

INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

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

WRITTEN STATEMENT

THE STATE OF KUWAIT

22 MARCH 2024

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CHAPTER I

INTRODUCTION

1. The State of Kuwait (“**Kuwait**”) submits this Written Statement in accordance with the Court’s Order of 20 April 2023¹ as amended by Court Order of 15 December 2023,² so as to furnish information on the questions submitted to the Court in General Assembly Resolution 77/276,³ adopted on 29 March 2023, and to assist the Court.
2. The terms of the General Assembly’s request in Resolution 77/276 (“**the Request**”) are as follows:

“(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?

¹ *Obligations of States in Respect of Climate Change (Request for an Advisory Opinion)*, Order of 20 April 2023 February 2023, paras. 1-2.

² *Obligations of States in Respect of Climate Change (Request for an Advisory Opinion)*, Order of 15 December 2023, paragraph 1 extends to 22 March 2024 the time-limit within which all written statements on the questions may be presented to the Court in accordance with Article 66, paragraph 2, of the Statute of the International Court of Justice.

³ General Assembly Resolution 77/276, 29 March 2023, A/RES/77/276.

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

3. By way of overview, Kuwait respectfully submits that the Court be guided by the following considerations when answering the questions put by the General Assembly:

- (1) ***On the obligations of States:*** The UNFCCC, Kyoto Protocol, and Paris Agreement constitute a *lex specialis* set of rules and obligations that exclusively govern States’ obligations under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic greenhouse gas emissions (“**GHG emissions**”);
- (2) The obligations of States contained in the UNFCCC, Kyoto Protocol, and Paris Agreement represent a balance struck between States on a number of competing considerations that operate in the area of GHG emissions and climate change. This balance has been reflected in a significant number of provisions in the UNFCCC, Kyoto Protocol, and Paris Agreement which provide both the object and purpose of the treaties as well as an important context within which the obligations contained in the treaties are to be construed.
- (3) There are a wide variety of obligations contained in the UNFCCC, Kyoto Protocol, and the Paris Agreement, the main obligations being:
 - (a) An obligation on all States Parties pursuant to Article 4.2 of the Paris Agreement to submit “*nationally determined contributions*” (“**NDC**”) which contain a State’s Party’s mitigation efforts to reduce its GHG emissions and adapt to climate change;
 - (b) An obligation of conduct (not result) on all States Parties pursuant to Articles 4.2 and 7.9 of the Paris Agreement to adopt mitigation measures and adaptation processes and actions aimed at achieving their individual NDC objectives; and

(c) An obligation on developed States Parties pursuant to Article 4.3 of the UNFCCC and Article 9 of the Paris Agreement to provide financial support and enable technology transfer to developing countries.

(4) ***On the legal consequences of these obligations for States who have caused significant harm to the climate system and the environment by GHG emissions:***

The Paris Agreement, UNFCCC, and Kyoto Protocol establish a set of *lex specialis* rules that govern the legal consequences for States which have breached their provisions. Thus these rules preclude the application of what the general “*residual*” rules on State responsibility may otherwise have required in terms of an immediate and unconditional cessation of a breach and/or imposition of an obligation to provide reparations arising from breach of the treaties. In any case, even were the “*residual*” customary international law rules of State responsibility to be applicable, they would preclude a claim for compensation relating to the adverse effects of climate change.

4. The State of Kuwait shares the concerns of the international community in mitigating GHG emissions and adapting to climate change. To this end, Kuwait is actively engaged with the regime established by the climate change treaties, and has taken, and continues to take, extensive efforts to mitigate GHG emissions.

5. Accordingly, this Written Statement is structured as follows:

Chapter II: Responds to the first question posed to the Court by detailing the obligations applicable to States under international law to ensure the protection of the climate system and other parts of the environment from GHG emissions for present and future generations;

Chapter III: Responds to the second question posed to the Court by setting out the legal consequences for States which “*have caused significant harm to the climate system and other parts of the environment*”;

Chapter IV: Considers the constructive efforts made by the State of Kuwait to mitigate GHG emissions and the effects of climate change, and also considers briefly certain climate change response measures adopted by other States; and

Chapter V: contains a full set of conclusions.

CHAPTER II
THE FIRST QUESTION ASKED OF THE COURT:

**THE OBLIGATIONS OF STATES TO PROTECT THE CLIMATE SYSTEM
AND OTHER PARTS OF THE ENVIRONMENT FROM ANTHROPOGENIC
EMISSIONS OF GREENHOUSE GASES**

6. The first question posed to the Court is as follows:

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

7. The UNFCCC, Kyoto Protocol, and Paris Agreement reflect careful compromises reached between States specifically on the particular matter of greenhouse gas (“GHG”) emissions given their effect on climate change and the environment more generally. These treaties have near universal State support and are the framework under which long standing negotiations have taken place. Moreover, these negotiations are still ongoing.
8. The UNFCCC, the Kyoto Protocol, and the Paris Agreement contain a set of *lex specialis* rules and obligations under international law which regulate GHG emissions in order to reduce their impact on climate change. The effect of these specific rules and obligations established by the treaties is that they prevail over more general international law rules and obligations that may otherwise have applied to GHG emissions.
9. The remainder of this **Chapter II** considers first in some detail the obligations of States relating to GHG emissions under international law as provided for in the UNFCCC, Kyoto Protocol, and Paris Agreement (**Chapter II, Part A below**), before turning to consider why these obligations represent the totality of States’ obligations in relation to GHG emissions given the *lex specialis* nature of the rules and obligations contained in the UNFCCC, Kyoto Protocol, and the Paris Agreement (**Chapter II, Part B below**).

A. The obligations of States relating to greenhouse gas emissions contained in the UNFCCC, Kyoto Protocol, and the Paris Agreement

10. The obligations on States contained in the UNFCCC, the Kyoto Protocol, and the Paris Agreement represent a balance struck between a number of competing considerations that operate in the area of GHG emissions and climate change. These main considerations include, *inter alia*, the following:

- (1) A specific focus on regulating GHG emissions in an attempt to reduce their role in creating climate change by ensuring the widest possible participation and meaningful cooperation amongst States by taking account of their common but differentiated responsibilities, respective capacities, and their differing social and economic conditions.
- (2) The UNFCCC and Paris Agreement balance on the one hand the recognition that some States have contributed the largest share of historical and current GHG emissions and on the other hand to recognise that certain developing States are in some cases particularly vulnerable to the adverse effects of climate change.
- (3) The UNFCCC and Paris Agreement also strike a balance between, on the one hand, a State's right to "*permanent sovereignty over [their] natural resources*"⁴ and their related sovereign right – particularly in the case of developing States and those whose economies are particularly dependent on fossil fuel production, use and exportation – to use these natural resources to grow and develop their economy in a sustainable manner pursuant to a gradual energy transition; and, on the other hand, a State's responsibility to ensure that activities within its jurisdiction and control do not cause significant transboundary harm to the environment of other States by GHG emissions and that they act in a precautionary manner to stabilize GHG emissions to prevent interference with the climate system.

⁴ This right of States has been recognised by the Court as existing pursuant to a principle of customary international law: see, e.g., *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168 at [244].

11. The balance that has been struck by States on these key considerations is reflected in a significant number of provisions in the UNFCCC, Kyoto Protocol, and Paris Agreement. These provisions provide an important context within which the obligations contained in the treaties are to be construed. They are set out below when considering the specific obligations of States relating to GHG emissions as contained in the UNFCCC (**Chapter II, Part A, Section 1 below**), Kyoto Protocol (**Chapter II, Part A, Section 2 below**), and Paris Agreement (**Chapter II, Part A, Section 3 below**). The remainder of this **Chapter II** then turns to consider briefly certain non-binding decisions adopted by the most recent UNFCCC Conference of Parties (“COP”) (**Chapter II, Part A, Section 4 below**).

1. The UN Framework Convention on Climate Change

12. The UNFCCC entered into force on 21 March 1994 and it has 198 Parties (197 of whom are States Parties) as at 22 March 2024. The UNFCCC is a framework convention that establishes the governance structure of the international climate change regime, and also contains specific rules and obligations that seek to combat GHG emissions.

13. The UNFCCC creates a governance structure when it establishes the Conference of the Parties (“COP”) as the supreme body tasked with regularly reviewing the implementation of the UNFCCC and any related legal instruments that the COP may adopt. The COP is also empowered to make decisions necessary to promote the implementation of the Convention.⁵ The UNFCCC establishes two subsidiary bodies to assist the COP, namely, the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation.⁶ The COP Subsidiary Body for Implementation is of particular importance when considering the second question asked of the Court relating to the legal consequences for States as explained at **paragraphs 93-107 below**.

⁵ Article 7.2 of the UNFCCC.

⁶ Articles 9 and 10 of the UNFCCC, establishing the Subsidiary Body for Scientific and Technological Advice and Subsidiary Body for Implementation, respectively.

(i) The balance struck in the UNFCCC between competing considerations that operate in the area of GHG emissions and climate change

14. As explained above, the obligations on States contained in the UNFCCC represent a balance struck between a number of competing considerations that operate in the area of GHG emissions and climate change. These considerations are referred to in terms throughout the UNFCCC and they provide both the objects and purposes of the treaty as well as an important context within which the obligations contained in the treaty is to be construed. More specifically:

(1) The UNFCCC focuses on regulating GHG emissions in an attempt to reduce their role in creating climate change by ensuring the widest possible participation and meaningful cooperation amongst States by taking account of their common but differentiated responsibilities, respective capacities, and their differing social and economic conditions. This is illustrated by reference to the following general provisions of the UNFCCC:

(1) Article 2 provides that the UNFCCC's objective is to achieve "*in accordance with*" the UNFCCC's provisions (i.e., pursuant to the obligations contained in the UNFCCC) the stabilisation of GHG concentrations at a level so as to prevent anthropogenic interference with the climate system;

(2) Article 3.1 stipulates that States Parties should protect the climate system on the basis of equity and in accordance with "*their common but differentiated responsibilities and respective capabilities*"; and

(3) The preamble in paragraph 1 expresses concern that human activities have substantially increased atmospheric concentrations of GHGs which contributes to global warming; but then goes on to acknowledge in paragraph 5 that the global nature of climate change "*calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response*", in accordance with

their “*common but differentiated responsibilities*”, “*respective capabilities*”, and their “*social and economic conditions*”.

(2) Moreover, the UNFCCC seeks to balance on the one hand the recognition that some States have contributed the largest share of historical and current GHG emissions and on the other hand to recognise that certain developing States are in some cases particularly vulnerable to the adverse effects of climate change. That the UNFCCC seeks to strike this balance is illustrated by its following general provisions:

(1) Preambular paragraph 2 states that “*the largest share of historical and current global emissions*” of GHG comes from “*developed countries*”, that per capita emissions in “*developing countries are still relatively low*” and that the share of “*global emissions originating in developing countries will grow to meet their social and development needs*”;

(2) Article 3.1 states that the developed States Parties “*should take the lead*” in combating climate change and its adverse effects, while preambular paragraph 17 recognises the “*need*” for developed States Parties to take immediate action having due consideration to their relative contributions to the enhancement of the greenhouse effect by GHG emissions; and

(3) Preambular paragraph 18 recognises that certain developing States Parties – “*low-lying and other small island countries, countries with low-lying coastal, arid and semi-arid areas or areas liable to floods, drought and desertification, and developing countries with fragile mountainous ecosystems*” – are particularly vulnerable to the adverse effects of climate change.

(3) The UNFCCC also strikes a balance between, on the one hand, a State’s right to permanent sovereignty over its natural resources and its related sovereign right – particularly in the case of developing States and those whose economies are particularly dependent on fossil fuel production, use and exportation – to use these natural resources to grow and develop their economy in a sustainable

manner pursuant to a gradual energy transition; and, on the other hand, a State's responsibility to ensure that activities within its jurisdiction and control do not cause significant transboundary harm to the environment of other States by GHG emissions and that they act in a precautionary manner to stabilize GHG emissions to prevent interference with the climate system. This is illustrated by reference to the following general provisions of the UNFCCC:

- (1) Preambular paragraph 7 recalls that States have “*the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction*”;
- (2) Preambular paragraph 9 expressly recognises that domestic standards applied by some States Parties may not be appropriate and are of “*unwarranted*” economic and social cost to developing countries; while preambular paragraph 19 further recognises the “*special difficulties*” of States, especially developing States Parties, whose economies “*are particularly dependent on fossil fuel production, use and exportation, as a consequence of action taken on limiting greenhouse gas emissions*”;
- (3) It is important that responses to climate change should be coordinated in an integrated manner with economic development, particularly for developing States Parties who have a “*legitimate priority*” for the achievement of “*sustained economic growth and the eradication of poverty*” (preambular paragraph 20); and that energy transition for developing States Parties will require “*access to resources*” to achieve “*sustainable social and economic development*” as well as a recognition that “*their energy consumption will need to grow taking into account the possibilities for achieving greater energy efficiency and for controlling greenhouse gas emissions in general, including through the application of new technologies on terms which make such an application economically and socially beneficial*” (paragraph 21);

- (4) That States parties “*should*” pursuant to Article 3.3 take “*precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects*” taking into account “*different socio-economic contexts*”. The use of the word “*should*” rather than “*shall*” here is important since it does not embody a binding obligation on States but is rather hortatory. This can be contrasted with the use of the word “*shall*” as contained in Article 4.1 of the UNFCCC, as explained below; and
- (5) Article 3.4 recognises that a State’s policies and measures to protect the climate system against human-induced change should “*be appropriate for the specific conditions of each Party*” and take into account “*that economic development is essential for adopting measures to address climate change.*”

15. It is thus plain that the UNFCCC properly situates the obligations it imposes on States within the necessary broader context of competing considerations so as to provide an effective way forward in seeking to achieve its objectives relating to GHG emissions and climate change. This context is of importance when construing the content of States’ obligations under the UNFCCC. The remainder of this Section now proceeds to consider these obligations of States under the UNFCCC.

