differentiated climate responsibilities, which consists of an expert-based and facilitative committee that is expressly directed to "pay particular attention to the respective national capabilities and circumstances of Parties"⁶⁴. Consistent with these provisions, the UNFCCC, Kyoto Protocol, and Paris Agreement did not provide for compulsory third-party adjudication of disputes⁶⁵.

- 3.13. For these reasons, the Court should be cautious in exercising its jurisdiction to render its advisory opinion in this case. It will be recalled that recently the International Law Commission was similarly cautious when adopting guidelines on the "Protection of the atmosphere", which, as the Commission explained, "were elaborated on the understanding that they were not intended to interfere with relevant political negotiations or to impose on current treaty regimes rules or principles not already contained therein"⁶⁶. The Commission did so despite the fact that—unlike the Court—

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.").

- ⁶⁴ Paris Agreement, Article 15 ("1. A mechanism to facilitate implementation of and promote compliance with the provisions of this Agreement is hereby established. 2. The mechanism referred to in paragraph 1 of this Article shall consist of a committee that shall be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive. The committee shall pay particular attention to the respective national capabilities and circumstances of Parties.").
- ⁶⁵ Rather, a separate consent to the jurisdiction of the International Court of Justice or of an arbitral tribunal is required. See UNFCCC, 9 May 1992, 1771 UNTS 107, Article 14 ("1. In the event of a dispute between any two or more Parties concerning the interpretation or application of the Convention, the Parties concerned shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice. 2. When ratifying, accepting, approving or acceding to the Convention, or at any time thereafter, a Party which is not a regional economic integration organization may declare in a written instrument submitted to the Depositary that, in respect of any dispute concerning the interpretation or application of the Convention, it recognizes as compulsory *ipso facto* and without special agreement, in relation to any Party accepting the same obligation: (a) Submission of the dispute to the International Court of Justice, and/or (b) Arbitration in accordance with procedures to be adopted by the Conference of the Parties as soon as practicable, in an annex on arbitration."); Kyoto Protocol, 10 Dec. 1997, 2303 UNTS 162, Article 19 ("The provisions of Article 14 of the Convention on settlement of disputes shall apply *mutatis mutandis* to this Protocol."); Paris Agreement, Article 24 ("The provisions of Article 14 of the Convention on settlement of disputes shall apply *mutatis mutandis* to this Agreement.").
- ⁶⁶ UN General Assembly resolution 76/112 of 9 Dec. 2021; Report of the ILC 2021 (A/76/10), pp. 13, 20; Draft Guidelines on the Protection of the Atmosphere, with commentaries 2021, preamble, para. 8, and commentary (10), pp. 13, 20.



its mandate includes “the promotion of the progressive development of international law”⁶⁷.

- 3.14. In these circumstances, the Court should exercise its recognized power to interpret the broad questions put to it in order to enable it “to answer rationally and effectively ‘the legal questions really in issue’”⁶⁸. As the Court has done in the past, it should “identify the existing principles and rules, interpret them and apply them. . . , thus offering a reply to the question posed based on law”⁶⁹.
- 3.15. The questions put to the Court ask it to assess the obligations of States with respect to climate change, and the legal consequences under these obligations, under existing rules of international law, as many participants in the General Assembly debate on 29 March 2023 explained⁷⁰.
- 3.16. With respect to climate change, these existing rules are set out in the specialized climate treaty regime consisting of the UNFCCC, Kyoto Protocol, and Paris Agreement, as explained further in Chapter 4, below.

IV. Conclusion

- 3.17. The following conclusions may be derived from the discussion in this chapter, and will be confirmed in the chapters which follow:

⁶⁷ UN General Assembly resolution 174(II) of 21 Nov. 1947, Statute of the International Law Commission, Article 1(1); UN Charter, Article 13(1)(a).

⁶⁸ See *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion of 20 July 1982, I.C.J. Reports 1982*, p. 325, at pp. 348-349, paras. 46-47 (confirming that the Court may interpret the question presented to it, in order “to bring out what it conceives to be the real meaning of the . . . request, and thereafter [to] proceed to attempt to answer rationally and effectively ‘the legal questions really in issue.’”).

⁶⁹ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996*, p. 226, at p. 234, para. 13; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004*, p. 136, at p. 154, para. 38 (same).

⁷⁰ See above, Chapter 1 - Introduction, paras. 1.9.



- (a) In exercising its jurisdiction to give an opinion, the Court will need to consider the factual and legal complexities surrounding the questions addressed to it, having regard to the limitations inherent in its judicial function and the advisory nature of the proceedings.
- (b) The Court's function is to state existing law. Just as in the case of contentious proceedings, it is no part of its task to make new law.
- (c) The specialized treaty regime on climate change (UNFCCC, Kyoto Protocol and Paris Agreement) plays the central legal role in respect of States' obligations in regard to climate change.
- (d) The Court should avoid any pronouncements that will contradict the compromises reached in the negotiations within the specialized treaty regime on climate change.



Chapter 4. THE SPECIALIZED TREATY REGIME ON CLIMATE CHANGE

I. Introduction

- 4.1. This chapter describes the rules of international law which are decisive for the questions put to the Court.
- 4.2. The relevant rules are set forth in the specialized treaty regime on climate change, which governs the obligations of States under international law with respect to climate change and comprises the UNFCCC, the Kyoto Protocol, and the Paris Agreement, and may be further agreed upon through other related legal instruments by the COP thereunder. Reference is also made, in Section V, to certain other international norms that do not reference climate change to which the Court has been asked to have regard.
- 4.3. The UNFCCC, concluded in 1992, was carefully negotiated by States, with the aim of addressing anthropogenic greenhouse gas emissions accumulating in the atmosphere. Nearly every State is a party to the UNFCCC⁷¹. The UNFCCC sets forth the overall framework for actions with respect to climate change. It is discussed further in Section II of this Chapter. The UNFCCC is the product of a series of lengthy and complex negotiations among nearly 200 equal and sovereign States, each with their own distinct context, level of economic development, history and policy interests.
- 4.4. The Kyoto Protocol and the Paris Agreement, which are discussed in Sections III and IV of this Chapter, operate within the institutional framework of the UNFCCC. These instruments were introduced to enhance implementation of the UNFCCC and build upon the principles and provisions established in the UNFCCC. They do not renegotiate, rewrite, restructure, reinterpret, or override the obligations and legal principles set out in the UNFCCC. Rather, the Kyoto Protocol and Paris Agreement add specific and ambitious targets for addressing climate change that serve to further implement the UNFCCC.

⁷¹ As of January 2024, 198 States and regional economic integration organizations are parties to the UNFCCC.



- 4.5. The specialized treaty regime on climate change does not mandate the specific measures that countries are to implement at the national level in order to achieve the objectives of the treaty regime. Instead, the means of implementation are left to national governments.

II. The UNFCCC

A. The UNFCCC Governs the Questions Before the Court

- 4.6. In ratifying the UNFCCC, its Parties reached consensus on a shared concern: that climate change poses “a common concern of humankind”,⁷² and “[d]etermined to protect the climate system for present and future generations”⁷³. To address this concern and determination, the ultimate objective of the UNFCCC is to achieve “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. . . within a time, frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner”⁷⁴. This objective makes clear that the UNFCCC’s focus is on greenhouse gas emissions from all sources. It also makes clear that a balance between the protection of the climate and other sustainable development goals is hardwired into the specialized treaty regime on climate change.
- 4.7. The UNFCCC is a ‘framework’ convention, which establishes an international legal regime for climate change that sets out the objective, institutions, and processes for adopting obligations. States have laid down an institutional structure for the adoption of obligations through the negotiation of protocols, amendments and further agreements

⁷² UNFCCC, preamble, para. 1.

⁷³ UNFCCC, preamble, para. 23.

⁷⁴ UNFCCC, Article 2.



implementing the UNFCCC⁷⁵, which include the Kyoto Protocol⁷⁶, and the Paris Agreement⁷⁷. In that respect, the COP is the “supreme decision-making body” of the UNFCCC⁷⁸.

- 4.8. Parties convene regularly at meetings of the COP to negotiate the implementation and further development of the specialized treaty regime on climate change, and adopt decisions and other related legal instruments within the ‘framework’ convention structure⁷⁹. This structure allows Parties over time to consider appropriate targets and address climate change on the basis of the most up to date science and developments in innovation and technology.
- 4.9. The UNFCCC’s ability to adapt and evolve based on international agreement is part of a deliberate effort to harmonize cooperative action and allow Parties’ obligations to protect the climate system to develop through a continuous negotiation process, while maintaining global consensus on climate change.

B. The UNFCCC Includes Key Principles and Obligations Applicable to the Questions Before the Court

- 4.10. The UNFCCC addresses greenhouse gas emissions from all sources. The actions of States to achieve the objective of the UNFCCC are guided by principles set out in Article 3 of the UNFCCC. These principles include differentiation, equity⁸⁰, the

⁷⁵ UNFCCC, Articles 15, 17.

⁷⁶ Kyoto Protocol, preamble.

⁷⁷ Paris Agreement, preamble, para. 1; *ibid.*, Article 2(1).

⁷⁸ *Conference of the Parties*, UNFCCC, available at <https://unfccc.int/process/bodies/supreme-bodies/conference-of-the-parties-cop> (last visited 12 Oct. 2023); see also UNFCCC, Article 7.2 (“The Conference of the Parties, as the supreme body of this Convention, shall keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention”).

⁷⁹ See UNFCCC, Article 7(2).

⁸⁰ UNFCCC, Article 3(1).



specific circumstances of developing country Parties, especially those particularly vulnerable to the adverse effects of climate change⁸¹, the precautionary principle⁸², the right and duty of Parties to promote sustainable development⁸³, the principle of cooperation⁸⁴, and protecting the climate system for the benefit of present and future generations⁸⁵. The UNFCCC does not mandate the specific measures that countries are to implement at the national level to achieve the objectives of the treaty regime. Instead, the means of implementation are left to national governments.

