



**INTERNATIONAL COURT OF JUSTICE**

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

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**WRITTEN STATEMENT OF THE DEMOCRATIC REPUBLIC OF TIMOR-LESTE**

22 MARCH 2024

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

## CHAPTER I. INTRODUCTION

1. On 29 March 2023, Resolution 77/276 was adopted by consensus by the United Nations General Assembly (UNGA), requesting the International Court of Justice (Court) to render an advisory opinion on the obligations of States in respect of climate change, specifically:

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

- (a) *What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations?*
- (b) *What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:*
  - (i) *States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?*
  - (ii) *Peoples and individuals of the present and future generations affected by the adverse effects of climate change?”<sup>1</sup> (Request)*

2. By letters dated 17 April 2023, the Deputy-Registrar gave notice of the Request to all States entitled to appear before the Court, pursuant to Article 66(1) of the Statute of the International Court of Justice (Statute).

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<sup>1</sup> *Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change, GA Res 77/276, UN GAOR, 77<sup>th</sup> sess, 64<sup>th</sup> plen mtg, UN Doc A/77/PV.64 (29 March 2023) ('Request').*

3. In its Order of 20 April 2023, the Court decided that “*the United Nations and its Member States are considered likely to be able to furnish information on the questions submitted to the Court for an advisory opinion and may do so within the time-limits fixed in this Order*”, and fixed 20 October 2023 as the time-limit within which written statements on the question could be presented to the Court.
4. In its Order of 4 August 2023, the Court extended:
  - 4.1 to 22 January 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*”; and
  - 4.2 to 22 April 2024 “*the time-limit within which States and organizations having presented written statements may submit written comments on the other written submission in accordance with Article 66, paragraph 4, of the Statute*”.
5. In its Order of 15 December 2023, the Court further extended:
  - 5.1 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*”; and
  - 5.2 to 24 June 2024 “*the time-limit within which States and organizations having presented written statements may submit written comments on the other written statements in accordance with Article 66, paragraph 4, of the Statute*”.
6. The Democratic Republic of Timor-Leste (**Timor-Leste**) submits this written statement in accordance with the Order of 15 December 2023.
7. Timor-Leste confirms that this written statement is without prejudice to its rights under international law, unrelated to the current Request.
8. Timor-Leste’s statement proceeds as follows:
  - 8.1 **Chapter II** briefly addresses the jurisdiction of the Court to reply to the Request;

- 8.2 **Chapter III** provides an overview of environmental, social, and geopolitical factors relevant to Timor-Leste;
  - 8.3 **Chapter IV** examines the effects of anthropogenic greenhouse gas emissions on Timor-Leste;
  - 8.4 **Chapter V** presents Timor-Leste's approach towards the law applicable to the Request. It considers that the Court must apply the core climate change treaties, the United Nations Framework Convention on Climate Change (**UNFCCC**), Paris Agreement, and Kyoto Protocol (together the **Climate Change Regime**) to answer the questions put before it, while other bodies of law may inform their correct interpretation;
  - 8.5 **Chapter VI** considers the interpretation of States' obligations under the Climate Change Regime, including the different obligations imposed on developed and developing States in accordance with the principle of common but differentiated responsibilities and respective capabilities (**CBDR-RC**);
  - 8.6 **Chapters VII, VIII, and IX** examine the potential relevance of climate change to States' obligations under the United Nations Convention on the Law of the Sea (**UNCLOS**), the Convention on Biological Diversity (**CBD**), and human rights treaties, respectively, including how they may inform the correct interpretation of the Climate Change Regime;
  - 8.7 **Chapter X** considers State responsibility flowing from breaches of States' climate change obligations; and
  - 8.8 **Chapter XI** briefly concludes.
9. As a least developed country (**LDC**) and small island developing State (**SIDS**), Timor-Leste's statement emphasises the importance of CBDR-RC to the interpretation of States' climate change obligations. CBDR-RC accounts for historical responsibility and present contributions to emissions, whilst also considering the vulnerability of States, as well as their financial, and technological capabilities.

10. Significant gaps remain in technical and financial support for both mitigation and adaptation measures, hindering the ability of developing States to respond to the adverse effects of climate change. Financial, technological, and capacity-building support are enablers for climate action. The continual failure of developed States to provide the necessary levels of support to developing States, as provided for in the UNFCCC and the Paris Agreement, prevents developing States from realising their climate mitigation and adaptation efforts to the fullest.
11. Consistent with the objectives of the Paris Agreement, there is a need to make financing flows consistent with a pathway towards low carbon development. Timor-Leste is at the forefront of global efforts regarding loss and damage resulting from climate change. While the fund for responding to loss and damage as established and operationalised by COP27 and COP28 (**Loss and Damage Fund**) is a step towards greater support for developing States, there remains a vast gap between the financial commitments developed States have made and the targets set at COP27 and COP28.
12. Timor-Leste welcomes the opportunity for the Court to clarify States' existing climate change obligations, particularly for the benefit of LDCs and SIDS who are most significantly impacted by the adverse effects of climate change.

## **CHAPTER II. JURISDICTION**

13. Timor-Leste is of the view that the Court has jurisdiction to render an advisory opinion on the questions submitted by the UNGA in Resolution 77/276, pursuant to Article 96(1) of the Charter of the United Nations (**Charter**), and Article 65(1) of the Statute. Specifically, the UNGA is permitted to request an advisory opinion on "any legal question" under Article 96(1) of the Charter, and the Court *may* give an advisory opinion on "any legal question" at the request of the UNGA under Article 65(1) of the Statute.



14. The Court’s advisory jurisdiction is predicated on the following bases:
- 14.1 The questions put to the Court by the UNGA are of a legal nature.<sup>2</sup> The Request seeks clarification of existing obligations of States under general international law as they relate to climate change.<sup>3</sup>
- 14.2 The UNGA has a clear and direct interest in the subject matter of the Request. The legal questions raised in the Request pertain directly to issues that have been, and continue to be, extensively dealt with by the UNGA as part of its functions.<sup>4</sup> In any event, as this Court observed in *Chagos and Construction of a Wall*, it “cannot substitute the assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion”.<sup>5</sup>
- 14.3 The Request concerns matters which, by their nature, impact all States: there is no pre-existing, unsettled bilateral dispute that “looms in the background”.<sup>6</sup>
- 14.4 There are thus no “compelling reasons” for the Court to decline to render the opinion sought.<sup>7</sup>

## PART A

15. This section responds to Part A of the question put to the Court, namely:

*What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from*

<sup>2</sup> *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter) (Advisory Opinion)* [1962] ICJ Rep 151, 155 (“*Certain Expenses of the United Nations*”).

<sup>3</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2019] ICJ Rep 95, 112 [58] (“*Chagos*”); *Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, [13] (“*Nuclear Weapons Advisory Opinion*”); *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal (Advisory Opinion)* [1973] ICJ Rep 166, 172 [14].

<sup>4</sup> See for example, Protection of global climate for present and future generations of mankind, GA Res 43/53, UN Doc A/Res/43/53 (27 January 1989, adopted 6 December 1988); Protection of global climate for present and future generations GA Res 63/32, UN Doc A/Res/63/32 (26 November 2008); Protection of global climate for present and future generations of humankind GA Res 69/220, UN Doc A/Res/69/220 (19 December 2014); Protection of global climate for present and future generations GA Res 78/153, UN Doc A/Res/78/153 (19 December 2023) (“*2023 Global Climate and Future Generations Resolution*”); Oceans and the law of the sea GA Res 77/248, UN Doc A/Res/77/248 (30 December 2022).

<sup>5</sup> *Chagos* (n 3), 115 [76]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 163 [62] (“*Construction of a Wall*”).

<sup>6</sup> Cf. *Chagos* (n 3) 95 [5]-[6] (Declaration of Judge Tomka).

<sup>7</sup> *Certain Expenses of the United Nations* (n 2) 155; *Judgment of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO (Advisory Opinion)* [1956] ICJ Rep 77, 86.

*anthropogenic emissions of greenhouse gases for States and for present and future generations?*

### CHAPTER III. BACKGROUND TO TIMOR-LESTE

16. This chapter seeks to contextualise Timor-Leste's response to Part A. In so doing, this chapter provides an overview of environmental, social, and geopolitical factors relevant to Timor-Leste.
17. Timor-Leste is a coastal State in Southeast Asia. Timor-Leste has two outlying islands, Atauro and the uninhabited Jaco Island. The total land area of Timor-Leste is approximately 15,000 km<sup>2</sup> inclusive of Oe-Cusse Ambeno which is located on the western part of Timor Island and is separated from the rest of Timor-Leste by Indonesian territory and borders the Savu Sea.<sup>8</sup>



**Figure 1** Map of the regions of Timor-Leste, United Nations (2007)

<sup>8</sup> Government of Timor-Leste, *Nationally Determined Contribution Timor-Leste 2022 – 2030*, 6 (Web Page) <[https://unfccc.int/sites/default/files/NDC/2022-11/Timor\\_Leste%20Updated%20NDC%202022\\_2030.pdf](https://unfccc.int/sites/default/files/NDC/2022-11/Timor_Leste%20Updated%20NDC%202022_2030.pdf)> ('*NDC Timor-Leste 2022-2030*').

18. With a coastline approximately 700 km in length, and a potential Exclusive Economic Zone (EEZ) of approximately 75,000 km<sup>2</sup>, Timor-Leste's identity is anchored in the sea. Many Timorese depend on the oceans for their sustenance and livelihoods, by fishing and harvesting marine species, such as tuna, snapper, and seaweed. The rich coral reefs and steep underwater cliffs that surround Timor-Leste are part of a diverse ecosystem, attracting scientists and tourists from around the world. Protection of climate systems from the adverse effects of climate change is critical to Timor-Leste's survival.
19. The geopolitical history of Timor-Leste is complex. It is likely the first people to arrive in Timor-Leste voyaged east from mainland Asia via a series of steppingstone islands. Stone tools have been excavated at Laili Cave in Manatuto and at Jerimalai shelter at the eastern tip of Timor-Leste dating back over 44,000 years. The Timorese developed a rich and diverse culture with many different languages, sophisticated music, fine art, including textiles, sculpture, and jewellery as well as complex rituals and dance. The Timorese were subsistence farmers and warriors.<sup>9</sup>
20. The Portuguese first landed in Oe-Cusse and began trading with the Timorese around 1515. Over a century later, in 1636, Catholic missionaries from Portugal established a settlement. The Dutch arrived on the island of Timor in 1613 and for nearly 300 years fought with the Portuguese for control.
21. In 1769, the Portuguese moved their capital to Dili after being attacked by the Dutch in the west of the island. Under Portuguese colonial rule the Timorese suffered exploitation.
22. During World War II, Portuguese Timor was devastated by the war and there was a terrible loss of life. Lisbon decided to remain neutral during the conflict, along with its dependent territories, including Timor-Leste. Bombing campaigns by Australia, the United States, and Japanese air forces inflicted great damage. Allied bombs destroyed Dili and Baucau, and other major towns and villages across the country. The Japanese conducted mass reprisals with entire villages being destroyed as a consequence of

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<sup>9</sup> All Balibo House Trust, Balibo Fort Veterans' Museum (Dili, Timor-Leste, 30 April 2022) ('Balibo Fort Veterans Museum').

Timorese support to the Australians. The Timorese also faced widespread hunger and starvation as a result of the war. The Japanese remained until the end of World War II and their occupation was harsh with the use of forced labour and the requisition of food. Timorese women were particularly vulnerable and subject to widespread abuse. Between 45,000 and 70,000 Timorese died either directly from the fighting or from war-caused famine and disease. This was between 10 to 15 percent of the Timorese population – proportionally one of the highest losses of life in World War II. Portuguese Timor received no war reparations or aid from Allied reconstruction programs and a weakened Portugal faced challenges developing its colony. World War II had long lasting and damaging effects on Timorese society and the development of the country.<sup>10</sup>

23. In 1960, Portuguese Timor was listed as a Non-Self-Governing Territory with the United Nations Decolonisation Committee which affirmed the right of the Timorese to self-determination. In the 1960s, national liberation movements in Portugal's African colonies turned to armed struggle to achieve independence. The Portuguese regime proved unable to resolve the African wars which led to calls for change. On 25 April 1974, the Carnation Revolution overthrew the Portuguese government. The peaceful revolution led to a process of decolonisation in Portuguese colonies.<sup>11</sup>
24. On 28 November 1975, the Revolutionary Front for an Independent East Timor unilaterally declared independence.<sup>12</sup> Within nine days of obtaining independence, Timor-Leste was invaded by neighbouring Indonesia in what became a military occupation lasting 24 years.<sup>13</sup> The Timorese fought against the occupation and for their right to self-determination. The struggle established three fronts of resistance, the diplomatic front, the clandestine front, and the armed front. It is estimated that potentially one third of Timor-Leste's population of 700,000 in 1975 died during

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<sup>10</sup> Paul Cleary, *The Men Who Came Out of the Ground* (Hachette Australia, 2016).

<sup>11</sup> Balibo Fort Veterans Museum.

<sup>12</sup> *NDC Timor-Leste 2022-2030* (n 8) 18.

<sup>13</sup> *Ibid.*

Indonesia's occupation.<sup>14</sup> Oppressive rule by Timor-Leste's occupiers disrupted the social life, cultural beliefs, and language of the Timorese people.<sup>15</sup>

25. With the continuing Timorese resistance and increased instability from the Asian Financial Crisis, domestic and international pressure mounted against President Suharto's regime. Within Indonesia calls for President Suharto's ouster grew louder, and demonstrations increased, ultimately resulting in the fall of President Suharto on 21 May 1998.
26. On 27 January 1999, Indonesian President Habibie asked the United Nations to hold a referendum giving the Timorese a choice of autonomy within Indonesia or self-determination. On 5 May 1999, an agreement was signed between Indonesia and Portugal in New York for a 'Popular Consultation' to be organised by a United Nations Mission in East Timor. The referendum was held on 30 August 1999, and, in a remarkable show of courage and resolve, the people of Timor-Leste exercised their right to self-determination. 78.5 percent of voters voted for independence.<sup>16</sup>
27. In 2001, Timor-Leste held its first election to elect a constituent assembly (the precursor of the National Parliament), which was responsible for drafting the constitution.
28. Timor-Leste restored its independence on 20 May 2002. His Excellency Kay Rala Xanana Gusmão was sworn in as the first democratically elected President of Timor-Leste on the same day.<sup>17</sup> On 27 September 2002, Timor-Leste was internationally recognised as an independent State as the 191<sup>st</sup> member of the United Nations.
29. International law, and the support of the international community, has been instrumental in Timor-Leste's quest for sovereignty and self-determination.<sup>18</sup> From 1975 to 1982, the UNGA passed resolutions affirming the inalienable right of the

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<sup>14</sup> Commission for Reception, Truth and Reconciliation Timor-Leste, *Chega! The Report of the Commission for Reception, Truth, and Reconciliation Timor-Leste: Executive Summary* (2005), 44; Western Australian Museum, 'The Indonesian Occupation: 1975-1999', (Web Page, 1985) <<https://museum.wa.gov.au/debt-of-honour/indonesian-occupation-1975-1999>>.

<sup>15</sup> Fan Wu and Xinrui Zhang, 'The Impact of Language Policy on National Identity in Timor-Leste from an Incrementalism Perspective' (2023) 15 *Journal of Education, Humanities and Social Sciences* 68.

<sup>16</sup> Alison Rourke, 'East Timor: Indonesia's invasion and the long road to independence', *The Guardian* (Online, 30 August 2019) <<https://www.theguardian.com/world/2019/aug/30/east-timor-indonesias-invasion-and-the-long-road-to-independence>>.

<sup>17</sup> International Monetary Fund, 'Kay Rala Xanana Gusmão', 2 (Web Page) <<https://www.imf.org/external/np/seminars/eng/2013/timor/pdf/krala.pdf>>.

<sup>18</sup> *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90, 17 [31] ('*East Timor Case*').

people of Timor-Leste to self-determination and independence, and the legitimacy of their struggle to achieve that right.<sup>19</sup> Throughout the transitional period preceding and following its restoration of independence, Timor-Leste was administered and supported by various missions from the United Nations.<sup>20</sup> The United Nations continued peacekeeping operations in Timor-Leste until the end of 2012.<sup>21</sup> More recently, Timor-Leste has vindicated its rights under international law by initiating the first Compulsory Conciliation under Annex V of UNCLOS to settle its maritime boundary with Australia.

30. Timor-Leste also made its first appearance in a proceeding before the International Tribunal for the Law of the Sea (**ITLOS** or **the Tribunal**) in its advisory opinion on climate change and the marine environment, signifying the importance of climate change issues to Timor-Leste.<sup>22</sup>
31. It is, in part, owing to this history that Timor-Leste is an active participant in the international community and a staunch supporter of international law. These factors underscore the importance to Timor-Leste of participation in these proceedings before the Court.
32. Timor-Leste is the youngest nation in Southeast Asia, has a vibrant, robust democracy following the restoration of its independence, and has achieved significant development in this time. In the 2021 edition of *Freedom in the World*, Timor-Leste was the only country in Southeast Asia – a region where democracy has been regressing for over a decade – to be ranked “Free” by Freedom House.<sup>23</sup> Life expectancy at birth in Timor-Leste has steadily risen from an average life expectancy of 60 years in 2002 to 68 years in 2021.<sup>24</sup> The infant mortality rate has fallen by more than half.<sup>25</sup> The population of

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<sup>19</sup> See GA Res 3485 (XXX) (12 December 1975); GA Res 31/53 (1 December 1976); GA Res 32/34 (28 November 1977); GA Res 33/39 (13 December 1978); GA Res 34/40 (21 November 1979); GA Res 35/27 (11 November 1980); GA Res 36/50 (24 November 1981); GA Res 37/30 (23 November 1982), consolidated at <<http://etan.org/etun/genasRes.htm>>.

<sup>20</sup> United Nations Integrated Mission in Timor-Leste, ‘UNMIT Background’, *United Nations* (Web Page) <<https://peacekeeping.un.org/mission/past/unmit/background.shtml>>.

<sup>21</sup> *Ibid.*

<sup>22</sup> ‘Verbatim Record’ *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (International Tribunal for the Law of the Sea, 20 September 2023, ITLOS/PV.23/C31/14/Rev.1) (Democratic Republic of Timor-Leste) (‘*Timor-Leste’s Verbatim Record ITLOS Advisory Opinion on Climate Change*’).

<sup>23</sup> Freedom House, ‘Timor-Leste Freedom in the world 2021’ (Web Page, 2022) <<https://freedomhouse.org/country/timor-leste/freedom-world/2022>>.

<sup>24</sup> ‘Life expectancy at birth, total (years) – Timor-Leste’, *The World Bank* (Web Page) <<https://data.worldbank.org/indicator/SP.DYN.LE00.IN?locations=TL>>.

<sup>25</sup> ‘Mortality rate, infant (per 1,000 live births) – Timor-Leste’, *The World Bank* (Web Page) <<https://data.worldbank.org/indicator/SP.DYN.IMRT.IN?locations=TL>>.

Timor-Leste is also young, with over half the total population under the age of 20.<sup>26</sup> This progress has in part been enabled by the revenues derived from Timor-Leste's oil and gas reserves and strong government-led initiatives focussed on sustainable development.

33. Despite progress made to strengthen national infrastructure and public services and increase employment, poverty in Timor-Leste remains widespread.<sup>27</sup> Timor-Leste is considered a SIDS and LDC,<sup>28</sup> and remains a fragile nation. Continued investment in economic development objectives and infrastructure services as well as improved access to education is required to build greater socio-economic resilience in Timor-Leste. Post-independence, Timor-Leste's economy has been reliant upon revenues from the oil and gas sector. Oil and gas production in Timor-Leste has declined significantly since 2012. While oil and gas revenues have been the largest contributor to government revenue, overall revenue from this source has declined commensurately.<sup>29</sup> As such, development and diversification of Timor-Leste's economy is critical to ensure Timor-Leste continues to provide basic social services for its people. Like other SIDS, the development and upskilling of Timor-Leste's workforce is vital for the future of the economy.<sup>30</sup>

#### **CHAPTER IV. THE EFFECTS OF ANTHROPOGENIC GREENHOUSE GAS EMISSIONS ON TIMOR-LESTE**

34. Available data demonstrates that the continued increase in anthropogenic greenhouse gas emissions will impact Timor-Leste in five major ways:
- 34.1 *first*, the adverse effects of climate change disproportionately impact developing States, particularly LDCs, that may not have the physical, financial, or technical ability to effectively adapt to, mitigate, and monitor the consequences of climate change;

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<sup>26</sup> *NDC Timor-Leste 2022-2030* (n 8) 7.

<sup>27</sup> *Ibid.*

<sup>28</sup> United Nations Conference on Trade and Development, *UN list of least developed countries* (Web Page, 2021) <<https://unctad.org/topic/least-developed-countries/list>>.

<sup>29</sup> Timor-Leste Petroleum Fund, *Annual Report 2021*, 7 (Web Page) <<https://www.laohamutuk.org/Oil/PetFund/Reports/PFAR2021en.pdf>>.

<sup>30</sup> *NDC Timor-Leste 2022-2030* (n 8).