(ii) Commitments that apply to all States Parties under the UNFCCC

16. Article 4.1 imposes various obligations on all States Parties to (i) develop, periodically update, and publish a national inventory of its emissions by sources and removals by sinks of GHGs using comparable methodologies to be agreed upon by the Conference of the Parties;⁷ (ii) formulate, implement, publish and regularly update their programmes to mitigate climate change;⁸ (iii) promote and cooperate in the development, application, and transfer of technologies, practices, and processes that

⁷ Article 4.1(a) of the UNFCCC.

⁸ Article 4.1(b) of the UNFCCC.

control, reduce or prevent GHG emissions;⁹ promote sustainable management and promote and cooperate in the conservation and enhancement of GHG sinks and reservoirs,¹⁰ cooperate in preparing for adaptation to the impacts of climate change;¹¹ (iv) take climate change into account, to the extent feasible, in policies and actions;¹² (v) exchange information;¹³ and (vi) promote and cooperate in scientific research,¹⁴ education, training, and public awareness.¹⁵

17. The commitments in Article 4.1 are qualified by its chapeau, which allows States Parties to take into account “*their common but differentiated responsibilities and specific national and regional development priorities, objectives and circumstances*” when carrying out the commitments in Articles 4.1(a) to (j). To similar effect, Article 4.7 recognises that for developing States Parties, the implementation of their commitments under the UNFCCC will depend on financial resources and transfer of technology from developed States Parties, and “*will take fully into account*” their economic and social priorities. Moreover, these provisions are further supported by the UNFCCC provisions set out in **paragraphs 14-15 above**, the consequence of which is that a certain leeway should be given developing States in implementing Article 4.1. For example, Article 4.1(f) requires that States “*take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions*”. (Emphasis added.) Thus when construing what is “*feasible*” regard should be had to whether a State is a developing State and, indeed, the nature of their economy and future available sources of economic development.
18. Of further importance here is Article 4.8 which stipulates in terms that when States Parties implement their commitments under Article 4 they “*shall give full consideration*

⁹ Article 4.1(c) of the UNFCCC.

¹⁰ Article 4.1(d) of the UNFCCC.

¹¹ Article 4.1(e) of the UNFCCC.

¹² Article 4.1(f) of the UNFCCC.

¹³ Article 4.1(h) of the UNFCCC.

¹⁴ Articles 4.1(g) and 5 of the UNFCCC.

¹⁵ Articles 4.1(i) and 6 of the UNFCCC.

to what actions are necessary” under the UNFCCC to meet the specific needs and concerns of developing States Parties arising from “the adverse effects of climate change and/or the impact of the implementation of response measures [taken by other States]”, especially on those developing States who fall within 4.8(a)-(i). These developing States include, among others, those “(h) Countries whose economies are highly dependent on income generated from the production, processing and export and/or consumption of fossil fuels and associated energy-intensive products”

19. Article 4.8 provides a further important context when construing and applying the obligations in Article 4.1 as it relates in particular to certain developing States.
20. There will be various consequences that flow for those developing States that fall within the scope of Article 4.8(a)-(i) both in terms of giving these States certain leeway when applying the commitments in Article 4 having regard to their special circumstances, but also in terms of all other States Parties considering whether they should adopt alternative GHG mitigation measures so as not to impact or unfairly prejudice such developing State Parties. Thus when all States Parties are engaged in formulating GHG mitigation measures to be implemented in their social, economic and environmental policies and actions pursuant to Article 4.1(f), then, for example, pursuant to Article 4.8(h) they “*shall give full consideration*” to ensure such policies and actions do not impact developing countries whose economies are “*highly dependent on income generated from*”, or “*on consumption of*”, fossil fuels.
21. Finally, Article 12.1 stipulates that States Parties shall communicate information to the COP on their national inventories and steps taken to implement the UNFCCC.

(iii) Further specific commitments for developed country Parties and other Parties included in Annex I of the UNFCCC

22. There are a variety of substantive and reporting requirements contained in Article 4.2 that pertain to developed States Parties and other Parties included in Annex I (“**Annex I Parties**”) and further obligations contained in Articles 4.3-4.4 relating to developed States Parties and other developed States included in Annex II.

23. Given that Kuwait is a developing State Party these obligations are not explored herewith in any detail except to note that Article 4.2(a) imposes additional, more onerous, obligations on Annex I Parties when it requires that they “*shall*” (1) adopt national policies and take measures to limit GHG emissions and (2) protect and enhance GHG sinks and reservoirs.
24. Moreover, Article 4.2(a) also recognises that a “*return by the end of the present decade [i.e., 2000] to earlier levels of [GHG emissions] would contribute to the modification*” of developed country emissions trends; while Article 4.2(b) further requires these Annex I Parties to protect and enhance sinks and reservoirs “*with the aim*” of returning to their 1990 levels of emissions. Finally, Article 4.2(e) provides that Annex I Parties “*shall*” coordinate between themselves in terms of relevant economic and administrative instruments, and “*shall*” identify and periodically review their policies and practices that encourage activities leading to greater levels of GHG emissions.

2. The Kyoto Protocol

25. The Kyoto Protocol entered into force on 16 February 2006 and its primary purpose was to strengthen the mitigation commitments of Annex I Parties under Article 4.2 of the UNFCCC. It has 192 Parties (of whom there are 191 States Parties) as at 22 March 2024.
26. The means by which it sought to strengthen mitigation commitments was pursuant to Article 3.1 which provides that Annex I Parties “*shall ... ensure that their aggregate anthropogenic carbon dioxide equivalent emissions ... do not exceed their assigned amount calculated pursuant to their quantified emissions limitation and reduction commitments inscribed in Annex B with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2003 to 2012*”.
27. The first commitment period elapsed in 2012. The second commitment period of 2013 to 2020 is reflected in the 2012 Doha Amendment, which entered into force on 31 December 2020. Given that the existing commitment periods under the Kyoto Protocol and Doha Amendment have been spent, the Kyoto Protocol is of limited assistance to the questions currently before the Court.

3. The Paris Agreement

28. The Paris Agreement entered into force on 4 November 2016 and it presently has 195 Parties (of whom 194 are States Parties) as at 22 March 2024. It is not an amendment or a protocol to the UNFCCC. However, the UNFCCC and the Paris Agreement are inextricably interlinked. For example, a number of the preambular paragraphs of the Paris Agreement make reference to the UNFCCC including paragraph 3, which provides that the States Parties have agreed to the Paris Agreement “[i]n pursuit of the objective of the [UNFCCC]”; and Article 2.1 expressly links the Paris Agreement with “enhancing the implementation” of the UNFCCC and “its objective”.

(i) **The balance struck in the Paris Agreement between competing considerations that operate in the area of GHG emissions and climate change**

29. As with the UNFCCC, the obligations on States contained in the Paris Agreement represent a balance struck between a number of competing considerations that operate in the area of GHG emissions and climate change. These considerations are referred to in terms throughout the Paris Agreement and they provide both the objects and purposes of the treaty as well as an important context within which the obligations contained in the Agreement is to be construed. More specifically:

(1) Like the UNFCCC, the Paris Agreement focuses on regulating GHG emissions in an attempt to reduce their role in creating climate change by ensuring the widest possible participation and meaningful cooperation amongst States by taking account of their common but differentiated responsibilities, respective capacities, and their differing social and economic conditions. Indeed, as already explained above, the Paris Agreement enhances the “implementation” of the UNFCCC and its objective (preambular paragraph 3 and chapeau of Article 2.1), but in so doing the Agreement “will be implemented” to “reflect equity and the principle of common but differentiated responsibilities and respective

capabilities, in the light of different national circumstances” (Preambular paragraph 3 and Article 2.2).

- (2) Like the UNFCCC, the Paris Agreement seeks to balance on the one hand the recognition that some States have contributed the largest share of historical and current GHG emissions and on the other hand to recognise that certain developing States are in some cases particularly vulnerable to the adverse effects of climate change. That the Paris Agreement seeks to strike this balance is illustrated by its following general provisions:
 - (1) Preambular paragraph 5 recognises the “*specific needs and special circumstances*” of developing States Parties, especially those that are particularly vulnerable to the adverse effects of climate change, as provided for in the UNFCCC; and
 - (2) Preambular paragraph 16 emphasises that developed States Parties are to “*take the lead*” in relation to recognising that sustainable lifestyles and patterns of consumption and production play an important role in addressing climate change.
- (3) Also like the UNFCCC, the Paris Agreement strikes a balance between, on the one hand, a State’s right to “*permanent sovereignty over [their] natural resources*” and their related sovereign right – particularly in the case of developing States and those whose economies are particularly dependent on fossil fuel production, use and exportation – to use these natural resources to grow and develop their economy in a sustainable manner pursuant to a gradual energy transition; and, on the other hand, a State’s responsibility to ensure that activities within its jurisdiction and control do not cause significant transboundary harm to the environment of other States by GHG emissions and that they act in a precautionary manner to stabilize GHG emissions to prevent interference with the climate system. This is illustrated by reference to the following general provisions of the Paris Agreement:

- (1) Preambular paragraph 7 recognises that States Parties may be affected not only by climate change, *“but also by the impacts of the measures taken in response to it”*; and
- (2) While preambular paragraph 8 emphasises the *“intrinsic relationship”* that climate change actions, responses and impacts have with *“equitable access to sustainable development and eradication of poverty”*; Article 2.1 emphasises that the Paris Agreement seeks to achieve the UNFCCC’s objective in the *“context of sustainable development and efforts to eradicate poverty”*.

30. Thus, as in the case of the UNFCCC, the Paris Agreement properly situates the obligations it imposes on States within the necessary broader context of competing considerations so as to provide an effective way forward in seeking to achieve its objectives relating to GHG emissions and climate change. This context is of importance when construing the content of States’ obligations under the Paris Agreement. The remainder of this Section now proceeds to consider these obligations of States under the Paris Agreement.

(ii) Articles 2.1 and 4.1 of the Paris Agreement

31. Article 2.1 sets out that the *“aim”* of the Paris Agreement is to *“strengthen the global response to the threat of climate change ... in the context of sustainable development and efforts to eradicate poverty”*, such as by holding the increase of global average temperature to well below 2°C above pre-industrial levels and to pursue efforts towards a 1.5°C temperature limit.¹⁶ Article 4.1 provides that in order to achieve the long-term temperature goal in Article 2, the Parties *“aim”* to reach global peaking of GHG as soon as possible and undertake rapid reductions thereafter *“on the basis of equity, in the context of sustainable development and efforts to eradicate poverty.”*
32. As such, Articles 2 and 4.1 set out the general purpose of the Paris Agreement in the form of *“aims”*, that is, hortatory goals that the Parties are trying to achieve. However,

¹⁶ Article 2.1(a) of the Paris Agreement.

they do not impose specific binding obligations. In particular, the articles do not set out quantitative goals on limiting GHG emissions, time limits to achieve its aims, nor the means by which the Parties should seek to achieve these goals. As already explained, both articles expressly recognise the need to ensure that States Parties' developmental needs are not prejudiced by the implementation of the Paris Agreement.

(iii) Article 4.2 of the Paris Agreement

33. Nationally determined contributions (“NDCs”) are at the heart of the Paris Agreement. They contain a State’s Party’s mitigation efforts to reduce its GHG emissions and adapt to climate change. The NDCs are the means by which States Parties intend to achieve the aims of the Paris Convention through each State Party preparing and communicating its NDC and submitting successive NDCs every five years.

34. Article 4.2 is the key provision here and it reads as follows:

“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.”

35. The first sentence of Article 4.2 uses the word “*shall*” and thus establishes a requirement for each State Party to prepare, communicate and maintain its “*nationally determined contributions*”. The Article says nothing relating to the content of each Party’s NDC. It is left solely to each Party to prepare and decide on the content of its NDC which it aims to achieve. Indeed various NDCs submitted thus far are formulated in a variety of ways. For instance, some reflect emission reduction targets, others include qualitative aims (for instance, goals to adopt climate friendly paths), and some are conditional on the provision of international support.¹⁷

36. The second sentence of Article 4.2 also uses “*shall*” when it requires that Parties pursue domestic mitigation measures with the aim of achieving their NDC objectives, but it

¹⁷ Bodansky et al., *Paris Agreement*, p. 231.

does not specify the measures that a Party must take. The obligation in the second sentence is one of conduct, not result. This approach can be contrasted with that of Article 3.1 of the Kyoto Protocol: “[t]he Parties... shall ensure that”. It is left entirely to each State Party how best to take domestic measures with the aim of achieving its NDC objectives. Indeed an obligation on a State Party to achieve its NDC objectives was omitted from the text on purpose: it was proposed by some States during the negotiations of the Paris Agreement, but opposed by others who did not want to be subject to such an obligation.¹⁸ The second sentence thus represents the compromise reached during the negotiation by imposing an obligation of good faith in a State Party’s pursuit of domestic mitigation measures.¹⁹ The extent of the obligation is that a State Party should act with good faith in undertaking its best and reasonable²⁰ efforts in the pursuit of domestic mitigation measures that aim to implement its NDC objectives.