1. Differentiation

- 4.11. The UNFCCC is premised on the principle of common but differentiated responsibilities (“CBDR”)⁸⁶. CBDR implies that all States have a role in addressing climate change, but that that role varies depending on facts that differentiate States, including their historical “contributions to the enhancement of the greenhouse effect”⁸⁷.
- 4.12. The UNFCCC sets forth general obligations that apply to all Parties. Reflecting CBDR, these general obligations are qualified to acknowledge *inter alia* that States have asymmetric abilities to mitigate climate change, taking into consideration national circumstances and economic and social development priorities, such as demand for energy in the developing world and the importance of fossil fuels to certain economies⁸⁸. Thus, to achieve the objective of the specialized treaty regime on climate change, the Parties are to “tak[e] into account their common but differentiated

⁸¹ UNFCCC, Article 3(2).

⁸² UNFCCC, Article 3(3) (applying to environmental harm).

⁸³ UNFCCC, Article 3(4).

⁸⁴ UNFCCC, Article 3(5).

⁸⁵ UNFCCC, Article 3(1).

⁸⁶ UNFCCC, Article 3(1).

⁸⁷ UNFCCC, preamble, paras. 3, 18; Articles 3(1), 4(1).

⁸⁸ UNFCCC, preamble, paras. 3, 4, 6, 8, 19, 20, 21.



responsibilities and their specific national and regional development priorities, objectives and circumstances”⁸⁹.

- 4.13. The UNFCCC also creates differentiated obligations for “developed country Parties” which “should take the lead in combating climate change and the adverse effects thereof”⁹⁰. CBDR is operationalized through the distinction between Parties listed in Annex I to the UNFCCC and those not listed in Annex I. The Annex I Parties have greater obligations under the specialized treaty regime on climate change⁹¹. The Annex I Parties agreed to this differentiation, thus accepting they have a higher level of responsibility to mitigate the adverse effects of climate change and acknowledging that their emissions exceeded those of the non-Annex I Parties⁹². The other States, the “non-Annex I Parties,” industrialized later or have not yet industrialized, and have fewer obligations under the specialized treaty regime on climate change⁹³. The UNFCCC thus reflects the international consensus that countries with a greater historical share of greenhouse gas emissions accept heightened obligations with respect to action on climate change.

2. Sustainable Development and Poverty Eradication

- 4.14. The specialized treaty regime on climate change at its core emphasizes a balancing of climate action against the need for “economic development to proceed in a sustainable manner” and “on the basis of equity, and in the context of sustainable development and

⁸⁹ UNFCCC, Article 4(1) (“to the extent feasible”).

⁹⁰ UNFCCC, Article 3(1).

⁹¹ UNFCCC, Articles 4(2)-4(5), 12(2)-12(3); see generally *ibid.*, Article 3.

⁹² The UNFCCC’s preamble reflects this acknowledgment, noting “the largest share of historical and current global emissions of greenhouse gases has originated in developed countries” and, as a result, recognizes “the need for developed countries to take immediate action ... as a first step towards comprehensive response strategies.” UNFCCC, preamble, paras. 3, 18. During the UNFCCC negotiations, industrialized countries accounted for around three-quarters of global carbon dioxide emissions, despite constituting only one-fifth of the global population.

⁹³ Annex I generally includes the 1992 members of the Organisation for Economic Co-operation and Development, together with the Russian Federation, the Baltic States, and Central and Eastern European States.



efforts to eradicate poverty”⁹⁴. In that respect, the UNFCCC is based upon the promotion of “sustainable development.”⁹⁵ Notably, the UNFCCC proclaims its “ultimate objective” to achieve “stabilization of greenhouse gas concentrations. . . within a time frame sufficient to allow ecosystems to adapt . . ., to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner”.⁹⁶ The UNFCCC requires climate change considerations to be taken into account, to the extent feasible, in each Party’s relevant social, economic, and environmental policies and actions⁹⁷. It balances the general obligation to control emissions by an injunction to “minimize adverse effects on the economy”.⁹⁸ One of its basic principles is that Parties “have a right to, and should, promote sustainable development”.⁹⁹ Their policies and measures should take into account that “economic development is essential for adopting measures to address climate change”.¹⁰⁰

- 4.15. It thus recognizes and seeks to address the energy trilemma of energy security, equity (accessibility and affordability), and sustainability at the heart of the emissions transition.
- 4.16. The UNFCCC further recognizes the sovereign right of States, in accordance with the Charter of the United Nations, to exploit their own resources¹⁰¹, which further underscores the need for a flexible approach and the need to have regard to the differentiated positions of States¹⁰². The right of permanent sovereignty over natural resources was shaped in the historical context of decolonization and the need for the

⁹⁴ UNFCCC, Article 2; Paris Agreement, Article 4(1).

⁹⁵ UNFCCC, Article 3(4).

⁹⁶ UNFCCC, Article 2 (emphasis added).

⁹⁷ UNFCCC, Article 4(1)(f). See also Chapter 2 above.

⁹⁸ UNFCCC, Article 4(1)(f) (emphasis added).

⁹⁹ UNFCCC, Article 3(4).

¹⁰⁰ UNFCCC, Article 3(4).

¹⁰¹ See UNFCCC, preamble, para. 8.

¹⁰² See, e.g., UNFCCC, preamble, paras.10, 20, 21, 22; Articles 3(1)-3(3), 4(1)-4(2).



economic development of States that did not industrialize early. The General Assembly gave expression to this right in its resolution 1803 (XVII) of 14 December 1962, in which it declared that “[t]he right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned”¹⁰³. In its 2005 Judgment in *Armed Activities on the Territory of the Congo*, the Court “recogniz[ed] the importance” of permanent sovereignty over natural resources as “a principle of customary international law”¹⁰⁴. In resolution 1803, the General Assembly emphasized “the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests”¹⁰⁵ and acknowledged that this right includes a State’s freedom to explore, develop and dispose of its natural resources, and its right to regulate such use¹⁰⁶. Resolution 1803 further declares that violation of the right of permanent sovereignty over natural resources is contrary to the spirit and principles of the UN Charter¹⁰⁷. Implementing that right, Article 4(1) of the UNFCCC provides for flexibility in the implementation of Parties’ commitments by allowing Parties to “tak[e] into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances”¹⁰⁸.

- 4.17. Article 4(8) of the UNFCCC further requires Parties to consider actions necessary to meet the specific needs and concerns of Parties not listed in Annex I that are affected by response measures to climate change, including countries whose economies are highly dependent on fossil fuel production and export.

¹⁰³ General Assembly resolution 1803 (XVII) of 14 December 1962, para. 1.

¹⁰⁴ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 251, para. 244.

¹⁰⁵ General Assembly resolution 1803 (XVII) of 14 December 1962, preamble.

¹⁰⁶ General Assembly resolution 1803 (XVII) of 14 December 1962, para. 2.

¹⁰⁷ General Assembly resolution 1803 (XVII) of 14 December 1962, para. 7.

¹⁰⁸ UNFCCC, Article 4(1).



- 4.18. The UNFCCC also requires States, as they take actions to protect the climate system, to minimize negative impacts on other States with economic dependence on fossil fuels¹⁰⁹. The UNFCCC provides that Parties, particularly non-Annex I Parties with economies that are highly dependent on fossil fuel production and export, are to be given particular consideration so as to avoid exacerbating vulnerabilities and adverse impacts to these economies when States implement climate system protection actions¹¹⁰.
- 4.19. Obligations of States to protect the climate system require taking into account that countries that industrialized late and have non-diversified, fossil-fuel dependent economies still need room to develop and need to rely on their natural resources to do so. Therefore, these countries stand in a different position from countries that industrialized early. This accords with the overarching CBDR principle because a State's role in addressing climate change varies depending on its dependency on fossil fuels.

¹⁰⁹ UNFCCC, Article 4(8)(h) ("In the implementation of the 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: . . . [c]ountries whose economies are highly dependent on income generated from the production, processing and export, and/or on consumption of fossil fuels and associated energy-intensive products").

¹¹⁰ UNFCCC, Article 4(10) ("The Parties shall, in accordance with Article 10, take into consideration in the implementation of the commitments of the Convention the situation of Parties, particularly developing country Parties, with economies that are vulnerable to the adverse effects of the implementation of measures to respond to climate change. This applies notably to Parties with economies that are highly dependent on income generated from the production, processing and export, and/or consumption of fossil fuels and associated energy-intensive products and/or the use of fossil fuels for which such Parties have serious difficulties in switching to alternatives.").



3. *Targets*

- 4.20. Consistent with its status as a framework convention, the UNFCCC governance framework allows States to take an incremental approach in addressing climate change. The UNFCCC does not specify fixed mandatory targets.
- 4.21. Instead, under Article 4(2)(a) and (b), each of the Annex I Parties undertook to “adopt national policies and take corresponding 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”, and communicate information “with the aim of returning individually or jointly to their 1990 levels” of anthropogenic emissions of carbon dioxide and other greenhouse gases by 2000¹¹¹. Accordingly, under the UNFCCC, the Annex I Parties commitments, but without fixed mandatory targets. In contrast, and despite its long-term objective to reduce greenhouse gas emissions, the UNFCCC recognized that the non-Annex I Parties’ share of greenhouse gas emissions “will grow to meet their social and development needs”¹¹².
- 4.22. Additionally, under Article 4(1), all Parties must develop national inventories of their emissions and promote efforts towards and cooperate in undertaking mitigation and adaptation measures¹¹³.

4. *Reporting*

- 4.23. The UNFCCC requires all Parties to report on their emissions¹¹⁴. The reporting requirement prompts States to adopt a nationally defined policy for climate mitigation

¹¹¹ UNFCCC, Article 4(2) (a-b).