- 34.2 *second*, ocean acidification and warming significantly threatens Timor-Leste’s coral and marine ecosystems which are critical to its cultural identity and development of a sustainable ocean economy;
- 34.3 *third*, climate change threatens Timor-Leste’s food security and water supply;
- 34.4 *fourth*, extreme climate and weather events, particularly sea level rise, flooding, and tropical storms, pose significant physical danger to Timor-Leste’s peoples and ecosystems; and
- 34.5 *fifth*, climate change may prejudice key growth areas in Timor-Leste’s economy, hindering development and diversification.
35. This chapter also highlights the steps Timor-Leste has already taken to promote mitigation and adaptation.
- A. The adverse effects of climate change disproportionately impact developing States, particularly LDCs, that may not have the physical, financial or technical ability to effectively adapt to, mitigate, and monitor the consequences of climate change**
36. Despite contributing the least to anthropogenic greenhouse gas emissions on average,<sup>31</sup> LDCs and SIDS are among the most exposed to the adverse effects of climate change. In its Special Report on Global Warming of 1.5°C, the Intergovernmental Panel on Climate Change (IPCC) identified with high confidence that, at levels of global warming of 1.5°C and beyond, SIDS and LDCs face disproportionately high climate-related risks to health, livelihoods, food security, water supply, human security, and economic growth.<sup>32</sup>
37. The difficulties developing States face in implementing adaptation measures further compound the risks climate change poses. For example, adaptive infrastructure projects

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<sup>31</sup> Intergovernmental Panel on Climate Change, ‘Summary for Policy Makers’ in *Climate Change 2022: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2022) [A.1.5] (‘*Summary for Policy Makers*’). This report identifies that LDCs and SIDS have much lower per capita emissions (1.7 tCO<sub>2</sub>-eq and 4.6 tCO<sub>2</sub>-eq, respectively) than the global average (6.9 tCO<sub>2</sub>-eq), excluding CO<sub>2</sub> from land use, land-use change and forestry.

<sup>32</sup> Intergovernmental Panel on Climate Change, ‘Global Warming of 1.5°C: An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty’ (Cambridge University Press, 2018) 9, 11 [B.5.1] (Web Page).



place significant strain on developing States' budgets which must balance the future risks climate change poses with servicing the immediate needs of their people.

38. Strain on financial resources can also prejudice developing States' ability to baseline and monitor the adverse effects of climate change. A limited ability, or inability, to identify and document these effects can limit the effectiveness of adaptive or mitigative measures and constrain the ability of affected States to obtain financial assistance. Timor-Leste has had limited technical capacity and human and fiscal resources to comprehensively report and monitor the impacts of climate change on both its terrestrial and marine ecosystems.<sup>33</sup> There is very limited data concerning the effects of climate change on Timor-Leste. As such, it is difficult to comprehensively report and monitor the impacts of climate change on its environment. Regional data must be relied upon, and extrapolated from, to discern a data-driven understanding of the true impacts of climate change upon the ecosystems of Timor-Leste. These informational shortcomings further stress the importance of cooperation in protecting and preserving the global climate system, particularly for SIDS and LDCs.<sup>34</sup>
39. Due to a confluence of political, geographic, and social factors, Timor-Leste is recognised as highly vulnerable to climate change impacts, ranked 122<sup>nd</sup> out of 185 countries in the 2021 ND-GAIN Index.<sup>35</sup> The ND-GAIN Index ranks 185 countries using a score which calculates a country's vulnerability to climate change and other global challenges as well as their readiness to improve resilience. The more vulnerable a country is the lower its score, while the more ready a country is to improve its resilience the higher it will be.
40. As a LDC, Timor-Leste must balance ensuring the availability of financial, technical, and human resources to deliver essential services to its people, and the need to use those same resources to comply with its obligations under international law. International cooperation in the preservation and maintenance of global climate systems, as well as

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<sup>33</sup> See Response of Timor-Leste to Judge Kittichaisaree's Question to COSIS dated 4 October 2023 in *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (Web Page) <[https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral\\_proceedings/questions/Comments\\_Timor-Leste.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/questions/Comments_Timor-Leste.pdf)>.

<sup>34</sup> Ibid.

<sup>35</sup> University of Notre Dame, *Notre Dame Global Adaptation Initiative* (2020) (Web Page) <<https://gain.nd.edu/our-work/country-index/>>.

related data and knowledge-sharing, will significantly affect the way in which climate change impacts Timor-Leste, and the effectiveness of its response.

41. At the 27<sup>th</sup> Conference of the Parties to the UNFCCC (**COP**), the COP reached a breakthrough agreement to provide “loss and damage” funding for vulnerable countries that have experienced climate disasters. The Sharm el-Sheikh implementation plan acknowledged the “... *growing gravity, scope and frequency in all regions of loss and damage associated with the adverse effects of climate change, resulting in devastating economic and non-economic losses, including forced displacement and impacts on cultural heritage, human mobility and the lives and livelihoods of local communities, and underlines the importance of an adequate and effective response to loss and damage*”<sup>36</sup> (emphasis added).
42. Then, at COP28, the COP agreed, by consensus, on a decision to operationalise the Loss and Damage Fund.<sup>37</sup> The stated purpose of the Loss and Damage Fund is:

*“to assist developing countries that are particularly vulnerable to the adverse effects of climate change in responding to economic and non-economic loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events”.*
43. Further, the Loss and Damage Fund is slated to provide support for funding “*that is complementary to humanitarian actions taken immediately after an extreme weather event...*”<sup>38</sup>
44. Timor-Leste is at the forefront of the global efforts regarding loss and damage resulting from climate change. While the Loss and Damage Fund was agreed by consensus, representing a positive step towards greater financial support for LDCs and SIDS, there remains a vast gap between the financial commitments developed States have made and the targets set at COP27 and COP28. A handful of States have pledged a combined total of just over USD 700 million to the Loss and Damage Fund. This amount reflects

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<sup>36</sup> United Nations Framework Convention on Climate Change, *Decision 1/CP.27: The Sharm el-Sheikh Implementation Plan*, UN Doc FCCC/CP/2022/10/Add.1 (17 March 2023, adopted 20 November 2022), 4 [22] (*‘Sharm el-Sheikh Implementation Plan’*).

<sup>37</sup> Conference of the Parties, United Nations Framework Convention on Climate Change, *Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4*, UN Doc FCCC/CP/2023/L.1-FCCC/PA/CMA/2023/L.1 (28 November 2023), 10 [17], 14 [2].

<sup>38</sup> *Ibid* 15 [8].

approximately 0.2 percent of the irreversible economic and non-economic losses developing countries face every year from global warming.<sup>39</sup> These pledges are also one-off commitments. Developing States have no certainty that these States, or even other developed States, will continue to contribute to the Loss and Damage Fund.

45. Timor-Leste strongly urges developed States Parties to provide further sustainable financial inputs which would mitigate the disproportionate financial impacts developing States face.<sup>40</sup>

**B. Ocean warming and acidification significantly threaten Timor-Leste's biodiversity and marine ecosystems which are critical to its cultural identity**

46. The seas have spiritual significance for the Timorese people: according to legend, the Timorese are the descendants of the “grandfather” crocodile – upon its death, its body became the land of Timor, the ridges on its back became the mountains and the valleys, and the oceans its final resting place.

47. The ocean is also of great significance to the cultural identity of Timor-Leste and its people. The ocean has forged Timor-Leste's past and is central to its vision for the future. The people of Timor-Leste practice *Tara Bandu*: customary rules that involve aspects of reducing or preventing community conflict, protecting the environment, managing natural resources, and improving community welfare. For the people of Timor-Leste, it is common for local communities to apply the practice of *Tara Bandu* to regulate the exploitation of its oceans.

48. Asia supports approximately 40 percent of the world's coral reef area, predominantly situated in Southeast Asia. The world's most diverse reef communities are in the “Coral Triangle”,<sup>41</sup> in which Timor-Leste is located. The Coral Triangle is a high biodiversity hotspot, comprising several globally significant ecosystems and endemic species. Its

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<sup>39</sup> Nina Lakhani, ‘\$700m pledged to loss and damage fund at Cop28 covers less than 0.2% needed’ *The Guardian* (Online, 7 December 2023) <<https://www.theguardian.com/environment/2023/dec/06/700m-pledged-to-loss-and-damage-fund-cop28-covers-less-than-02-percent-needed>>.

<sup>40</sup> President José Ramos-Horta, ‘Timor-Leste's Country Statement’ (Speech, COP28 Dubai, 2 December 2023) 1-2 (*‘Timor-Leste's COP28 Statement’*).

<sup>41</sup> Intergovernmental Panel on Climate Change, ‘Asia’ in *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2014) 1342 (*‘IPCC Asia’*).

tropical reefs are some of the most biodiverse in the world.<sup>42</sup> A 2012 marine survey found seven potentially new marine species and extremely high concentrations of biodiversity, with 734 fish species and 360 species of corals, in one area alone.<sup>43</sup> In November 2023, researchers surveyed Timor-Leste's north coast and identified more than 130 different species of nudibranchs, belonging to 55 genera. Of these, approximately 30 species are new to science.<sup>44</sup>

49. Timor-Leste also has one of the largest concentrations of cetaceans on the planet, as well as migration corridors, including for pygmy blue whales and sperm whales. One rapid cetacean survey sighted more than 2,280 whales and dolphins from 11 different species, including superpods of up to 600 individuals, in a period of only five days.<sup>45</sup>
50. Climate change driven ocean acidification and warming threaten Timor-Leste's natural endowment of rich biodiversity and marine ecosystems, and the cultural and spiritual significance which attaches to them. This in turn affects Timor-Leste's development strategy for its tourism industry which seeks to leverage the country's natural beauty, tropical waters rich in marine life, white sand beaches and mountain ranges.<sup>46</sup> Degradation of warm-water coral reefs and loss of biodiversity will likely adversely affect both the attractiveness and continued availability of eco-tourism activities such as snorkelling and diving.
51. In 2022, the World Meteorological Organisation identified an overall surface ocean warming trend of 0.5°C per decade since 1982 in the Asia region, more than three times the global rate.<sup>47</sup> A continuation of this trend would be disastrous for Timor-Leste's biodiversity, especially in its marine and coastal ecosystems which are particularly

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<sup>42</sup> Michael Slezak, 'Atauro Island: Scientists Discover the Most Biodiverse Waters in the World', *The Guardian* (Online, 17 August 2016) <<https://www.theguardian.com/world/2016/aug/17/atauro-island-timor-leste-the-push-to-protect-the-most-biodiverse-waters-in-the-world>>.

<sup>43</sup> Government of the Democratic Republic of Timor-Leste, *Timor-Leste's National Adaptation Plan* (2018) 18 <<https://www4.unfccc.int/sites/NAPC/Documents/Parties/Timor%20Leste%20NAP.pdf>> ('*Timor-Leste's NAP*').

<sup>44</sup> Marine and Environmental Sciences Centre, 'Do you already know all the species of sea slugs?' (2023) *MARE Centre* (Web Page) <<https://www.mare-centre.pt/en/sera-que-ja-conhece-todas-as-especies-de-lesmas-do-mar>>.

<sup>45</sup> Conservation International, 'Marine Conservation International' (Web Page) <<https://www.conservation.org/timor-leste/our-work/marine-conservation>>.

<sup>46</sup> Government of the Democratic Republic of Timor-Leste, *Timor-Leste Strategic Development Plan 2011-2030* (2011) 141-142 (Web Page) <<https://www.unep.org/resources/report/timor-leste-strategic-development-plan-2011-2030>> ('*Strategic Development Plan*').

<sup>47</sup> World Meteorological Organization, *State of the Climate in Asia 2022* (2022) 12 (Web Page) <<https://public.wmo.int/en/our-mandate/climate/wmo-statement-state-of-global-climate/Asia-2022>>.

vulnerable to fluctuations in temperature. The IPCC’s Working Group II has recognised the effects of this warming upon these vulnerable ecosystems:

*“Near-term warming and increased frequency, severity and duration of extreme events will place many terrestrial, freshwater, coastal and marine ecosystems at high or very high risks of biodiversity loss (medium to very high confidence, depending on ecosystem). Near-term risks for biodiversity loss are moderate to high in forest ecosystems (medium confidence), kelp and seagrass ecosystems (high to very high confidence), and high to very high in Arctic sea-ice and terrestrial ecosystems (high confidence) and warm-water coral reefs (very high confidence). Continued and accelerating sea level rise will encroach on coastal settlements and infrastructure (high confidence) and commit low-lying coastal ecosystems to submergence and loss (medium confidence)”*.<sup>48</sup>

52. For Southeast Asia, the IPCC’s Sixth Assessment Report indicates there is a key risk of coral reef decline. Continuation of current trends in sea surface temperatures and ocean acidification would result in large declines in coral-dominated reefs by mid-century.<sup>49</sup>
  53. The vulnerability of Timor-Leste’s marine ecosystems means that continued climate trends will threaten globally significant biota, therein damaging the cultural connection the Timorese share with the oceans of Timor-Leste and inhibiting Timor-Leste’s ability to diversify its economy through development of an ocean economy.
- C. Extreme climate and weather events, particularly sea level rise, flooding and tropical storms, pose significant physical danger to Timor-Leste’s people, infrastructure and ecosystems**
54. Timor-Leste has significant topographic polarity. Despite being a SIDS, the mountainous backbone of Timor-Leste reaches heights of almost 3,000 metres above sea level. However, the vast majority of Timorese reside in coastal and low-land areas. The recent National Coastal Vulnerability Assessment suggests that, at any given time, between 75-85 percent of Timor-Leste’s population resides in low-land and coastal areas of the country. Timor-Leste’s capital and largest population hub, Dili, is situated

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<sup>48</sup> Intergovernmental Panel on Climate Change, ‘Summary for Policymakers’ in *Contributions of Working Group II to the Sixth Assessment Report: Summary for Policymaker Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2022) 13 [B.3.1].

<sup>49</sup> *IPCC Asia* (n 41).

only a few metres above sea level.<sup>50</sup> Furthermore, natural resources available in Timor-Leste's coastal zones are vital for the economy of coastal populations.<sup>51</sup>

55. As a SIDS, the issue of rising sea levels and their consequences are of great concern for Timor-Leste. Mean sea levels in Timor-Leste are projected to rise throughout the 21<sup>st</sup> century. Satellite data indicates the sea level has risen near Timor-Leste by about 5 to 9 mm annually since 1993, larger than the global average of 2.8–3.6 mm per year.<sup>52</sup> This higher rate relates to the natural fluctuations caused by phenomena such as the El Niño-Southern Oscillation. The sea level around Timor-Leste is expected to continue to rise. A study done by the Pacific Climate Change Science Program in 2011 indicated that under a very high emission scenario sea levels may rise between 90–180 mm by 2030.<sup>53</sup> Should this scenario eventuate, the consequences would be significant and devastating for Timor-Leste without major investments to fortify coastlines and relocate communities and critical infrastructure.<sup>54</sup>
56. In addition to sea level rise, Timor-Leste is also vulnerable to a range of extreme climate change-induced weather events. The IPCC predicts that the Southeast Asia region will be exposed to more frequent and/or severe heavy precipitation events, heatwaves, flooding, and tropical cyclones, amongst other similar occurrences.<sup>55</sup> While many States will feel, and continue to feel, these effects, the IPCC acknowledges that SIDS are particularly exposed to natural disasters, finding that economic losses SIDS suffer resulting from extreme weather events exceed one percent of Gross Domestic Product (GDP) in many cases, and in the most extreme cases can reach eight percent of GDP.<sup>56</sup>

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<sup>50</sup> World Bank Group, 'Climate Risk Country Profile: Timor-Leste' (2021) (Web Page) 15 <<https://www.adb.org/sites/default/files/publication/751241/climate-risk-country-profile-timor-leste.pdf>> ('Timor-Leste Climate Risk Profile').

<sup>51</sup> *Timor-Leste's NAP* (n 43).

<sup>52</sup> United Nations Development Programme, 'National Coastal Vulnerability Assessment and Designing of Integrated Coastal Management and Adaptation Strategic Plan for Timor-Leste' (Report, February 2018) 21.

<sup>53</sup> *Ibid.*

<sup>54</sup> *NDC Timor-Leste 2022-2030* (n 8) 10.

<sup>55</sup> Intergovernmental Panel on Climate Change, 'Weather and Climate Extreme Events in a Changing Climate' in *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2021) 1517-1518 and 1585.

<sup>56</sup> Intergovernmental Panel on Climate Change, 'Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation. A Special Report of Working Groups I and II of the Intergovernmental Panel on Climate Change' (Cambridge University Press, 2012), 9.

57. Timor-Leste knows well the impact and cost of such events. In April 2021, Tropical Cyclone Seroja struck Timor-Leste (**Seroja**). More than 40 fatalities were recorded<sup>57</sup> and the estimated cost of the damage caused ranged as high as USD 420 million, an amount equal to approximately 11.6 percent of Timor-Leste's GDP in 2021.<sup>58</sup> In the flooding which followed the cyclone, the United Nations Office for Disaster Risk Reduction reported that over 30,000 households were affected, over 4,000 homes destroyed, and agricultural areas covering 2,163 hectares were impacted.<sup>59</sup> The capital of Dili was significantly impacted with much of the city inundated.
58. Timor-Leste remains vulnerable to extreme climate and weather events, undermining its ability to pursue sustainable development and compromising the safety and security of its people.

**D. Climate change threatens Timor-Leste's food security and water supply**

59. As a LDC ranked 112<sup>th</sup> of 125 in the 2023 Global Hunger Index,<sup>60</sup> Timor-Leste and its people are sensitive to food security shocks.
60. The IPCC's Sixth Assessment Report identifies that the general conditions of ocean warming in the 20<sup>th</sup> century and beyond has contributed to an overall decrease in maximum catch potential:

*“The decline in warm-water coral reefs is projected to greatly compromise the services they provide to society, such as food provision (high confidence), coastal protection (high confidence) and tourism (medium confidence). Increases in the risks for seafood security (medium confidence) associated with decreases in seafood availability are projected to elevate the risk to nutritional health in some communities highly dependent on seafood (medium confidence), such as those in the Arctic, West Africa, and Small Island Developing States”.*<sup>61</sup>

<sup>57</sup> ‘Timor-Leste: Rebuilding After Cyclone Seroja Will Be Costly but Offers Opportunities to Strengthen Disaster Resilience’, *The World Bank* (2022) (Web Page) <<https://www.worldbank.org/en/news/press-release/2022/01/23/timor-leste-rebuilding-after-cyclone-seroja-will-be-costly-but-offers-opportunities-to-strengthen-disaster-resilience>> (*World Bank Coverage of Cyclone Seroja*). Note that while The World Bank reported the number fatalities as 44, the number of recorded fatalities differs between sources, and no official statistic has been published. In addition to those fatalities recorded, it is estimated that further fatalities went unrecorded.

<sup>58</sup> ‘Data: Timor-Leste’, *The World Bank* (Web Page) <<https://data.worldbank.org/country/timor-leste?display=graph>> (*World Bank Data on Timor-Leste*); *World Bank Coverage of Cyclone Seroja* (n 57).

<sup>59</sup> Jennee Grace U. Rubrico, ‘Timor-Leste floods teach costly lessons’, *United Nations Office for Disaster Risk Reduction* (2022) (Web Page) <<https://www.undr.org/news/timor-leste-floods-teach-costly-lessons>>.

<sup>60</sup> Global Hunger Index, ‘Timor Leste’, (Web Page) <<https://www.globalhungerindex.org/timor-leste.html>>.

<sup>61</sup> Intergovernmental Panel on Climate Change, ‘Summary for Policymakers’ in *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* (Cambridge University Press, 2019) 26 [B.8.2].

61. Most fishing in Timor-Leste has historically been at the subsistence and artisanal level and supplemented by other livelihood activities such as agriculture.<sup>62</sup> By 2050, it is estimated that catch potential will experience a decline of an order of 5 to 10 percent in local fisheries.<sup>63</sup> Under a high-emission scenario, the average maximum bodyweight of marine fish will decline by 14 to 24 percent,<sup>64</sup> ultimately impacting the livelihoods of those who are reliant on income received from the sale of fish.
62. In addition to fisheries, over 70 percent of Timorese families rely on farming activities for their survival<sup>65</sup> and agriculture is identified as one of three “critical industries” at the heart of Timor-Leste’s *Strategic Development Plan 2011-2030*, both as a means of developing self-sufficient food production and export markets.<sup>66</sup> The IPCC’s Sixth Assessment Report links the adverse effects of climate change and reduced food security as a result of disaffected agricultural conditions for low-latitude countries like Timor-Leste:

*“Increasing weather and climate extreme events have exposed millions of people to acute food insecurity and reduced water security, with the largest impacts observed in many locations and/or communities in ... Small Islands [amongst others] ...”*<sup>67</sup> (emphasis added).

63. The impacts of climate change may compromise Timor-Leste’s food security, and have cascading effects for the subsistence, nutrition, and livelihoods of the Timorese people.

**E. Climate change prejudices key growth areas in Timor-Leste’s economy, hindering development and diversification**

64. Crude petroleum and other petroleum products constitute Timor-Leste’s primary export market and have comprised as much as 90 percent of Timor-Leste’s exports in recent years.<sup>68</sup> The oil and gas industry has been for some time, and continues to be, Timor-Leste’s greatest source of State budget revenue. The industry has played a significant

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<sup>62</sup> National CTI Coordinating Committee of Timor-Leste, ‘State of the Coral Reefs of Timor Leste’ (2012) (Web Page) <<https://iwlearn.net/resolveuid/6c2eac02f19b68b457ff543ee847d7e1>>.

<sup>63</sup> *Timor-Leste Climate Risk Profile* (n 50) 17.

<sup>64</sup> *IPCC Asia* (n 41).