37. The Paris Agreement does not dictate specific types of measures for a State Party to pursue in discharging its obligation under Article 4.2. Article 4.14 only contains general guidance that Parties “*should take into account, as appropriate, existing methods and guidance under the [UNFCCC]*” Moreover, the Paris Agreement is neutral on the use of market-based and non-market approaches to assist in achieving a State Party’s NDC.²¹ This reflects the flexibility under the climate change regime that allows each State to decide on its own domestic mitigation measures with the aim of achieving its NDC objectives.
38. In sum on Article 4.2, it establishes a procedural obligation for each party to prepare, communicate and maintain its NDC, and to take such domestic mitigation measures that it considers appropriate with the aim of achieving its NDC objectives.

(iv) Article 4.3 of the Paris Agreement

¹⁸ *Ibid.*, at p. 232.

¹⁹ *Ibid.*, at p. 231.

²⁰ The Court in *Gabčíkovo-Nagymaros* explained that “*the principle of good faith obliges the Parties to apply [the treaty] in a reasonable way and in such a manner that its purpose can be realised.*” (at p. 79)

²¹ Article 6.1 of the Paris Agreement.

39. Article 4.3 provides that each “*successive*” NDC will “*represent a progression*” beyond the Party’s then current NDC and reflect the Party’s “*highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances*”.
40. While a State is required to put forward successive NDCs every five years,²² the content of each successive NDC is again solely to be determined by the State concerned. Indeed, the use of the word “*will*” in Article 4.3 demonstrates its hortatory nature; a Party is ultimately not required to develop further its NDC objectives. It is in this context that Article 4.3 refers to a Party’s “*highest possible ambition*” when formulating its successive NDC, taking into account “*common but differentiated responsibilities and respective capabilities, in the light of different national circumstances*”.
41. The principles relating to successive NDCs in Article 4.3 are the same as those governing Article 4.1 together with the important contextual elements of the preamble and other provisions of the Paris Agreement as explained in **paragraph 29 above**. This is also consistent with the express references in Articles 4.3 and 4.19 to “*common but differentiated responsibilities and respective capabilities*” (“**CBDR-RC**”) and to each Party’s “*different national circumstances*”, together with the express recognition in Article 4.15 to Parties being obliged to (“*shall*”) take into consideration in implementation of the Paris Agreement “*the concerns of Parties with economies most affected by the impacts of response measures, particularly developing country Parties.*”
42. Accordingly, the concepts of “*progression*” and “*highest possible ambition*” are not quantifiable concepts capable of objective determination other than by the State itself. They are to be determined by each State Party at the point in time when it updates its NDC, taking into account its national circumstances, including its CBDR-RC and in particular in the case of developing States having regard to its development and other specific needs as provided for by the UNFCCC and Paris Agreement as explained above.

²² Article 4.9 of the Paris Agreement.

(v) Article 7 of the Paris Agreement

43. Article 7 recognises the “*global goal on adaptation*”²³ and the importance of adaptation in the long-term global response to climate change.²⁴
44. Article 7.9 requires that each State Party “*shall*”, “*as appropriate, engage in adaptation planning processes and the implementation of actions*” for adaptation. Moreover, Article 7.10 provides that each State Party should, as appropriate, submit and update periodically an adaptation communication including, *inter alia*, its plans and actions, but these should not create “*any additional burden for developing country Parties.*”

(vi) Article 9 of the Paris Agreement

45. Article 9 requires developed States Parties to provide financial resources to assist developing States Parties with adaptation and mitigation in continuation of their existing obligations under the UNFCCC²⁵ and to take the lead in mobilising climate finance that represents progression beyond previous efforts.²⁶ This approach is consistent with the various provisions of the UNFCCC and the Paris Agreement considered above, since developed States are considered the main cause of GHG emissions leading to climate change. This is because the stock of GHG emissions was already at dangerously high

²³ Article 7.1 of the Paris Agreement.

²⁴ Article 7.2 of the Paris Agreement.

²⁵ Article 9.1 of the Paris Agreement.

²⁶ Article 9.3 of the Paris Agreement.

levels before non-Annex I States began to develop GHG emitting economies in any sizable proportion to annual GHG emissions.²⁷

46. Moreover, developed States Parties have transparency and reporting obligations pursuant to Articles 9.5 and 9.7 in relation to financial and other support they are providing to developing States Parties.
47. There has been some progress made by developed States Parties in the provision and mobilization of climate finance.²⁸ However, the Conference of Parties serving as the meeting of the Parties to the Paris Agreement (the “CMA”) in its “Outcome of the first global stocktake”²⁹ stated that the goal of developed States Parties to mobilize jointly US\$100 billion per year by 2020 was not met³⁰ and it urged developed States Parties to “*fully deliver on this goal through to 2025*” and to also “*enhance the coordination of their efforts to deliver on the goal.*”³¹ The CMA also urged developed States Parties to provide support “*on a voluntary basis*” for activities to address loss and damage³² and to “*take the lead*” and provide financial resources for commencing the operationalization of the fund for responding to loss and damage.³³

(vii) Article 13 of the Paris Agreement

²⁷ A graphical representation of global emissions from 1850-2021 indicates that a small number of States are responsible for the largest share of historical emissions, while the least developed countries contributed a comparatively meagre volume. (UN Environment Programme, *Emissions Gap Report* (2023) at p. 8).

²⁸ Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, Outcome of the first global stocktake, FCCC/PA/CMA/2023/L.17 at paragraph 76 notes that there has been an “*increase in climate finance from developed countries in 2021 to USD 89.6 billion and [that there is a] likelihood of meeting the goal in 2022...*” and, at paragraph 77, that there have also been “*efforts of developed country Parties to make progress in at least doubling adaptation finance from 2019 levels by 2025...*”

²⁹ Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, Outcome of the first global stocktake, FCCC/PA/CMA/2023/L.17. On the non-binding nature of recommendations contained in the global stocktake, see **paragraphs 54-55 in the text below**.

³⁰ *Supra* n. 29 at paragraph 80.

³¹ *Supra* n. 29 at paragraph 85.

³² *Supra* n. 29 at paragraph 88.

³³ *Supra* n. 29 at paragraph 89.

48. Article 13 establishes a transparency framework under the Paris Agreement with “*built-in flexibility which takes into account Parties’ different capacities and builds upon collective experience*”³⁴, with specific reference made to flexibility for “*developing country Parties that need it in the light of their capacities.*”³⁵ The transparency framework is to be implemented in a “*facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty, and avoid placing undue burden on Parties.*”³⁶
49. To this end, the chapeau of Article 13.7 provides only that each State Party “*shall regularly*” provide the required information, which includes a national inventory report³⁷ and information necessary to track progress made in implementing and achieving the State’s NDC.³⁸ While the Paris Agreement does not specify when such information shall be provided, the CMA decided that this shall “*be no less frequently than on a biennial basis*”, save that least developed States Parties and small island developing States may submit the information at their discretion.³⁹
50. Additionally, Article 13.9 imposes an obligation on developed States Parties to provide information on financial, technology transfer and capacity-building support. By contrast, Article 13.10 only suggests that developing country Parties “*should*” provide such information as well as information on the support that they need in relation to such matters.

4. The UNFCCC Conference of Parties decisions

51. The UNFCCC Conference of Parties (“COP”) is, pursuant to Article 16.1 of the Paris Agreement, the “*supreme*” governing body of the UNFCCC and also serves as the meeting of the Parties to the Paris Agreement. The COP is charged with keeping under

³⁴ Article 13.1 of the Paris Agreement.

³⁵ Article 13.2 of the Paris Agreement.

³⁶ Article 13.3 of the Paris Agreement.

³⁷ Article 13.7(a) of the Paris Agreement.

³⁸ Article 13.7(b) of the Paris Agreement.

³⁹ COP Decision 1/CP.21, “Adoption of the Paris Agreement”, FCCC/CP/2015/10/Add.1 at [90].

regular review the implementation of the UNFCCC pursuant to Articles 14.1 and 16.4 of the Paris Agreement. It is also empowered to take decisions necessary to promote the effective implementation of the UNFCCC, including on institutional and administrative matters.⁴⁰ The Paris Agreement entrusts additional monitoring and review mechanisms to the COP, including the carrying out of a “*global stocktake*” every five years to assess collective process towards achieving the purpose of the Paris Agreement and its long-term goals.⁴¹ This is a key feature of the *lex specialis* system regulating the climate change regime. States Parties are not required to implement recommendations made as part of the global stocktake, but instead they are used to “*inform Parties in updating and enhancing, in a nationally determined manner*” their actions and support in accordance with the relevant provisions of the Paris Agreement and to enhance their cooperative efforts.⁴²

52. The first global stocktake was adopted by the CMA at COP28, which was held in the United Arab Emirates from 30 November 2023 through 12 December 2023.⁴³ A number of its relevant provisions are set out in the table below for reference:

Paragraph number	Text of the paragraph in the First Global Stocktake
[6]	<i>“Commits to accelerate action in this critical decade on the basis of the best available science, reflecting equity and the principle of common but differentiated responsibilities and respective capabilities in the light of different national circumstances and in the context of sustainable development and efforts to eradicate poverty”</i>
[7]	<i>“Underscores Article 2, paragraph 2, of the Paris Agreement, which stipulates that the Agreement will be implemented to reflect the</i>

⁴⁰ Article 16.4 of the Paris Agreement.

⁴¹ Articles 14.1-14.2 of the Paris Agreement.

⁴² Article 14.3 of the Paris Agreement.

⁴³ Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, “First global stocktake”, FCCC/PA/CMA/2023/L.17, 13 December 2023.

	<i>equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances”</i>
[11]	<i>“Recognizes the specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, as provided for in the Convention and the Paris Agreement”</i>
[25]	<i>“Expresses concern that the carbon budget consistent with achieving the Paris Agreement temperature goal is now small and being rapidly depleted and acknowledges that historical cumulative net carbon dioxide emissions already account for about four fifths of the total carbon budget for a 50 per cent probability of limiting global warming to 1.5 °C”</i>
[26]	<i>“Recognizes the finding in the Synthesis Report of the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, [footnote omitted] based on global modelled pathways and assumptions, that global greenhouse gas emissions are projected to peak between 2020 and at the latest before 2025 in global modelled pathways that limit warming to 1.5 °C with no or limited overshoot and in those that limit warming to 2 °C and assume immediate action, and notes that this does not imply peaking in all countries within this time frame, and that time frames for peaking may be shaped by sustainable development, poverty eradication needs and equity and be in line with different national circumstances, and recognizes that technology development and transfer on voluntary and mutually agreed terms, as well as capacity-building and financing, can support countries in this regard”</i>
[28]	<i>“Further recognizes the need for deep, rapid and sustained reductions in greenhouse gas emissions in line with 1.5 °C pathways and calls on Parties to contribute to the following global efforts, in</i>

a nationally determined manner, taking into account the Paris Agreement and their different national circumstances, pathways and approaches:

(a) Tripling renewable energy capacity globally and doubling the global average annual rate of energy efficiency improvements by 2030;

(b) Accelerating efforts towards the phase-down of unabated coal power;

(c) Accelerating efforts globally towards net zero emission energy systems, utilizing zero- and low-carbon fuels well before or by around mid-century;

(d) Transitioning away from fossil fuels in energy systems, in a just, orderly and equitable manner, accelerating action in this critical decade, so as to achieve net zero by 2050 in keeping with the science;

(e) Accelerating zero- and low-emission technologies, including, inter alia, renewables, nuclear, abatement and removal technologies such as carbon capture and utilization and storage, particularly in hard-to-abate sectors, and low-carbon hydrogen production;

(f) Accelerating and substantially reducing non-carbon-dioxide emissions globally, including in particular methane emissions by 2030;

(g) Accelerating the reduction of emissions from road transport on a range of pathways, including through

	<p><i>development of infrastructure and rapid deployment of zero- and low-emission vehicles;</i></p> <p><i>(h) Phasing out inefficient fossil fuel subsidies that do not address energy poverty or just transitions, as soon as possible”</i></p>
[29]	<p><i>“Recognizes that transitional fuels can play a role in facilitating the energy transition while ensuring energy security”</i></p>
[38]	<p><i>“Recalls Article 4, paragraph 4, of the Paris Agreement, which provides that developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets, and that developing country Parties should continue enhancing their mitigation efforts and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances”</i></p>
[39]	<p><i>“Reaffirms the nationally determined nature of nationally determined contributions and Article 4, paragraph 4, of the Paris Agreement and encourages Parties to come forward in their next nationally determined contributions with ambitious, economy-wide emission reduction targets, covering all greenhouse gases, sectors and categories and aligned with limiting global warming to 1.5 °C, as informed by the latest science, in the light of different national circumstances”</i></p>

53. The First Global Stocktake contains at paragraph 28 a long list of measures by which States Parties can contribute to global efforts to reduce further GHG emissions *“in a nationally determined manner, taking into account the Paris Agreement and their different national circumstances, pathways and approaches”*.

54. But it should be said at the outset that this Global Stocktake does not change in any way the structure or content of the obligations in the UNFCCC and Paris Agreements as explained above. The Global Stocktake does not bind States Parties nor does it change or otherwise affect the commitments made by States in their NDCs. Indeed the Global Stocktake cannot purport to require States Parties to have to adopt any commitments in their NDCs since this would be contrary to Articles 4.2-4.3 as explained above.⁴⁴ But in any case the outcome of the Global Stocktake is made plain by Article 14.3 which limits its effect such that it shall only “*inform*” States when they update and enhance “*in a nationally determined manner, their actions and support in accordance with ... this Agreement*”, and it can be used to enhance international cooperation for climate change.
55. The hortatory nature of this paragraph 28 is, moreover, consistent with the use in its chapeau of language which denotes its non-binding nature (“*calls on Parties*”).
56. The hortatory nature of paragraph 28 of the Global Stocktake is further emphasised by paragraph 39, quoted above, which “[r]eaffirms the nationally determined nature” of NDCs.
57. But there is also here the key distinction between the position of developed and developing States Parties. Paragraph 28 of the Global Stocktake references Article 4.4 of the Paris Agreement whereby developed States Parties “*should continue taking the lead*” on setting country-wide emission reduction targets.
58. But the position of developing States here compared to developed States – especially those whose economies and economic development rely heavily on production and export of fossil fuels and those whose economies rely heavily on their use – requires even greater emphasis given the key provisions of the UNFCCC and Paris Agreement which have already been considered in some detail above at **paragraphs 18-20 and 29(3)**, respectively.