¹¹² See UNFCCC, preamble (“the share of global emissions originating in developing countries will grow to meet their social and development needs”).

¹¹³ UNFCCC, Article 4(1).

¹¹⁴ UNFCCC, Articles 4(1)(a), 7(2)(d), 12(1).



and adaptation. Such national reports are to be communicated to the COP, which will review them and assess each Party's implementation¹¹⁵.

- 4.24. Annex I Parties also have to report on the national policies and measures adopted towards mitigating climate change¹¹⁶.

5. *Financing and Means of Implementation*

- 4.25. Financing obligations are imposed solely on the Annex I Parties which are also listed in Annex II (*i.e.*, the OECD countries, but not economies in transition).

- 4.26. Annex II Parties must provide financing to non-Annex I Parties "to meet the agreed full costs incurred" in complying with their reporting obligations¹¹⁷. They are also required to provide financing to non-Annex I Parties "to meet the agreed full incremental costs" of their other obligations under Article 4(1)¹¹⁸. Annex II Parties "shall also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change" in meeting adaptation costs to those effects¹¹⁹.

- 4.27. Annex II Parties committed to assist all Parties and non-Annex I Parties especially, by taking "all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how . . . to enable them to implement the provisions of the Convention"¹²⁰.

- 4.28. All Parties also have an obligation to "[p]romote and cooperate in the development, application and diffusion, including transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases . . . in all

¹¹⁵ UNFCCC, Article 12(1).

¹¹⁶ See UNFCCC, Articles 4(2)(b), 12(2).

¹¹⁷ UNFCCC, Articles 4(3), 12(1).

¹¹⁸ UNFCCC, Articles 4(3), 4(1).

¹¹⁹ UNFCCC, Article 4(4).

¹²⁰ UNFCCC, Article 4(5).



relevant sectors . . .”¹²¹. Additionally, Article 4(8) requires all Parties to consider actions necessary—including actions related to funding, insurance, and the transfer of technology—to meet the specific needs and concerns of non-Annex I Parties affected by response measures to climate change, including States whose economies are highly dependent on fossil fuel production and export¹²².

C. The UNFCCC Includes Provisions on Compliance and the Settlement of Disputes

1. Compliance

4.29. The COP is responsible for reviewing the implementation of the UNFCCC by periodically examining the obligations of the Parties and assessing States’ progress towards achieving the objectives of the UNFCCC¹²³. Compliance with the UNFCCC is further strengthened by the Subsidiary Body for Implementation, which assists the COP in reviewing the effective implementation of the UNFCCC¹²⁴.

2. Dispute Resolution

4.30. With respect to States’ progress towards achieving the objectives of the UNFCCC, the climate change regime facilitates compliance and promotes cooperation, rather than dispute resolution through adversarial procedures.

4.31. Article 13 of the UNFCCC calls for the establishment of a non-adjudicatory mechanism that would enable cooperation and provide a consultative process to help with implementation of the UNFCCC. While States Parties did not immediately adopt such

¹²¹ UNFCCC, Article 4(1)(c).

¹²² UNFCCC, Article 4(8)(h) (“In the implementation of the 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: [c]ountries whose economies are highly dependent on income generated from the production, processing and export, and/or on consumption of fossil fuels and associated energy-intensive products.”).

¹²³ UNFCCC, Articles 7.2(a) and (e).

¹²⁴ UNFCCC, Article 10.



a mechanism under the UNFCCC, they did adopt similar mechanisms pursuant to the Kyoto Protocol and the Paris Agreement, addressed below in Sections III and IV of this Chapter.

- 4.32. In addition, Article 14 of the UNFCCC provides for the settlement of disputes concerning the interpretation or application of the UNFCCC. It provides for negotiation or other peaceful means of their own choice (which may include the International Court of Justice or arbitration). If the Parties concerned are unable to settle the dispute, either Party may refer it to conciliation.

III. The Kyoto Protocol

A. The Kyoto Protocol Is a Related Legal Instrument Applicable to the Questions Before the Court

- 4.33. The Kyoto Protocol was adopted “[i]n pursuit of the ultimate objective of the [UNFCCC] as stated in its Article 2” to stabilize greenhouse gas concentrations in the atmosphere at a level that will prevent dangerous human interference with the climate system¹²⁵.
- 4.34. The Kyoto Protocol was the result of COP meetings, where the Parties to the UNFCCC agreed to establish a process to negotiate strengthened commitments for Annex I Parties¹²⁶. The Parties specifically ruled out new commitments for non-Annex I Parties¹²⁷. The Parties acknowledged that industrial activities of certain countries over the past 150 years had primarily contributed to the elevated levels of greenhouse gas emissions in the atmosphere. On that basis, the Annex I Parties committed to setting

¹²⁵ Kyoto Protocol, preamble.

¹²⁶ Report on the Conference of the Parties on its First Session (FCCC/CP/1995/7/Add.1), 6 June 1995, p. 4, available at <https://unfccc.int/resource/docs/cop1/07a01.pdf>.

¹²⁷ Ibid.



internationally binding emission reduction targets for greenhouse gas emissions for Annex I Parties¹²⁸.

- 4.35. While several States withdrew from Kyoto and the commitment periods for States' greenhouse gas reduction commitments have now expired, this negotiation and the resulting instruments show that when States intend to impose top-down, legally binding obligations, they do so explicitly.
- 4.36. While the commitment periods for State reduction obligations under the Kyoto Protocol have expired, the Kyoto Protocol's principles remain important for climate negotiations and action.

B. The Kyoto Protocol Includes Key Principles and Obligations Applicable to the Questions Before the Court

- 4.37. Like the UNFCCC, the Kyoto Protocol addresses greenhouse gas emissions from all sources. The Kyoto Protocol built on the principles and provisions of the UNFCCC and set forth obligations of States with respect to climate change—legally binding targets for Annex I Parties.

1. Differentiation

- 4.38. Like the UNFCCC, the Kyoto Protocol differentiated between Annex I and non-Annex I Parties. The Kyoto Protocol cited the CBDR principle as a basis for not introducing new commitments for non-Annex I Parties¹²⁹. It also explicitly recognized specific needs and concerns of non-Annex I Parties. For example, the Kyoto Protocol required Annex I Parties to strive to implement their greenhouse gas emission reduction obligations in a way that minimizes adverse effects on non-Annex I Parties¹³⁰.

¹²⁸ Report on the Conference of the Parties on its Second Session (FCCC/CP/1996/15/Add.1), 29 Oct. 1996, p. 73, available at <https://unfccc.int/resource/docs/cop2/15a01.pdf>.

¹²⁹ Kyoto Protocol, Article 10.

¹³⁰ See, e.g., Kyoto Protocol, Articles 2(3), 3(14).



2. *Targets*

- 4.39. In the Kyoto Protocol, Annex I Parties¹³¹ agreed to meet individualized greenhouse gas emissions reductions tied to those States' historic greenhouse gas emissions within national borders¹³².
- 4.40. The Kyoto Protocol provided that Annex I Parties "shall" individually or jointly "ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases. . . do not exceed their assigned amounts. . . with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012"¹³³. The country-specific reduction commitments were set out in an Annex to the Kyoto Protocol. Non-Annex I Parties were not subject to greenhouse gas reduction commitments. Under the December 2012 "Doha Amendment" to the Kyoto Protocol, the Annex I Parties accepted new emissions reductions obligations for the period from 2013 through 2020.

3. *Reporting*

- 4.41. The Kyoto Protocol established procedural obligations for Annex I Parties, including the requirement to report on annual inventory of anthropogenic emissions¹³⁴, and issue a periodic national communication¹³⁵.

4. *Financing and Means of Implementation*

- 4.42. The Kyoto Protocol affirmed the commitment of Annex I Parties to provide new and additional financial resources¹³⁶.

¹³¹ The Annex I States are listed in Annex B to the Kyoto Protocol.

¹³² Kyoto Protocol, Article 3(1).

¹³³ Kyoto Protocol, Article 3(1).

¹³⁴ Kyoto Protocol, Article 7(1).

¹³⁵ Kyoto Protocol, Article 7(3).

¹³⁶ Kyoto Protocol, Article 11(2).



- 4.43. Article 12(8) of the Kyoto Protocol also required that Annex I Parties assist non-Annex I Parties that are particularly vulnerable to the adverse effects of climate change in meeting adaptation costs. The Kyoto Protocol provided that the Annex I Parties will provide “such financial resources, including for the transfer of technology, needed by the [non-Annex I] Parties” to meet certain agreed costs¹³⁷.

C. The Kyoto Protocol Includes a Compliance Mechanism

- 4.44. States Parties of the UNFCCC negotiating the Kyoto Protocol expressly provided for a mechanism that would address non-compliance, and established a Compliance Committee, with an Enforcement Branch and a Facilitative Branch. The Facilitative Branch is responsible for providing advice and facilitation to support Protocol implementation, promoting compliance through non-punitive measures, while the mandate of the Enforcement Branch is to assess the compliance of Annex I Parties with their emissions limitation or reduction commitments, reporting, and eligibility for emissions trading and the clean development mechanism¹³⁸.

¹³⁷ Kyoto Protocol, Article 11(2)(b).

¹³⁸ Report of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol – Addendum Part Two: Action taken by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol at its first session, Decision 27/CMP.1 (“Kyoto Protocol compliance procedure”), FCCC/KP/CMP/2005/8/Add.3, Section II, para. 1 (30 Mar. 2006); KP compliance procedure, §§ IV, V. Each branch must include a member from each of the UN’s five geographical groups; one from the small island developing States; and two members each from Annex I and non-Annex I Parties, respectively.