<sup>65</sup> *Summary for Policy Makers* (n 31) 50.

<sup>66</sup> *Strategic Development Plan* (n 46) 106.

<sup>67</sup> *Summary for Policy Makers* (n 31) 50.

<sup>68</sup> World Trade Organisation, *Timor-Leste* (Web Page, 2023) <[https://www.wto.org/english/res\\_e/statis\\_e/daily\\_update\\_e/trade\\_profiles/TL\\_e.pdf](https://www.wto.org/english/res_e/statis_e/daily_update_e/trade_profiles/TL_e.pdf)> (‘*WTO Timor-Leste Profile*’).



role in kick-starting and developing Timor-Leste's nascent economy following its independence.<sup>69</sup> In spite of these factors, Timor-Leste has, in recent years, undertaken significant efforts to diversify its economy, with a particular focus on the agricultural and tourism sectors.<sup>70</sup> However, the adverse effects of climate change are most likely to directly affect these growth areas, forestalling Timor-Leste's economic development and diversification away from reliance upon oil and gas exploitation towards a low carbon development pathway.

65. After petroleum products, Timor-Leste's next largest export is coffee, constituting 80 percent of non-oil exports. It is estimated that over 50,000 Timorese families are reliant upon income generated from coffee production. Timor-Leste occupies a niche position of competitive advantage as the largest single source provider of organic coffee in the world, with varieties recognised on the international market as high-quality.<sup>71</sup> However, in addition to the general threats to agricultural production described in this **Chapter IV**, coffee production is specifically sensitive to two climatic influences: optimal annual temperature and precipitation ranges, and interannual climate variability such as the impacts of heatwaves, droughts, frost and floods.<sup>72</sup> Climate change is expected to aggravate both of these sensitivities. As a result, it is estimated that up to 50 percent of the global area of land suitable for coffee cultivation may be reduced across emission scenarios.<sup>73</sup> At this rate of decline, the consequences for the livelihoods of coffee producers in Timor-Leste would be devastating, and, at a macroeconomic level, would seriously disaffect efforts to develop and diversify the economy of Timor-Leste.

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<sup>69</sup> *Strategic Development Plan* (n 46) 136.

<sup>70</sup> *Ibid* 106.

<sup>71</sup> *Ibid* 127.

<sup>72</sup> Richardson D, Kath J, Byrareddy VM, et al., 'Synchronous Climate Hazards Pose an Increasing Challenge to Global Coffee Production' (2023) 2(3) *PLOS Climate* 2.

<sup>73</sup> Bunn, C., Läderach, P., Ovalle Rivera, O, et al, 'A Bitter Cup: Climate Change Profile of Global Production of Arabica and Robusta Coffee' (2015) 129 *Climatic Change* 89.

**F. Timor-Leste has undertaken significant climate change mitigation and adaptation initiatives despite its position as a LDC and a SIDS**

66. Timor-Leste takes seriously its commitments to protect the climate system from the adverse effects of climate change. Despite being a LDC, Timor-Leste has taken a number of steps to facilitate mitigation and adaptation initiatives, as follows:

66.1 *first*, Timor-Leste has implemented a robust domestic regulatory framework to protect the environment;

66.2 *second*, Timor-Leste has been proactive in addressing the sustainable development of its oil and gas sector; and

66.3 *third*, Timor-Leste has already taken a number of practical steps to demonstrate its commitment to reduce carbon emissions, promote climate change resilience and protect its environmental assets.

*Timor-Leste has implemented a robust domestic regulatory framework to protect its environment*

67. The sustainable management of Timor-Leste's natural resources is enshrined in Timor-Leste's Constitution. Timor-Leste's Constitution recognises the Government must pursue the fundamental objective of promoting the environment and preserving natural resources.<sup>74</sup> The Constitution further provides that:

67.1 everyone has the right to a humane, healthy and ecologically balanced living environment and there is a duty to protect and improve it for the benefit of future generations;

67.2 the Government must preserve and enhance natural resources; and

67.3 the Government must promote actions to defend the environment and safeguard the sustainable development of the economy.<sup>75</sup>

68. Protection of the environment is embedded in Timor-Leste's national legislation and policy frameworks. Timor-Leste's Environmental Framework Law establishes the

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<sup>74</sup> *Constitution of the Democratic Republic of Timor-Leste 2002* art 6(f) ('*Constitution of Timor-Leste*').

<sup>75</sup> *Ibid* art 61.

founding principles for conservation and protection of the environment in Timor-Leste. The law also seeks to encourage the preservation and sustainable use of natural resources to promote the quality of life of citizens. A key obligation includes conservation of the marine environment through implementing integrated management of the marine coast as a basis for the conservation, protection and sustainable use of marine resources, ecosystems, and marine species. This takes into account:

- 68.1 the control and prevention of pollution and discharge of waste from land or sea sources;
  - 68.2 the regulation of fishing and aquaculture activities;
  - 68.3 the necessary measures to adapt to climate change;
  - 68.4 natural disaster response measures; and
  - 68.5 measures to promote ecotourism.<sup>76</sup>
69. The cultural practice of *Tara Bandu* has also been incorporated into legal frameworks relating to natural resource management and in the management of marine protected areas. Within the Environmental Framework Law of Timor-Leste (Decree Law no. 26/2012), *Tara Bandu* is defined as an integral custom of Timor-Leste's culture, which regulates a person's relationship with their surrounding environment. The Government of Timor-Leste has recognised this traditional law as a local customary law for protecting and conserving the environment and use of natural resources in a sustainable manner.<sup>77</sup> The Environmental Framework Law acknowledges the importance and effectiveness of *Tara Bandu*, imposing an obligation on the State to protect areas that *Tara Bandu* covers. At the implementation level, communities across Timor-Leste have established new *Tara Bandu* resource management regimes that include forest conservation areas, fishery no-take zones, bans on certain types of destructive fishing methods, and prohibitions on harvesting of certain species.

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<sup>76</sup> *Environmental Basic Legislation 2012* (Decree Law 26/2012) art 25.

<sup>77</sup> *Ibid* art 8.

70. Timor-Leste has also adopted the National System of Protected Areas (Decree Law 5/2016). Under this law, Timor-Leste has declared 43 terrestrial protected areas, one terrestrial and marine protected area, and two natural aquatic reserves in coastal areas. Under Timor-Leste's Nationally Determined Contribution (NDC), at least 10 percent of Timor-Leste's total combined land and marine area will be protected from extractive activities.
71. Timor-Leste also has in place a strict framework on substances that deplete the ozone layer (Decree-Law 36/2012), which implements its obligations under the Vienna Convention on the Protection of the Ozone Layer and the Montreal Protocol.
72. Timor-Leste is committed to taking an active role in continually developing and implementing its regulatory framework to adapt to the changing needs and circumstances precipitated by climate change.

*Timor-Leste has been proactive in addressing the sustainable development of its oil and gas sector*

73. Timor-Leste's cumulative annual emissions equate to less than 0.003 percent of global emissions,<sup>78</sup> and Timor-Leste is committed to pursuing sustainable economic development.
74. Timor-Leste acknowledges that oil and gas exploration and production has been, and continues to be, a pillar of Timor-Leste's economy and crucial to its development. As a LDC, State budget revenue derived from Timor-Leste's oil and gas sector provides the means for developing social welfare policies, driving development, and servicing the immediate needs of the Timorese people. Timor-Leste has always conducted its offshore oil and gas exploration and production operations with regard for the environment and in a safe and responsible manner.
75. The Constitution of Timor-Leste vests mineral resources in the State, and conditions their exploitation on the fair and equitable use of proceeds, the preservation of ecological balance, and the prevention of ecosystem destruction.<sup>79</sup> To implement these

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<sup>78</sup> NDC Timor-Leste 2022-2030 (n 8).

<sup>79</sup> Constitution of Timor-Leste (n 74) arts 139(1) and (3).

principles, Timor-Leste has established a framework of legal and regulatory requirements to ensure transparency, accountability, and sustainable operations in its oil and gas sector.

76. The primary legal instrument governing petroleum exploitation in Timor-Leste is the Law on Petroleum Activities (Law No. 13/2005) (**Petroleum Activities Law**). The Petroleum Activities Law requires that Timor-Leste's National Petroleum Authority discharge its obligations in such a manner as to ensure that petroleum is exploited, developed, and managed in a way that minimises damage to the environment. The Law prescribes significant penalties for breaches that seriously endanger the environment.<sup>80</sup>
77. Established as subordinate legislation pursuant to the Petroleum Activities Law, the Decree-Law on Offshore Petroleum Operations in Timor-Leste (Decree Law 32/2016) (**Petroleum Decree Law**) regulates petroleum operations relating to offshore petroleum resources. The Petroleum Decree Law states as two of its main objectives: (i) the prevention of waste and pollution, and (ii) the use of safe and efficient exploration and exploitation practices. Chapter XVII of the Petroleum Decree Law specifies provisions relating to environmental management and protection. Key requirements include that before any petroleum operations are carried out an adequate and sufficient assessment of the environmental risks has been undertaken including consulting with the Ministry and submitting an Environmental Impact Statement.<sup>81</sup> The Petroleum Decree Law and Timor-Leste's environmental legislation also require that petroleum operations be subject to an Environmental Impact Assessment and licensing, including in respect of drilling, all activities relating to the development, production and transportation of petroleum—extending to the construction of offshore facilities and pipelines—and decommissioning and abandonment.<sup>82</sup> These provisions seek to balance the protection of Timor-Leste's marine environment without hindering its economic development.

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<sup>80</sup> *Law No. 13/2005 on Petroleum Activities* arts 6(1)(b), 23(1)(c) and 35.

<sup>81</sup> *Offshore Oil Operations in Timor-Leste* (Decree Law 32/2016) arts 134(2) and 136.

<sup>82</sup> *Ibid* art 137(1).

78. As Timor-Leste’s oil and gas regulator, the National Petroleum Authority has been actively enforcing the highest environmental protection standards since its creation in 2008. Timor-Leste has not suffered any oil and gas-related incidents to-date.
79. Timor-Leste was the third nation, and the first in Asia, to sign and fully comply with the Extractive Industries Transparency Initiative (EITI).<sup>83</sup> Among the EITI’s requirements is a disclosure regime intended to assist stakeholders to assess the adequacy of regulatory frameworks and monitoring efforts to manage the environmental and social impact of extractive industries, as well as to assess the adherence of extractive companies to environmental and social obligations.<sup>84</sup>

*Timor-Leste has already taken a number of practical steps to demonstrate its commitment to reduced carbon emissions, promote climate change resilience and protect its environmental assets*

80. Timor-Leste has made substantial commitments to climate change adaptation and mitigation initiatives. These commitments include:
- 80.1 the development of a National Climate Change Policy (Government Resolution 8/2022) which affirms Timor-Leste’s vision of becoming a climate resilient country, promoting and protecting the rights of its citizens, the right to an environment that is healthy and ecologically balanced, and to help equip the people of Timor-Leste with the capacity to cope with the adverse impacts of climate change;
- 80.2 setting an Intended NDC in 2016, and then setting a formal NDC for 2022 to 2030, despite being one of the lowest emitters and contributors to global climate change.<sup>85</sup> Timor-Leste submitted its first National Communication in 2014, and in 2020 and 2022 submitted updated NDCs;
- 80.3 implementing a National Adaptation Plan for Timor-Leste with a vision to “*build a climate resilient development trajectory for the country and its*

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<sup>83</sup> *Strategic Development Plan* (n 46) 136.

<sup>84</sup> See, e.g., ‘Extractive Industries Transparency Initiative Requirements’, *EITI* (Web Page, 12 June 2023) 6.4 <<https://eiti.org/eiti-requirements>>.

<sup>85</sup> *NDC Timor-Leste 2022-2030* (n 8) 1.

people”.<sup>86</sup> One of the priority adaptation activities includes developing alternative livelihood options to enhance community resilience through fisheries and marine ecosystem-based bio-physical resources;<sup>87</sup>

80.4 implementing a National Adaptation Programme of Action on Climate Change (NAPA) to “*make the Timorese people more resilient to climate change*” with adaptation measures focusing on reducing the adverse effects of climate change and promoting sustainable development. The NAPA focuses on priority adaptation measures in areas such as food security, water resources, natural disasters, and forest, biodiversity, and coral ecosystems;<sup>88</sup>

80.5 adopting a *Strategic Development Plan 2011 – 2030* to protect and conserve marine biodiversity and coral reefs. Timor-Leste will continue to work with governments in the region that have signed up to the Coral Triangle Initiative to safeguard the region’s marine and coastal biological resources for sustainable growth and the prosperity of current and future generations; and <sup>89</sup>

80.6 researching and pursuing the approval of a legislative and regulatory framework for decarbonisation of the economy.

## **CHAPTER V. APPLICABLE LAW & RULES OF INTERPRETATION**

81. This Chapter explains Timor-Leste’s approach to the legal framework that should guide the Court in answering the questions in the Request.

82. As opposed to more specialised courts and tribunals, the ICJ is a court of general competence which will allow it to consider all relevant legal rules to answer the questions before it. In this case, the Court is tasked with interpreting the existing legal obligations of States under international law as they relate to climate change.

83. The preamble to the Request before the Court refers to various bodies of law that may be relevant to assessing the legal obligations of States with respect to climate change.

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<sup>86</sup> *Timor-Leste’s NAP* (n 43) x.

<sup>87</sup> *Ibid* xiii.

<sup>88</sup> Government of the Democratic Republic of Timor-Leste, *Timor-Leste National Adaptation Programme of Action to Climate Change* (Web Page, 2010) 11 <<https://unfccc.int/resource/docs/napa/tls01.pdf>>.

<sup>89</sup> *NDC Timor-Leste 2022-2030* (n 8) 57.

The preamble refers to the Charter, as well as human rights law (the International Covenant on Civil and Political Rights (**ICCPR**), the International Covenant on Economic, Social and Cultural Rights (**ICESCR**) and the Universal Declaration of Human Rights (**UDHR**)), the Climate Change Regime (the UNFCCC, the Kyoto Protocol, and the Paris Agreement), UNCLOS, and obligations of a more general nature that relate to the environment (duty of due diligence, the principle of prevention of significant harm to the environment, and the duty to protect and preserve the marine environment). This does not necessitate that all of these sources of law are relevant to the issues before the Court, nor do they exclude the relevance of other sources.<sup>90</sup> As explained below, Timor-Leste is of the view that the UNFCCC and the Paris Agreement are the central sources of law relevant to the issues before the Court, while other bodies of law may inform their correct interpretation and vice versa.

84. The customary rules of treaty interpretation are reflected in Articles 31 to 33 of the Vienna Convention on the Law of Treaties (**VCLT**).<sup>91</sup> Article 31(3)(c) prescribes that when interpreting a treaty “*any relevant rules of international law applicable in the relations between the parties*” be taken into account, together with its context.<sup>92</sup>
85. The rule in Article 31(3)(c) is intended to achieve coherence between international obligations of States Parties “*to the extent possible*”, over an interpretation that may result in conflicting obligations for States. This is a principle often referred to as “systematic integration” or “harmonious interpretation”.<sup>93</sup> If harmonisation is not possible, the law of treaties dictates that between two treaties on the same subject matter, the later treaty prevails.<sup>94</sup> Notably, within the treaties mentioned in the Request, the UNFCCC and the Paris Agreements were the last to be concluded.

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<sup>90</sup> Request (n 1).

<sup>91</sup> Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (*VCLT*); see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43, 110 [160] (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide*’); *Responsibilities and obligations of States with respect to activities in the Area (Advisory Opinion)* [2011] ITLOS Rep 10, 27 [57] (*Responsibilities and obligation of States with respect to activities in the Area*’).

<sup>92</sup> *VCLT* (n 91) art 31(3).

<sup>93</sup> International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 58<sup>th</sup> sess, Agenda Item 11, UN Doc A/CN.4/L.682 (13 April 2006) 178 (*ILC Report on the Fragmentation of International Law*’).

<sup>94</sup> *VCLT* (n 91) art 30(3).



86. Another related rule is “*lex specialis*”. The *lex specialis* rule dictates that “*whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific*”.<sup>95</sup> As explained in the Report of the International Law Commission (ILC) on fragmentation:

“*[t]hat special law has priority over general law is justified by the fact that such special law, being more concrete, often takes better account of the particular features of the context in which it is to be applied than any applicable general law. Its application may also often create a more equitable result and it may often better reflect the intent of the legal subjects*”.<sup>96</sup>

87. Thus, the general obligations are understood through the application of the more specific rules. The Court followed this paradigm to ascertain the correct understanding of the right to life in times of armed conflict, where the “special” rules of international humanitarian law apply:

“*[i]n principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself*”.<sup>97</sup>

88. When it comes to the international legal rules that govern the rights and obligations of States with respect to climate change, the Climate Change Regime, specifically the UNFCCC and the Paris Agreement, are the controlling *lex specialis*.<sup>98</sup>

89. The function of *lex specialis* is not to exclude necessarily other legal regimes which are not specific to that field. Rather, the *lex specialis* provides a prism through which to apply other relevant fields of law.<sup>99</sup> And, at the same time, it ensures that the rules

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<sup>95</sup> ILC Report on the Fragmentation of International Law (n 93) 105.

<sup>96</sup> Ibid.

<sup>97</sup> Nuclear Weapons Advisory Opinion (n 3) 240 [25].

<sup>98</sup> Alan Boyle, ‘Protecting the Marine Environment from Climate Change: The LOSC Part XII Regime’, in Elise Johansen, Signe Veierud Busch and Ingvild Ulrikke Jakobsen (eds), *The Law of the Sea and Climate Change: Solutions and Constraints* (Cambridge University Press, 2021) 81, 93-94.

<sup>99</sup> See, Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), [11]; Human Rights Committee, *General Comment No 36: The Right to Life (On Article 6 of the International Covenant on Civil and Political Rights)*, CCPR/C/GC/36 (2019), [67].

tailored and intended to regulate a particular issue are not rendered meaningless by other bodies of law.<sup>100</sup>

90. The particular relations between the *lex specialis* and other rules of international law depend on the specific context and issue at hand. As explained by the Court with respect to the relationship between international humanitarian law and human rights law:

“[m]ore generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict... As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law”.<sup>101</sup>

91. *Lex specialis* is not a “conflict of laws” rule. To the contrary, just like the rule in Article 31(3)(c) of the VCLT, its function is that of conflict *avoidance*.<sup>102</sup> The application of both rules is intended to avoid placing States in a situation of conflicting international obligations by providing them the tools to harmonise their different obligations.
92. As Timor-Leste will demonstrate, the two rules – harmonious interpretation and *lex specialis* – work together to achieve harmonisation and coherence in States’ rights and obligations with respect to climate change. In the present context, the Climate Change Regime is the *lex specialis*. The correct interpretation of the specific rights and obligations of the *specialised treaty regime* is informed by other applicable rules of international law.
93. Accordingly, to assist the Court, Timor-Leste will examine the rights and obligations enumerated in the *lex specialis*, the Climate Change Regime. In addition, it will address rights and obligations found in other possibly relevant fields of international law. These include other environmental treaties, human rights law, the law of the sea, and other

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<sup>100</sup> *Nuclear Weapons Advisory Opinion* (n 3) 242 [30].

<sup>101</sup> *Construction of a Wall* (n 5) 136 [106].

<sup>102</sup> Marko Milanovic, ‘Norm Conflicts, International Humanitarian Law, and Human Rights Law’, in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law*, (Oxford 2011) 115-116.

rights and obligations of States under international law. All of these sources of law serve to inform the correct understanding of the Climate Change Regime, and the rights and obligations of States with respect to climate change.

## CHAPTER VI. CLIMATE CHANGE CONVENTIONS

### A. The Climate Change Regime regulates anthropogenic greenhouse gas emissions

94. Three principal treaties regulate anthropogenic greenhouse gas emissions:
- 94.1 The UNFCCC – a broad framework which establishes guiding principles to regulate climate change;
- 94.2 The Kyoto Protocol – imposes binding substantive obligations of result requiring developed countries to achieve greenhouse gas mitigation targets and timetables; and
- 94.3 The Paris Agreement – sets procedural obligations and obligations of conduct regarding greenhouse gas mitigation and adaptation on all States Parties. The Paris Agreement is a treaty, that contains “*a mix of hard, soft and non-obligations between which there is dynamic interplay*”.<sup>103</sup>
95. As a LDC and SIDS, Timor-Leste’s submissions will focus primarily on States’ obligations in the UNFCCC and the Paris Agreement.

### B. The Paris Agreement reflects an internationally agreed, science-backed consensus on what is necessary to prevent the most catastrophic effects of climate change, and requires States to take specific measures that represent a progression over time

96. The Paris Agreement gives effect to the UNFCCC’s objective to stabilise “*greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system*”.<sup>104</sup> A central tenet of the Paris Agreement is “enhancing the implementation” of the UNFCCC “*including its*

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<sup>103</sup> Lavanya Rajamani, ‘The 2015 Paris Agreement: Interplay between Hard, Soft and Non-Obligations’ (2016) 28(2) *Journal of Environmental Law*, 352; see also Boyle, ‘Protecting the Marine Environment from Climate Change: The LOSC Part XII Regime’ (n 98) 95.

<sup>104</sup> *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994), art 2 (‘UNFCCC’).