⁴⁴ Paris Agreement, Bodansky at p. 245 observes that Article 14 of the Paris Agreement is a “*carefully balanced provision*” that “*links the outcome of the stocktake with the process of updating Parties’ contributions*” but also “*underscores the ‘nationally determined’ nature of actions and support, thus addressing concerns over loss of autonomy and external ratchets.*”

59. There is, in any case, express recognition given in paragraph 29 of the Global Stocktake quoted above to the importance that “*transitional fuels can play a role in facilitating the energy transition while ensuring energy security*”. This is of particular importance to developing States Parties – especially those whose economies and economic development rely heavily on production and export of fossil fuels and those whose economies rely heavily on their use – as expressly recognised by the UNFCCC and Paris Agreement, as explained in some detail above at **paragraphs 18-20 and 29**, respectively.

B. The *lex specialis* nature of the rules and obligations governing greenhouse gas emissions contained in the UNFCCC and the Paris Agreement

60. The basis of the *lex specialis* maxim is that where there is a specific rule of international law regulating a particular matter then this precludes a more general rule that may exist from being applied in relation to the same matter. As the Report of the International Law Commission Study Group on Fragmentation of International Law observed “[t]he idea that special enjoys priority over general has a long pedigree in international jurisprudence ... [going as far back as Grotius].”⁴⁵ The *Max Planck Encyclopedia of International Law* entry on “*Lex specialis*” provides at paragraph 8 that the *lex specialis* maxim “means that if a particular matter is being regulated by a general norm and a more specific one, the special norm shall prevail over the general standard.”

1. The three main reasons why the UNFCCC, the Kyoto Protocol, and the Paris Agreement constitute a *lex specialis* set of rules that exclusively govern States’ obligations in relation to GHG emissions and their effect on the environment under international law

61. There are three main reasons why the UNFCCC, the Kyoto Protocol, and the Paris Agreement constitute a *lex specialis* set of rules that exclusively govern States’

⁴⁵ Report of the International Law Commission Study Group on Fragmentation, “*Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*”, Doc. A/CN.4/L.682 and Add. 1, p. 19 (paragraph 59).

obligations in relation to GHG emissions and their effect on the environment under international law.

62. **First**, the rules and obligations contained in the UNFCCC, Kyoto Protocol, and Paris Agreement as treaty rules and obligations should “*enjoy priority over custom*”. This approach is supported in terms by the Report of the International Law Commission Study Group on Fragmentation of International Law. The Report states:

*“79. That treaty rules enjoy priority over custom is merely incidental to the fact that most general international law is jus dispositivum, so that parties are entitled to derogate from it by establishing specific rights or obligations to govern their behaviour. As the International Court of Justice has pointed out [in the **North Sea Continental Shelf** case, I.C.J. Reports 1969, p. 3, at p. 42, paragraph 72] ‘it is well understood that, in practice, rules of [general] international law can, by agreement, be derogated from in particular cases, or as between particular parties’. This approach, together with the practical priority of treaty over custom, was also affirmed by the Court in **Military and Paramilitary Activities in and against Nicaragua**:*

*‘In general, treaty rules being **lex specialis**, it would not be appropriate that a State should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of a such a claim.’*

*80. In the **Continental Shelf (Tunisia/Libyan Arab Jamahiriya)** case, the Court suggested that States might be able to opt out from the development of general law by this means. ...*

*81. In these cases, the Court accepted that general international law may be subject to derogation by agreement and that such agreement may be rationalized as **lex specialis**. **These cases illustrate the practice of international tribunals to give precedence to treaty law in matters where there is customary law as well—a practice that highlights the dispositive nature of custom and the tribunals’ deference to agreements** Thirlway summarizes the [Court’s] jurisprudence as follows:*

'It is universally accepted that – consideration of jus cogens apart – a treaty as lex specialis is law between the parties to it in derogation of the general customary law which would otherwise have governed their relations.' [H. Thirlway, 'The law and procedure of the International Court of Justice 1960–1989 (Part One)', *British Year Book of International Law* 1989, vol. 60, p. 147.]⁴⁶

63. The **second reason** why the UNFCCC, the Kyoto Protocol, and the Paris Agreement constitute a *lex specialis* set of rules is that the rules and obligations contained in these treaties represent a series of balances struck between States on a number of competing considerations that operate in the specific area of GHG emissions and climate change. Thus it is not appropriate to apply more broader formulations of customary international law to impose obligations on States outside the context of this particular GHG emissions framework. These competing considerations and their resolution in the terms of the UNFCCC and the Paris Agreement have already been considered in detail above.
64. The **third** reason why the UNFCCC, Kyoto Protocol, and Paris Agreement embody a *lex specialis* set of rules and obligations that exclusively govern States' obligations in relation to GHG emissions and climate change is that States have taken the more general principles of international law – whether customary or otherwise – relating to the environment and transboundary pollution and subsumed, integrated and applied them in the specific set of rules and obligations contained in these treaties. This is illustrated, for example, by reference to the precautionary principle, the preventive principle, and other procedural obligations under international law that may generally be considered of relevance to GHG emissions and climate change.

⁴⁶ Report of the International Law Commission Study Group on Fragmentation, "*Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*", Doc. A/CN.4/L.682 and Add. 1, p. 23 (paras. 79-81).

2. Other international norms which have been subsumed, integrated, and applied by the UNFCCC, Kyoto Protocol, and Paris Agreement and thus which have no application to States outside the confines of these treaties

(i) The precautionary principle

65. This principle has an uncertain status under international law: its customary status in particular is unclear.⁴⁷ In any case, the precautionary principle has been expressly referenced and subsumed into the UNFCCC by Article 3(3) which establishes a specific standard and application of the precautionary principle in relation to GHG emissions and the environment.

66. Article 3(3) of the UNFCCC provides:

*“The Parties **should** take precautionary measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic*

⁴⁷ The WTO Panel in *European Communities—Measures Affecting the Approval and Marketing of Biotech Products* (EC – Approval and Marketing of Biotech Products) held that the legal status of the precautionary principle was “unsettled” and that the panel would “refrain from expressing a view on this issue” (at pp. 340 – 341). In *Gabčíkovo-Nagymaros* at [140], the principle was invoked but not addressed by the Court. The Court observed that in the field of environmental protection “new norms and standards have been developed”, which should be taken into consideration and given proper weight but the Court did not identify the precautionary principle as such a norm. In *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion*, 1 February 2011, ITLOS Reports 2011 (“*Responsibilities in the Area*”) at p. 10, the ITLOS Seabed Disputes Chamber on the specific issue of whether the precaution principle amounted to customary international law, declined to make a finding simply observing that “the precautionary approach has been incorporated into a growing number of international treaties and other instruments” and that there was a “trend towards making this approach part of customary international law” (at [135]).

sectors. Efforts to address climate change may be carried out cooperatively by interested Parties.” (Emphasis added.)

67. As explained above, the use of the word “*should*” here rather than “*shall*” is important since it means the provision does not embody a binding obligation on States but is rather hortatory. For present purposes this has the consequence that the precautionary principle applies within the specific context of Article 3(3) of the UNFCCC, but only in a way that is non-binding and that is consistent with the UNFCCC’s other terms.
68. Moreover, the UNFCCC does not mandate the type of precautionary measure that should be taken, and instead recognises that policies and measures to deal with climate change should be cost effective and take into account different socio-economic contexts.
69. On any view, Article 3(3) of the UNFCCC subsumes the precautionary principle into its terms and propounds a specific (non-binding) formulation of the principle that applies to States Parties.
70. This approach embodied in Article 3(3) of the UNFCCC is subsequently adopted by the Kyoto Protocol which in its third preambular paragraph expressly provides that the States Parties in agreeing the Protocol are “[b]eing guided by Article 3” of the UNFCCC; while the Paris Agreement in its third preambular paragraph provides that the States Parties in agreeing the Paris Agreement are again “being guided by its [UNFCCC’s] principles [which are contained in Article 3 of UNFCCC]”.
71. Since the UNFCCC and Paris Agreement subsume the precautionary principle into their terms and propound a specific formulation of the principle that applies to States Parties, this constitutes a *lex specialis* rule that governs the particular matter of GHG emissions and the environment thereby precluding the application of a more general formulation of the principle to States Parties to the treaties.

(ii) The principle of prevention

72. There is a customary international law principle that a State should ensure that activities within its jurisdiction and control do not cause significant transboundary harm to the environment of other States.⁴⁸
73. The UNFCCC subsumes this principle of prevention into its terms and propounds a specific formulation of the principle that applies to States Parties. As explained above, preambular paragraph 7 of the UNFCCC seeks to balance the sovereign right of States to exploit their own resources pursuant to their own environmental and developmental policies with “*the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction*”. The UNFCCC then proceeded to implement this “*responsibility*” of States in the context of GHG emissions pursuant to the obligations contained in Article 4 of the UNFCCC as they have been explained above.
74. Moreover, these obligations of the UNFCCC were further developed in the context of the Paris Agreement by the mechanism of States Parties having to prepare, communicate and maintain successive NDCs under Articles 4.2 as already explained above. In this respect, a State Party’s NDC is intended to “*reflect its highest possible ambition*”, and a State that in good faith exerts efforts to meet its NDC objectives can be said to be acting with due diligence in discharge of its obligation to ensure its GHG emissions do not cause damage to the environment of other States.
75. Thus the NDCs can be said to reflect the balance to which States have agreed to commit in order to regulate GHG emissions and thereby combat climate change under the Paris Agreement. This is the extent to which the prevention principle applies in the context

⁴⁸ The customary international law status of this “*principle of prevention*” – which has its origins in the principle of “*due diligence*” required of a State when acting in its territory – has been confirmed by the Court in the *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14, 55 at [101]. Furthermore, in *Trail Smelter Arbitration (United States v Canada)* (1938 and 1941) 3 RIAA 1905 at p. 1965, the tribunal observed that the harm in question had to be “*of serious consequence*” and “*established by clear and convincing evidence.*”

of the *lex specialis* rules and obligations established by the UNFCCC and Paris Agreement.

(iii) Other procedural obligations under international law

76. There may, potentially, be other procedural obligations under international law that are relevant to the questions posed to the Court, specifically: (i) the obligation to cooperate to prevent transboundary harm;⁴⁹ and (ii) the obligation to undertake an environmental impact assessment.⁵⁰ But these obligations are both regulated and subsumed by the *lex specialis* obligations contained in the UNFCCC and Paris Agreement which indeed provide for their application in particular ways to States Parties.
77. On the obligation to cooperate to prevent transboundary harm, there are indeed a number of such obligations specifically incorporated in the UNFCCC and Paris Agreement. Articles 4.1(g) and 5 of the UNFCCC require States Parties to, *inter alia*, cooperate in research related to the climate system. Furthermore, Articles 4.1(i) and 6 of the UNFCCC also require States Parties to cooperate in education, training and public awareness related to climate change. Similarly, the Paris Agreement also contains many articles on cooperation. For instance, Article 7.7 calls on States Parties to “*strengthen their cooperation on enhancing action on adaptation*” and Article 10.2 requires that States Parties “*shall strengthen cooperative action on technology development and transfer.*”
78. Since the UNFCCC and Paris Agreement subsume the obligation to cooperate to prevent transboundary harm into their terms and propound specific formulations of the obligation applicable to States Parties, this constitutes a *lex specialis* that precludes application to States Parties of a more general obligation to cooperate in relation to GHG

⁴⁹ *Pulp Mills* at [145]: “*the principle of good faith... applies to all obligations established by a treaty, including procedural obligations which are essential to co-operation between States....*” See also *Mox Plant (Ireland v United Kingdom)* (Provisional Measures, Order of 3 December 2001) [2001] ITLOS Reports 95 at [82]: “*the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law....*”

⁵⁰ *Pulp Mills* at [204]: “*it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context....*”

emissions not envisaged by the treaties. While States Parties remain free to pursue other types of cooperation not required by the treaties, their failure to do so cannot be considered a breach of their obligations under general international law or indeed under the climate change regime established by the treaties.

79. On the scope and content of an environmental impact assessment, it is Article 4.1(f) of the UNFCCC which subsumes this obligation into its terms and propounds a specific formulation of the obligation applicable to States Parties.
80. Article 4(1)(f) requires States parties to “*employ appropriate methods, for example impact assessments, formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change*”.
81. This provision reflects the extent to which States have agreed to commit to undertake an environmental impact assessment in order to regulate GHG emissions and thereby combat climate change. It establishes a *lex specialis* rules obligation in relation to GHG emissions which precludes any such broader obligation as may exist under international law from applying to States Parties to the treaties.

CHAPTER III.