IV. The Paris Agreement

A. The Paris Agreement Is a Related Legal Instrument Applicable to the Questions Before the Court

- 4.45. The Paris Agreement was adopted in 2015, and aims to “enhance[] the implementation of the [UNFCCC], including its objective” and “strengthen the global response to the threat of climate change”¹³⁹. Almost all UNFCCC Parties are Parties to it ¹⁴⁰.
- 4.46. Partly due to the lack of commitment of some Annex I Parties under the Kyoto Protocol¹⁴¹, States decided to strengthen the focus on “cooperative action” instead of a top-down approach to climate mitigation¹⁴². The Paris Agreement sets out its objective to enhance the implementation of the UNFCCC and thereby “strengthen the global response to the threat of climate change”¹⁴³. In particular, the Paris Agreement “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” taking three steps: (a) holding the increase in the global average temperature to specified temperature benchmarks; (b) increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development; and (c) making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.¹⁴⁴ States Parties are to

¹³⁹ Paris Agreement, Article 2(1).

¹⁴⁰ 195 States and regional economic integration organizations are parties to the Paris Agreement. See *Paris Agreement*, UNITED NATIONS TREATY COLLECTION, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en (last visited 12 Oct. 2023).

¹⁴¹ Certain developed Annex I Parties refused to ratify the Kyoto Protocol, others withdrew from it, and others fell short of their emissions reduction obligations.

¹⁴² Report of the Conference of the Parties on its thirteenth session (as amended) (FCCC/CP/2007/6/Add.1) 14 Mar. 2008, p. 3; see also UNFCCC, Articles 3(3), 3(5).

¹⁴³ Paris Agreement, Article 2(1).

¹⁴⁴ Paris Agreement, Article 2.



undertake and communicate ambitious efforts with respect to their contributions to achieve the purpose of the Paris Agreement.¹⁴⁵

4.47. Unlike the Kyoto Protocol, however, the Paris Agreement does not impose greenhouse gas emissions reduction targets for individual States, Annex I or otherwise. Indeed, the history of the Paris Agreement negotiations shows that States decided to strengthen the focus on “cooperative action” instead of a top-down approach to climate mitigation¹⁴⁶. The *travaux préparatoires* for Article 2 show that language which might have entailed binding, goal-orientated obligations or obligations of result, was rejected by States. For example:

- a. A Working Group text on February 25, 2015, proposed that “[a]ll Parties *shall take action and cooperate to further implement the Convention in order to reach its ultimate objective* [...] by achieving an emission pathway consistent with limiting the global average temperature increase to below 2°C or 1.5°C above pre-industrial levels.”¹⁴⁷
- b. On November 6, 2015, the same Working Group proposed the following, less prescriptive, wording: “The purpose of this Agreement is to enhance the implementation of the Convention and to achieve its objective of the Convention as stated in its Article 2. In order to strengthen and support the global response to the urgent threat of climate change, Parties *shall agree to take urgent action and enhance cooperation support* so as to: a. hold the increase in the global average temperature.”¹⁴⁸

¹⁴⁵ Paris Agreement, Article 3.

¹⁴⁶ Report of the Conference of the Parties on its thirteenth session (as amended) (FCCC/CP/2007/6/Add.1) 14 Mar. 2008, p. 3; see also UNFCCC, Articles 3(3), 3(5).

¹⁴⁷ Ad Hoc Working Group on the Durban Platform for Enhanced Action, Negotiating text, second session, part eight, FCCC/ADP/2015/1, 25 Feb. 2015, p. 6 (Negotiating text, C. General/Objective, Option 3) (emphasis added; cleaned up).

¹⁴⁸ ADP, Draft Agreement and Draft Decision on Workstreams 1 and 2 of the Ad Hoc Working Group on the Durban Platform for Enhanced Action, ADP.2015.11. Informal Note, 6 Nov. 2015, p. 3 (Article 2, Option I, para. 1).



**B. The Paris Agreement Includes Key Principles and Obligations that are
Applicable to the Questions Before the Court**

4.48. Like the UNFCCC and the Kyoto Protocol, the Paris Agreement addresses greenhouse gas emissions from all sources. It contains carefully negotiated provisions with varying legal character, including objectives, ambitions, principles, and obligations.

1. Differentiation

4.49. The Paris Agreement differentiates between the responsibilities of States¹⁴⁹. The Paris Agreement states that the Agreement “will be implemented” to reflect the principles of equity and CBDR¹⁵⁰.

4.50. The general obligations set forth in the Paris Agreement are qualified by the acknowledgment that States have common but differentiated responsibilities. Numerous provisions of the Paris Agreement recognize differentiation with respect to States’ responsibilities. To achieve the objective of the Paris Agreement, States Parties are to take into account “different national circumstances”¹⁵¹ and “the specific needs and special circumstances of developing country Parties”¹⁵², and “the specific needs and special situations of the least developed countries [“LDCs”]”¹⁵³.

4.51. The Paris Agreement also specifies what States that industrialized early should do. It provides that developed country Parties “should continue taking the lead by undertaking economy-wide absolute emission reduction targets” in their NDCs, as further discussed

¹⁴⁹ See, e.g., Paris Agreement, preamble, para. 3, Articles 2(2), 4(3), 4(19).

¹⁵⁰ Paris Agreement, Article 2(2).

¹⁵¹ Paris Agreement, preamble, para. 4, Articles 2(2), 4(3).

¹⁵² Paris Agreement, preamble, para. 5.

¹⁵³ Paris Agreement, preamble, para. 6.



below¹⁵⁴. Developing country Parties, on the other hand, are “encouraged to move over time” towards such targets¹⁵⁵.

2. *Sustainable Development and Poverty Eradication*

- 4.52. States Parties acknowledge in the Paris Agreement that due regard should be given to the right to development in addressing climate change¹⁵⁶. The Paris Agreement emphasizes the importance of addressing the specific needs and unique circumstances of “those that are particularly vulnerable to the adverse effects of climate change”¹⁵⁷ and “the intrinsic relationship that climate change actions, responses and impacts have with equitable access to sustainable development and eradication of poverty”¹⁵⁸.
- 4.53. Parties have therefore undertaken to reduce emissions “in the context of sustainable development and efforts to eradicate poverty”¹⁵⁹. Implementation should consider the concerns of Parties “with economies most affected by the impacts of response measures, particularly developing country Parties”¹⁶⁰. Climate adaptation measures are to be undertaken “with a view to contributing to sustainable development”¹⁶¹.
- 4.54. Article 7 also emphasizes the importance of transparency and participation of vulnerable groups and communities in developing adaptation policies, “with a view to integrating adaptation into relevant socioeconomic and environmental policies and actions”¹⁶².

¹⁵⁴ Paris Agreement, Article 4(4).

¹⁵⁵ Paris Agreement, Article 4(4).

¹⁵⁶ Paris Agreement, preamble.

¹⁵⁷ Paris Agreement, preamble, para. 5.

¹⁵⁸ Paris Agreement, Preamble, para. 8.

¹⁵⁹ Paris Agreement, Article 4(1).

¹⁶⁰ Paris Agreement, Article 4(15).

¹⁶¹ Paris Agreement, Article 7(1).

¹⁶² Paris Agreement, Article 7(5).



4.55. In view of these principles, the Paris Agreement affords flexibility for each State to design its own just transition in pursuit of a common goal¹⁶³. A just transition requires that the transition to clean energy allow for consultation with affected producers and workers, as well as time for economic adjustments by communities affected by the transition. The energy trilemma of energy security, equity (accessibility and affordability), and sustainability plays a central role in effecting the emissions transition.

3. *Targets*

4.56. Rather than fixing greenhouse gas emissions reduction targets like the Kyoto Protocol, the Paris Agreement gives States latitude to determine and implement their own approach.

4.57. In its Article 2, the Paris Agreement sets forth the aim to strengthen the global response to the threat of climate change, “including by . . . [h]olding 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”¹⁶⁴.

4.58. The text of Article 2 makes clear that the goal to limit the global temperature increase does not give rise to an obligation on States to act or refrain from taking any particular actions. Nor can it be read to impose any obligation of result to achieve temperature reduction targets.

4.59. Article 2 provides that the Agreement “aims” to strengthen the global response to the threat of climate change “including” by holding the increase in the global average

¹⁶³ See Draft decision -/CMA.5, Outcome of the first global stocktake, FCCC/PA/CMA/2023/L.17, 13 Dec. 2023, paras. 10, 28(h), 42, 140, 151, 152.

¹⁶⁴ Paris Agreement, Article 2(1)(a).



temperature to the specified targets. The use of the word “aims” indicates that this is a hortatory objective.

- 4.60. The hortatory nature of the Paris Agreement’s temperature goal is even more apparent for the 1.5°C target, which refers to “pursuing efforts” to limit the temperature increase to 1.5°C above pre-industrial levels.
- 4.61. To guide Parties towards the achievement of these temperature goals, the Paris Agreement encourages mitigation and adaptation measures.
- 4.62. The Paris Agreement encourages the undertaking of mitigation measures in Article 4, though it does not impose obligations on States in that regard. Indeed, there is an important qualification in Article 4, as the Parties “aim” to reach global peaking of greenhouse gas emissions as soon as possible. Reflecting the principle of CBDR, the Parties also recognize that “peaking will take longer for developing country Parties”¹⁶⁵. Furthermore, the goal set out in Article 4(1) is to be achieved “on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty”¹⁶⁶.
- 4.63. The Paris Agreement also emphasizes the importance of enhancing adaptive capacity and strengthening resilience particularly in vulnerable countries. The Paris Agreement sets out three overall actions for Parties to undertake in connection with their adaptation efforts: (i) strengthening cooperation, (ii) engaging in adaptation planning and implementation, and (iii) preparing and submitting communications on adaptation efforts. Article 7(13) requires that “[c]ontinuous and enhanced international support” shall be provided to non-Annex I Parties for the implementation of adaptation efforts¹⁶⁷. As explained in Chapter 2 above, the Kingdom is particularly vulnerable to climate

¹⁶⁵ Paris Agreement, Article 4(1).