*objective*”.<sup>105</sup> Article 2(1)(a) of the Paris Agreement, which sets one of its objectives, “*aims to strengthen the global response to the threat of climate change*” by:

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

97. Article 2(1)(a) sets the objective of acceptable warming at “well below 2°C” with efforts to be made to limit temperature rise to 1.5°C. In addition to the temperature goals, Article 2(1) further strives to increase States’ abilities to “*adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development*”,<sup>106</sup> and make “*finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development*”.<sup>107</sup>
98. Since the adoption of the Paris Agreement in 2016, the States Parties to the UNFCCC have reaffirmed and underscored the objective of pursuing efforts towards 1.5°C in their annual COP. In 2023, at COP28, States Parties reaffirmed that “*limiting global warming to 1.5°C with no or limited overshoot requires deep, rapid, and sustained reductions in global greenhouse gas emissions*”.<sup>108</sup>
99. The objective of pursuing efforts to limit global warming to 1.5°C above pre-industrial levels reflects the current science-backed consensus on what is necessary to prevent the most catastrophic effects of climate change.
100. The States Parties to the Paris Agreement also agreed to take specific measures toward their efforts of achieving the 1.5°C limit, as explained below. At the same time, Article 2(1)(a) must be read in light of Article 4(1) of the Paris Agreement which requires States to “*aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties*” and that States should also undertake economy-wide absolute emissions reduction targets.<sup>109</sup> In

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<sup>105</sup> Ibid.

<sup>106</sup> *Paris Agreement*, opened for signature 22 April 2016, 1155 UNTS 146 (entered into force 4 November 2016), article 2(1)(b) (*‘Paris Agreement’*).

<sup>107</sup> Ibid art 2(1)(c).

<sup>108</sup> United Nations Framework Convention on Climate Change, *Draft-Decision -/CMA.5: The UAE Consensus, FCCC/PA/CMA/2023/L.17* (13 December 2023) 5 [27] (*‘The UAE Consensus’*).

<sup>109</sup> *Paris Agreement* (n 106) art 4.

the case of LDCs and SIDS, Article 4(6) provides flexibility in communicating their climate ambitions, commensurate with their national circumstances which “*reflect[s] their special circumstances*”. States obligations in this respect are discussed in detail at **Chapter VI, Part C**.

101. While Article 2(1)(a) is one of the central tenets of the Paris Agreement, the decision to group three objectives under the chapeau of Article 2(1) demonstrates the interrelated nature of the temperature goal, adaptation measures, and financing flows. States’ abilities to adapt to the adverse impacts of climate change and foster resilience in pursuit of Article 2(1)(b) is discussed in detail at **Chapter VI, Part E**. As was acknowledged at COP27, there are currently significant gaps “*in support for adaptation and means of implementation for developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, as provided for in the Convention*”.<sup>110</sup>
102. The need to make financing flows “*consistent with a pathway towards low greenhouse gas emissions and climate-resilient development*” reflected in Article 2(1)(c) is discussed in detail at **Chapter VI, Part F**. As was also acknowledged at COP27, to remain on track to achieve the temperature goal States Parties must enhance their efforts to reduce aggregated emissions “*while recognizing the financial, technological, economic, capacity-building and institutional challenges and needs and special circumstances of developing country Parties*”. Financial, technological, and capacity-building support as enablers for climate action “*are not yet aligned with the urgency of a rapid, just and equitable low-emission and climate-resilient transition and significant gaps still exist in terms of both the scale and the speed of such progress*”.<sup>111</sup>
103. The compounding effect of the continual failure of developed States Parties to provide the necessary levels of support to developing States Parties, as provided for in the UNFCCC and the Paris Agreement, means that “*despite overall progress on mitigation, adaptation and means of implementation and support, Parties are not yet collectively*

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<sup>110</sup> Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on its Twenty-Seventh Session, held in Sharm el-Sheikh from 6 to 20 November 2022: Decision 21/CP.27: ‘Second Periodic Review of the Long-Term Global Goal Under the Convention and of Overall Progress Towards Achieving it’*, UN Doc FCCC/CP/2022/10/Add.2 (17 March 2023) 41 [16].

<sup>111</sup> *Ibid* [18].

*on track towards achieving the purpose of the Paris Agreement and its long-term goals” (emphasis added)<sup>112</sup> and “there is a rapidly narrowing window for raising ambition and implementing existing commitments in order to achieve it [The Paris Agreement temperature goal]”.<sup>113</sup>*

**C. States’ obligations under the Climate Change Regime are obligations of conduct and are of a “due diligence” character that must represent a progression over time**

*Obligations of conduct*

104. The Climate Change Regime contains both “obligations of result” and “obligations of conduct”. Obligations of result require the realisation of a specified outcome. Obligations of conduct require an endeavour towards a goal or outcome.<sup>114</sup>

105. The UNFCCC established open-ended obligations of conduct. By contrast, the Kyoto Protocol created an obligation of result, requiring developed State Parties’ anthropogenic CO<sub>2</sub> equivalent emissions to not exceed assigned amounts. The Paris Agreement, like the UNFCCC, imports substantive obligations of conduct, defined further with reference to a Party’s successive NDCs.<sup>115</sup>

106. Article 4(2) of the Paris Agreement is the linchpin of the Climate Change Regime. It requires each State Party to:

*“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”.*<sup>116</sup>

107. Article 4(2) presents two separate but related obligations. The first sentence of Article 4(2), being the obligation to prepare and communicate a NDC, is a binding procedural obligation of result. The result in this case is that States Parties are obliged (“shall”) to submit its NDC in the stipulated timeframe.

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<sup>112</sup> Ibid 41, [15]; *The UAE Consensus* (n 108) 2 [2].

<sup>113</sup> *The UAE Consensus* (n 108) 4 [24].

<sup>114</sup> Benoit Mayer, ‘Obligations of conduct in the international law on climate change: A defence’ (2018) 27(2) *Review of European, Comparative & International Environmental Law* 131.

<sup>115</sup> Ibid 135.

<sup>116</sup> *Paris Agreement* (n 106) art 4(2).

108. However, the second sentence of Article 4(2), which requires States to pursue domestic measures with the aim of achieving the objective of their NDCs, is an obligation of conduct and is subject to due diligence requirements.<sup>117</sup> The use of the word “shall” in the second sentence creates a legal obligation to “*pursue domestic measures*”. The obligation in Article 4(2) to pursue domestic measures is an obligation of conduct for two reasons:

108.1 *first*, the use of unspecified “measures” relates to conduct rather than the achievement of a particular result; and

108.2 *second*, the phrases “*intends to achieve*” in the first sentence, and “*with the aim of achieving the objectives*” in the second sentence, reflects an obligation to exercise “best efforts”,<sup>118</sup> but stops short of requiring those efforts to achieve a particular objective or result. The obligation is to engage in conduct in furtherance of the State’s NDC objectives.<sup>119</sup> This is further reinforced in the French language of the text (“*prennent des mesures internes ... en vue de réaliser les objectifs*”), that requires the measures be reasonably viewed, at the time when they are pursued, as capable of realising the objective of meeting their NDCs.<sup>120</sup>

109. Circumscribing the object of the obligation to conduct under the control of the Parties, Article 4(2) “*ensures that parties will not be sanctioned when external circumstances hinder their efforts, thus reflecting the principle that a State’s obligation depends on its capabilities*”.<sup>121</sup>

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<sup>117</sup> Lavanya Rajamani, ‘Due Diligence in International Climate Law’ in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (Oxford University Press, 2020) 169.

<sup>118</sup> See Lavanya Rajamani, ‘Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics’, (2016) 65(2) *International and Comparative Law Quarterly* 493– 514; Daniel Bodansky, ‘The Legal Character of the Paris Agreement’ (2016) 25(2) *Review of European, Comparative and International Environmental Law* 142– 150; Ralph Bodle and Sebastian Oberthür, ‘The Legal Form of the Paris Agreement and Nature of its Obligations’ in Daniel Klein et al (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford University Press, 2017) 91-103.

<sup>119</sup> Rajamani, ‘The 2015 Paris Agreement: Interplay between Hard, Soft and Non-Obligations’ (n 103) 354.

<sup>120</sup> ‘Mesures *en vue de*’ (literally: ‘measures in the view of’, corresponding to ‘measures, with the aim of’) has typically been translated as ‘measures to’ or ‘measures for’; see, respectively, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia) (Judgment)* [1997] ICJ Rep 7, [25] (‘*Gabčíkovo-Nagymaros Project*’); and *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (Judgment)* [2008] ICJ Rep 12, [147].

<sup>121</sup> Mayer, ‘Obligations of conduct in the international law on climate change: A defence’ (n 114) 137; *Paris Agreement* (n 106) art 2(2).

110. As part of its context, Article 4(2) of the Paris Agreement is to be read in conjunction with Article 3 of the Paris Agreement which provides:

*“As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in Article 2. The efforts of all Parties will represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of this Agreement”*.<sup>122</sup>

111. Article 3 contains both substantive (“undertake”) and procedural (“communicate”) obligations. Article 3 also contains obligations of conduct as evidenced by the use of the word “efforts” which provides States with discretion as to how its “efforts” will represent a “*progression over time*”.

112. Article 3 contains three key elements:

112.1 *first*, the obligation extends to all Parties to “undertake and communicate” ambitious efforts in mitigation, adaptation, finance, technology, capacity-building, and transparency to achieve the purpose of the Paris Agreement;

112.2 *second*, it sets an expectation that efforts of all Parties “*will represent a progression over time*”; and

112.3 *third*, it recognises that “*progression over time*” is interrelated to the need to support developing country Parties for the effective implementation of the Paris Agreement. Given States are not equally positioned, this relates directly to the critical principle of CBDR-RC, elaborated on below.

113. The first element relates to the “efforts” required of States. The language States chose here was deliberate. The obligation is not just to “communicate” ambitious efforts (the communication being a procedural obligation of result) but also to “undertake” ambitious efforts. While what constitutes “ambitious” in this context may not be easily ascertained, the word “undertake” implies a legal obligation of conduct.<sup>123</sup> The due diligence required under this obligation of conduct cannot be measured by achieving a

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<sup>122</sup> Paris Agreement (n 106) art 3.

<sup>123</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (n 91) 111 [162].



specific outcome, measured in degrees or “temperature goals”,<sup>124</sup> which the Paris Agreement clearly refrains from doing. Nor can one assess the standard of conduct by analogy to a State’s obligation to achieve a certain result using the means of its own choosing.<sup>125</sup>

114. The second element relates to those efforts representing “*a progression over time*”. The phrase sets an expectation of more ambitious actions over time.<sup>126</sup> The language States chose is not consistent with minimal or no action, rather it builds upon existing commitments in the UNFCCC.<sup>127</sup> This good faith expectation of “*progression over time*” is further emphasised in later provisions that require States Parties to provide information necessary to track progress in achieving its NDC.<sup>128</sup>
115. Naturally, “progression” is measured from a certain starting point, which is not set in the Paris Agreement. This reflects the reality that each States’ baseline for meeting its obligations under the Climate Change Regime varies, reflective of the principle of CBDR-RC discussed below. Neither “progression” itself nor “highest possible ambition”<sup>129</sup> is defined in the Paris Agreement. However, Articles 3 and 4 of the Paris Agreement link together other key provisions of the Paris Agreement in relation to mitigation and adaptation, and support progression across these areas.<sup>130</sup> The wording of these articles is deliberately open-textured.<sup>131</sup> The multiple functions that Article 3 and Article 4(2) play, in particular, suggest “*there is dynamic interplay between procedural obligations and substantive obligations, between obligations of result and obligations of conduct (with corresponding due diligence requirements)*”.<sup>132</sup> Importantly, as “due diligence” provides the standard of conduct for obligations of

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<sup>124</sup> ‘Verbatim Record’ *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (International Tribunal for the Law of the Sea, 13 September 2023, ITLOS/PV.23/C31/5) 10 (Commonwealth of Australia) (‘*Australia’s Verbatim Record ITLOS Advisory Opinion on Climate Change*’).

<sup>125</sup> ‘Verbatim Record’ *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (International Tribunal for the Law of the Sea, 12 September 2023, ITLOS/PV.23/C31/3) 18-19 (Commission of Small Island States).

<sup>126</sup> Daniel Klein et al, *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford University Press, 2017) 140.

<sup>127</sup> Boyle, ‘Protecting the Marine Environment from Climate Change: The LOSC Part XII Regime’ (n 98) 96.

<sup>128</sup> *Paris Agreement* (n 106) art 13(7)(b).

<sup>129</sup> *Ibid* art 4(3).

<sup>130</sup> *Ibid* art 4(4); Klein et al, *The Paris Agreement on Climate Change: Analysis and Commentary* (n 118) 139.

<sup>131</sup> Rajamani, ‘The 2015 Paris Agreement: Interplay between Hard, Soft and Non-Obligations’ (n 190) 233-259.

<sup>132</sup> Rajamani, ‘Due Diligence in International Climate Law’ (n 117) 170.

conduct,<sup>133</sup> notions of “due diligence”, as set out below at **paragraphs 118 to 127**, inform the assessment of “*progression over time*”.

116. Furthermore, Article 3 does not speak of simply “progression”, which implies constant progress and forward movement of States’ ambitious efforts. Rather, “progression” must be achieved “*over time*”, i.e., States will undertake efforts to move forward in the long-term, but that does not necessarily require that efforts reflect constant progression at every point in time. This important point relates directly to the third element, as relating to developing States.
117. The final element is a recognition of the need to support developing States Parties in implementing the Paris Agreement, discussed below in **Chapter VI, Part F**.

“Due diligence” character that must represent a progression over time

118. The non-procedural obligations contained in the Paris Agreement, particularly Articles 3 and 4, are obligations of conduct with a “due diligence character”. The context-setting provisions of the Climate Change Regime suggest that the object, purpose, and goals of the Climate Change Regime guide the nature and extent of due diligence required of States. The following context-setting provisions are relevant to informing the scope of due diligence required:

118.1 **Article 2 UNFCCC:** which sets the objective of the UNFCCC being “*stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system*”, in a time frame sufficient to allow ecosystems to naturally adapt to climate change, ensure food protection is not threatened, and to enable sustainable economic development.

118.2 **Article 2 Paris Agreement:** as explained above.

118.3 **Article 4(1) Paris Agreement:** which requires that parties “*aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties*”, and “*undertake rapid*

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<sup>133</sup> Ibid 164.

*reductions thereafter in accordance with best available science*” to achieve the Paris Agreement’s temperature goal.

119. Article 4(2) requires States to pursue domestic mitigation measures. The second sentence, “*with the aim of achieving the objectives of such contributions*”, establishes the due diligence standard of conduct. States ought to do “*as well as they can in designing, implementing and enforcing domestic measures aiming at achieving the objective of their respective NDC*”.<sup>134</sup>
120. In considering the content of a “due diligence obligation”, the Seabed Disputes Chamber in its Advisory Opinion *Activities in the Area*, concluded that a “due diligence” obligation required States to take affirmative measures within its legal system, consisting of “*laws and regulations and administrative measures*”.<sup>135</sup>
121. The exercise of due diligence also requires that, in addition to adopting rules and measures, there must be “*a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators*”.<sup>136</sup> Importantly, this is a continuing obligation.<sup>137</sup> The obligation evolves over time to take into account “*new scientific or technological knowledge ... [or] change[s] in relation to the risks involved in the activity*”.<sup>138</sup> These findings are equally relevant for determining the due diligence standards for obligations of conduct in the UNFCCC and Paris Agreement.
122. Further, Articles 3 and 4(3) of the Paris Agreement establish a requirement that the efforts of all Parties will “*represent progression over time*” and “*reflect its highest possible ambition*”.
123. Article 4(3) sets a clear expectation that States Parties will communicate successive NDCs that progress beyond the existing and past NDCs, with the view to being more ambitious (with the caveat that progression is measured “over time”, allowing

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<sup>134</sup> Christina Voigt, ‘The Paris Agreement: What Is the Standard of Conduct for Parties?’ (2016) 26 *Questions of International Law* 17, 20.

<sup>135</sup> See also *Responsibilities and obligation of States with respect to activities in the Area* (n 91) 74.

<sup>136</sup> *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)* [2010] ICJ Rep 14, 79 [197] (‘*Pulp Mills Case*’).

<sup>137</sup> *Trail Smelter (United States, Canada) (Award)* III International Arbitral Awards 1905, 1963.

<sup>138</sup> *Responsibilities and obligation of States with respect to activities in the Area* (n 91) 43 [117].

flexibility in that regard, as explained above). The references for future NDCs are a self-referential baseline “*but are also guided by the normative expectations of ‘highest possible ambition’—a ‘direction of travel’ of becoming more ambitious over time*”.<sup>139</sup> For quantitative progression, the reference point is a States’ own NDC. As such, Article 4(3) effectively sets a “floor” for the ambitions of the next NDC, requiring each Party to set its ambitions beyond the previous NDC.

124. The phrase “*highest possible ambition*” is responsive to States’ differing responsibilities, capabilities, and circumstances, while at the same time aiming to match ambition with the overall aim.
125. Importantly, the “*progression*” reflecting the “*highest ambitions*” of a State, referred to in Article 4(3), must be read together with Article 4(1) of the Paris Agreement, which recognises that “*peaking [their emissions] will take longer for developing country Parties*”. Thus, the ability for such States, particularly LDCs such as Timor-Leste, to achieve progress and “*undertake rapid reductions*”, must be measured through a much longer timeframe than that of other States. LDCs, home to approximately 1.1 billion people or 14 percent of the world’s population have contributed minimally to greenhouse gas emissions.<sup>140</sup> In 2019, LDCs accounted for less than four percent of total world greenhouse gas emissions.<sup>141</sup> In other words, the “*highest possible ambition*” of LDCs and their ability to undertake rapid reductions is very different from that of developed States (and even other developing States) and, moreover, will take longer to achieve.
126. Article 4(6) of the Paris Agreement states that “[t]he *least developed countries and small island developing States may prepare and communicate strategies, plans and actions for low greenhouse gas emissions development reflecting their special circumstances*”. Article 4(6) aims to provide LDCs and SIDS with greater flexibility in communicating their climate ambitions, commensurate with their national circumstances. Accordingly, Timor-Leste has submitted two NDCs, with its updated

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<sup>139</sup> Klein et al, *The Paris Agreement on Climate Change: Analysis and Commentary* (n 118) 148.

<sup>140</sup> United Nations Conference on Trade and Development, *The low-carbon transition and its daunting implications for structural transformation: The Least Developed Countries Report 2022* (Report, UNCTAD/LDC/2022 and Corr.1 and Corr.2, 2022) xvii.

<sup>141</sup> *Ibid* xv, 108.

NDC for 2022 to 2030 being submitted in November 2022.<sup>142</sup> Timor-Leste’s updated NDC focuses on four priority areas in keeping with its obligations under Article 4(6), namely, (1) climate risk governance; (2) nature-positive growth and transition; (3) low carbon development; and (4) climate change adaptation and resilience building.<sup>143</sup> Importantly, Timor-Leste’s NDC includes a section which sets out the means of implementing these priority areas. This section states:

*“The Government of Timor-Leste requires urgent technical support and financing to establish a robust National Greenhouse-Gas (GHG) Inventory to support its ability to report to the UNFCCC and comply with the requirements of the Paris Agreement”.*<sup>144</sup>

127. The due diligence standard of care expected of a State with a well-developed economy and resources and with highly evolved systems and structures of government is different from States that are not so well-placed.<sup>145</sup> This leads to Timor-Leste’s submission that States’ climate change obligations should take full account of the special circumstances and needs of developing countries and be based on the principle of CBDR-RC.

**D. States’ climate change obligations should be based on the principle of common but differentiated responsibilities and should take full account of the special circumstances and needs of developing countries**

128. It is well understood climate change is a “common concern of humankind”<sup>146</sup> and States must collectively address this concern.<sup>147</sup> All States owe duties to protect and preserve the environment, but the content of these duties is not the same for each State.

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<sup>142</sup> United Nations Climate Change, *Nationally Determined Contributions Registry – Timor-Leste* (Web Page) <[https://unfccc.int/NDCREG?gclid=Cj0KCQjw84anBhCtARIsAISl-xfLPsfirA6mPdAlznR8tr95R6xlCQeggRKjBwd-C2nMLFfx7Bq3ywaAhetEALw\\_wcB](https://unfccc.int/NDCREG?gclid=Cj0KCQjw84anBhCtARIsAISl-xfLPsfirA6mPdAlznR8tr95R6xlCQeggRKjBwd-C2nMLFfx7Bq3ywaAhetEALw_wcB)>.

<sup>143</sup> *NDC Timor-Leste 2022-2030* (n 8) 21-43.

<sup>144</sup> *Ibid* 45.

<sup>145</sup> René Lefeber, *Transboundary Environmental Interference and the Origin of State Liability* (Kluwer, 1999) 65; Voigt, ‘The Paris Agreement: What Is the Standard of Conduct for Parties?’ (n 134) 26.

<sup>146</sup> United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development*, UN Doc A/CONF.151/26 (vol I) (12 August 1992), preamble (‘Rio Declaration’); *The UAE Consensus* (n 108), preamble.

<sup>147</sup> *The UAE Consensus* (n 108) 20 [157].