THE SECOND QUESTION ASKED OF THE COURT: THE LEGAL CONSEQUENCES FOR STATES WHERE THEY HAVE CAUSED SIGNIFICANT HARM TO THE CLIMATE SYSTEM AND OTHER PARTS OF THE ENVIRONMENT BY THEIR GREENHOUSE GAS EMISSIONS

82. The second question asked by the General Assembly of the Court provides:

“What are 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?”*

83. The Articles on State Responsibility provide a “*residual*” set of rules in Part II which “*deals with the legal consequences for the responsible State of its internationally wrongful act [e.g. breach of a treaty], in particular as they concern cessation and reparation.*”⁵¹ It is Article 28 of the ILC Articles which provides:

“Article 28. Legal consequences of an internationally wrongful act

The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of Part One involves legal consequences as set out in this Part.”

⁵¹ ILC Commentary on Articles on State Responsibility, *Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected*, p. 32.

84. The ILC Commentary to Article 28 clarifies that the “*core legal consequences of an internationally wrongful act set out in Part Two are the obligations of the responsible State to cease the wrongful conduct (art. 30) and to make full reparation for the injury caused by the internationally wrongful act (art. 31).*”⁵²
85. However, these “*residual rules*” determining the legal consequences of an internationally wrongful act can be displaced or modified where, e.g., a treaty provides a set of *lex specialis* rules that regulate the legal consequences flowing from breaches of the treaty. This scenario is expressly envisaged by Article 55 of the ILC Articles on State Responsibility which is examined in detail in **Chapter III, Part A below** which also considers the role of *lex specialis* rules in precluding application of the general “*residual*” rules on State responsibility. **Chapter III, Part B below** then goes on to explain that the Paris Agreement, UNFCCC, and Kyoto Protocol have established a set of *lex specialis* rules that govern the legal consequences for States that flow from a breach of their provisions and which thus preclude the application of what the general “*residual*” rules on State responsibility may require in terms of an immediate and unconditional cessation of breach and/or imposition of an obligation to provide reparations arising from breach of the Agreement. Finally, **Chapter III, Part C below** goes on to explain that in any case the application of the “*residual*” general rules of State responsibility would preclude a claim for compensation relating to the adverse effects of climate change.

A. The role of *lex specialis* rules in precluding application of the general “*residual*” rules on State responsibility

86. As explained above, the UNFCCC, Kyoto Protocol, and Paris Convention establish a set of *lex specialis* rules, institutions and obligations governing GHG emissions and climate change. This set of *lex specialis* rules further extends also to the separate issue of State responsibility so as to preclude application of the general “*residual*” rules on State responsibility under international law.

⁵² ILC Commentary on Articles on State Responsibility, *Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected*, p. 87.

87. As the Report of the International Law Commission Study Group on Fragmentation of International Law further explained: “*The rationale for special regimes is the same as that for lex specialis. They take better account of the particularities of the subject matter to which they relate; they regulate it more effectively than general law and follow closely the preferences of their members.*”⁵³ (Emphasis added.)
88. In the case of the UNFCCC and Paris Agreement this is precisely what they do as explained in more detail below: they take better account of the particularities of regulating GHG emissions and they follow more closely the preferences of their States Parties.
89. Indeed the International Law Commission Articles on State Responsibility expressly envisage that a *lex specialis* set of rules can preclude application of the more general “*residual*” rules on State responsibility. This is provided for by Article 55 of the ILC Articles:

“Article 55. *Lex specialis*

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.”

⁵³ Report of the International Law Commission Study Group on Fragmentation, “*Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*”, Doc. A/CN.4/L.682 and Add. 1, p. 44 (paragraph 191). Indeed the *lexis specialis* set of rules, institutions and obligations governing GHG emissions and climate change can even be considered as a special or self-contained regime under international law. A special or self-contained regime provides for a specialised system of reacting to a breach of international law that claims precedence over the rules of general international law. In the context of the present treaties, they provide both a set of obligations and a system for dealing with breaches of those obligations. To paraphrase the language of the Court in the 1980 *Iran Hostages* case: these rules, institutions and obligations “*constitute a self-contained regime which, on the one hand, lays down the receiving State’s obligations regarding ... [GHG emissions and climate change] and, on the other foresees their possible ... [non-compliance by States] ... and specifies the means ... [that are exclusively intended to deal with such non-compliance].*” But the *lex specialis* nature of the UNFCCC and Paris Convention rules that preclude the general international law rules on State responsibility does not depend on the treaties establishing a special regime under international law.

90. The ILC Commentary on the Articles on State Responsibility explain that “**article 55 makes it clear by reference to the *lex specialis* principle that the articles have a residual character.** Where some matter otherwise dealt with in the articles is governed by a special rule of international law, the latter will prevail to the extent of any inconsistency.”⁵⁴ The ILC Commentary went on at paragraph 2 to the Commentary to Article 55 to say that “*Article 55 provides that the articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or its legal consequences are determined by special rules of international law. It reflects the maxim *lex specialis derogat legi generali*. ... article 55 makes it clear that the present articles operate in a residual way*”⁵⁵ (emphasis added) and the Commentary at paragraph 4 provides that “[f]or the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other. **Thus, the question is essentially one of interpretation.**”⁵⁶ (Emphasis added.)
91. This emphasis on interpretation is of particular relevance in the present case since out of the 197 States Parties to the UNFCCC, 191 States Parties to the Kyoto Protocol, and 194 States Parties to the Paris Agreement, there are a small number of States who have made declarations on ratification indicating that the treaties do not involve a renunciation of rights arising from the law of State responsibility including claims for compensation said to arise from the impact of climate change.⁵⁷
92. But it is for the Court itself to interpret the rules set out in the UNFCCC, Kyoto Protocol, and Paris Agreement in order to ascertain whether their provisions constitute a *lex specialis* that precludes operation of the “*residual*” general rules of State responsibility

⁵⁴ ILC Commentary on Articles on State Responsibility, *Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected*, p. 139.

⁵⁵ ILC Commentary on Articles on State Responsibility, *Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected*, p. 140.

⁵⁶ ILC Commentary on Articles on State Responsibility, *Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected*, p. 140.

⁵⁷ As stated in S. Maljean-Dubois, “Climate Change Litigation”, *Max Planck Encyclopedia of International Law* (2018), paragraph 13.

to the particular matter of GHG emissions and climate change. This issue is now considered in the following **Chapter III, Part B**.

B. The *lex specialis* rules under the climate change treaties that preclude application of the general “*residual*” rules on State responsibility

93. It is the Paris Agreement – which is inextricably interlinked to the UNFCCC – and to a lesser extent the Kyoto Protocol, which provide a set of *lex specialis* rules which preclude the application of what the ILC has referred to as the “*core legal consequences of an internationally wrongful act ... the obligations of the responsible State to cease the wrongful conduct (art. 30) and to make full reparation for the injury caused by the internationally wrongful act*”.⁵⁸
94. This is because these treaties – and the COP as established by the Paris Agreement – have provided a set of rules that preclude these legal consequences, and instead where there is a breach of their obligations focuses on States seeking to ensure compliance using a non-adversarial and non-punitive mechanism that respects each State Party’s respective capabilities, respective responsibilities, and national circumstances.
95. The Kyoto Protocol in Article 18 provides that the Conference of Parties shall approve “*procedures and mechanisms to determine **and address cases of non-compliance** with the provisions of this Protocol, including through an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance. Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol.*”
96. The Paris Agreement provides three elements to this mechanism to deal with breaches of its obligations:
- (1) The transparency framework under Article 13.1 to build mutual trust and confidence and to promote effective implementation, “*with built-in*

⁵⁸ ILC Commentary on Articles on State Responsibility, *Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected*, p. 87.

flexibility which takes into account Parties' different capacities and builds upon collective experience";

- (2) the global stocktake under Article 14; and
- (3) most importantly, the compliance mechanism under Article 15 to *“facilitate implementation of and promote compliance with the provisions of this Agreement”* which *“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.”* (Emphasis added.) This ‘Compliance Committee’ shall report annually to the Conference of the Parties serving as the meeting of the Parties to this Agreement (“CMA”).

97. The CMA subsequently established this Compliance Committee as recorded in its document entitled *“Modalities and Procedures for the Effective Operation of the Committee to Facilitate Implementation and Promote Compliance Referred to in Article 15, Paragraph 2, of the Paris Agreement”*.⁵⁹

98. The CMA provided as follows for the Committee under the heading “Purpose, principles, nature, functions and scope” at paragraphs 3-4:

“3. The Committee’s work shall be guided by the provisions of the Paris Agreement, including its Article 2.

4. In carrying out its work, the Committee shall strive to avoid duplication of effort, shall neither function as an enforcement or dispute settlement mechanism, nor impose penalties or sanctions, and shall respect national sovereignty.”

⁵⁹ Decision 20/CMA.1, Modalities and Procedures for the Effective Operation of the Committee to Facilitate Implementation and Promote Compliance Referred to in Article 15, Paragraph 2, of the Paris Agreement, UN Doc FCCC/PA/CMA/2018/3/Add.2 (19 March 2019) Annex, at [22(a)].

99. These provisions are important since they mandate that when the Committee is policing breaches of the Paris Agreement they are to be “*guided*” by Article 2 and they should not function as an enforcement body imposing penalties or sanctions for non-compliance, all the while respecting State sovereignty.
100. It is recalled from above that Article 2.1 provides that the Paris Agreement seeks to achieve the UNFCCC’s objective, and to enhance its implementation, by aiming to strengthen the global response to the threat of climate change in the context of sustainable development and efforts to eradicate poverty. Moreover, in Article 2.2 the Paris Agreement stresses that the Agreement will be implemented to reflect equity between States Parties and on the basis of common but differentiated responsibilities and respective capabilities, having regard to different national circumstances.
101. The Compliance Committee is given specific functions to perform in cases of non-compliance by a State Party with its obligations under the Paris Agreement. Specifically, paragraph 22 provides that the Committee “*will initiate the consideration of issues*” in cases of a breach by a State Party of certain key obligations under the Paris Agreement, namely where a State Party has not (i) communicated or maintained an NDC under Article 4 of the Paris Agreement; (ii) submitted a mandatory report or communication of information under Articles 13.7, 13.9, 9.5 and 9.7 of the Paris Agreement; (iii) participated in the facilitative, multilateral consideration of progress; or (iv) submitted a mandatory communication of information under Article 9.5 of the Paris Agreement.⁶⁰
102. Moreover, the Compliance Committee is also empowered, though with the consent of the State Party concerned, to “*engage in a facilitative consideration of issues in cases of significant and persistent inconsistencies of information*” submitted under Articles 13.7 and 13.9.⁶¹ This “*facilitative consideration*” will be based on recommendations made in the final technical expert review reports, prepared under Article 13.11-12, together with any written comments provided by the State Party during the review.

⁶⁰ Decision 20/CMA.1, Modalities and Procedures for the Effective Operation of the Committee to Facilitate Implementation and Promote Compliance Referred to in Article 15, Paragraph 2, of the Paris Agreement, UN Doc FCCC/PA/CMA/2018/3/Add.2 (19 March 2019) Annex, at [22(a)].

⁶¹ *Ibid* at [22](b)].

103. In performing these functions, the Compliance Committee is required pursuant to paragraph 19 of the CMA decision to be guided by the following:

“(b) In considering how to facilitate implementation and promote compliance, the Committee shall endeavour to constructively engage with and consult the Party concerned at all stages of the process, including by inviting written submissions and providing opportunities to comment;

(c) The Committee shall pay particular attention to the respective national capabilities and circumstances of Parties, recognizing the special circumstances of the least developed countries and small island developing States, at all stages of the process, in accordance with the provisions of the Paris Agreement, including in determining how to consult with the Party concerned, what assistance can be provided to the Party concerned to support its engagement with the Committee, and what measures are appropriate to facilitate implementation and promote compliance in each situation;

...

(e) The Committee should take into account considerations related to the impacts of response measures.”

104. It is plain from this paragraph 19 that the Paris Agreement prioritises the facilitation of implementation and compliance by constructive engagement and consultation with the State Party in breach of the Agreement. This precludes any legal consequence relating to reparations due for breach of the Agreement which is otherwise mandated under the “*residual*” rules of State responsibility under customary international law.

105. This approach is further corroborated by Section IV of the CMA decision establishing the Committee which provides in paragraph 30 as follows:

“With a view to facilitating implementation and promoting compliance, the Committee shall take appropriate measures. These may include the following:

“(a) Engage in a dialogue with the Party concerned with the purpose of identifying challenges, making recommendations and sharing information, including in relation to accessing finance, technology and capacity-building support, as appropriate;

(b) Assist the Party concerned in the engagement with the appropriate finance, technology and capacity-building bodies or arrangements under or serving the Paris Agreement in order to identify possible challenges and solutions;

(c) Make recommendations to the Party concerned with regard to challenges and solutions referred to in paragraph 30(b) above and communicate such recommendations, with the consent of the Party concerned, to the relevant bodies or arrangements, as appropriate;

(d) Recommend the development of an action plan and, if so requested, assist the Party concerned in developing the plan;

(e) Issue findings of fact in relation to matters of implementation and compliance referred to in paragraph 22(a) above.”

106. It is readily apparent from such “*appropriate measures*” to be taken by the Committee that reparations for and indeed cessation of breach are precluded from the *lex specialis* of the Paris Agreement’s system for responding to such a breach. Indeed the focus instead is on engaging in dialogue, to identify challenges and provide information and support, and to recommend and even assist in formulating an action plan to help achieve compliance. Such an approach is entirely consistent with the object and purpose of the Agreement as contained in Article 2 with its focus on, *inter alia*, strengthening the global response to the threat of climate change. In this regard, it is far better for the Committee to work with a State to try and assist it meet its obligations which are directed at regulating GHG emissions than simply to require it immediately and unconditionally cease its breach and/or impose an obligation to provide reparations arising from breach of the Agreement.