¹⁶⁶ Paris Agreement, Article 4(1).

¹⁶⁷ Paris Agreement, Article 7(13).



change, and is leading efforts to address climate change adaptation and mitigation, including by multilateral, regional, and national efforts.

4. *Nationally Determined Contributions*

- 4.64. The Paris Agreement establishes a process wherein each State prepares and communicates successive NDCs to advance the Paris Agreement's objective¹⁶⁸. NDCs are the main instrument for achieving the Paris Agreement's long-term ambitions. Through their NDCs, Parties are able to self-differentiate their climate action efforts and have flexibility to decide the type and scope of their contributions.¹⁶⁹
- 4.65. Each Party "shall communicate" an NDC "every five years"¹⁷⁰. While Parties are not legally bound to achieve their NDCs, they are legally bound to outline clearly their pledges and to report on their progress in achieving their NDCs¹⁷¹.
- 4.66. NDCs exist on the basis of self-differentiation. That is, Parties are to justify their contribution as "fair and ambitious"¹⁷² and "should strive to formulate and communicate long-term low greenhouse gas emission development strategies, mindful of Article 2" taking into account CBDR¹⁷³. That also means that "Parties shall take into consideration in the implementation of this Agreement the concerns of Parties with economies most affected by the impacts of response measures, particularly developing country Parties"¹⁷⁴.

¹⁶⁸ Paris Agreement, Article 4(2).

¹⁶⁹ Paris Agreement, Art. 3.

¹⁷⁰ Paris Agreement, Article 4(9).

¹⁷¹ Paris Agreement, Articles 4(8), 13(7).

¹⁷² Paris Agreement, Article 2; Decision 1/CP.21, Adoption of the Paris Agreement (FCCC/CP/2015/10/Add.1), 29 Jan. 2016, para. 51.

¹⁷³ Paris Agreement, Article 4(19).

¹⁷⁴ Paris Agreement, Article 4(15).



- 4.67. Thus, the Paris Agreement requires States Parties to identify and publish NDCs, which are ambitious in light of a State's national circumstances. It is through an NDC that a State articulates the extent to which the State can prevent, reduce and control its own greenhouse gas emissions. This is because the NDC is where the State sets out its ambition to reduce greenhouse gas emissions that occur within its own national borders based on its national circumstances. As further carefully negotiated, States are required to "aim" to achieve the objectives of their NDCs through domestic measures¹⁷⁵. States are not legally bound to meet targets or goals set forth in their NDCs.
- 4.68. However, States Parties did not agree to be bound by any obligations which regulate the content or enforcement of their NDCs. States Parties continue to enjoy flexibility and discretion in this respect. The negotiating history of the Paris Agreement demonstrates that States rejected earlier text which sought more strictly to regulate the contents of an NDC, including by prescribing a list of specific criteria on which an NDC would be based¹⁷⁶. Almost all Parties have submitted NDCs.
- 4.69. The transition to the Paris Agreement's nationally determined approach for NDCs emphasizes the functionality of the UNFCCC as a framework agreement, providing Parties with the flexibility to adapt their climate action strategies over time in alignment with sustainable development.
- 4.70. Neither the treaties, nor the guidance set by the COP, nor the methodologies prescribed by the IPCC, require States Parties to account for Scope 3 emissions in their national inventories of anthropogenic emissions or NDC. Indeed, according to the IPCC's Guidelines for National Greenhouse Gas Inventories (as revised in 2019), "[n]ational inventories include greenhouse gas emissions and removals taking place *within national territory and offshore areas over which the country has jurisdiction.*"

¹⁷⁵ Paris Agreement, Article 4(2).

¹⁷⁶ Ad Hoc Working Group on the Durban Platform for Enhanced Action, Negotiating text, second session, part eight, FCCC/ADP/2015/1, 25 Feb. 2015, p. 13.



5. Reporting

- 4.71. In line with the obligations of all Parties to adopt NDCs and the cooperative framework established by the Paris Agreement, all Parties must report on their progress with reaching the targets set out in their NDCs¹⁷⁷. Annex I Parties have the additional obligation to report on their “financial, technology transfer and capacity-building support provided to developing country Parties under Articles 9, 10 and 11”¹⁷⁸.

6. Response Measures

- 4.72. Like the UNFCCC, the Paris Agreement recognizes that States may be affected not only by climate change, but also by the impacts of the measures taken in response to it. The Paris Agreement emphasizes the “intrinsic relationship” between climate change responses and equitable access to sustainable development and eradication of poverty and recognizes the “fundamental priority” of safeguarding food security and ending hunger¹⁷⁹. In addition, the Paris Agreement states that the Parties have taken into account the issue of the “just transition of the workforce and the creation of decent work and quality jobs in accordance with nationally defined development priorities”¹⁸⁰.

7. Finance and Means of Implementation

- 4.73. The Paris Agreement addresses finance and means of implementation by establishing mechanisms to mobilize financial resources, facilitate technology transfer and enhance capacity-building to support climate action in developing countries¹⁸¹. According to Article 9.4, “the provision of scaled up financial resources should aim to achieve a balance between adaptation and mitigation, taking into account countries driven strategies, and the priorities and needs of developing country parties...”. The

¹⁷⁷ Paris Agreement, Article 13(7).

¹⁷⁸ Paris Agreement, Article 13(9).

¹⁷⁹ Paris Agreement, preamble, paras. 8-9.

¹⁸⁰ Paris Agreement, preamble, para. 10.

¹⁸¹ Paris Agreement, Articles 9-11.



provisions on finance and means of implementation again underscore differentiation in the specialized treaty regime on climate change as the Paris Agreement refers to climate finance in the context of the needs, priorities, and national strategies of non-Annex I Parties, and only Annex I Parties are required to provide financing. This is further reinforced by the Paris Agreement reflecting the concepts of differentiation and CBDR by referring to climate finance in the context of the needs, priorities, and national strategies of non-Annex I Parties.

- 4.74. Developed country Parties “shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation”¹⁸². However, other countries are also permitted—indeed “encouraged”—to provide such financing: “[o]ther Parties are encouraged to provide or continue to provide such support voluntarily”¹⁸³.
- 4.75. Annex I Parties are obligated to report their financial contributions: Annex I Parties “shall” communicate biennially “indicative quantitative and qualitative information”¹⁸⁴ related to their climate finance efforts, including projected levels of public financial resources to be provided to developing country Parties. The financing information reported “shall” be taken into account as part of the global stocktake¹⁸⁵.

¹⁸² Paris Agreement, Article 9(1).

¹⁸³ Paris Agreement, Article 9(2).

¹⁸⁴ Paris Agreement Article 9(5). As part of these efforts, developed country Parties are also required to provide “transparent and consistent information on support for developing country Parties” biennially in accordance with modalities, procedures, and guidelines to be adopted by the COP serving as the meeting of the Parties to the Paris Agreement at its first session. See Paris Agreement, Articles 9(7), 13(13).

¹⁸⁵ Paris Agreement, Article 9(6).



**C. The Paris Agreement Includes Implementation, Compliance, and Loss and
Damage Mechanisms**

1. Compliance

- 4.76. The Paris Agreement establishes a transparency framework that tracks the Parties' progress towards achieving their individual NDCs and adaptation actions¹⁸⁶. As part of this mechanism, the progress of Parties is submitted to a technical expert review, and Parties participate in a consideration of progress to assess the implementation and achievement of the nationally determined contribution¹⁸⁷. The review identifies areas of improvement for the Party¹⁸⁸.
- 4.77. Article 14 also provides that the COP will “periodically take stock of the implementation of [the Paris Agreement] to assess the collective progress towards achieving the purpose [of the] Agreement and its long-term goals”¹⁸⁹.

2. Compliance Mechanism

- 4.78. Paris Agreement Article 15 establishes a mechanism to “to facilitate implementation of and promote compliance” with the Agreement. The mechanism “shall consist of a committee that shall be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive.” The committee “shall pay particular attention to the respective national capabilities and circumstances of Parties”¹⁹⁰.

¹⁸⁶ Paris Agreement, Article 13.5.

¹⁸⁷ Paris Agreement, Article 13(11).

¹⁸⁸ Paris Agreement, Article 13(11).

¹⁸⁹ Paris Agreement, Article 14(1).

¹⁹⁰ Paris Agreement, Article 15.



4.79. This is a “non-adversarial” and “non-punitive” procedure, designed to facilitate and promote compliance. The express reference to “national capabilities and circumstances” reinforces this conclusion.

3. *Dispute settlement*

4.80. Article 24 of the Paris Agreement, by reference to Article 14 of the UNFCCC includes a dispute resolution mechanism providing for negotiation, conciliation, or adjudication in the event of a dispute between Parties. In the event that there is a dispute between State Parties to one of the climate change treaties as to its application or interpretation and such dispute cannot be resolved through negotiation or conciliation, there is provision for resolution of a dispute by the Court or arbitration. However, jurisdiction is conditional on an express opt-in by the relevant State under Article 14 of the UNFCCC.

4. *Loss and Damage*

4.81. Efforts under the specialized treaty regime on climate change to address “loss and damage”, or injuries from, and vulnerabilities to, adverse effects of climate change due to geographical circumstances and levels of development, began in 2010. This is when the Parties to the UNFCCC implemented a program to consider loss and damage associated with climate change, as well as the impacts on countries that were particularly vulnerable to catastrophic physical events caused by climate change¹⁹¹.

4.82. In 2013, the Parties established an international mechanism for loss and damage associated with climate change impacts (the “Warsaw International Mechanism”). The decision also outlined that the functions of the Warsaw International Mechanism to include *inter alia* (i) developing knowledge and understanding of loss and damage; (ii)

¹⁹¹ The Cancun Agreements in 2010 listed examples of loss and damages events: “sea level rise, increasing temperatures, ocean acidification, glacial retreat and related impacts, salinization, land and forest degradation, loss of biodiversity and desertification.” COP 16, 1/CP.16, para. 25 (15 Mar. 2011).