129. The principle of CBDR-RC is embodied in Principle 7 of the Rio Declaration,<sup>148</sup> and reflected throughout the UNFCCC<sup>149</sup> and the Paris Agreement,<sup>150</sup> among other treaties. It is a central principle of international environmental law.<sup>151</sup>
130. The principle of CBDR-RC is understood as consisting of two elements:
- 130.1 *first*, concerning the common responsibilities of States for the protection of the environment, individually and collectively, including in the regulation of anthropogenic greenhouse gas emissions; and
- 130.2 *second*, concerning the need to take into account “different national circumstances”. In particular, each State’s contribution of greenhouse gas emissions, including both historical and current responsibility for anthropogenic greenhouse gas emissions, causing climate change and environmental problems, and each State’s ability to prevent, reduce, and control the threat.<sup>152</sup>
131. Climate change certainly presents intragenerational equity challenges, as both vulnerabilities to climate change and financial and technological capacities for mitigation and adaptation are, and will continue to be, unequal among countries.<sup>153</sup> Differentiation of treatment has been a prominent regulatory tool in multilateral environmental agreements, in particular since the 1992 United Nations Conference on Environment and Development.<sup>154</sup>
132. The idea of differentiation is closely linked to the concept of sustainable development and intragenerational equity in that it allows the balancing of economic development and environmental protection while considering notions of equity.<sup>155</sup>

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<sup>148</sup> UNFCCC (n 104).

<sup>149</sup> Ibid art 3(1).

<sup>150</sup> *Paris Agreement* (n 106) preamble, arts 2(2), 4(3), and 4(19).

<sup>151</sup> Ellen Hey and Sophia Paulini, ‘Common but Differentiated Responsibilities’ in *Max Planck Encyclopedia of Public International Law* (Oxford University Press) (Web Page) [19] <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1568>>.

<sup>152</sup> Philippe Sands, *Principles of International Environmental Law* (Cambridge University Press, 3<sup>rd</sup> ed, 2012) 233.

<sup>153</sup> Intergovernmental Panel on Climate Change, *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2014) 76–77; see also Daria Shapovalova, ‘In Defence of the Principle of Common but Differentiated Responsibilities and Respective Capabilities’ in Benoit Mayer and Alexander Zahar (eds), *Debating Climate Law* (Cambridge University Press, 2020) 64.

<sup>154</sup> *Rio Declaration* (n 146) principles 6 and 7.

<sup>155</sup> Hey and Paulini, ‘Common but Differentiated Responsibilities’ (n 151) [19].

133. From the outset of the negotiation of the UNFCCC, States have acknowledged the different position and capabilities of developed and developing States, in particular LDCs. In the First Session of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, “[m]any countries emphasized that an effective framework convention and any related legal instruments should be based on the principles of equity and common but differentiated responsibility, taking full account of the necessity for the energy consumption of developing countries to grow as their economies develop”.<sup>156</sup>
134. During the First Session, Working Group I was charged with the responsibility of considering appropriate commitments for limiting and reducing net emissions.<sup>157</sup> The Working Group noted that “[d]eveloped countries are the main contributors of GHGs and thus should take the lead and shoulder the main responsibility to stabilize and limit the greenhouse gas emissions”.<sup>158</sup> This understanding is reflected in the texts of the UNFCCC, the Paris Agreement, and COP decisions.<sup>159</sup>
135. Notions of CBDR-RC are reflected throughout the UNFCCC and the Paris Agreement:
- 135.1 **Preamble UNFCCC:** “*Acknowledging 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 and respective capabilities and their social and economic conditions*” (emphasis added);
- 135.2 **Article 3(1) UNFCCC:** “*The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities...*” (emphasis added);

<sup>156</sup> Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the work of its First Session, UN Doc A/AC.237/6, Washington, D.C. (Report, 4 to 14 February 1991) 12, [46].

<sup>157</sup> Ibid 24.

<sup>158</sup> Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, *Compilation of Texts Related to Principles, Submitted by the Bureau of Working Group I*, UN DocA/AC.237/Misc.6 (13 August 1991) first session, part I.E.7 (‘INCFCCC Compilation of Texts Related to Principles’).

<sup>159</sup> *The UAE Consensus* (n 108) 14 [38].

- 135.3 **Article 4(1) UNFCCC:** “*All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall ...” (emphasis added);*
- 135.4 **Preamble Paris Agreement:** “*In pursuit of the objective of the Convention, and being guided by its principles, including the principle of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances” (emphasis added);*
- 135.5 **Article 2(2) Paris Agreement:** “*This 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” (emphasis added);*
- 135.6 **Article 4(3) Paris Agreement:** “*Each Party’s successive nationally determined contribution will represent a progression beyond the Party’s then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances” (emphasis added) while considering the flexibility given to the LDCs and SIDS under Article 4(6) of the Paris Agreement; and*
- 135.7 **Article 4(19) Paris Agreement:** “*All Parties should strive to formulate and communicate long-term low greenhouse gas emission development strategies, mindful of Article 2 taking into account their common but differentiated responsibilities and respective capabilities, in the light of different national circumstances”.*
136. It is clear the principle of CBDR-RC is a central tenet of the Climate Change Regime. CBDR-RC “*gives effect to conceptions of equity and fairness*”,<sup>160</sup> accounting for

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<sup>160</sup> Friedrich Soltau, *Fairness in International Climate Change Law and Policy* (Cambridge University Press, 2009) 187.



historical responsibility and present contributions to emissions, whilst also considering the vulnerability, financial, and technological capabilities of States.

137. The temperature goal expressed in Article 2 is a fundamental “common” objective of the Paris Agreement. However, it is qualified by Article 2(2) of the Paris Agreement which requires implementation of the Agreement in line with the CBDR-RC principle in order for States to perform their “fair share”. It is important to note that differentiation under the Paris Agreement is an “*an amalgamation of country-specific responsibilities, capabilities, and circumstances which also services the purpose of the agreement and its long-term goals*”.<sup>161</sup> The application of the CBDR-RC principle acknowledges the need for equitable burden-sharing of that common effort to achieve the temperature goal in Article 2.
138. The phrase “*in the light of different national circumstances*” further qualifies Article 2(2). This entails additional flexibility in interpreting States’ responsibilities within the parameters of differentiation. Interpretation of States’ obligations under the Paris Agreement can therefore be considered against a broader array of criteria such as “*past, current, and projected future emissions, but also financial and technical capabilities, human capacity, population size and other demographic criteria, abatement costs, opportunity costs, and so on*”.<sup>162</sup> The Global Stocktake Decision at COP28 also acknowledged the need to ensure that the climate response was in line with the principle of CBDR-RC and considered “*in the context of sustainable development and efforts to eradicate poverty*”.<sup>163</sup>
139. This language also reflects a dynamic interpretation which accounts for the evolving position of States (as opposed to the fixed categorisations of States in the Kyoto Protocol), including LDCs, which can enhance mitigation and adaptation ambition over time as States level of development increases.<sup>164</sup> This is particularly relevant in the case of Timor-Leste, which is not only a LDC, but a small newly-independent and fragile

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<sup>161</sup> Christina Voigt and Felipe Ferreira, ‘Differentiation in the Paris Agreement’ [2016] 6(1) *Climate Law* 58, 66.

<sup>162</sup> Harald Winkler et al, ‘What Factors Influence Mitigation Capacity’ (2007) 35 *Energy Policy* 692-703.

<sup>163</sup> *The UAE Consensus* (n 108) 2 [6].

<sup>164</sup> Rajamani, ‘Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics’ (n 118) 508.

State, with a very young population and limited human resources and national capabilities.

140. CBDR-RC is of general application to the obligations in the Climate Change Regime.<sup>165</sup> Neither “developed” nor “developing countries” are defined in the Paris Agreement. The absence of such definition suggests countries can move towards greater mitigation and ambition over time “*without the need to ‘graduate’ from one category to the other*”.<sup>166</sup>
141. Further, Article 4(3) and Article 4(4) of the Paris Agreement should be read together. Article 4(4) of the Paris Agreement provides that:
- “Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. 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”.*
142. Differentiation applies to the content (i.e. ambition, or “how much”), the form (i.e. type of target, or “what”), and the pace of implementation (i.e. the time needed, “over time”) of Parties’ mitigation efforts. This allows Parties to make an equitable determination of its contribution at any point in time.<sup>167</sup> When read together Articles 4(3) and 4(4) operationalise the CBDR-RC principle through self-differentiation, whilst also setting normative expectations in relation to progression and highest possible ambition through successive cycles of contributions.<sup>168</sup> This allows flexibility to reflect Parties’ evolving social and economic realities, whilst also pursuing further ambition on climate mitigation and adaptation.
143. It is crucial that States’ obligations under the Climate Change Regime are interpreted coherently with the principle of CBDR-RC, to take into account the “*specific needs and special circumstances of developing country Parties... especially developing country*

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<sup>165</sup> Thomas Deleuil, ‘The Common but Differentiated Responsibilities Principles: Changes in Continuity After the Durban Conference of the Parties’ (2012) 21(3) *Review of European Community and International Environmental Law* 271-281.

<sup>166</sup> Shapovalova, ‘In Defence of the Principle of Common but Differentiated Responsibilities and Respective Capabilities’ (n 153) 68.

<sup>167</sup> Voigt and Ferreira, ‘Differentiation in the Paris Agreement’ (n 161) 58, 68.

<sup>168</sup> Lavanya Rajamani, ‘The Principle of Common but Differentiated Responsibilities and Respective Capabilities in the International Climate Change Regime’ in Rosemary Lyster et al (eds) *Research Handbook on Climate Disaster Law* (Edward Elgar Publishing, 2018) 55.

*Parties, that would have to bear a disproportionate or abnormal burden under the Convention”*.<sup>169</sup> Otherwise, certain standards may be inappropriate, and of unwarranted economic and social cost to some States, in particular developing States.<sup>170</sup> For States with the most limited means, like LDCs, imposing the same level of commitment would ultimately compromise their right to pursue sustainable and inclusive development. Further, as acknowledged above, developed States bear the primary responsibility for historical emissions. It would be unjust for developing States to bear the same burden as developed States for a problem to which their contribution was negligible.

144. The principle of CBDR-RC is clearly reinforced in Article 4(7) of the UNFCCC which states:

*“The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties”* (emphasis added).

145. Article 4(7) demonstrates a certain dependency between the obligations of developed and developing States. Article 4(7) is further operationalised through provisions in the UNFCCC and the Paris Agreement that place specific obligations on developed States to provide technical and financial assistance to developing States. Resource redistribution and enabling measures have been, and continue to be, important features of the COP negotiations. States’ obligations in respect of technical and financial assistance under the Climate Change Regime are addressed below in **Chapter VI, Part F**. Without the provision of the necessary technical and financial assistance to States in need, those States that *“depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology”* cannot meet their own obligations to the fullest.

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<sup>169</sup> UNFCCC (n 104) art 3(2).

<sup>170</sup> Malgosia Fitzmaurice, ‘International Protection of the Environment’ (2002) 293 *Collected Courses from the Hague Academy of International Law*, 65.

**E. The Court must consider the effects of the climate response on countries that are highly dependent on fossil fuel production and exportation, and developing countries generally**

146. Measures that must be adopted to address climate change must be balanced against the need to ensure all peoples in the world are entitled to an appropriate standard of living. As such, the Court must account for two interrelated points when considering States' climate change obligations:

146.1 *first*, special consideration should be given to developing States whose economies are highly dependent on fossil fuels with a very low rate of domestic greenhouse gas emissions; and

146.2 *second*, that the measures taken in response to States' climate change obligations do not unfairly prejudice the ongoing social and economic development of developing and fragile countries.

*Countries that are highly dependent on fossil fuel production and exportation*

147. Principle 21 of the United Nations Declaration on the Human Environment recognises that:

*“States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental 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”*.<sup>171</sup>

148. States thus have an inalienable sovereign right to exploit their natural resources in an environmentally responsible way. The rights and obligations of States under the Climate Change Regime, in this regard, complement each other.

149. Developing States often view natural resources, including fossil fuel resources, as assets. Such resources can be developed to provide an opportunity to drive economic development and fund basic social services. Importantly, during the first session of the

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<sup>171</sup> United Nations Conference on the Human Environment, *Stockholm Declaration: Declaration on the Human Environment*, UN Doc A/CONF.48/14/Rev.1 (16 June 1972), principle 21 (*'Stockholm Declaration'*).

Intergovernmental Negotiating Committee, Working Group I considered the impacts of the UNFCCC on living standards and the right to development. The Working Group recognised “developing countries have as their main priority alleviating poverty and achieving social and economic development and that their net emissions must follow from their, as yet, relatively low energy consumption to accommodate their development needs”<sup>172</sup> (emphasis added). The Working Group further recognised the right to development as an “*inalienable human right*”.<sup>173</sup>

150. The UNFCCC preamble recognises 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*”<sup>174</sup> (emphasis added).
151. Since the UNFCCC, every major climate commitment including the Paris Agreement,<sup>175</sup> the Glasgow Climate Pact,<sup>176</sup> the Sharm el-Sheikh Implementation Plan,<sup>177</sup> and the UAE Consensus,<sup>178</sup> has expressly acknowledged the right to development in its preamble.
152. The Working Groups during the negotiation of the UNFCCC<sup>179</sup> recognised this position and it is expressly reflected in the preamble and the text of Article 4(10) of the UNFCCC which states:

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

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<sup>172</sup> *UNFCCC Compilation of Texts Related to Principles* (n 158) first session, part III.B.4, and 1.

<sup>173</sup> *Ibid* part III.B.3.

<sup>174</sup> *UNFCCC* (n 104) preamble.

<sup>175</sup> United Nations Framework Convention on Climate Change, *Decision 1/CP.21: Adoption of the Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1 (29 January 2016, adopted 13 December 2015) (*‘UNFCCC Adoption of the Paris Agreement’*).

<sup>176</sup> United Nations Framework Convention on Climate Change, *Decision 1/CP.26: Glasgow Climate Pact*, UN Doc FCCC/CP/2021/12/Add.1 (13 November 2021, adopted 8 March 2022) (*‘Glasgow Climate Pact’*).

<sup>177</sup> *Sharm el-Sheikh Implementation Plan* (n 36).

<sup>178</sup> *The UAE Consensus* (n 108) preamble.

<sup>179</sup> *UNFCCC Compilation of Texts Related to Principles* (n 158) first session, part III.C., 10 [1]-[6].

*switching to alternatives*”<sup>180</sup> (emphasis added).

153. Further, in the First Session of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, Working Group I expressly noted:

*“Notwithstanding the commitments agreed upon in this convention, all countries, particularly developing countries and countries with economies in transition, in exercising their right to choose the best path to ensure their sustainable development and to reach an appropriate standard of living, shall be entitled to choose the forms of energy which suit better their growth need, especially those energy resources which are characterized by security of access, abundance and low-cost”*<sup>181</sup> (emphasis added).

154. At COP28, the Global Stocktake Decision also recognised *“time frames for peaking may be shaped by sustainable development, poverty eradication needs and equity and be in line with different national circumstances”*.<sup>182</sup>

155. An interpretation of States’ obligations under the Climate Change Regime should be read taking into account Article 4(10) of the UNFCCC. The needs of developing countries reliant on income generated from fossil fuels must be balanced against the need to pursue ongoing protection of the environment and the need for developing States to alleviate poverty and achieve social and economic development. Timor-Leste’s situation as a LDC and SIDS, that is critically dependent on income generated from fossil fuels exemplifies the need for such an interpretation.

156. Timor-Leste has pursued the development of its natural resources, taking into account its environmental obligations. The development of such resources led to the establishment of the Petroleum Fund which is *“used for the benefit of both current and future generations”*.<sup>183</sup> It is these funds that allow Timor-Leste to ensure national food security, build basic infrastructure, schools, and hospitals, and provide other fundamental services.

157. Timor-Leste has every intention to diversify its sources of revenue in the future, including investment in alternative sources of energy, in accordance with the Paris

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<sup>180</sup> UNFCCC (n 104) art 4 (10).

<sup>181</sup> INCFCCC *Compilation of Texts Related to Principles* (n 158) first session, part III.A, 8 [9].

<sup>182</sup> *The UAE Consensus* (n 108) 5 [26].

<sup>183</sup> *Petroleum Fund Law 2005* (Law No.9/2005 of 3 August), preamble (‘*Petroleum Fund Law*’).

Agreement. Consistent with its latest NDC, Timor-Leste has planned to promote the development of renewable energy technology, focussing on a low carbon development path. But at present, in seeking to advance its own development, Timor-Leste must rely on the resources it has available to it whilst also complying with its international obligations. As such, Timor-Leste must balance its commitment to a low carbon development pathway, with emissions from its hydrocarbon industry during a transition phase. COP28 expressly recognised that “*transitional fuels can play a role in facilitating the energy transition while ensuring energy security*”.<sup>184</sup> Without the ability to develop its natural resources, Timor-Leste’s development will be challenged.

*Adverse impacts on developing countries*

158. Measures taken in response to States’ climate change obligations should not unfairly prejudice the ongoing social and economic development of developing States, particularly LDCs. This was acknowledged in the preamble to the Paris Agreement which recognises that “*Parties may be affected not only by climate change, but also by the impacts of the measures taken in response to it*”. Article 4(15) of the Paris Agreement further recognises:

*“Parties shall take into consideration in the implementation of this Agreement the concerns of Parties with economies most affected by the impacts of response measures, particularly developing country Parties”.*

159. LDCs have contributed the least (less than two percent of global emissions) to the adverse effects of climate change yet will experience the highest impacts both due to higher levels of vulnerability and lower adaptive capacities.<sup>185</sup> The fact that SIDS have a combined population of around 65 million people contributing to less than one percent of global greenhouse gas emissions, means that they will suffer disproportionately from the damaging impacts of climate change and that some may become uninhabitable.<sup>186</sup> Climate adaptation presents both short-, medium-, and long-term challenges in how LDCs can adopt appropriate low greenhouse gas development strategies.

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<sup>184</sup> *The UAE Consensus* (n 108) 5 [29].

<sup>185</sup> Patricia Kameri-Mbote, ‘The Least Developed Countries and Climate Change Law’ in Cinnamon Carlarne et al (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press, 2016) 743.

<sup>186</sup> Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, *Small Island Developing States in Numbers: Climate Change Edition* (Report, 2015) 6.

160. The climate response cannot leave developing States behind. Whilst States like Timor-Leste have taken measures to adopt and implement their NDCs and take mitigation and adaptation measures, global progress in this space is conditional on developed States meeting their commitments under the Climate Change Regime. The measures taken in response to climate change must not compound the multitude of challenges developing States are already facing, in particular LDCs and SIDS. The Court must consider the effects of the climate response on developing States and ensure developing States are provided with the same opportunities to pursue sustainable economic growth as developed States were.

**F. Developed States are required to provide technical and financial assistance to developing States to assist in climate mitigation and adaptation initiatives**

161. Historically, economic development has been strongly correlated with increasing energy use and growth of greenhouse gas emissions. Developed States have access to significant technological advancements in renewable energy options that can help to decouple this correlation whilst promoting sustainable development of developing countries.<sup>187</sup>

162. Obligations to provide financial and technical assistance, and capacity building are at the core of the Climate Change Regime. Under the UNFCCC, developed States:

162.1 “*shall provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties in complying with their obligations... They shall also provide such financial resources, including for the transfer of technology, needed by the developing country Parties to meet the agreed full incremental costs of implementing measures...*”<sup>188</sup> (emphasis added);

162.2 “*shall also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation*”<sup>189</sup> (emphasis added);

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<sup>187</sup> Intergovernmental Panel on Climate Change, ‘Renewable Energy Sources and Climate Change Mitigation: Special Report on Renewable Energy Sources and Climate Change Mitigation’ (Cambridge University Press, 2012) 18, 33, and 35.

<sup>188</sup> UNFCCC (n 104) art 4(3).

<sup>189</sup> Ibid art 4(4).



162.3 “*shall take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other Parties, particularly developing country Parties, to enable them to implement the provisions of the Convention. In this process, the developed country Parties shall support the development and enhancement of endogenous capacities and technologies of developing country Parties*”<sup>190</sup> (emphasis added);<sup>191</sup> and

162.4 “*shall take full account of the specific needs and special situations of the least developed countries in their actions with regard to funding and transfer of technology*”.<sup>192</sup>

163. The Paris Agreement creates further legal obligations of a similar nature: Article 4(5) requires that support “*shall be provided to developing country Parties for the implementation of this Article... recognizing that enhanced support for developing country Parties will allow for higher ambition in their actions*”.

164. Article 9(1) of the Paris Agreement is a clear obligation on developed country Parties to provide financial resources to developing countries (“*shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention*”). The phrase “*in continuation of their existing obligations under the Convention*” can be interpreted as a reference to the obligation on developed country Parties in Article 4(3) of the UNFCCC to provide financial resources to developing country Parties.<sup>193</sup>

165. Article 9(2) of the Paris Agreement complements Article 9(1) stating “*other Parties are encouraged to provide or continue to provide such support voluntarily*”. The difference in language between Article 9(1) and Article 9(2) clearly indicates Article 9(1) was intended as a legally binding obligation on developed country Parties.<sup>194</sup> Article 9(3) of the Paris Agreement further enshrines the core obligation on developed country

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<sup>190</sup> Ibid art 4(5).

<sup>191</sup> See also ibid art 4(7).

<sup>192</sup> See also ibid art 4(9).

<sup>193</sup> Klein et al, *The Paris Agreement on Climate Change: Analysis and Commentary* (n 118) 243.

<sup>194</sup> Ibid 244.

Parties to provide climate financing. This is evidenced through the phrase “*continue to take the lead in mobilizing climate financing*”.<sup>195</sup> While Article 9(3) does not create a separate legal obligation, it provides relevant context to the correct interpretation of the obligation in Article 9(1). It suggests that it is incumbent on developed States to act in a way that ensures that “*mobilization of climate finance should represent a progression beyond previous efforts*”. The actions of developed States in the context of financial and technological assistance and transfer are, therefore, to increase overtime.<sup>196</sup> Importantly, Article 9(5) further requires developed States to “*biennially communicate indicative and qualitative information related to [...], as available, projected levels of public financing to be provided to developing country Parties*”.