107. For these reasons, the Paris Agreement, UNFCCC, and Kyoto Protocol have established a set of *lex specialis* rules that govern the legal consequences for States that flow from a breach of their provisions and which thus preclude the application of what the general “*residual*” rules on State responsibility may require in terms of an immediate and unconditional cessation of breach and/or imposition of an obligation to provide reparations arising from breach of the Agreement.

C. In any case, application of the general “*residual*” rules of State responsibility would preclude a claim for compensation relating to the adverse effects of climate change

108. If, however, the Court were in any case minded to apply the “*residual*” general rules of State responsibility as embodied in the ILC Articles, this could only be in relation to alleged breaches of the obligations of States contained in the UNFCCC, Kyoto Protocol, and Paris Conventions. Any attempt to seek compensation more generally in relation to the adverse effects of climate change would run contrary to the ILC Articles and would in any case suffer from remoteness of causation.

109. Under the customary international law rules of State responsibility embodied in the ILC Articles on State Responsibility, an injured State can invoke the responsibility of another State for a breach of an obligation.⁶²

110. However, the key point here is that the obligation on a State to provide full reparation in the form of restitution and/or compensation under the ILC Articles relates solely to those internationally wrongful acts that have found to be committed. This follows from what is required as a matter of customary international law.

111. A convenient statement of custom is, of course, contained in the *Chorzów Factory case* 1928 PCIJ (ser A) No 17, at 47: “*reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.*” (Emphasis added.)

⁶² Article 42 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries (A/56/10) (“Draft Articles on State Responsibility”).

112. Another key statement here, of course, is Article 31 of the 2001 International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts (“**ILC Articles**”) which reflects custom and provides that:

“1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.” (Emphasis added.)

113. The ILC in its Commentary on Article 31 states at paragraph 9 (p. 92) that “[p]aragraph 2 addresses a further issue, namely the question of a causal link between the internationally wrongful act and the injury. It is only ‘[i]njury ... caused by the internationally wrongful act of a State’ for which full reparation must be made. This phrase is used to make clear that **the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act**” (Emphasis added.)

114. The Court has repeatedly reaffirmed the *Chorzów Factory* standard: see, e.g., *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 81, paragraph 152; *Case Concerning the Arrest Warrant of 11 April 2000, (Democratic Republic of Congo v. Belgium)*, 2002 I.C.J. 3 at paragraph 76; and *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004, p. 59, paras. 119-121.

115. The second and third stages of this enquiry in relation to compensation will comprise causation and quantum (respectively), but it is the conclusions on breach which define the point of departure for its causation enquiry (i.e. ascertaining that the injury is caused by the breach), and its conclusions on causation will define the point of departure for its quantum enquiry (i.e. the determination of the appropriate compensation for that injury).

116. Causation under international law has both a factual and a legal element. As the ILC Commentary to Article 31, paragraph 10 provides at pp. 92-93: “*causality in fact is a necessary but not a sufficient condition for reparation. There is a further element,*

associated with the exclusion of injury that is too ‘remote’ or ‘consequential’ to be the subject of reparation.”

117. Indeed in the *Ahmadou Sadio Diallo Case (Republic of Guinea v Democratic Republic of the Congo)* case,⁶³ the Court recalled that in order to award compensation the Court has to determine “*whether there is a sufficiently **direct and certain causal nexus** between the wrongful act ... and the injury suffered by the Applicant*”.⁶⁴ Similarly, in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* the Court awarded compensation environmental damage, but noted that compensation is only due when there is a “*direct and certain causal link between such damage and [the wrongful] activity*”.⁶⁵
118. Thus in sum, the conventional starting point for the determination of factual causation is the “but for” test, which entails a comparison of the injured party’s actual situation with the hypothetical situation that the injured party would have been in “but for” the wrongful act.
119. Accordingly, in the case of alleged breaches of the UNFCCC, Kyoto Protocol, and Paris Agreement, to the extent that such a claim is not precluded by their *lex specialis* rules on breach (see **Chapter III, Part B above**), then compensation may in any case only be claimed for those losses that are directly caused by the specific breaches of the treaties. The customary rules on State Responsibility would not allow, e.g., a purported claim for compensation to be made for the adverse effects of climate change on a State since this is not connected to breach of a specific provision of the UNFCCC, Kyoto Protocol or Paris Agreement. It runs counter to the *Chorzów Factory* requirement that reparations must solely be directed at wiping out the consequences of the illegal act (*in casu*, the alleged breach of the treaty).

⁶³ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (“**Diallo case**”), Compensation, Judgment, ICJ Reports 2012, p. 324.

⁶⁴ *Diallo case*, *ibid*, paragraph 14; also quoted in *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, Compensation Judgment, ICJ Reports 2018, p. 15 at paragraph 32.

⁶⁵ *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Compensation Judgment) [2018] ICJ Reports 15 at paragraph 72.

120. There is a further problem of causation relating to any purported claim for compensation being made for the adverse effects of climate change: as the Court in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* recognised, there may be difficulties with establishing the existence of damage and causation from environmental damage where “*damage may be due to several concurrent causes, or the state of science regarding the causal link between the wrongful act and the damage may be uncertain ...*”⁶⁶ The Court noted that such difficulties “*must be addressed as and when they arise in light of the facts of the case at hand and the evidence presented to the Court.*”⁶⁷
121. While issues of causation will ultimately turn on the circumstances of the case including the damage suffered, proof of causation in relation to a particular State, or group of States, may be particularly difficult to prove in the case of GHG emissions and climate change. This is because the harm caused by GHG emissions is cumulative in nature over a course of time and occurs when GHG levels pass a certain threshold. For instance, carbon dioxide (CO₂), which is the GHG emission most associated with climate change, remains in the atmosphere for between 300 to 1,000 years.⁶⁸ Furthermore, CO₂ molecules take close to a decade to reach their full warming potential, and other impact-relevant effects such as sea level rise, changes to natural ecosystems and ice sheet melting will take many more years to reach their maximum impact.⁶⁹
122. Moreover, there are a range of causes that have impacted the climate system. Many of these causes are historical and date back to the first industrial revolution. Indeed the IPCC has stated that “*Observed increases in well-mixed GHG emissions since around 1750 are unequivocally caused by GHG emissions from human activities.*”

⁶⁶ *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Compensation Judgment) [2018] ICJ Reports 15 at paragraph 34.

⁶⁷ *Ibid.*

⁶⁸ Alan Buis, *The Atmosphere: Getting a Handle on Carbon Dioxide*, NASA (9 October 2019), (accessible: <https://climate.nasa.gov/news/2915/the-atmosphere-getting-a-handle-on-carbon-dioxide/>).

⁶⁹ Katharine L Ricke and Ken Caldeira, “Maximum warming occurs about one decade after a carbon dioxide emission”, [2014] 9 *Environmental Research Letters* 124002 at p. 6.

123. The largely historical cause of climate change has the further consequence that such anthropogenic activity at the time was not regulated, let alone prohibited, by international law, and nor is it clear whether any of the acts by private actors responsible for GHG emissions were attributable to the States concerned.
124. For all of these reasons, there is nowhere near the requisite degree of direct causation necessary for a court to be able to establish that States today bear liability for climate change arising from GHG emissions whether on an individual or collective basis.⁷⁰

⁷⁰ Thus even a strong proponent of climate change litigation has observed “*Except by interpreting causation in a very loose way or by applying probabilistic theories, it will be difficult in the current state of scientific knowledge to establish a ‘direct and certain causal nexus’ between a climate damage and the emissions of a particular State or group of States.*” (S. Maljean-Dubois, “Climate Change Litigation”, *Max Planck Encyclopedia of International Law* (2018), paragraph 30.)

CHAPTER IV.

THE CONSTRUCTIVE EFFORTS BY THE STATE OF KUWAIT TO MITIGATE GREENHOUSE GAS EMISSIONS AND THE EFFECTS OF CLIMATE CHANGE

125. The State of Kuwait is a developing country which became a fully independent State on 19 June 1961. The State of Kuwait comprises the mainland as well as eight small islands, and is particularly cognisant that the Request itself was at the behest of small island developing States. It was one of the first States to sign the UNFCCC: it joined the Convention on 28 December 1994 and it entered into force for the State on 28 March 1995. Kuwait also ratified the Kyoto Protocol on 11 March 2005 and it entered into force for the State on 9 June 2005. Kuwait also signed the Paris Agreement on 22 April 2016.
126. The State of Kuwait shares the concerns of the international community in limiting the negative impacts of climate change. Kuwait recognizes that the global nature of climate change calls for maximum cooperation and participation in an effective international response in implementing the terms of the UNFCCC from all countries of the world in accordance with common but differentiated responsibilities as provided by Article 4(1), and as explained above. To this end, Kuwait is engaged with the climate change regime established by the treaties.
127. The remainder of this Chapter IV considers some of the impacts of climate change on Kuwait (**Chapter IV, Section A below**), before considering briefly the impact of certain climate change response measures on Kuwait (**Chapter IV, Section B below**), and then turning to consider Kuwait's extensive efforts to mitigate GHG emissions (**Chapter IV, Section C below**).

A. Impact of Climate Change on the State of Kuwait

128. Although Kuwait did not participate in causing climate change,⁷¹ Kuwait is vulnerable to the adverse effects of climate change in a number of ways, including the following:

- (1) ***Increasing temperatures:*** Kuwait is already a subtropical desert with an extremely arid climate. Daily temperatures can reach 45°C during the summer, during which there is no rainfall.⁷² It is now suffering from a rise in average temperatures. In Summer months (May to October) the maximum temperature reaches to more than 50°C in the shade. The State has to expend considerable resources to ensure provision in key areas such as energy, water and housing.⁷³ For example, due to its climate, Kuwait is one of the world’s most water-stressed countries, with the lowest per capita renewable internal freshwater availability of any country.⁷⁴ It has to rely almost entirely for its water supply on seawater desalination, which accounts for 93% of its entire water supply and this requires an energy intensive process to produce.⁷⁵ The demand for water will likely increase with increasing temperatures.
- (2) ***Increasing desertification and more frequent sandstorms:*** Nearly 70% of Kuwait’s land area is subject to desertification.⁷⁶ With increasing global temperature, desertification within Kuwait is likely to increase. There has already been a discernible increase in the frequency of intense sandstorms.⁷⁷ Moreover, projections indicate that under certain Regional Climate Models, average future rainfall in Kuwait will decrease thus exacerbating desertification.

⁷¹ State of Kuwait “Nationally Determined Contributions, October 2021” (“**NDC 2021**”) at p. 13.

⁷² Environment Public Authority of the State of Kuwait, First Biennial Update Report of the State of Kuwait (September 2019) at p. 10 (“**First Biennial Update Report**”).

⁷³ NDC 2021 at p. 6.

⁷⁴ State of Kuwait Environment Public Authority, State of Kuwait Second National Communication, July 2019 (“**Second National Communication**”) at p. 9.

⁷⁵ NDC 2021 at p. 6.

⁷⁶ Second National Communication at p. 5.

⁷⁷ State of Kuwait “Intended Nationally Determined Contributions” – November 2015, p. 2.

Certain portions of Kuwait have experienced steep reductions of roughly 15%-18% lower rainfall than the historical average.⁷⁸

- (3) ***Sea level rise will affect Kuwait's coastal zones:*** Projections indicate that sea level rise is likely to significantly affect many parts of Kuwait, especially given much of its low-lying coastal areas are at risk and much of its economic activity and infrastructure are mostly within 20 km of the coastline.⁷⁹ The coastal areas along Kuwait Bay, which includes the western coast near Doha Port and densely populated neighbourhoods around Kuwait City are also highly vulnerable to sea level rise.⁸⁰ Furthermore, current hard coastal protection structures, such as sea walls, bulkheads to protect roads, buildings and other infrastructure are insufficient to provide protection from sea-level rise and would have to be replaced or retrofitted to offer the same level of protection.⁸¹ It is estimated that a loss of c. 1.4 – 3% of Kuwait's coastal zones as a result of sea level rise caused by climate change will affect c. 5% of Kuwait's GDP.⁸² Moreover, in certain scenarios roughly half of the large Boubyan Island, an important area of biodiversity,⁸³ would be inundated.⁸⁴
- (4) ***Destruction of parts of the marine ecosystem:*** Climate change is expected to result in coral reef coverage loss in Kuwait of nearly 122 thousand square meters.⁸⁵

⁷⁸ Second National Communication at pp. 41 to 42.

⁷⁹ *Ibid.*, at p. 44; and NDC 2021 at p. 6.

⁸⁰ *Ibid.*, at p. 47.

⁸¹ *Ibid.*, at p. 47.

⁸² NDC 2021 at p. 14.

⁸³ The Kuwaiti island of Boubyan is the second largest island in the Arabian Gulf and home to pristine marine and terrestrial ecosystems of regional and international importance. The northern half of Boubyan is designated a marine protected area and was also recently designated as a Ramsar Convention Site. (Second National Communication at p. 1.)

⁸⁴ Second National Communication at p. 47.

⁸⁵ *Ibid.*, at p. 56.