- strengthening dialogue among Parties on loss and damage; and (iii) enhancing action and support, including financial support, technological support, and capacity building to address loss and damage through providing technical support, information and facilitating the enhancement of support¹⁹².
- 4.83. The Paris Agreement also addresses loss and damage, providing in Article 8 that the Warsaw International Mechanism shall be subject to the authority and guidance of the COP serving as the meeting of the Parties to the Paris Agreement, “and may be enhanced and strengthened,” as determined by that body¹⁹³. The decision adopting the Paris Agreement explicitly states that Article 8 of the Paris Agreement does not determine liability or compensation¹⁹⁴.
- 4.84. Recognizing the complex nature and asymmetric allocation of duties to protect the climate system, Parties continue to address loss and damage through facilitating access to finance, improving coordination and oversight and enhancing knowledge, including by technology and capacity building (the “Loss and Damage Mechanism”)¹⁹⁵.
- 4.85. At the 27th Session of the COP in November 2022, State Parties agreed to establish a new Loss and Damage Fund (the “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 the adverse effects of climate change”¹⁹⁶. The Parties further established a Transitional Committee “with a

¹⁹² Report of the Conference of the Parties on its Nineteenth Session (“COP 19”) (FCCC/CP/2013/10/Add.1), 31 Jan. 2014, paras. 5-7.

¹⁹³ Paris Agreement, Article 8(2).

¹⁹⁴ Decision 1/CP.21, Adoption of the Paris Agreement (FCCC/CP/2015/10/Add.1), 29 Jan. 2016, para. 51.

¹⁹⁵ Decision 1/CP.21, Adoption of the Paris Agreement (FCCC/CP/2015/10/Add.1), 29 Jan. 2016, para. 47 (deciding on continuation of the Warsaw Institutional Mechanism for Loss and Damage associated with Climate Change Impacts); Decision 3/CP.18, Adoption of the Paris Agreement (FCCC/CP/2012/8/Add.1), 28 Feb. 2013, para. 51 (Approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change to enhance adaptive capacity); Decision 2/CP.19, Adoption of the Paris Agreement (FCCC/CP/2013/10/Add.1), 31 Jan. 2014 (Warsaw international mechanism for loss and damage associated with climate change impacts).

¹⁹⁶ UNFCCC Decision 2/CP.27 (FCCC/CP/2022/10/Add.1), 17 Mar. 2023, p. 12, para. 1.



view to operationalizing the funding arrangements,” including identifying sources of funding¹⁹⁷.

- 4.86. On 4 November 2023, the Transitional Committee formalized its recommendations in relation to the proposed organization of the Fund, the Fund’s Governing Instrument and recommending the establishment of a 26-member board with legal personality and a secretariat¹⁹⁸. The Transitional Committee also recommended that the World Bank serve as interim trustee of the Fund and administer the Fund’s assets¹⁹⁹. The Governing Instrument states that funding will be able to receive contributions from public and private entities, including “from innovative sources, as appropriate,” and specifies that the board “will prepare a long-term fund raising and resource mobilisation strategy and plan for the Fund to mobilise new, additional, predictable and adequate financial resources from all sources of funding”²⁰⁰. The Governing Instrument also established factors to be used in allocating the Fund’s resources, including a “minimum percentage allocation floor for LDCs and SIDs”²⁰¹. The Transitional Committee recommendations, which were adopted by Parties at COP28, recalled the understanding that the decision to establish the Fund and funding arrangements does not involve liability or compensation²⁰².

¹⁹⁷ UNFCCC Decision 2/CP.27 (FCCC/CP/2022/10/Add.1), 17 Mar. 2023, p. 12, para. 4.

¹⁹⁸ Proposal of the Fifth Meeting of the Transitional Committee on the Operationalization of the New Funding Arrangements for Responding to Loss and Damage and the Fund Established in Paragraph 3 of Decisions 2/CP.27 and 2/CMA.4 (TC5/2023/4/Rev.2), 4 Nov. 2024, paras. 2-3, 7, 15, Annex I para. 21.

¹⁹⁹ Proposal of the Fifth Meeting of the Transitional Committee on the Operationalization of the New Funding Arrangements for Responding to Loss and Damage and the Fund Established in Paragraph 3 of Decisions 2/CP.27 and 2/CMA.4 (TC5/2023/4/Rev.2), 4 Nov. 2024, paras. 15, 35.

²⁰⁰ Proposal of the Fifth Meeting of the Transitional Committee on the Operationalization of the New Funding Arrangements for Responding to Loss and Damage and the Fund Established in Paragraph 3 of Decisions 2/CP.27 and 2/CMA.4 (TC5/2023/4/Rev.2), 4 Nov. 2024, Annex I, para. 55.

²⁰¹ Proposal of the Fifth Meeting of the Transitional Committee on the Operationalization of the New Funding Arrangements for Responding to Loss and Damage and the Fund Established in Paragraph 3 of Decisions 2/CP.27 and 2/CMA.4 (TC5/2023/4/Rev.2), 4 Nov. 2024, Annex I, para. 59.

²⁰² Proposal of the Fifth Meeting of the Transitional Committee on the Operationalization of the New Funding Arrangements for Responding to Loss and Damage and the Fund Established in Paragraph 3 of Decisions 2/CP.27 and 2/CMA.4 (TC5/2023/4/Rev.2), 4 Nov. 2024, p. 1.



- 4.87. At COP28 in November-December 2023, the Parties adopted the Transitional Committee's recommendations, which included provisions for a mechanism to operationalize the Fund²⁰³. In adopting the recommendations of the Transitional Committee, Parties decided to; "urge developed country Parties to continue to provide support and encourage other Parties to provide, or continue to provide support, on a voluntary basis, for activities to address loss and damage" and "invite financial contributions with developed country Parties continuing to take the lead to provide financial resources for commencing the operationalization of the Fund".
- 4.88. As of 13 December 2023, at COP28, pledges to the Fund amounted to USD 792 million²⁰⁴.
- 4.89. The establishment of the Loss and Damage Fund shows consensus on the response to the needs of non-Annex I Parties experiencing the adverse effects of climate change. It also represents an acknowledgement by States that a means exists within the framework of the specialized treaty regime on climate change to support non-Annex I Parties that are most vulnerable to the adverse effects of climate change due to their geographical circumstances and level of development.

**V. Other International Norms To Which The Court Has Been Asked To Have
Regard**

- 4.90. As shown in the preceding sections, the international law obligations of States relating to climate change are set forth in the specialized treaty regime on climate change. Those obligations are not altered or superseded by other sources of law.

²⁰³ Draft decision -/CP.28 -/CMA.5 Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2-3 of decisions 2/CP.27 and 2/CMA.4 (FCCC/CP/2023/L.1-FCCC/PA/CMA/2023/L.1), 29 Nov. 2023, paras. 1-2, 27.

²⁰⁴ Draft decision -/CMA.5, Outcome of the first global stocktake (FCCC/PA/CMA/2023/L.17), 13 Dec. 2023, para. 79.



4.91. There are certain issues related to greenhouse gases that are operationalized in other treaty regimes. Given the unique nature of the subject matters covered in these treaties, States expressed willingness to cooperate and have effectively managed these legal regimes separately:

- The impacts of specific ozone-depleting substances on the ozone layer are addressed in the 1985 Vienna Convention for the Protection of the Ozone Layer, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, and the 2016 Kigali Amendment (the “Ozone regime”). These set out international legal requirements and reductions in the production of certain ozone depleting substances. Because some ozone depleting substances are also potent greenhouse gases, the Ozone regime has contributed to mitigating climate change. Indeed, the 2016 Kigali Amendment has a “co-benefit” of reducing greenhouse gas emissions from emissions of those ozone depleting substances.²⁰⁵ Nevertheless, the specialized treaty regime on climate change and the Ozone regime both provide that the Ozone regime is not intended to address the climate effects of controlled substances, which would instead be addressed under the specialized treaty regime on climate change.²⁰⁶
- Other specific regimes deal with sector-specific greenhouse gas emissions. These include:

²⁰⁵ UN Environment Program, The Montreal Protocol, *Phase down of HFCs – the Kigali Amendment*, available at <https://www.unep.org/ozonaction/who-we-are/about-montreal-protocol#:~:text=The%20Parties%20to%20the%20Montreal,cent%20by%20the%20late%202040s> (last visited 19 Jan. 2024).

²⁰⁶ UNFCCC, Article 4(1)(a) (“All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall: (a) Develop, periodically update, publish and make available to the Conference of the Parties, in accordance with Article 12, national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol.”); see also UNFCCC Article 4(1)(b)–(j). Article III of the Kigali Amendment provides that the Kigali Amendment does not except hydrofluorocarbons from commitments contained in Articles 4 (Commitments) and 12 (Communication of Information Related to Implementation) of the UNFCCC, and Articles 2, 5, 7, and 10 of the Kyoto Protocol.



- Emissions from aircraft, which are regulated by the International Civil Aviation Organization (“ICAO”). ICAO, under the Chicago Convention, has adopted provisions to curb greenhouse gas emissions from international civil aviation, encompassing fuel efficiency standards (Volume III) and the Carbon Offsetting and Reduction Scheme for International Aviation (CORSA) (Volume IV).
- Emissions from shipping, which are regulated by the International Maritime Organization (“IMO”). The IMO’s mandate includes, among others, the prevention of marine and atmospheric pollution by ships²⁰⁷. As was confirmed in the Kyoto Protocol, Annex I Parties agreed to pursue reductions of greenhouse gas emissions from maritime shipping through IMO²⁰⁸.