166. The obligations in Article 9 of the Paris Agreement to provide financial resources were further reinforced in the COP Decision adopting the Paris Agreement.<sup>197</sup> Paragraph 53 of that Decision stated:

“... in accordance with Article 9, paragraph 3, of the Agreement, developed countries intend to continue their existing collective mobilization goal through 2025 in the context of meaningful mitigation actions and transparency on implementation; prior to 2025 the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement shall set a new collective quantified goal from a floor of USD 100 billion per year, taking into account the needs and priorities of developing countries”.<sup>198</sup>

167. In subsequent COP Decisions, including the Glasgow Climate Pact, developed country Parties were urged “*to urgently and significantly scale up their provision of climate finance, technology transfer and capacity-building for adaptation so as to respond to the needs of developing country Parties as part of a global effort, including for the formulation and implementation of national adaptation plans*”.<sup>199</sup> This same sentiment was stressed again in the Sharm el-Sheikh implementation plan.<sup>200</sup>

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<sup>195</sup> Ibid 245.

<sup>196</sup> See also *Paris Agreement* (n 106) preamble, arts 4(5), 9(3), 11(1) and 11(3).

<sup>197</sup> *UNFCCC Adoption of the Paris Agreement* (n 175).

<sup>198</sup> Ibid [53].

<sup>199</sup> *Glasgow Climate Pact* (n 176) 3 [11].

<sup>200</sup> *Sharm el-Sheikh Implementation Plan* (n 36)6 [35].

168. On 22 September 2022, the OECD released its disaggregated data analysis of climate finance provided and mobilised in 2016 to 2020.<sup>201</sup> In 2020, developed States Parties provided USD 83.3 billion of climate finance, USD 16.7 billion short of the USD 100 billion per year by 2020 goal.<sup>202</sup> In every year from 2013 to 2020, developed country Parties failed to meet their commitment to provide USD 100 billion per year in climate financing to developing States.

169. However, the figures reported in the OECD reports do not accurately reflect the real support provided to developing States. Of the USD 83.3 billion committed to the USD 100 billion goal, only USD 21 to USD 24.5 billion of this could be considered real support.<sup>203</sup> There are two key reasons for the discrepancy in these figures:

169.1 *first*, reported climate finance often overestimates the climate relevance of funds when mitigation or adaptation are not the main objective of a reported project. The correct approach to reporting would be to reflect a proportion of a project's total financing that contributes to mitigation or adaptation. However, many funders do so with “*generous assumptions related to the climate relevance of reported funds*”;<sup>204</sup> and

169.2 *second*, climate finance providers usually report non-grant instruments (such as loans) at their face value rather than by the financial effort of the provider or the financial benefit to the recipient resulting from preferential terms of, for example, a concessional loan with several years of grace period or lower interest rates if compared with instruments under market conditions.<sup>205</sup> For example, reporting a concessional loan at face value reports the value of that loan in today's dollars. However, face value does not account for the time value of money and how that loan and its subsequent repayments are accounted for over time. A valuation using net present value demonstrates the difference between

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<sup>201</sup> OECD, *Climate Finance Provided and Mobilised by Developed Countries in 2016-2020: Insights from Disaggregated Analysis, Climate Finance and the USD 100 Billion Goal*, <<https://doi.org/10.1787/286dae5d-en>>.

<sup>202</sup> Ibid 4.

<sup>203</sup> Oxfam, *Climate Finance Shadow Report 2023: Assessing the Delivery of the \$100 Billion Commitment*, (Web Page 2023) 9 <<https://www.oxfam.org.nz/wp-content/uploads/2023/06/Climate-Finance-shadow-report.pdf>> (*'Oxfam Climate Finance Shadow Report 2023'*).

<sup>204</sup> Ibid.

<sup>205</sup> Ibid.

the present value of cash inflows and cash outflows over a period of time. Net present value therefore accounts for the initial outlay required to fund a project and discounts its future value back to present day dollars. Reporting at face value fails to account for the time value of money and can overstate the financial benefit to the recipient.

170. At COP 28 in December 2023, it was again acknowledged that the world’s largest and wealthiest economies, have yet again failed to deliver on their commitments to provide USD 100 billion per year, in climate funding for developing countries.<sup>206</sup>
171. Further climate financing commitments were made by States, development institutions, and private businesses, with more than USD 83 billion mobilised during the first five days of the event.<sup>207</sup> The USD 100 billion in annual climate finance, committed in 2020, was provided. However, this still falls significantly short of the estimated amount required each year for climate adaptation alone.
172. Furthermore, the States Parties to the UNFCCC also expressly acknowledged that the “*adaptation finance gap is widening*”<sup>208</sup> and “*that current levels of climate finance, technology development and transfer and capacity-building for adaptation remain insufficient to respond to worsening climate change impacts in developing country Parties*”.<sup>209</sup>
173. In addition to failing to meet their climate finance obligations, where climate finance has been provided it is often provided in the form of loans. When the USD 100 billion a year goal was set in 2009, it was expected most finance would be provided as grants or other highly concessional finance, in recognition of developed countries’ disproportionate responsibility for causing the climate crisis and their financial

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<sup>206</sup> *The UAE Consensus* (n 108) 11 [80] and 12 [85].

<sup>207</sup> Reuters, ‘Who is pledging climate finance at COP28, and how much?’ (Web Page, 2023) <<https://www.reuters.com/business/environment/who-is-pledging-climate-finance-cop28-how-much-2023-12-06/>>.

<sup>208</sup> *The UAE Consensus* (n 108) 11 [81].

<sup>209</sup> *Ibid.*

capability to act.<sup>210</sup> Developed States and high emitter States have not upheld their end of the deal.

174. Financing lower net emissions is a fundamental challenge facing developing States. Acknowledging Timor-Leste's status as a LDC, States like Timor-Leste are reliant on support from the international community to help it fulfil its obligations in respect of climate change.
175. To date, Timor-Leste has received USD 65.3 million in total financing from the Green Climate Fund (GCF) to address mitigation and adaptation measures. Timor-Leste only received its first funding from the GCF in July 2019. Current financing flows are inadequate for Timor-Leste to seriously address climate mitigation and adaptation initiatives contemplated in its current NDC. Timor-Leste's NDC identifies examples of its priorities for capacity building, finance, and technology transfer, including:
  - 175.1 assistance to improve its capacity to understand and assess climate risks and improve national climate information services;
  - 175.2 the ability to invest in and scale up renewable energy and improve national greenhouse gas emissions reporting;
  - 175.3 specific and additional financial and technical assistance to improve national capacity to cope with and address the nexus of disaster and climate change-related impacts alongside sustainable development priorities and the mid-term impact of the COVID-19 pandemic;<sup>211</sup> and
  - 175.4 targeted financing to build coastal resilience and minimise the risk of coastal community displacement, including technical assistance to establish marine protected areas and protect tropical reefs which are some of the most biodiverse in the world.<sup>212</sup>

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<sup>210</sup> *Oxfam Climate Finance Shadow Report 2023* (n 203) 9.

<sup>211</sup> *NDC Timor-Leste 2022-2030* (n 8) 46.

<sup>212</sup> *Ibid.*

176. Timor-Leste has also submitted its National Adaptation Plan (**NAP**) which identifies adaptation activities for the country across priority sectors.<sup>213</sup> Like with its NDC, Timor-Leste's NAP initiatives are largely reliant on external financing and technological support for their implementation.
177. As acknowledged in Article 4(7) of the UNFCCC, and reflected in Timor-Leste's NDC, LDCs are virtually completely dependent on developed States' meeting their obligations of providing technical and financial assistance.
178. Finally, it is imperative that the reference of the above agreements to classes or groups of States, such as "developed" and "developing" does not obscure the nature of binding legal obligations. That the texts do not refer to *all States* or name individual States is due to the special content and nature of the Climate Change Regime. But this classification does not alter the content or nature of the obligations themselves. A reference to the obligations of "developed" States to provide financial assistance and technological transfer entails an individual obligation for each developed State to do so. In other words, each individual State included in that class or group of States has to meet its individual obligations as a member of that group of States.

**G. States have a duty to cooperate to achieve their obligations under the Climate Change Regime**

179. At its core, the duty to cooperate requires States to work together to pursue a common goal or task.<sup>214</sup> The duty to cooperate manifests in the Climate Change Regime in three ways:
- 179.1 the duty to cooperate in mitigation and adaptation measures;
- 179.2 the duty to cooperate to continue negotiations under the Climate Change Regime; and
- 179.3 the duty to cooperate to avoid transboundary harm.

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<sup>213</sup> *Timor-Leste's NAP* (n 43).

<sup>214</sup> Oxford University Press, 'co-operation' in *Oxford English Dictionary* (Web Page, 2023) <[www.oed.com/view/Entry/41037](http://www.oed.com/view/Entry/41037)>.

Duty to cooperate in mitigation and adaptation measures

180. The duty to cooperate is fundamental to international law, particularly international environmental law. Principle 7 of the Rio Declaration indicates that “*States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem*”. Principle 24 of the Stockholm Declaration further reinforces this position stating:

*“Co-operation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States”*.<sup>215</sup>

181. In her Separate Opinion in *Whaling in the Antarctic*, *Ad Hoc* Judge Charlesworth emphasised that the conservation and management of shared resources and the environment “*must be based on shared interests, rather than the interests of one party*”.<sup>216</sup> The duty to cooperate “*denotes an important shift in the general orientation of the international legal order. It balances the principle of sovereignty of States and thus ensures that community interests are taken into account vis-à-vis individualistic State interests*”.<sup>217</sup> As such, the duty to cooperate is “other-regarding”.

182. Cooperation is central to the Climate Change Regime’s recognition of climate change as “a common concern of humankind”.<sup>218</sup> Cooperation in mitigation and adaptation is critical to bridge the gap between human, technical, and financial resources of States to combat climate change. The temperature goal in Article 2 of the Paris Agreement is one of the most significant commitments of the international community and cooperation to achieve is equally significant, as “[t]he significance and value of cooperation depends upon the goal to be achieved”.<sup>219</sup> A duty to cooperate must be

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<sup>215</sup> *Stockholm Declaration* (n 171) principle 24.

<sup>216</sup> *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* [2014] ICJ Rep 226, 457 [13] (Separate Opinion of Judge Ad Hoc Charlesworth).

<sup>217</sup> *MOX Plant (Ireland v United Kingdom) (Provisional Measures)* [2001] ITLOS Rep 95, 131 (Separate Opinion of Wolfrum).

<sup>218</sup> *Paris Agreement* (n 106) preamble.

<sup>219</sup> Rüdiger Wolfrum, ‘International Law of Cooperation’ in *Max Planck Encyclopedia of Public International Law* (Oxford University Press) (Web Page) [2] <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1427?rskey=2ZqGVc&result=1&prd=OPIL>>.

understood within the framework of the relevant treaty, taking into account its object and purpose.<sup>220</sup>

183. The final report of the Fifth Session of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, notes that as the UNFCCC had been adopted by consensus, this represented “*a first step towards a new era of understanding and global cooperation*”.<sup>221</sup> Subsequent COP decisions such as the “Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action”, have acknowledged 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 with a view to accelerating the reduction of global greenhouse gas emissions*”.<sup>222</sup>
184. Article 4 of the UNFCCC is drafted in prescriptive language (“shall”) and imposes obligations to cooperate in several contexts. These include cooperation:
- 184.1 “*in the development, application and diffusion, including transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases*”<sup>223</sup> (emphasis added);
- 184.2 “*in preparing for adaptation to the impacts of climate change*”<sup>224</sup> (emphasis added);
- 184.3 “*in scientific, technological, technical, socio-economic and other research*” to further understanding of, and bridging information gaps, with respect to climate change;<sup>225</sup>

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<sup>220</sup> Neil Craik, ‘The Duty to Cooperate in International Environmental Law: Constraining State Discretion through Due Respect’ (2019) 30(1) *Yearbook of International Environmental Law* 22, 28.

<sup>221</sup> *Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the work of the second part of its Fifth session, held at New York from 30 April to 9 May 1992 (A/AC.237/18 (Part II), 16 October 1992), 10 [33].*

<sup>222</sup> United Nations Framework Convention on Climate Change, *Decision 1/CP.17: Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action* UN Doc FCCC/CP/2011/9/Add.1, (15 March 2022 adopted 11 December 2011) preamble.

<sup>223</sup> UNFCCC (n 104) art 4(1)(c).

<sup>224</sup> *Ibid* art 4(1)(e).

<sup>225</sup> *Ibid* art 4(1)(g).



184.4 in “*full, open and prompt exchange of relevant scientific, technological, technical, socio-economic and legal information*” relating to climate change and its economic impacts;<sup>226</sup> and

184.5 in the “*education, training and public awareness related to climate change*”.<sup>227</sup>

185. Article 10(2) of the Paris Agreement establishes an obligation for States to “*strengthen cooperative action on technology development and transfer*” (emphasis added). Article 12 of the Paris Agreement creates a legal obligation on Parties to cooperate in taking measures to enhance climate change education, training, public awareness, public participation, and public access to information.<sup>228</sup>

186. Education can help vulnerable communities to better understand the effects of climate change. Education is also fundamental to help the citizens of developing States to learn the necessary skills to participate in a changing work environment. Training is critical to transfer skills and knowledge to enhance human resources required to address climate change impacts and participate in the workforce.

187. Cooperation is imperative for other related obligations. For example, the obligations on developed States to provide technical and financial assistance to developing States (as discussed at **Chapter VI, Part F**), clearly requires cooperation between developed and developing States.

*Duty to cooperate to continue to negotiate under the Climate Change Regime*

188. The duty to cooperate is not just limited to mitigation and adaptation initiatives. States also have a duty to cooperate to develop the Climate Change Regime and undertake negotiations through the COP negotiating mechanism. The nature of many environmental framework treaties such as the UNFCCC is that the agreement marks

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<sup>226</sup> Ibid art 4(1)(h).

<sup>227</sup> Ibid art 4(1)(i).

<sup>228</sup> Klein et al, *The Paris Agreement on Climate Change: Analysis and Commentary* (n 118) 296-297.

the start of cooperation, with further arrangements contemplated to be arrived at under the treaty.<sup>229</sup>

189. Article 7 of the UNFCCC establishes the COP<sup>230</sup> and gives it the power to, within its mandate, make “*the decisions necessary to promote the effective implementation of the Convention*”.<sup>231</sup> Article 17 of the UNFCCC contemplates that the COP may adopt protocols to the UNFCCC.<sup>232</sup> The adoption of both the Kyoto Protocol and the Paris Agreement reflect the cooperation and collective efforts between States to realise progress under the UNFCCC towards greater emissions reduction.
190. The duty to cooperate in the context of ongoing negotiations is informed by the purpose of the relevant treaty. In the case of the UNFCCC, Article 2 sets the objective of the Convention as the “*stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system*”. In light of the development in the scientific understating of climate change, the Parties can only achieve this through further agreement. When Article 2 is read in the context of Article 7, States have a duty to cooperate in ongoing negotiations to make decisions necessary to promote the effective implementation of the UNFCCC.
191. As such, Articles 7 and 17 of the UNFCCC require States to cooperate to continue to negotiate under the Climate Change Regime taking into account the objectives of the Regime, and the measures required for its effective implementation.

*Duty to cooperate to avoid transboundary harm*

192. A third duty to cooperate relates to activities or proposed activities that have the potential to affect the interests of another State.<sup>233</sup>

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<sup>229</sup> See Lawrence Susskind and Connie Ozawa, ‘Negotiating More Effective International Environmental Agreements’ in Andrew Hurrell and Benedict Kingsbury (eds), *The International Politics of the Environment: Actors, Interests, and Institutions* (Oxford University Press, 1992) 142 (discussing the framework/protocol structure of post-Rio multilateral environmental agreements); Craik, ‘The Duty to Cooperate in International Environmental Law: Constraining State Discretion through Due Respect’ (n 220) 27.

<sup>230</sup> UNFCCC (n 104) art 7(1).

<sup>231</sup> Ibid art 7(2).

<sup>232</sup> Ibid art 17(1).

<sup>233</sup> Craik, ‘The Duty to Cooperate in International Environmental Law: Constraining State Discretion through Due Respect’ (n 220) 23, 44.

193. The preamble to the UNFCCC acknowledges that “*States have ... 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*”.
194. The part of the preamble set out above is a reference to the obligation of States to avoid significant transboundary harm. Under customary international law, a State is obligated to use “*all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State*”.<sup>234</sup> Not only must States refrain from certain actions, but they are also required to positively take action to meet their obligations.
195. “Significant harm” is not defined in the UNFCCC, nor in any of the other international agreements. The ILC’s commentary to the Transboundary Harm Articles provides the following interpretation of the words “significant” and “harm”:

*“The term ‘significant’ is not without ambiguity and a determination has to be made in each specific case. It involves more factual considerations than legal determination. It is to be understood that ‘significant’ is something more than ‘detectable’ but need not be at the level of ‘serious’ or ‘substantial’. The harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States. Such detrimental effects must be susceptible of being measured by factual and objective standards”.*<sup>235</sup>

196. In 2015, the Court summarised the core of this obligation of customary international law in *Certain Activities and Construction of a Road*:

*“... to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment [...] If the environmental impact assessment confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the*

<sup>234</sup> *Pulp Mills Case* (n 136) 56 [101].

<sup>235</sup> International Law Commission, ‘Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (and Commentaries)’ in *Report of the International Law Commission on the Work of its 53rd Session* (23 April 2001–1 June 2001 and 2 July 2001–10 August 2001) UN Doc A/56/10, 152 [4] (‘*Transboundary Harm Articles*’).

*appropriate measures to prevent or mitigate that risk*".<sup>236</sup>

197. The occurrence of significant transboundary harm in itself is not a breach of international law. Rather, a breach may arise where a State fails to exercise due diligence,<sup>237</sup> including a failure to ensure “vigilance in the enforcement” of appropriate rules and measures,<sup>238</sup> such as monitoring activities likely to cause “significant harm”.<sup>239</sup>
198. In the context of the Climate Change Regime, a State’s due diligence obligations to address “significant harm” reflects its level of ability, in light of the principle of CBDR-RC. The principle of CBDR-RC in the context of climate change is discussed in detail at **Chapter VI, Part D**.

#### **H. The UNFCCC requires States to protect the climate system for the benefit of present and future generations**

199. Climate change is an inherently intergenerational problem. Multiple generations of human activities, largely resulting from the actions of developed countries, have contributed to the adverse effects of climate change today. In some cases, climate impacts can be irreversible on human timescales, presenting challenges for future generations caused by the actions of present ones. The Climate Change Regime therefore contemplates the notion of both intra- and inter-generational equity.
200. Intragenerational equity is concerned with equity between people of the same generation.<sup>240</sup> Intergenerational equity requires “*the needs of future generations be considered alongside the needs of the present generation*”.<sup>241</sup> Inter-generational considerations under the Climate Change Regime are also tied to States’ obligations

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<sup>236</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica) (Judgment)* [2015] ICJ Rep 665, 706 [104] (‘*Costa Rica v Nicaragua*’).

<sup>237</sup> *Pulp Mills Case* (n 136) 26 [10]; *2001 Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities*, ILC 53<sup>rd</sup> sess, UN Doc. A/RES/56/82 (10 October 2001) art 3.

<sup>238</sup> *Pulp Mills Case* (n 136) 55 [101].

<sup>239</sup> *Ibid.* See also, with respect to “serious” impacts on human rights, *Daniel Billy & Ors v Australia (Torres Strait Islanders Petition)* (2022) CCPR/C/135/D/3624/2919, 15: “...*the adverse consequences of those impacts are serious because of their intensity or duration and the physical or mental harm that they cause*”.

<sup>240</sup> United Nations Environment Programme, *Intragenerational equity* (Web Page) <<https://leap.unep.org/knowledge/glossary/intragenerational-equity>>.

<sup>241</sup> Margaretha Wewerinke-Singh, Ayan Garg, Shubhangi Agarwalla, ‘In Defence of Future Generations’ (2023) 34(3) *European Journal of International Law* 651, 665.

with respect to the realisation of the rights of children, discussed in detail at **Chapter IX, Part E**.

201. Question (a) asks the Court to consider the “[p]eoples and individuals of the present and future generations affected by the adverse effects of climate change”.<sup>242</sup> The opening preambular paragraph to the UNGA resolution adopting the Request for this Advisory Opinion recognises that “*climate change is an unprecedented challenge of civilizational proportions and that the well-being of present and future generations of humankind depends on our immediate and urgent response to it*”<sup>243</sup> (emphasis added). The second preambular paragraph recalled the UNGA’s resolutions and decisions “*relating to the protection of the global climate for present and future generations of humankind*” (emphasis added).<sup>244</sup>
202. The accumulation of greenhouse gas emissions over time can result in a time lag between the release of emissions and the latent detrimental effects. The IPCC reports that in a scenario where no immediate climate action is taken:
- “... children aged ten or younger in the year 2020 are projected to experience a nearly four-fold increase in extreme events under 1.5°C of global warming by 2100, and a five-fold increase under 3°C warming. Such increases in exposure would not be experienced by a person aged 55 in the year 2020 in their remaining lifetime under any warming scenario”*.<sup>245</sup>
203. The percentage of the population exposed to deadly heat stress is projected to increase from today’s 30 percent to 48-76 percent by the end of the century, depending on future warming levels and location.<sup>246</sup> If the world warms more than 4°C by 2100, the number of days with climatically stressful conditions for outdoor workers will increase by up to 250 workdays per year in some parts of South Asia, tropical sub-Saharan Africa and parts of Central and South America, with dire cross-cutting consequences.<sup>247</sup> Today’s children and future generations are more likely to be exposed and vulnerable to climate

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<sup>242</sup> Request (n 1) 2.