(5) **Impacts on public health:** Kuwait has prevailing conditions of very high temperatures and frequent dust storms. These pose major health risks that can lead to premature mortality and increased healthcare facility visits particularly among the elderly and very young.⁸⁶ With the higher temperatures and increased frequency of sandstorms, this will result in increased heat stress and increased cardiovascular and respiratory diseases associated with more frequent dust storms.⁸⁷ This presents a significant public health issue for Kuwait’s population.⁸⁸

129. Kuwait has developed a National Adaptation Plan 2019-2030,⁸⁹ with the overall objective of providing “*an integrated development plan and subsequent programmes targeting local communities and environmental components in areas under the threat of climate change*”.⁹⁰ This Plan has specifically been prepared “*in accordance with the UNFCCC directives and articles and includes a detailed survey of the environment and the most affected areas and sectors in climate change, detailed analysis pertaining to climate change vulnerability, and gaps in each sector to adapt to climate change.*”⁹¹

130. Kuwait has already undertaken several projects to adapt to the effects of climate change such as rising temperatures, decreased rainfall and limited water sources, sea level rise, and the increased intensity of sandstorms.⁹²

131. The Environmental Protection Law No. 42 of 2014 (discussed in further detail at **paragraph 135 below**) and its amendments also include articles relating to adapting to the negative effects of climate change.

⁸⁶ *Ibid.*, at p. 57.

⁸⁷ Second National Communication at p. 57.

⁸⁸ *Ibid.*, at p. 57.

⁸⁹ State of Kuwait Environment Public Authority (“**Kuwait National Adaptation Plan 2019 – 2030**”) (2019).

⁹⁰ *Ibid.*, at p. 24.

⁹¹ *Ibid.*, at p. 24.

⁹² NDC 2021 at p. 10.

B. The impact of certain climate change response measures on the State of Kuwait

132. In the implementation of commitments under the UNFCCC, the Parties have agreed to consider the specific needs and concerns of developing countries arising from the impact of the execution of response measures taken by States in combatting climate change.⁹³
133. Kuwait is a State with a single source of income.⁹⁴ Its industry is primarily based on extracting, refining and exporting oil, with oil export revenue amounting to more than 90% of its total revenue and contributing c. 55% of Kuwait's GDP.⁹⁵ Government income is solely funded by oil exports.⁹⁶ Other sectors are also heavily dependent on oil and gas revenues. For instance, social services are entirely funded by public oil revenues.⁹⁷ The largest manufacturers in the State are oil-based, and most other activities are heavily subsidised by oil income.⁹⁸ Thus Kuwait's economic growth, its jobs, and energy security are all highly dependent on fossil fuels and are vulnerable to changes in global oil demand, as well as international oil market price volatility.

C. The State of Kuwait's extensive efforts to mitigate GHG emissions

134. The State of Kuwait in its Nationally Determined Contributions, October 2021 ("**NDC 2021**"), has set out its ambitious plan of "*seeking to avoid emitting the equivalent of 7.4% of its total emissions in 2035 with unconditional national efforts*".⁹⁹ This NDC 2021 succeeds Kuwait's Intended Nationally Determined Contributions dated November 2015.¹⁰⁰

⁹³ Article 4.8 of the UNFCCC. See **paragraphs 18-20 in the text above**.

⁹⁴ NDC 2021 at p. 7.

⁹⁵ *Ibid.*, at p. 7.

⁹⁶ Second National Communication at p. 27.

⁹⁷ *Ibid.*, at p. 15.

⁹⁸ *Ibid.*, at p. 15.

⁹⁹ NDC 2021 at pp. 3 and 9.

¹⁰⁰ State of Kuwait, Intended Nationally Determined Contributions, November 2015.

135. Domestically, Kuwait has undertaken numerous projects to achieve its NDC objective, based on the principles of the low-carbon circular economy¹⁰¹ that enhance the reduction, disposal, reuse, and recycling of GHG.¹⁰² To this end, Kuwait has established an independent Environment Public Authority (“EPA”), undertaken plans and development projects and enacted laws in the areas of mitigation and adapting to the adverse effects of climate change, which are mutually beneficial to mitigation.¹⁰³ Examples of actions taken thus far are as follows:

- (1) Kuwait has established the EPA as an independent regulatory body focused on environmental action and implementation of environmental law and policy.¹⁰⁴ It regulates all activities related to the protection of the environment in Kuwait, including: (i) overseeing the implementation of Kuwait’s sustainable development goals, (ii) preparing, supervising, and executing work plans for environmental protection and conservation of natural resources, in coordination with the competent authorities; (iii) participating in the guidance and support of environmental research and studies; (iv) developing and executing environmental surveys, monitoring programs, and impact assessments; (v) creating a general framework for programs for national environmental awareness; and (vi) monitoring updates in the national laws and regulations relating to the protection of environment.¹⁰⁵

- (2) Kuwait has enacted environmental protection legislation in its Environmental Protection Law 42/2014 (as amended by Law 99/2015), which expressly recognises and regulates GHG emissions and climate change.¹⁰⁶ All public

¹⁰¹ NDC 2021 at p. 9.

¹⁰² Statement by Sheikh/Sabah Al-Khaled Al-Hamad Al-Sarah at the Twenty-Sixth Conference of the Parties to the United Nations Convention on Climate Change, November 2021.

¹⁰³ NDC 2021 at p. 8.

¹⁰⁴ As overseen by the Environment Supreme Council (Environmental Protection Law 42/2014 (as amended by Law 99/2015) at Article 6).

¹⁰⁵ Environmental Protection Law 42/2014 (as amended by Law 99/2015) at Articles 7(1), (2), (5), (8), (10), (11), (14).

¹⁰⁶ Environmental Protection Law 42/2014 (as amended by Law 99/2015) at Articles 48, 52 and 53.

authorities within Kuwait are subject to the provisions of this law. The law demonstrates Kuwait's interest and direction in reducing GHG emissions in the energy sector and paves the way for the development, adoption, and implementation of a national strategy to reduce its consumption of energy and diversify energy sources, especially increasing the percentage of clean energies.¹⁰⁷ It also empowers the EPA to carry out the activities as set out at paragraph 138(1) above.¹⁰⁸

- (3) Under its Clean Development Mechanism¹⁰⁹, Kuwait has implemented various GHG mitigation projects through, for instance, flare gas recovery,¹¹⁰ renewable energy,¹¹¹ and improving electric distribution efficiency.¹¹² It also empowers the EPA to carry out the activities as set out at paragraph 138(1) above.¹¹³
- (4) Kuwait has a national strategy to diversify sources of power and secure a significant renewable energy capability by the year 2030 so as to supply a considerable part of local demand.¹¹⁴ Kuwait has taken steps towards such energy diversification efforts by development of the Shagaya Renewable Energy Power Park. Phase I of the three phase plan has already resulted in the

¹⁰⁷ NDC October 2021 at p. 11.

¹⁰⁸ Environmental Protection Law 42/2014 (as amended by Law 99/2015) at Article 7.

¹⁰⁹ This is a mechanism developed to “*stimulate sustainable development and emission reduction targets under the Kyoto Protocol*”. Second National Communication at p. 66.

¹¹⁰ For instance, flare gas recovery units have been installed at the Mina Al Ahmadi Refinery and Mina Abdullah Refinery, which recover gases that are currently flared at the refinery. The project has led to annual GHG emission reductions of about 54.4 Gg and 89.5 Gg respectively. (Second National Communication at p. 66).

¹¹¹ A 10MW solar photovoltaic farm has been built in western Kuwait, which partially meets the electricity demands of 29 oil wells and related infrastructure in the region. The project has resulted in annual GHG emission reductions of about 13.7 Gg. (Second National Communication at p. 66).

¹¹² This project introduces capacitor bank technologies at various 11/0.433 KV substations to improve the power factor in the electric distribution system. This led to substantial improvement in the average power factor, leading to a reduction in distribution losses. The project resulted in annual GHG emission reductions of about 112.7Gg. (Second National Communication at p. 66).

¹¹³ Environmental Protection Law 42/2014 (as amended by Law 99/2015) at Article 7.

¹¹⁴ Second National Communication at p. 76.

construction of a wind farm with a capacity of 10 MW. The wind farm is now fully operational and connected to the national electricity grid.¹¹⁵

- (5) Kuwait has invested in the use of advanced fossil fuel technologies for electricity generation, including high efficiency natural gas combined cycle units and district cooling¹¹⁶ and the installation of several photovoltaic solar systems.¹¹⁷
- (6) Kuwait has also invested in the production of environmentally friendly oil products through the largest project in Kuwait's history, the Clean Fuel Energy Project (USD 15.5 billion). This Project includes upgrading of the Mina Al-Ahmadi and Mina Abdullah refineries.¹¹⁸ The project will produce clean petroleum products that conform to Euro-4 specifications, and will reduce SOx, NOx and other pollutant emissions.
- (7) Kuwait retired its Shuiba refinery and replaced it with the Al-Zour refinery, which is specialised in producing fuel that is compatible with emerging environmental standards in developed countries.¹¹⁹ The refinery has now started to produce low Sulphur fuel oil (0.5% S content), which preliminary findings indicate should reduce SO emissions by c. 70% and CO2 and N2O by c. 4-6%.
- (8) Kuwait's Ministry of Electricity and Water and Renewable Energy has shifted most of its power generation plants from the use of oil to natural gas, with the

¹¹⁵ *Ibid.*, at p. 76.

¹¹⁶ *Ibid.*, at p. 73.

¹¹⁷ For instance, the Kuwait National Petroleum Company has implemented advanced technologies for solar panels in their fuel filling stations across Kuwait. The Kuwait Petroleum Corporation is currently installing solar panels in its head office (Second National Communication at p. 66). A photovoltaic solar system of nearly 40 kW was also installed in a school and minor-sized units have also been installed for remote applications (Second National Communication at p. 75).

¹¹⁸ *Ibid.*, at p. 27.

¹¹⁹ *Ibid.*, at p. 27.

objective of reducing harmful emissions caused by the fuel mix in electricity production in Kuwait.¹²⁰

- (9) Kuwait has also created sinks through the building of natural reserves and oasis to correct environmental damage, restore life and biodiversity to the land, and contribute to the mitigation of air pollution.¹²¹ A nature reserve in Al-Wafra called the “KNPC Center for Propagating and Developing Native Plants” has also been established, which was designed to protect and propagate indigenous species of wild plants and animals and fauna in their natural environment.
- (10) Kuwait has, through the Kuwait Fund for Arab Economic Development (“Kuwait Fund”), contributed to a range of low-carbon development projects in developing countries. The Kuwait Fund has financed projects in 105 countries totalling more than USD 23 billion, with approximately USD 523 million specifically allocated to green initiatives in the past decade. The Kuwait Investment Authority also joined the One Planet Initiative for sovereign wealth funds in 2017, aligning its investments with climate change goals of transitioning towards a resilient, low-carbon economy.¹²²

136. Kuwait is also in the process of actively developing future plans to achieve net-zero emissions by 2060. These include the following plans:

- (1) Under the Greenhouse Gas Mitigation Scenario, several projects have been proposed to expand on the projects implemented under the Clean Development Mechanism such as the expansion of improved electric distribution efficiency¹²³ and the expansion of renewable-based electricity production.¹²⁴ Kuwait aims to

¹²⁰ Kuwait’s Biennial Update Report (30 September 2019) at p. 59.

¹²¹ This includes the creation of several oasis and farms in different areas such as the Abdaliah, Ahmadi Oasis, Spirit of the Desert, Kuwait Oasis, Magwa Oasis, Jaidan Farm, West Kuwait Oasis and On al Aish Oasis.

¹²² Statement of the Minister of Foreign Affairs of the State of Kuwait Sheikh Salem Abdullah Al-Jaber Al-Sabah at the 28th Conference of the Parties of the United Nations Framework Convention on Climate Change, 1 – 2 December 2023.

¹²³ Second National Communication at p 67.

¹²⁴ Second National Communication at p 67. Phases II and III of the Shagaya Renewable Energy Power Park plan will develop significant renewable energy capabilities through solar thermal, photovoltaic and wind energy

meet 15% of its energy demand via renewable energy sources by 2030 through its investment in such projects and in renewable energy.¹²⁵

- (2) Improving mitigation measures in the transport sector through, for instance, fuel efficiency improvements for vehicles, use of alternative clean fuel, transportation infrastructure improvements, and tariff and subsidy reductions.¹²⁶
- (3) Committing to upgrading Kuwait's petrochemical products by updating their specifications to ensure they meet new specifications as required for use in advanced markets. The Ministry of Commerce and Industry has also committed that local manufacturing sectors will comply with new international standards in the production of their products.¹²⁷ There are also efforts to improve waste heat recovery from industrial processes as a means of reducing GHG emissions, and to adopt more advanced plants, technologies and processes to reduce electricity demand.¹²⁸
- (4) The Kuwait Petroleum Corporation – Kuwait's 100% State-owned national oil corporation,¹²⁹ and one of the least emissions-intense oil and gas producers worldwide – is committed to achieve net-zero emissions by 2050 by actively reducing scope 1 and scope 2 GHG emissions from its global operations. It aims

technologies. By its completion, the plan will have introduced a total renewable energy capacity of 3,070 MWs, resulting in annual GHG emission reductions of about 5,000 Gg (equivalent to displacing 12.5 million barrels of oil).

¹²⁵ *United Nations, Exploring Climate Action in Kuwait: A Focus on Environmentally Sustainable Finance*, 5 July 2021 at p. 7.

¹²⁶ First Biennial Update Report at p. 47.

¹²⁷ First Biennial Update Report at p. 59.

¹²⁸ First Biennial Update Report at p. 47.

¹²⁹ Decree-Law No. 6/1980 on the establishment of the Kuwait Petroleum Corporation. KPC was first established in 1980 to bring together all State-owned elements of the Kuwait oil sector under one corporate umbrella. It is today one of the world's leading major energy conglomerates in providing safe, clean energy to the global markets.

to achieve this by harnessing carbon capture, utilization and storage (CCUS) technology, reducing gas flaring, and pursuing biofuels.¹³⁰

¹³⁰ *Kuwait Petroleum Corporation, Sustainability: A sustainable Energy Future* (accessible: <https://www.kpc.com.kw/Sustainability>).