4.92. The law of the sea, consisting of both multilateral treaties and customary international law, includes a number of rules concerning the protection and preservation of the marine environment. But UNCLOS makes no express reference to climate change or greenhouse gas emissions. Part XII of UNCLOS addresses in broad terms obligations of States to protect and preserve the marine environment,²⁰⁹ but also expressly reserves the sovereign right of States “to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.”²¹⁰

4.93. UNCLOS Part XII is essentially a framework agreement, as is common for international environmental law. Part XII expresses the expectation that States will in the future

²⁰⁷ International Maritime Organization Convention, Article 1(a).

²⁰⁸ Kyoto Protocol, Article 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.”).

²⁰⁹ UNCLOS (Dossier # 45), Articles 192, 194.

²¹⁰ UNCLOS (Dossier # 45), Article 193.



establish more specific “rules” and “standards” to prevent, reduce, and control pollution.²¹¹ These subsequent laws and regulations will thus regulate the implementation of a State’s obligation to prevent, reduce and control specific types of pollution. In the area of climate change, these are the specialized treaty regime consisting of the UNFCCC, the Kyoto Protocol and the Paris Agreement.

4.94. The general framework provisions in UNCLOS Part XII are not intended to supplant or alter the more detailed rights and obligations set out in these specific international or regional conventions. In this vein, Article 237(1) of UNCLOS states that “[t]he provisions of [Part XII] are without prejudice to the specific obligations assumed by States under special conventions and agreements . . . which may be concluded in furtherance of the general principles set forth in this Convention.” Article 311(2) likewise provides that “[t]his Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.”²¹²

4.95. The Kingdom recalls that the relevant provisions of the UNCLOS must be interpreted in harmony with the specialized treaty regime on climate change, which amounts to *lex specialis* in relation to climate change and greenhouse gas emissions. There is no legal basis under UNCLOS or any of its implementing agreements to impose obligations on States in this field which go beyond or are inconsistent with those obligations which States have already agreed to in the specialized treaty regime on climate change. For present purposes, the Kingdom refers to its oral statement made before the International Tribunal for the Law of the Sea on 13 September 2023²¹³. The Kingdom reserves the right to comment on the advisory opinion to be delivered by the Tribunal in due course.

²¹¹ UNCLOS (Dossier # 45), Articles 207, 212.

²¹² UNCLOS (Dossier # 45), Article 311.

²¹³ *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Kingdom of Saudi Arabia Oral Statement to ITLOS (ITLOS/PV.23/C31/5), 13 Sept. 2023.



- 4.96. The Kingdom is a State Party to a number of specialized environmental regimes and treaties (referenced in the preamble to the advisory opinion request to the Court) which enjoy nearly universal ratification. These regimes or treaties predate the UNFCCC and Paris Agreement and seek to regulate, at an international level, States Parties' efforts to prevent or reduce other, specific forms of environmental harm, and not climate change.²¹⁴
- 4.97. The United Nations General Assembly Request makes reference to international treaties on human rights. Quite apart from the fact that such treaties do not bind non-parties, they simply do not deal with the obligations of States under international law to ensure the protection of the climate system from anthropogenic greenhouse gas emissions. No interpretations of human rights treaties by treaty committees or rapporteurs could impose climate change obligations beyond those painstakingly negotiated and agreed to by States in the legally binding treaty regime on climate change. Nor can national or regional court decisions rewrite or override the universally agreed, specialized treaty regime on climate change.
- 4.98. Important as they are, even if human rights treaties could in principle override the *lex specialis* of climate change law (which they cannot), there are additional grounds why they do not do so. The main human rights treaties lack universality. Many States,²¹⁵ including at least twelve small island States,²¹⁶ are not parties to either or both of the International Covenant on Civil and Political Rights (ICCPR) (174 Parties) or the International Covenant on Economic, Social and Cultural Rights (ICESCR) (172

²¹⁴ Convention on Biological Diversity of 5 June 1992 (1760 U.N.T.S. 79); United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa of 14 October 1993 (1954 U.N.T.S. 3).

²¹⁵ For example, Malaysia, Singapore, the United Arab Emirates, and the Kingdom are not parties to either the ICPR or the IESCR. China is not party to the ICPR and the United States of America is not party to the IESCR.

²¹⁶ At least the following Small Island States are not parties to *either* the ICPR or the IESCR: Comoros, Cook Islands, Kiribati, Micronesia, Nauru, Niue, Palau, St. Kitts and Nevis, St. Lucia, and Tuvalu. In addition, Solomon Islands is not party to the ICPR and Vanuatu is not party to the IESCR.



Parties). This contrasts with the near universality of the UNFCCC (198 Parties) and the Paris Agreement (195 Parties).

- 4.99. Finally, to the extent the United Nations General Assembly advisory opinion request asks the Court to have “particular regard” to various principles, the request does not contend that they amount to customary international law in the context of climate change. Nor could it. Under current international law, the best evidence of a general practice of States and of *opinio juris* is provided by the practice of States in adopting and implementing the specialized treaty regime on climate change.

VI. Conclusion

- 4.100. As discussed in the present chapter, the universally accepted specialized treaty regime on climate change comprehensively sets out international law applicable to greenhouse gas emissions and climate change.
- 4.101. An important principle of the specialized treaty regime on climate change relevant to the answer to the questions now before the Court is the principle of CBDR. CBDR recognizes that certain States that industrialized early and historically saw significant greenhouse gas emissions from within their territories are included in Annex I to the UNFCCC and have greater responsibilities to protect the climate system. CBDR is a cornerstone of the specialized treaty regime on climate change, and application of the regime must ensure differentiation on this basis.
- 4.102. While climate action is important, other elements of sustainable development are also of vital and urgent importance. Climate change mitigation may ease some harmful effects of poverty, but it is imperative to acknowledge that certain measures implemented to attain climate objectives could inadvertently impede the goal of ending poverty. As the Parties noted at COP28, “the global transition to low-emissions and



climate resilient development [...] poses challenges to sustainable development, economic growth and eradication of poverty.”²¹⁷

- 4.103. For example, energy shortages resulting from extreme climate change measures would significantly set back the eradication of poverty and impair economic growth. Indeed, reducing investment in responsible production or abruptly curtailing the use of petroleum could lead to severe economic shock. Recent history shows that oil or gas shortages and accompanying price increases arising from war or geopolitical instability can cause widespread economic harm.
- 4.104. The specialized treaty regime accounts for the complexity of these interrelations, emphasizing the need to balance climate objectives with broader sustainable development goals, including poverty eradication.
- 4.105. The specialized treaty regime on climate change further establishes a compliance and implementation mechanism which is facilitative and cooperative in nature, tailored to the specific character of the obligations and commitments of States thereunder. It also addresses loss and damage, or how States that are injured by, specifically affected by, or particularly vulnerable to the adverse effects of climate change due to their geographical circumstances and level of development can be provided with financial support.
- 4.106. The Paris Agreement sets out an obligation of all States Parties to prepare and communicate NDCs, which have become the main instrument for achieving the treaty regime’s ambitions. States have flexibility in deciding on the type and scope of their contributions.
- 4.107. In this respect, the specialized treaty regime on climate change does not mandate the specific measures that countries not included on Annex I to the UNFCCC are to

²¹⁷ Draft decision -/CMA.5, Outcome of the first global stocktake, FCCC/PA/CMA/2023/L.17, 13 Dec. 2023, para. 150.



implement at the national level in order to achieve the objectives of the treaty regime. Instead, the means of implementation for countries not included on Annex I is left to national governments.



Chapter 5. QUESTION (A) – THE OBLIGATIONS OF STATES TO PROTECT THE CLIMATE SYSTEM FROM ANTHROPOGENIC GREENHOUSE GASES

5.1. This Chapter addresses question (a), which 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 for present and future generations?

- 5.2. As described in Chapter 4, specific obligations with respect to climate change are set out in the specialized treaty regime on climate change, which currently consists of the UNFCCC and the decisions and agreements adopted thereunder, including the Kyoto Protocol and the Paris Agreement. This regime has been carefully negotiated by States, in light of a number of factors, including their particular circumstances, history, level of economic development and need for innovative solutions.
- 5.3. The specialized regime has been carefully developed to account for, *inter alia*: (i) the extent and impact of historical emissions since the Industrial Revolution; (ii) the asymmetric benefits States received from early industrialization, and the resulting place States have on their trajectory to development; (iii) asymmetric vulnerabilities of States to climate change; (iv) critical differences in possible responses to climate action across States; and (v) other national circumstances.
- 5.4. No basis exists for imposing legal obligations that go beyond what States have agreed to in the UNFCCC, the Kyoto Protocol, and the Paris Agreement.

I. Obligations of States in Respect of Climate Change Are Set Out in the Specialized Treaty Regime on Climate Change

- 5.5. The specialized treaty regime on climate change cannot be interpreted based on a different legal regime, such as human rights or environmental law. Rather, assessment of the content of States' obligations with respect to climate change requires special



consideration of the function of the specialized treaty regime on climate change separate from other legal regimes²¹⁸.

- 5.6. The specialized treaty regime on climate change constitutes *lex specialis*. As explained by the International Law Commission's Study Group, "[t]he maxim *lex specialis derogat legi generali* is a generally accepted technique of interpretation and conflict resolution in international law. It suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific."²¹⁹
- 5.7. The Court recognized and applied this maxim in, among other decisions, its advisory opinion in *Legality of the Threat or Use of Nuclear Weapons*, where it described the relationship between human rights law and the laws of armed conflict as follows:

"The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself."²²⁰

²¹⁸ Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, *adopted by the International Law Commission*, 58th session, p. 177, para. 247-248 (2006) ("New types of specialized law do not emerge accidentally but seek to respond to new technical and functional requirements . . . [i]n order for the new law to be efficient, it often includes new types of treaty clauses or practices that may not be compatible with old general law or the law of some other specialized branch. Very often new rules or regimes develop precisely in order to deviate from what was earlier provided by the general law. . . . It is quite important to note that such deviations do not emerge as legal-technical "mistakes". They reflect the differing pursuits and preferences of actors in a pluralistic (global) society.").