<sup>243</sup> Ibid preamble.

<sup>244</sup> Ibid.

<sup>245</sup> Intergovernmental Panel on Climate Change, *FAQ 3: How will Climate Change Affect the Lives of Today’s Children Tomorrow, if no Immediate Action is Taken?* (Web Page) <<https://www.ipcc.ch/report/ar6/wg2/about/frequently-asked-questions/keyfaq3/>>.

<sup>246</sup> Ibid.

<sup>247</sup> Ibid.

change and related risks such as flooding, heat stress, water scarcity, poverty, and hunger.

204. Coastal cities, especially in South and Southeast Asia, are expected to see significant increases in average annual economic losses between 2005 and 2050 due to flooding, with very high losses in East Asian cities under the high-emissions scenario.<sup>248</sup> Climate change will amplify the urban heat-island effect across Asian cities (especially South and East Asia) at 1.5°C and 2°C temperature rise, both substantially larger than under the present climate.<sup>249</sup> Therefore, steps must be taken to secure the protection of the environment from the effects of anthropogenic greenhouse gas emissions for the benefit of future generations.
205. The opening line of the Charter states that the United Nations is “*determined to save succeeding generations*”. Even prior to the UNFCCC, several treaties have expressly incorporated the principle of protecting the natural environment for future generations.<sup>250</sup>
206. The reference to intra- and inter-generational equity in the Request was deliberate and ensures States with a history of significant greenhouse gas emissions do not avoid responsibility for their past actions. As noted throughout this submission, LDCs have contributed the least to global greenhouse gas emissions yet will experience the highest impacts both due to higher levels of vulnerability and lower adaptive capacities.<sup>251</sup> Now and in the future, these States must shoulder the burden of mitigation and adaptation for a problem to which they largely did not contribute.
207. In *Legality of the Threat or Use of Nuclear Weapons*, the Court stressed that “*the environment is not an abstraction but represents the living space, the quality of life and*

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<sup>248</sup> Intergovernmental Panel on Climate Change, ‘Asia’ in *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2022) 1460.

<sup>249</sup> Ibid.

<sup>250</sup> See for example, *Convention on the prevention of marine pollution by dumping of wastes and other matters*, opened for signature 23 June 1977, 1046 UNTS 138 (entered into force 30 August 1975); *Convention on International Trade in Endangered Species*, opened for signature 13 January 1976, 993 UNTS 244 (entered into force 1 July 1975); *Convention Concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 9 March 1977, 1037 UNTS 152 (entered into force 17 December 1975).

<sup>251</sup> Kameri-Mbote, ‘The Least Developed Countries and Climate Change Law’ (n 185) 743.

*the very health of human beings, including generations unborn*” (emphasis added).<sup>252</sup>  
The Court reaffirmed that position in *Gabčíkovo-Nagymaros Project*.<sup>253</sup>

208. As noted above, the preamble to the UNFCCC recognises climate change to be a “common concern of humankind”. Article 3(1) of the UNFCCC goes further:

*“In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, inter alia, by the following:*

*“The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities...”*<sup>254</sup> (emphasis added)

209. Article 3(1) recognises considerations of inter-generational equity, in connection with the CBDR-RC principle<sup>255</sup> (as discussed above at **Chapter VI, Part D**).
210. In addition to the express language of Article 3(1) of the UNFCCC, inter-generational considerations are frequently referenced in COP decisions and in resolutions of the UNGA in relation to climate change and protection for future generations.
211. The Court must therefore ensure Article 3 is interpreted as requiring States to consider both present and future generations when carrying out their obligations under the Climate Change Regime.<sup>256</sup>

## CHAPTER VII. LAW OF THE SEA

### **A. The Court must consider the role of the law of the sea in regulating the effects of climate change resulting from anthropogenic greenhouse gas emissions**

212. Climate change has already had severe impacts on the world’s oceans. As the planet’s greatest carbon sink, the ocean absorbs excess heat and energy released from rising greenhouse gas emissions trapped in the Earth’s system. It is estimated our oceans have absorbed approximately 90 percent of the heat generated from rising emissions. The

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<sup>252</sup> *Nuclear Weapons Advisory Opinion* (n 3) 241 [29].

<sup>253</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Judgment)* [1997] ICJ Reps 7, [53], [112], [140].

<sup>254</sup> UNFCCC (n 104) art 3(1).

<sup>255</sup> Catherine Redgwell, ‘Principles and Emerging Norms in International law: Intra- and Intergenerational Equity’ in Kevin Gray et al (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press, 2016) 193.

<sup>256</sup> UNFCCC (n 104) art 2.

impacts of climate change on Timor-Leste's maritime areas are detailed above at **Chapter IV**.

213. Recognising the relationship between climate change and our oceans, Timor-Leste participated in the ITLOS advisory opinion proceeding on climate change and the marine environment.<sup>257</sup> Timor-Leste reaffirms its submissions made in that proceeding.<sup>258</sup>
214. UNCLOS sets out a jurisdictional framework within which ocean-related climate change measures can be implemented. As stated by Judge Paik of ITLOS, “[t]he challenge facing the Tribunal is ...how to make the Convention relevant in an area in which law and realities have changed rapidly and will continue to do so”.<sup>259</sup>
215. The customary rules of treaty interpretation, mentioned above, are also applicable to the interpretation of the rights and obligations of States under UNCLOS, including Article 31(3)(c) of the VCLT which prescribes that when interpreting a treaty “any relevant rules of international law applicable in the relations between the parties” be taken into account, together with its context.<sup>260</sup> Furthermore, in accordance with the principle of “harmonious interpretation”, explained above, the interpretation of UNCLOS obligations should coincide with other applicable obligations of States Parties “to the extent possible”.<sup>261</sup>
216. Article 237 of UNCLOS specifically provides that obligations set forth in Part XII are:

*“without prejudice to the specific obligations assumed by States under special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment and to agreements which may be concluded in furtherance of the general principles set forth in this Convention”.*<sup>262</sup>

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<sup>257</sup> ITLOS, Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal) Case No. 31 (2023).

<sup>258</sup> *Timor-Leste's Verbatim Record ITLOS Advisory Opinion on Climate Change* (n 22).

<sup>259</sup> Judge Jin-Hyuk Paik, then President of ITLOS, ‘Building Transformative Partnerships for Ocean Sustainability: The Role of ITLOS’ (Speech, WMU Global Conference, 2018).

<sup>260</sup> *VCLT* (n 91) art 31(3). This approach was applied with respect to the content of UNCLOS article 192, see *South China Sea Arbitration (Philippines v China) (Award)*, (2016) PCA Case No 2013-19, 373 [941] (‘*South China Sea Arbitration*’); *Timor-Leste's Verbatim Record ITLOS Advisory Opinion on Climate Change* (n 22) 7.

<sup>261</sup> See discussion above at **Chapter V**.

<sup>262</sup> *United Nations Convention on the Law of the Sea* (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397, article 237 (‘*UNCLOS*’).



217. Article 237 thus reflects the understanding that States will continue to develop the rules of international environmental law. UNCLOS is intended to apply in harmony with the specific environmental rights and obligations of States, rather than undermining or superseding them.<sup>263</sup>
218. When it comes to the protection and preservation of the environment, the Climate Change Regime is the controlling *lex specialis*, as explained in **Chapter V**.<sup>264</sup> This is equally true as it applies to the relationship between these rules and the law of the sea.<sup>265</sup> Concluded after UNCLOS, drafters of the Climate Change Regime, including many UNCLOS Parties, were presumably aware of their obligations under UNCLOS when adopting these texts. As such, the relationship between these treaty regimes is one of complementarity, and there are no discernible normative conflicts between the relative treaties. Complementarity entails a role for the relevant UNCLOS obligations while, at the same time, it also follows that UNCLOS cannot overtake later agreements and render their mix of obligations and non-obligations redundant.<sup>266</sup>
219. Rights and obligations in UNCLOS, particularly those in its Part XII, should therefore be interpreted and understood without prejudice to, and harmoniously with, the rights and obligations of States contained in other international agreements which protect and preserve the marine environment, regulate greenhouse gas emissions, and allow for negotiations between States on climate change.
220. Part XII of UNCLOS, which addresses protection and preservation of the marine environment, provides sufficient flexibility to adapt to new challenges and scientific developments.
221. UNCLOS defines “pollution of the marine environment” in Article 1(1)(4) as:

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

<sup>263</sup> *Timor-Leste’s Verbatim Record ITLOS Advisory Opinion on Climate Change* (n 22) 8.

<sup>264</sup> Boyle, ‘Protecting the Marine Environment from Climate Change: The LOSC Part XII Regime’ (n 98) 81, 93-94.

<sup>265</sup> *Timor-Leste’s Verbatim Record ITLOS Advisory Opinion on Climate Change* (n 22) 16-17.

<sup>266</sup> *Ibid.*

*reduction of amenities”*.<sup>267</sup>

222. As a preliminary consideration, and as States making submissions in the ITLOS *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* near universally agreed, the definition of “pollution of the marine environment” in UNCLOS Article 1(1)(4) applies to anthropogenic greenhouse gas emissions.<sup>268</sup>

**B. States have an obligation to protect and preserve the marine environment from the adverse effects of climate change**

223. In its recent judgment in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, the Court acknowledged that “*all States have the obligation under customary international law to protect and preserve the marine environment*”.<sup>269</sup> Under UNCLOS, that obligation is articulated in Article 192.<sup>270</sup>

224. Article 192 is a general obligation and a framework provision. It creates a broad substantive obligation on States in respect of both the present and future condition of the marine environment. The use of “protect” requires States to prevent future damage to the marine environment. The use of “preserve” extends the obligation in Article 192 to the restoration of parts of the marine environment or ecosystems that have experienced degradation.<sup>271</sup> Consequently, Article 192 addresses both present and future impacts.<sup>272</sup>

225. Article 192 “*entails the positive obligation to take active measures to protect and preserve the marine environment, and by logical implication, entails the negative*

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<sup>267</sup> UNCLOS (n 262) art 1(1)(4).

<sup>268</sup> See for example, *Timor-Leste’s Verbatim Record ITLOS Advisory Opinion on Climate Change* (n 22) 7; *Australia’s Verbatim Record ITLOS Advisory Opinion on Climate Change* (n 124) 6; ‘Verbatim Record’ *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (International Tribunal for the Law of the Sea, 13 September 2023, ITLOS/PV.23/C31/6), 21 (People’s Republic of Bangladesh); ‘Verbatim Record’ *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (International Tribunal for the Law of the Sea, 25 September 2023, ITLOS/PV.23/C31/18), 29 (United Kingdom); ‘Verbatim Record’ *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (International Tribunal for the Law of the Sea, 20 September 2023, ITLOS/PV.23/C31/14), 32 (The European Union).

<sup>269</sup> *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia) (Judgment)* [2022] ICJ Rep 266, [95]; *Timor-Leste’s Verbatim Record ITLOS Advisory Opinion on Climate Change* (n 22) 8.

<sup>270</sup> *Timor-Leste’s Verbatim Record ITLOS Advisory Opinion on Climate Change* (n 22) 8.

<sup>271</sup> Myron H. Nordquist et al. (eds), *United Nations Convention on the Law of the Sea* (Martinus Nijhoff Publishers, 2013) Vol I, 39-40.

<sup>272</sup> *South China Sea Arbitration* (n 260) 373 [941].

*obligation not to degrade the marine environment*".<sup>273</sup> Further, the framework nature of Article 192 indicates that the content "*of the general obligation in Article 192 is further detailed in the subsequent provisions of Part XII, including Article 194, as well as by reference to specific obligations set out in other international agreements, as envisaged in Article 237 of the Convention*".<sup>274</sup>

226. Article 192 should be given an evolutionary interpretation,<sup>275</sup> and interpreted to apply to the protection and preservation of the marine environment from the adverse impacts of climate change. The scope of these obligations is to be understood harmoniously with the obligations of States under the Climate Change Regime, the *lex specialis*.

227. These obligations, as with many other obligations related to the environment in UNCLOS, are of a "due diligence" character.<sup>276</sup> As addressed above at **Chapter VI, Part C**, due diligence informs how the obligation in Article 192 must be performed in terms of the level of diligence required and the choice of measures available to a State in discharging that duty.<sup>277</sup> Whilst **Chapter VI, Part C** considers due diligence in the context of the Climate Change Regime, the reasoning set forth in that chapter applies equally to the interpretation of obligations under Article 192.

**C. States have an obligation to prevent, reduce, and control pollution entering into the marine environment, including pollution resulting from anthropogenic greenhouse gas emissions**

228. The content of Article 192 of UNCLOS is "*informed by other provisions of Part XII and other applicable rules and principles of international law*",<sup>278</sup> including Article 194.

229. Article 194 links the two statements of general principle contained in Articles 192 and 193 (see below) to the more specific rules in the subsequent articles in Part XII. Article 194 therefore informs the content of Article 192.<sup>279</sup>

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<sup>273</sup> Ibid.

<sup>274</sup> Ibid.

<sup>275</sup> *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* [2009] ICJ Rep 213, [64].

<sup>276</sup> *Timor-Leste's Verbatim Record ITLOS Advisory Opinion on Climate Change* (n 22) 9.

<sup>277</sup> Ibid.

<sup>278</sup> *South China Sea Arbitration* (n 260) 373 [941].

<sup>279</sup> Ibid [942].

230. The focus of Article 194 is on mitigation of polluting effects on the marine environment.<sup>280</sup> As set out above, the definition of “pollution of the marine environment” in UNCLOS Article 1(1)(4) applies to anthropogenic greenhouse gasses.
231. Article 194(1) obliges States “*to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities*”. The obligation to take “necessary measures” means that Article 194 is an obligation of conduct, not result.<sup>281</sup> The conduct in question requires the exercise of due diligence.<sup>282</sup> As explained above, as an obligation “of conduct”, due diligence cannot be measured by achieving a specific outcome, measured in degrees or “temperature goals”.<sup>283</sup>
232. Several of UNCLOS’ Part XII provisions, including Articles 207 and 212, refer to the adoption and existence of international rules and standards, external to UNCLOS. Those rules therefore inform the standard of conduct. Furthermore, Article 237 states that UNCLOS is “without prejudice” to the specific rights and obligations of States, in “*international agreements related to the protection and preservation of the marine environment*”.
233. For Article 237 of UNCLOS and the principle of harmonious treaty interpretation to have meaning, the correct interpretation of the more general UNCLOS obligations, cannot be to negate and override the agreement of States found in the Climate Change Regime. These nuanced and carefully negotiated texts, specific to climate change, are later in time relative to UNCLOS, and UNCLOS parties should not be assumed to have taken upon themselves conflicting obligations.<sup>284</sup>
234. The language “prevent, reduce and control” neither implies that all pollution must be prevented,<sup>285</sup> nor that anthropogenic greenhouse gas emissions must cease immediately. Measures that gradually reduce marine pollution by lowering emissions over a period

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<sup>280</sup> Boyle, ‘Protecting the Marine Environment from Climate Change: The LOSC Part XII Regime’ (n 98) 81, 86.

<sup>281</sup> Obligations of conduct and result are discussed in **Chapter VI, Part C**.

<sup>282</sup> Obligations of conduct and the concept of due diligence are discussed extensively in **Chapter VI, Part C**.

<sup>283</sup> *Australia’s Verbatim Record ITLOS Advisory Opinion on Climate Change* (n 124) 7; *Timor-Leste’s Verbatim Record ITLOS Advisory Opinion on Climate Change* (n 22) 15.

<sup>284</sup> *Timor-Leste’s Verbatim Record ITLOS Advisory Opinion on Climate Change* (n 22) 16.

<sup>285</sup> *Pulp Mills Case* (n 136) 77 [187].

of time meet the requirements of Article 194(1). Such an approach is consistent with Article 2 of the UNFCCC which sets the Convention's objective being the "*stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system*". The UNFCCC's objective is not to eliminate anthropogenic greenhouse gas emissions. Rather, the UNFCCC focuses on "stabilising" anthropogenic greenhouse gas emissions on a timescale that is "*sufficient to allow ecosystems to adapt naturally to climate change*".<sup>286</sup>

235. Article 194 of UNCLOS should also be read in the context of Article 3(3) of the UNFCCC. Article 3(3) of the UNFCCC requires States to take "*take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects*". Consistent with the precautionary principle under customary international law,<sup>287</sup> where States have evidence of a serious or irreversible risk to the marine environment, under Article 194, States must take appropriate actions to mitigate the adverse effects of climate change.

236. Importantly, the phrase "*best practicable means at their disposal and in accordance with their capabilities*" qualifies States' obligations under Article 194(1).<sup>288</sup> In other words, a State's capabilities and level of development influences the nature of the obligation of conduct imposed.<sup>289</sup> This reflects the concern of the international community that obligations under UNCLOS, applied uniformly, could impose an excessive burden on developing States and LDCs in circumstances where they:

236.1 *first*, lack the necessary capabilities and technology; and

236.2 *second*, are necessarily focussed on improving the economic wellbeing of their own peoples.

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<sup>286</sup> UNFCCC (n 104) art 2.

<sup>287</sup> The precautionary principle is discussed above at Error! Reference source not found., **Part** Error! Reference source not found..

<sup>288</sup> *Timor-Leste's Verbatim Record ITLOS Advisory Opinion on Climate Change* (n 22) 18.

<sup>289</sup> International Law Association, *Study Group on Due Diligence in International Law* (Second Report, 2016) 3, 16.

237. The CBDR-RC principle is discussed in detail at **Chapter VI, Part D**. The reasoning adopted in that Chapter applies equally in relation to Article 194 of UNCLOS.

**D. States obligations to protect and preserve the marine environment, and to prevent, reduce, and control pollution entering into the marine environment, including pollution resulting from anthropogenic greenhouse gas emissions, must be read in light of Article 193 of UNCLOS**

238. The general obligation to protect and preserve the environment is informed by, and does not negate, other rights and obligations of State Parties under UNCLOS.<sup>290</sup> Immediately following Article 192, Article 193 of UNCLOS provides that:

*“States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment”.*

239. The right is also reflected in Principle 21 of the United Nations Declaration on the Human Environment.<sup>291</sup> Article 193 is an important precursor to the principle of sustainable development, and *“demonstrates the compromise that had to be made between the proper consideration of the different economic status of States ... and the common awareness of the need to protect and preserve the marine environment”.*<sup>292</sup>

240. As is stated in the Virginia commentary:

*“[i]t is clear from the Convention as a whole (and not merely from Part XII), that the obligation of Article 192 (and with it the right of Article 193) is always subject to the specific rights and duties laid down in the Convention”.*<sup>293</sup>

241. During the negotiation of UNCLOS, discussants in the Third Committee acknowledged that the potential resources of the sea *“offered developing States a genuine opportunity to improve their living standards”.*<sup>294</sup> UNCLOS recognises that a State’s right to exploit its natural resources is not mutually exclusive from the protection and preservation of the marine environment. This is consistent with analogous rights under

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<sup>290</sup> *Timor-Leste’s Verbatim Record ITLOS Advisory Opinion on Climate Change* (n 22) 9.

<sup>291</sup> *Stockholm Declaration* (n 171) principle 21.

<sup>292</sup> Detlef Czybulka, ‘Article 193: Sovereign Right of States to Exploit Their Natural Resources’ in Alexander Pröbß (ed), *United Nations Convention on The Law of The Sea: A Commentary* (2017) 1289.

<sup>293</sup> Myron H Nordquist et al. (eds), *United Nations Convention on the Law of the Sea* (n 271) Vol I, 43.

<sup>294</sup> *Summary Record of the 7<sup>th</sup> Meeting*, Third United Nations Conference on the Law of the Sea 3<sup>rd</sup> Comm, 7<sup>th</sup> mtg, Agenda item 14 UN Doc A/CONF.62/C.3/SR.7 (18 July 1974) 338 [30].

general international law and treaties on biological diversity, the latter of which is set out in **Chapter VIII** below.<sup>295</sup>

242. Article 193 serves to qualify the content of Article 192 and vice versa. States are permitted to exploit their natural resources, subject to States' positive obligations under Articles 192 and 194 of UNCLOS to protect the marine environment.
243. Article 4(10) of the UNFCCC is discussed above in detail at **Chapter VI, Part E**. In seeking to provide a harmonious interpretation of UNCLOS, Article 193 should be read having regard to the commitments made in Article 4(10) of UNFCCC.<sup>296</sup> The UNGA resolution on ensuring access to affordable, reliable, sustainable, and modern energy for all, which was adopted by consensus in 2023, further supports this position.<sup>297</sup>
244. Article 193 represents a balance between the interests of individual States in their economic development and the universal interests in the protection and preservation of the marine environment.<sup>298</sup> The correct interpretation of Articles 192 and 194 must be read in tandem with the Article "sandwiched" between them.<sup>299</sup> LDCs should not be placed in a position where they are forced to choose between the protection of the global marine environment, and the protection of their people. The rights and obligations of States, in this regard, account for various factors. This includes the level of development of each nation in accordance with the principle of CBDR-RC, in light of different national circumstances.<sup>300</sup>
245. The notions expressed in Article 193 of UNCLOS are further reinforced in **Chapter IX, Part C** in relation to the right to development.