CHAPTER V

CONCLUSION

137. On the **first question** asked of the Court – the obligations of States to protect the climate system from GHG emissions – the State of Kuwait respectfully submits that the Court be guided by the following considerations:

- (1) The UNFCCC, Kyoto Protocol, and Paris Agreement constitute a *lex specialis* set of rules and obligations that exclusively govern States' obligations under international law to ensure the protection of the climate system and other parts of the environment from GHG emissions.
- (2) The comprehensive regime embodied in the UNFCCC, Kyoto Protocol, and Paris Agreement have near universal State support and are the framework under which long standing and ongoing negotiations have taken place. These treaties were negotiated to reflect the interests of all States with respect to climate change, poverty reduction, and sustainable development.
- (3) The obligations on States contained in these treaties further reflect careful compromises reached between States and represent a balance struck between a number of competing considerations that operate in the area of GHG emissions and climate change. These considerations are referred to in terms throughout the UNFCCC and Paris Agreement and they provide both the objects and purposes of the treaties as well as an important context within which the obligations contained in these treaties are to be construed. These considerations include the following:
 - (i) A specific focus on regulating GHG emissions in an attempt to reduce their role in creating climate change by ensuring the widest possible participation and meaningful cooperation amongst States by taking account of their common but differentiated responsibilities (“**CBDR**”), respective capacities, and their differing social and economic conditions;

- (ii) The UNFCCC and Paris Agreement balance on the one hand the recognition that some States have contributed the largest share of historical and current GHG emissions and on the other hand to recognise that certain developing States are in some cases particularly vulnerable to the adverse effects of climate change. Indeed the international community agreed to an asymmetrical allocation of the burden of climate change mitigation as between high GHG emitting Parties that industrialised early as listed in Annex I and other Parties, consistent with the CBDR principle; and
 - (iii) The UNFCCC and Paris Agreement also strike a balance between, on the one hand, a State's right to permanent sovereignty over their natural resources and their related sovereign right – particularly in the case of developing States and those whose economies are particularly dependent on fossil fuel production, use and exportation – to use these natural resources to grow and develop their economy in a sustainable manner pursuant to a gradual energy transition; and, on the other hand, a State's responsibility to ensure that activities within its jurisdiction and control do not cause significant transboundary harm to the environment of other States by GHG emissions and that they act in a precautionary manner to stabilize GHG emissions to prevent interference with the climate system.
- (4) There are a wide variety of obligations contained in the UNFCCC, Kyoto Protocol, and the Paris Agreement, the main obligations being:
- (i) An obligation on all States Parties pursuant to Article 4.2 of the Paris Agreement to submit NDCs which contain a State's Party's mitigation efforts to reduce its GHG emissions and adapt to climate change;
 - (ii) An obligation of conduct (not result) on all States Parties pursuant to Articles 4.2 and 7.9 of the Paris Agreement to adopt mitigation measures and adaptation processes and actions aimed at achieving their individual NDC objectives; and

- (iii) An obligation on developed States Parties pursuant to Article 4.3 of the UNFCCC and Article 9 of the Paris Agreement to provide financial support and enable technology transfer to developing countries.
- (5) The obligations of States Parties to the UNFCCC and Paris Agreement are to be construed by reference to their objects and purposes and within their context as explained above in some detail and as summarised in this Conclusion at **paragraph 137(3) above**.
- (6) The Parties to the UNFCCC and Paris Agreement have not adopted more stringent measures, such as specific GHG emission reduction requirements or indeed penalties for non-compliance. The imposition of legal obligations that go beyond what States Parties have agreed to in the UNFCCC, the Kyoto Protocol, and the Paris Agreement may well violate the objects and purposes of these treaties which, *inter alia*, prioritise States cooperating on a voluntary basis to work collectively and individually to regulate and reduce GHG emissions.
- (7) More specifically, the UNFCCC, Kyoto Protocol, and Paris Agreement contain a set of *lex specialis* rules and obligations under international law which regulate GHG emissions in order to reduce their impact on climate change. The effect of these specific rules and obligations established by the treaties is that they prevail over more general international law rules and obligations that may otherwise have applied to GHG emissions:
- (i) The basis of the *lex specialis* maxim is that where there is a specific rule of international law regulating a particular matter then this precludes a more general rule that may exist from being applied in relation to the same matter.
 - (ii) There are three main reasons why the UNFCCC, the Kyoto Protocol, and the Paris Agreement constitute a *lex specialis* set of rules that exclusively govern States' obligations in relation to GHG emissions and their effect on the environment under international law.

- (a) **First**, the rules and obligations contained in the UNFCCC, Kyoto Protocol, and Paris Agreement as *treaty* rules and obligations should “*enjoy priority over custom*”. This approach is supported in terms by, *inter alia*, the Report of the International Law Commission Study Group on Fragmentation of International Law.
- (b) **Second**, the rules and obligations contained in these treaties represent a series of balances struck between States on a number of competing considerations that operate in the specific area of GHG emissions and climate change. Thus it is not appropriate to apply more broader formulations of customary international law to impose obligations on States outside the context of this particular GHG emissions framework as contained in these treaties.
- (c) **Third**, the States have taken the more general principles of international law – whether customary or otherwise – relating to the environment and transboundary pollution and subsumed, integrated, and applied them in the specific set of rules and obligations contained in the UNFCCC, Kyoto Protocol, and Paris Agreement. This is demonstrated, for example, by reference to the precautionary principle, the preventive principle, and other procedural obligations under international law that may generally be considered of relevance to GHG emissions and climate change.

138. On the **second question** asked of the Court – the legal consequences for States where they have caused significant harm to the climate system and other parts of the environment by their GHG emissions – the State of Kuwait respectfully submits that the Court be guided by the following considerations:

- (1) The UNFCCC, Kyoto Protocol, and Paris Convention establish a set of *lex specialis* rules, institutions and obligations governing GHG emissions and climate change. Thus it is only a breach of the obligations contained in these agreements which is relevant to the second question asked of the Court in terms of determining the legal consequences for States who have caused significant

harm to the climate system. Moreover, this set of *lex specialis* rules in these treaties further extends also to the separate issue of State responsibility so as to preclude application of the general “*residual*” rules on State responsibility under international law:

- (i) Part II of the International Law Commission Articles on State Responsibility provide a “*residual*” set of rules which deals with the legal consequences for States of internationally wrongful acts (e.g. breach of a treaty) in relation to the core consequences of cessation of breach and reparation for breach. However, these “*residual rules*” determining the legal consequences of an internationally wrongful act can be displaced or modified where, e.g., a treaty provides a set of *lex specialis* rules that regulate the legal consequences flowing from breaches of the treaty. This scenario is expressly envisaged by Article 55 of the ILC Articles on State Responsibility.
- (ii) The reason why the UNFCCC, Kyoto Protocol, and Paris Convention – and the COP as established by the Paris Agreement – preclude the ILC Articles on State Responsibility from determining legal consequences of a breach of these treaties is that they displace the residual rules of cessation of breach and reparation from operating within the context of the treaty regime that governs GHG emissions and the climate system. More specifically, the Compliance Committee is to act in a “*facilitative*”, “*non-adversarial*” and “*non-punitive*” way that respects the “*national capabilities and circumstances*” of a Party to seek to achieve compliance. Moreover, the focus of the Committee is on engaging in dialogue with the State in breach of a treaty, to identify challenges and provide information and support, and to recommend and even assist in formulating an action plan to help achieve compliance. Such an approach is entirely consistent with the object and purpose of the Paris Agreement as contained in Article 2 with its focus on, *inter alia*, strengthening the global response to the threat of climate change. In this regard, it is far better for the Committee to work with a State to try and assist it to meet its obligations which are directed at regulating GHG emissions than

simply to require it immediately and unconditionally to cease its breach and/or impose an obligation to provide reparations arising from breach of the Agreement.

- (2) In any case, even if the general “*residual*” rules of State responsibility were to apply to the second question asked of the Court (which they do not), then they would preclude a claim for compensation relating to the adverse effects of climate change:
- (i) Under the customary international law rules of State responsibility embodied in the ILC Articles on State Responsibility, an injured State can invoke the responsibility of another State for breach of an obligation (e.g. a treaty), but they can only claim restitution and/or compensation solely in relation to those breaches that have caused the claimant State an injury.
 - (ii) On the issue of the causation required, this involves comparison of the injured State’s actual situation with the hypothetical situation that the injured State would have been in “but for” the wrongful act. Accordingly, in the case of alleged breaches of the UNFCCC, Kyoto Protocol, and Paris Agreement, to the extent that such a claim is not precluded by their *lex specialis* rules on breach, then compensation may in any case only be claimed for those losses that are directly caused by the specific breaches of the treaties. The customary rules on State Responsibility would not allow, e.g., a purported claim for compensation to be made for the adverse effects of climate change on a State since this is not connected to breach of a specific provision of the UNFCCC, Kyoto Protocol or Paris Agreement. It runs counter to the *Chorzów Factory* requirement that reparations must solely be directed at wiping out the consequences of the illegal act (*in casu*, the alleged breach of the treaty).
 - (iii) There is a further problem of causation relating to any purported claim for compensation being made for the adverse effects of climate change: as the Court in *Certain Activities Carried Out by Nicaragua in the Border*

Area (Costa Rica v Nicaragua) recognised, there may be difficulties with establishing the existence of damage and causation from environmental damage where damage may be due to several concurrent causes, or the state of science regarding the causal link between the wrongful act and the damage may be uncertain. While issues of causation here will ultimately turn on the circumstances of the case including the damage suffered, proof of causation in relation to a particular State, or group of States, may be particularly difficult to prove in the case of GHG emissions and climate change. This is because the harm caused by GHG emissions is cumulative in nature over a course of time and occurs when GHG levels pass a certain threshold. For instance, carbon dioxide (CO₂), which is the GHG emission most associated with climate change, remains in the atmosphere for between 300 to 1,000 years. Furthermore, CO₂ molecules take close to a decade to reach their full warming potential, and other impact-relevant effects such as sea level rise, changes to natural ecosystems and ice sheet melting will take many more years to reach their maximum impact.

- (iv) Moreover, there are a range of causes that have impacted the climate system. Many of these causes are historical and date back to the first industrial revolution. The largely historical cause of climate change has the further consequence that such anthropogenic activity at the time was not regulated, let alone prohibited, by international law, and nor is it clear whether any of the acts by private actors responsible for GHG emissions were attributable to the States concerned.
- (v) Thus there is nowhere near the requisite degree of direct causation necessary for a court to be able to establish that States today bear liability for climate change arising from GHG emissions whether on an individual or collective basis.

Ali Ahmad AIDafiri
Ambassador of the State of Kuwait to the Kingdom of the Netherlands

22 March 2024

CERTIFICATION

I certify that the annexes are true copies of the documents reproduced therein.

Ali Ahmad AIDafiri
Ambassador of the State of Kuwait to the Kingdom of the Netherlands

Representative of the State of Kuwait

22 March 2024

LIST OF ANNEXES

The Annexes to the Kuwait's Written Statements are set out below and numbered in the order in which they are referred to in the text.

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- Annex No. 5** *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005
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- Annex No. 8** *United Nations Environment Programme, Emissions Gap Report 2023: Broken Record – Temperatures hit new highs, yet world fails to cut emissions (again)* (20 November 2023)
- Annex No. 9** UNFCCC, 'Outcome of the first global stocktake' (13 December 2023)
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- Annex No 10** UNFCCC, 'COP Decision 1/CP.21', 'Adoption of the Paris Agreement' (29 January 2016) FCCC/CP/2015/10/Add.1
- Annex No. 11** ILC, 'Report of the Study Group of the International Law Commission on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (18 July 2006) UN Doc A/CN.4/L.682 and Add. 1
- Annex No. 12** 'Lex Specialis' in *Max Planck Encyclopedia of International Law*
- Annex No. 13** *North Sea Continental Shelf*, Judgement, I.C.J. Reports 1969
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- Annex No. 16** Hugh Thirlway, 'The law and procedure of the International Court of Justice 1960–1989 (Part One)' in *British Year Book of International Law 1989*, vol. 60
- Annex No. 17** Extract from Report of the Panel, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, WTO Doc. WT/DS291/R
- Annex No. 18** *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011
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- Annex No. 20** *Trail Smelter Arbitration (United States v. Canada)* (1938 and 1941) 3 RIAA 1905
- Annex No. 21** *Mox Plant (Ireland v United Kingdom), Provisional Measures, Order of 3 December 2001*, ITLOS Reports 2001
- Annex No. 22** United Nations General Assembly, *Yearbook of the International Law Commission* (2001) vol. II, Part Two (as corrected)
- Annex No. 23** *United States Diplomatic and Consular Staff in Tehran*, Judgment, I.C.J. Reports 1980

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- Annex No. 27** Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries (2001) A/56/10
- Annex No. 28** *Factory at Chorzow (Germany v. Poland)*, 1928 P.C.I.J. (ser. A, No. 17)
- Annex No. 29** *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002
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- Annex No. 32** *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation Judgment, I.C.J. Reports 2018
- Annex No. 33** Alan Buis, 'The Atmosphere: Getting a Handle on Carbon Dioxide', NASA (9 October 2019)
- Annex No. 34** Katharine L Ricke and Ken Caldeira, 'Maximum warming occurs about one decade after a carbon dioxide emission', 2014 Environ. Res. Lett. 9 124002
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