²¹⁹ International Law Commission, *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, Vol. II YEABOOK INT'L L. COMM'N, p. 178, Conclusion 5 (2006).

²²⁰ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996*, p. 240, para. 25.



- Non-Annex I Party obligations in the specialized treaty regime on climate change “will take fully into account” that “economic and social development and poverty eradication are the first and overriding priorities of the developing country parties”²²². In line with States’ right to their natural resources and right to development, the specialized treaty regime on climate change underscores that efforts to mitigate climate change must be balanced along with ending energy poverty, geographic and resource constraints and the rights of States, and particularly States not listed in Annex I to the UNFCCC, to develop and use their natural resources and pursue sustainable development in light of national circumstances.

5.13. Historic contributions to greenhouse gas emissions:

- Throughout adoption of the specialized treaty regime on climate change, and decades of negotiations within the UNFCCC continuing to the present day, States have recognized that the largest share of historical global greenhouse gas emissions originated within the territories and territories in control of Annex I Parties. Historic contributions to climate change should be accorded proper weight in providing content to the obligations of States in respect of climate change, through CBDR.
- Annex I Parties should take the lead in combating climate change and the adverse effects thereof. These States reaped the main benefits of industrialization and emissions within their own territory or territories under their control, which in turn resulted in the spike in greenhouse gas emissions.

5.14. Obligations to communicate NDCs:

- All States, regardless of whether they are Annex I Parties or non-Annex I Parties, are obligated to prepare, communicate, and maintain NDCs. While the

²²² UNFCCC, Article 4(7).



specialized treaty regime on climate change imposes obligations of conduct and of a procedural nature with respect to the preparation, communication, and maintenance of NDCs is legally binding, the NDCs themselves (content, implementation, and achievement) are not legally binding.

5.15. Emissions reduction obligations:

- An Annex I Party has an obligation to “adopt national policies and take corresponding 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”²²³. In contrast, and not diminishing its long-term objective, the specialized treaty regime on climate change recognizes that the non-Annex I Parties’ share of greenhouse gas emissions “will grow to meet their social and development needs”²²⁴.

5.16. Adaptation:

- The Paris Agreement obligates all Parties, regardless of whether a State is an Annex I Party or a non-Annex I Party, to “engage in adaptation planning processes and the implementation of actions”²²⁵, with the goal of “enhancing adaptive capacity, strengthen resilience and reduce vulnerability to climate change, with a view to contributing to sustainable development”²²⁶. The obligation with respect to adaptation is forward looking, aimed at prevention. Adaptation demands differ from one State to another and across industries, and often vary widely.

5.17. Financing and means of implementation obligations:

²²³ UNFCCC, Article 4(2).

²²⁴ UNFCCC, preamble.

²²⁵ Paris Agreement, Article 7(9).

²²⁶ Paris Agreement, Article 7(1).



- The UNFCCC, Kyoto Protocol, and Paris Agreement all impose financing obligations on Annex I Parties, as well as obligations for Annex I Parties to assist non-Annex I Parties in their mitigation and adaptation efforts, including through technology transfer and capacity building.

5.18. Reporting obligations:

- Under the Paris Agreement all Parties must report on their anthropogenic emissions and on “the progress made in implementing and achieving its [NDC]”²²⁷. Additionally, Annex I Parties have to report “on financial, technology transfer and capacity-building support provided to developing country Parties under Articles 9, 10 and 11”²²⁸.

III. Conclusion

- 5.19. The specialized treaty regime on climate change was negotiated to reflect the interests of all States with respect to climate change, poverty reduction and sustainable development. The international community agreed to an asymmetrical allocation of the burden of climate change mitigation as between high greenhouse gas emitting Parties that industrialized early listed in Annex I and other Parties, consistent with the principle of CBDR.
- 5.20. This comprehensive regime sets out Parties’ obligations with respect to climate change and is legally binding on the Parties to the treaties concerned, which includes nearly all States.
- 5.21. The obligations of Parties with respect to climate action must be considered in light of the commitments reflected in the above specialized treaty regime on climate change, recognizing that States have common but differentiated responsibilities.

²²⁷ Paris Agreement, Article 13(7).

²²⁸ Paris Agreement, Article 13(9).



- 5.22. The Parties to the UNFCCC and Paris Agreement have not adopted more stringent measures, such as specific greenhouse gas emissions reduction requirements or penalties for non-compliance. The imposition of legal obligations that go beyond what States agreed to in these multilateral agreements would undermine the importance of cooperation embedded within these instruments.



Chapter 6. QUESTION (B) – LEGAL CONSEQUENCES FOR STATES WHERE THEY HAVE CAUSED SIGNIFICANT HARM TO THE CLIMATE SYSTEM

6.1. This Chapter addresses question (b), which reads as follows:

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

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

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

- 6.2. As a preliminary point, it is important to note that the question is hypothetical. The Court has not been asked to adjudicate whether any violation of State obligations has, in fact, occurred. And where no breach has been authoritatively determined or adjudicated, no remedy is required.
- 6.3. As explained in Chapters 4 and 5, State obligations to protect the climate system and other parts of the environment from anthropogenic greenhouse gas emissions are set out exclusively in the specialized treaty regime on climate change (with the exception of certain discrete cases described in Chapter 4, Section V). Thus, the legal consequences of any breach of these obligations must be determined by reference to the specialized climate treaty regime.
- 6.4. Through Article 8 of the Paris Agreement, the Warsaw International Mechanism and decisions at the COP, States have already committed to a mechanism to address loss and damage associated with the adverse effects of climate change and begun to operationalize and implement this. However, this mechanism does not provide a basis for liability, and is instead rooted in the consultative, cooperative and non-adversarial framework of the specialized treaty regime on climate change. States by consensus



determined that there is no basis for the imposition of a separate mechanism which would provide for compensation for loss and damage on the basis of remedy for breach of a State's climate obligations.

- 6.5. In the event that a Party to the UNFCCC, Kyoto Protocol, or Paris Agreement considers that another Party has failed to abide by its commitments, such as if an Annex I Party allegedly fails to meet its obligation to assist developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting adaptation costs²²⁹, or a State allegedly fails to prepare an NDC, recourse may be had to the relevant compliance and dispute settlement mechanisms, including under Article 14 of the UNFCCC or the compliance mechanisms in the Kyoto Protocol or the Paris Agreement. As explained in Chapter 4, the compliance mechanism in the Paris Agreement is “transparent, non-adversarial and non-punitive”, reflecting the need for cooperation in dealing with the global effects of climate change²³⁰.
- 6.6. If a case concerning a State's alleged failure to abide by its commitments under the UNFCCC, Kyoto Protocol, or Paris Agreement were to be brought to an international court or tribunal with jurisdiction, the legal consequences would be determined in accordance with the provisions of the UNFCCC, Kyoto Protocol, or Paris Agreement and, only secondarily, if necessary, by the general rules on State responsibility to the extent they might be applicable.
- 6.7. The purpose of the specialized climate treaty regime is not to assign responsibility or liability for the adverse effects of climate change to particular States or groups of States. The Parties made clear upon the adoption of the Paris Agreement that the Warsaw International Mechanism “does not involve or provide a basis for any liability or

²²⁹ UNFCCC, Article 4(4).

²³⁰ Paris Agreement, Article 15(2); see also Chapter 4, Section IV.C.2, above.



compensation”²³¹. In any event, the general rules of State responsibility are likely to be of limited utility in the context of climate change for the following reasons inter alia:

- *First*, there must have been a breach of a relevant international obligation. A certain level of greenhouse gas emissions would not result in the breach of any such international obligation, and likewise there is no international obligation to achieve a specific temperature reduction target.
- *Second*, the breach must be attributable to a Party. Acts by private actors not under State control that cause harm to the climate system, including most greenhouse gas emissions, would not, by themselves, implicate the responsibility of the State. Rather, the UNFCCC, Kyoto Protocol, and Paris Agreement impose certain climate change-related obligations on States—for example, all States have the obligation to prepare and submit NDCs—but do not impose obligations on private actors, as explained in Chapters 4 and 5 above.
- *Third*, for a State or its nationals to be entitled to reparation, there must be a proximate causal link between a specific breach of a relevant international obligation which is attributable to a Party or group of Parties and the resulting injury incurred by another Party. Given that the harms resulting from climate change are the result of historical accumulations of greenhouse gas emissions over many decades from many States, the existence of a causal link to any particular Party is highly problematic.

6.8. In the event of a breach of a relevant international obligation in the specialized climate treaty regime that is attributable to a Party, the legal consequences of such breach would be limited to cessation of the wrongful conduct in question and reparation to reestablish the situation affected by the breach.²³² In the context of a breach of an obligation under

²³¹ UNFCCC Decision 1/CP.21 (FCCC/CP/2015/10/Add.1), 29 Jan. 2016, para. 51.

²³² ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), Article 28 cmt. 2 (“The core legal consequences of an internationally wrongful act . . . are the obligations of the responsible



the specialized climate treaty regime, cessation could mean, *e.g.*, ceasing to fail to prepare and publish NDCs. Reparation could include, *e.g.*, assurances to produce and publish NDCs in the future and/or preparing and posting a previously omitted NDC.

Ziad M.D AlAtiyah

Ambassador of the Kingdom of Saudi Arabia to the
Kingdom of the Netherlands

21 March 2024

State to cease the wrongful conduct (art. 30) and to make full reparation for the injury caused by the internationally wrongful act (art. 31.); Article 31 cmt. 2 (emphasizing that the function of reparation is “the re-establishment of the situation affected by the breach”). *See also id.* (“[R]eparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed had that act not been committed”) (quoting *Factory at Chorzów, Judgment of 13 September 1928, P.C.I.J. Series A, No. 17, p. 47*).