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<sup>295</sup> *Timor-Leste's Verbatim Record ITLOS Advisory Opinion on Climate Change* (n 22) 9.

<sup>296</sup> *Ibid.*

<sup>297</sup> *Ensuring Access to Affordable, Reliable, Sustainable and Modern Energy for All*, GA Res 78/157, UN Doc A/RES/78/157, (21 December 2022, adopted on 19 December 2023) [10].

<sup>298</sup> Myron H Nordquist et al. (eds), *United Nations Convention on the Law of the Sea* (n 271) Vol IV 49.

<sup>299</sup> *Timor-Leste's Verbatim Record ITLOS Advisory Opinion on Climate Change* (n 22) 9.

<sup>300</sup> *Ibid.*

**E. Developed States have obligations to provide technical and financial assistance to assist developing States to satisfy their obligations under Part XII of UNCLOS in addressing the adverse effects of climate change**

246. The preamble to UNCLOS recalls that in seeking to achieve States' objectives to protect and preserve the marine environment, doing so will "*contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries...*"<sup>301</sup> (emphasis added). The preamble to the Paris Agreement further notes the need to take full account "*of the specific needs and special situations of the least developed countries with regard to funding and transfer of technology*".<sup>302</sup>
247. UNCLOS and the Climate Change Regime recognise the needs of developing States, in particular LDCs, for assistance in carrying out their obligations to protect and preserve the marine environment, and to reduce greenhouse gas emissions, respectively. Articles 202 and 203 of UNCLOS reflect the unique position of developing States in trying to balance their development and the protection of the marine environment.
248. Article 202 of UNCLOS calls on States Parties to promote programs of "*scientific, educational, technical and other assistance*" in developing States, and contains an open-ended list of specific forms of assistance. Similar obligations are reflected in Articles 10, 11 and 12 of the Paris Agreement and discussed above in **Chapter VI, Parts F and G**. During the negotiation of Article 202, delegations recognised that provisions on scientific, technological, and financial assistance were required to ensure that "*no States' development [was] disproportionately hindered by observance of its international obligations*".<sup>303</sup>
249. Article 203 of UNCLOS provides preferential treatment for developing States in the allocation of funds and technical assistance from international organisations "*for the purposes of prevention, reduction and control of pollution of the marine environment or minimization of its effects*". Article 203 refers directly to the allocation of

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<sup>301</sup> UNCLOS (n 262) preamble.

<sup>302</sup> Paris Agreement (n 106) preamble.

<sup>303</sup> Myron H Nordquist et al. (eds), *United Nations Convention on the Law of the Sea* (n 271) Vol I, 100; *Timor-Leste's Verbatim Record ITLOS Advisory Opinion on Climate Change* (n 22) 19.



“*appropriate funds and technical assistance*” and requires international organisations to grant “preference” to developing States in such allocation. This implies that “*the distribution of available funds and technical assistance shall be made on the basis of need, with the developing States having priority*”.<sup>304</sup> Similarly, Article 9 of the Paris Agreement aims to reinforce this support. It obligates developed States to “*provide financial resources to assist developing country Parties with respect to both mitigation and adaptation*”.<sup>305</sup>

250. Articles 202 and 203 of UNCLOS seek to “*ease the burden which the law could impose upon States not adequately equipped to meet those obligations*”.<sup>306</sup> When read in conjunction with the technical and financial assistance provisions in the Climate Change Regime, it is clear that LDCs like Timor-Leste, are reliant on support from the international community to help them fulfil their obligations to protect and preserve the marine environment from the adverse effects of climate change.

251. Financial and technology transfers are critical to reduce the immense challenges developing States face in balancing the need to protect the marine environment without compromising the social security of their people.

**F. States have a duty to cooperate in respect of their obligations under Part XII of UNCLOS to protect the marine environment from the adverse effects of climate change**

252. The preamble to UNCLOS recognises that States agreeing the text of UNCLOS did so “*in a spirit of mutual understanding and cooperation*”. Indeed, there must be meaningful cooperation between high emitter States and low emitter States to meet States’ shared, but ultimately differentiated, obligations; both under UNCLOS, to

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<sup>304</sup> Myron H Nordquist et al. (eds), *United Nations Convention on the Law of the Sea* (n 271) Vol IV, 108.

<sup>305</sup> Financial assistance under the Climate Change Regime is discussed in detail at **Chapter VI, Part Chapter VI.F; Timor-Leste’s Verbatim Record ITLOS Advisory Opinion on Climate Change** (n 22) 19.

<sup>306</sup> Myron H Nordquist et al. (eds), *United Nations Convention on the Law of the Sea* (n 271) Vol I, 107.

protect the marine environment, and under the Climate Change Regime to manage and reduce emissions.<sup>307</sup>

253. Under Article 197 of UNCLOS, States are required to cooperate, considering shared interests to protect and preserve the marine environment, “*taking into account characteristic regional features*”.<sup>308</sup> Accordingly, specially affected regions and States with lesser capacities, require assistance from developed States to cooperate in the development of mitigation and adaptation standards.
254. The duty to cooperate in the context of the Climate Change Regime is addressed extensively at **Chapter VI, Part G**.<sup>309</sup> Further, the CBDR-RC principle itself is addressed extensively at **Chapter VI, Part D**. The reasoning adopted in those Chapters applies equally in relation to the duty to cooperate under UNCLOS to protect and preserve the marine environment from the adverse effects of climate change, in particular, anthropogenic greenhouse gas emissions.

## CHAPTER VIII. BIOLOGICAL DIVERSITY

### A. The interpretation of the Convention on Biological Diversity is informed by other rules of international law

255. The customary rules of treaty interpretation, as set out above in **Chapter V**, are applicable in ascertaining the relationship between the CBD and the Climate Change Regime.
256. The States Party to the CBD and the UNFCCC are identical. The CBD was adopted in May 1992, whilst the UNFCCC was signed in June 1992. States Parties to the CBD were presumably aware of the parallel negotiations over the UNFCCC.
257. The CBD specifies its relationship with other rules of international law in its Article 22:<sup>310</sup>

“(1) *The provisions of this Convention shall not affect the rights and obligations*

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<sup>307</sup> UNCLOS (n 262) art 197.

<sup>308</sup> Ibid.

<sup>309</sup> See in particular **paragraphs 180 to 187 and 192 to 198** in relation to the duty to cooperate in mitigation and adaptation measures, and the duty to cooperate in the prevention of transboundary harm, respectively.

<sup>310</sup> *Convention on Biological Diversity*, 1760 UNTS 69 (signed 5 June 1992, entered into force 29 December 1993), art 22 (*‘Convention on Biological Diversity’*).

*of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.*

*(2) Contracting Parties shall implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea” (emphasis added).*

258. As such, the CBD is mutually supportive of other treaties and without prejudice to them (other than extreme situations where the exercise of rights under earlier agreements would threaten or cause serious damage to biological diversity).<sup>311</sup> This leaves a relatively wide scope for interpreting the rights and obligations of States under the CBD, where States have other obligations under international law.<sup>312</sup> The CBD Conference of the Parties (CBD COP) has adopted a wide range of decisions which emphasise and endorse cooperation between the CBD and other conventions and instruments.<sup>313</sup>

259. Thus, the CBD should be interpreted in light of the rights and obligations of States contained in other international agreements, including those which:

259.1 regulate anthropogenic greenhouse gas emissions; and

259.2 allow for negotiations between States on climate change.

**B. States have a general obligation to conserve and sustainably use and manage its natural resources, including its biological diversity**

260. “Biological diversity”, as defined in Article 2(1) of the CBD,<sup>314</sup> means the “*variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part...*”. As

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<sup>311</sup> Convention on Biological Diversity (n 310) art 22; *Marine and Coastal Biodiversity: Review, Further Elaboration and Refinement of the Programme of Work*, UN Doc UNEP/CBD/SBSTTA/8/INF/3/Rev.1 (22 February 2003) 6 [16].

<sup>312</sup> Rüdiger Wolfrum and Nele Matz, ‘The Interplay of the United Nations Convention on the Law of the Sea and the Convention on Biological Diversity’ (2000) 4 *Max Planck Yearbook United Nations Law* 445, 475.

<sup>313</sup> See, for example, *Relationship of the Convention with the Commission on Sustainable Development an biodiversity-related conventions, other international agreements, institutions and processes of relevance*, UN Doc UNEP/CBD/COP/DEC/III/21 (4 November 1996) [2]; *The relationship of the Convention on Biological Diversity with the Commission on Sustainable Development an biodiversity-related conventions, other international agreements, institutions and processes of relevance*, UN Doc UNEP/CBD/COP/DEC/IV/15 (4-15 May 1998) [3]; *Cooperation with other Biodiversity-related Conventions*, UN Doc UNEP/CBD/COP/DEC/II/13 (6-17 November 1995); *Cooperation with other bodies*, UN Doc UNEP/CBD/COP/DEC/V/21 (15-26 May 2000); *Cooperation with other organisations, initiatives and conventions*, UN Doc UNEP/CBD/COP/DEC/VI/20 (7-19 April 2002); *Cooperation with other conventions and international organisations and initiatives*, UN Doc UNEP/CBD/COP/DEC/VII/26 (13 April 2004).

<sup>314</sup> Convention on Biological Diversity (n 310) art 2(1).

such, biological diversity is a part of the broader term “natural resources”, which also includes non-living organisms.<sup>315</sup> “Natural resources” thus includes a biological diversity component.

261. The international community has acknowledged the mutual links between biological diversity and climate change, in that biological diversity contributes to climate change mitigation, while climate change can lead to degradation of both land and marine biological diversity.<sup>316</sup>
262. States have recognised that the linked events of climate change and ocean acidification have significant impacts on biological diversity.<sup>317</sup> In May 2000, the CBD COP first recognised the need for mitigating action to combat climate change, in order to protect biological diversity.<sup>318</sup> There, Decision V/15 urged States Parties and other Governments to:

*“explore possible ways and means by which incentive measures promoted through the Kyoto Protocol under the United Nations Framework Convention on Climate Change can support the objectives of the Convention on Biological Diversity”*.<sup>319</sup>

263. Pursuant to Article 6 of the CBD, Parties shall develop and integrate national strategies for the conservation and sustainable use of biological diversity.<sup>320</sup> Parties therefore have a procedural obligation under the CBD to implement national policies that address the sustainable use of biological diversity in a way which will not lead to long-term decline.
264. The CBD COP has made various decisions which recognise and emphasise the principle of intergenerational equity in the conservation and sustainable use of biological diversity. For example, in adopting the Kunming-Montreal Global

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<sup>315</sup> Ulrich Beyerlin and Vanessa Holzer, ‘Conservation of Natural Resources’ in *Max Planck Encyclopedia of Public International Law* (Oxford University Press) (Web Page) [1] <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1569?rskey=FkBuHS&result=1&prd=MPIL>>.

<sup>316</sup> *Glasgow Climate Pact* (n 176) 2; *Biodiversity and climate change*, UN Doc UNEP/CBD/COP/DEC/IX/16 (9 October 2008); *Biodiversity and climate change*, UN Doc UNEP/CBD/COP/DEC/14/5 (30 November 2018); *Marine and coastal biodiversity*, UN Doc UNEP/CBD/COP/DEC/X/29 (29 October 2010) [7]-[8].

<sup>317</sup> United Nations Framework Convention on Climate Change, *Nationally determined contributions under the Paris Agreement*, UN Doc FCCC/PA/CMA/2021/8/Rev.1 (25 October 2021) [158]; Secretariat of the Convention on Biological Diversity, *CBD Technical Series No 41: Connecting Biodiversity and Climate Change Mitigation and Adaptation: Report of the Second Ad Hoc Technical Expert Group on Biodiversity and Climate Change* (2009) (Web Page) 8-12 <<https://www.cbd.int/doc/publications/cbd-ts-41-en.pdf>>.

<sup>318</sup> *Incentive Measures*, UN Doc UNEP/CBD/COP/DEC/V/15 (15-26 May 2000).

<sup>319</sup> *Ibid* [6].

<sup>320</sup> *Convention on Biological Diversity* (n 310) art 2.

Biodiversity Framework (**Kunming-Montreal Framework**), the CBD COP decided that the framework must be:

*“guided by the principle of intergenerational equity which aims to meet the needs of the present without compromising the ability of future generations to meet their own needs and to ensure meaningful participation of younger generations in decision making processes at all levels”* (emphasis added).<sup>321</sup>

265. As discussed in **Chapter VI, Part H**, the Court should interpret the obligations of States with a view of recognising and protecting the interests of future generations.
266. Furthermore, under Article 14(1)(a) of the CBD, Parties shall undertake environmental impact assessments and introduce arrangements to ensure the minimisation of “*significant adverse effects on biological diversity*” arising from proposed projects. “Significant adverse effects” is not defined in the CBD. Timor-Leste is of the view that activities which cause “significant adverse effects” are those which significantly contribute to the loss and degradation of biodiversity, both directly and indirectly, such as deforestation, urbanisation or international economic climate.<sup>322</sup> As with “significant transboundary harm”, significant is more than “detectable” but need not be “serious” or “substantial”, but must be susceptible of being measured against factual and objective standards.<sup>323</sup> Where there is a risk of “significant adverse effects”, the obligation of prevention arises (see **paragraphs 192 to 198** above).<sup>324</sup>
267. Importantly, States Parties are obliged to (“shall”) undertake “*in-situ conservation*” on the basis of Article 8 of the CBD. “In-situ conservation” means the “*conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties*”.<sup>325</sup>

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<sup>321</sup> *Kunming-Montreal Global Biodiversity Framework*, UN Doc UNEP/CBD/COP/DEC/15/4 (19 December 2022) [7] (‘*Kunming-Montreal Global Biodiversity Framework*’).

<sup>322</sup> Lyle Glowka et al. ‘A Guide to the Convention on Biological Diversity’ (1994) *IUCN Environmental Law Centre: Environmental Policy and Law Paper No. 30*, 66 and 87.

<sup>323</sup> *Transboundary Harm Articles*, 152.

<sup>324</sup> *Pulp Mills Case* (n 136) 55 [101]; *Costa Rica v Nicaragua* (n 236) 720 [153]; see *Indus Waters Kishenganga (Pakistan v India)*, PCA Case No. 2011-01, Partial Award (18 February 2013) 170 [451], and Final Award (20 December 2013) 39 [112].

<sup>325</sup> *Convention on Biological Diversity* (n 310) art 2.

268. Conservation and sustainable use of biological diversity, not unlike other areas of climate and environmental governance, sets targets that seek to synthesise the practical goals of States Parties to the CBD. As such, the CBD COP adopted the Aichi Biodiversity Targets in Decision X/2 of 2010,<sup>326</sup> as put forward by the Executive Secretary of the CBD.<sup>327</sup> States Parties have largely failed to meet most of the Aichi Biodiversity Targets by the 2020 timeline.<sup>328</sup> The Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment of January 2017 confirmed that “*States are not meeting the standards they themselves have set for the protection of biodiversity*”.<sup>329</sup>
269. In 2014, States, including Timor-Leste, adopted the Small Island Developing States Accelerated Modalities of Action (**SAMOA Pathway**)<sup>330</sup> which has broad objectives targeting sustainable economic development, climate change mitigation and adaption, and the protection of biodiversity and environmental health.<sup>331</sup> The SAMOA Pathway recognises the leadership of SIDS to conserve and sustainably use oceans and natural resources,<sup>332</sup> and encourages developed States to fulfil commitments to support SIDS.<sup>333</sup> In particular, it urges developed States to:
- “increase technology, finance and capacity-building support to enable increased mitigation ambition and adaption actions on the part of developing country parties”*.<sup>334</sup>
270. Following the adoption of the Aichi Biodiversity Targets and the SAMOA Pathway, CBD COP15 adopted the Kunming-Montreal Framework as a means to implement the

<sup>326</sup> *The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets*, UN Doc UNEP/CBD/COP/DEC/X/2 (29 October 2010).

<sup>327</sup> *Revised and Updated Strategic Plan: Technical Rationale and Suggested Milestones and Indicators: Note by the Executive Secretary*, UN Doc UNEP/CBD/COP/10/9 (18 July 2010).

<sup>328</sup> See *Review of Progress in the Implementation of the Convention and the Strategic Plan for Biodiversity 2011-2020*, UN Doc CBD/SBI/3/2 (26 June 2020); Graeme Buchanan et al, ‘Assessment of national-level progress towards elements of the Aichi Biodiversity Targets’ (2020) 116 *Ecological Indicators*.

<sup>329</sup> John H Knox, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/HRC/34/49 (19 January 2017) [48].

<sup>330</sup> United Nations General Assembly, *SIDS Accelerated Modalities of Action (SAMOA) Pathway*, UN Doc A/RES/69/15 (15 December 2014) (*‘SAMOA Pathway’*).

<sup>331</sup> United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, ‘Final Report: A Toolkit for Monitoring and Reporting on the SAMOA Pathway’ (Web Page, 2023) 12 <[https://www.un.org/ohrls/sites/www.un.org.ohrls/files/files/finalreport\\_sp\\_160123.pdf](https://www.un.org/ohrls/sites/www.un.org.ohrls/files/files/finalreport_sp_160123.pdf)>.

<sup>332</sup> *SAMOA Pathway* (n 330) Annex [18].

<sup>333</sup> *Ibid* Annex [44].

<sup>334</sup> *Ibid* Annex [39].

obligations under the CBD, noting that the current efforts under the CBD have been insufficient to slow the current rate of global biodiversity degradation.<sup>335</sup>

271. While the Kunming-Montreal Framework is not legally binding, the Framework informs the interpretation of the CBD.<sup>336</sup> Target 8 of the Kunming-Montreal Framework seeks for States Party to “*minimise the impact of climate change and ocean acidification on biodiversity*”. The Kunming-Montreal Framework provides the strategic plan for conservation obligations and is highly complementary with the Paris Agreement.<sup>337</sup> States retain rights to exploit natural resources within their national jurisdiction in accordance with their own national environmental policies and general international law.

*Principle of permanent sovereignty over natural resources*

272. The principle of permanent sovereignty over natural resources (**PSNR**) is derived from UNGA Resolution 1803/VII,<sup>338</sup> which declared the existence of “[t]he right of peoples and nations to permanent sovereignty over their natural wealth and resources”, including their disposal in accordance with their national interest.<sup>339</sup>
273. The principle of PSNR is considered customary international law.<sup>340</sup> The wording of UNGA Resolution 1803/VII has subsequently been repeated in international instruments,<sup>341</sup> and the Court in *East Timor*<sup>342</sup> and in *Armed Activities on the Territory of the Congo*,<sup>343</sup> recognised the principle’s status as customary international law. The

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<sup>335</sup> Tim Stephens, ‘Introductory Note to the Kunming-Montreal Global Biodiversity Framework’ (2023) 62(5) *International Legal Materials* 868; *Kunming-Montreal Global Biodiversity Framework* (n 321).

<sup>336</sup> Charlotte Streck ‘Synergies between the Kunming-Montreal Global Biodiversity Framework and the Paris Agreement: the role of policy milestones, monitoring frameworks and safeguards’ (2023) 23(6) *Climate Policy* 800 [3.1].

<sup>337</sup> *Ibid* [3]; *The UAE Consensus* (n 108) 6 [33].

<sup>338</sup> United Nations General Assembly, *Permanent sovereignty over natural resources*, UN Doc A/RES/1803/XVII (14 December 1962) (‘1962 Permanent sovereignty over natural resources resolution’).

<sup>339</sup> *Ibid*.

<sup>340</sup> *Texaco Overseas Petroleum Co. and California Asiatic Oil Co. v. Government of Libyan Arab Republic*, Award of 19 January 1977, 17 ILM (1978), 1; Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge, 1997) 357; See, for example, Constitution of the Republic of Namibia (Namibia) art 100; Constituição da República Federativa do Brasil Constitution of the Federative Republic of Brazil (Brazil) art 20. See also Antonio R Parra, ‘Principles Governing Foreign Investment, as Reflected In National Investment Codes’ in Ibrahim F I Shihata (ed), *Legal Treatment of Foreign Investments: The World Bank Guidelines* (Martinus Nijhoff, 1993) 311, 311–12.

<sup>341</sup> Charter of Economic Rights and Duties of States, UNGA Res 3281 XXIX (1974) art 2.

<sup>342</sup> *East Timor Case* (n 18).

<sup>343</sup> *Armed Activities on the Territory of the Congo (Congo v Uganda) (Judgment)* [2005] ICJ Rep 168 [244]; 1962 Permanent sovereignty over natural resources resolution (n 338); United Nations General Assembly, *Declaration on the Establishment of a New International Economic Order*, UN Doc A/RES/3201/S.VI (1 May 1974).

principle is based on other established and uncontested principles such as sovereignty and territorial integrity.<sup>344</sup>

274. PSNR has been codified in Article 3 of the CBD:

*“States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”.*

275. The principle informs the specific obligations under the CBD and has broader relevance to the questions before the Court.

276. The principle of PSNR entails a right and duty to use those natural resources for national development, economic advancement and the well-being of the people within the State.<sup>345</sup> In the early circulations of principles to be included in the Stockholm Declaration, the “delicate balance” between rights and obligations arising from PSNR was debated between States.<sup>346</sup> Developing States sought the inclusion of sovereignty at the forefront of the principle,<sup>347</sup> with the final Principle 21 reflecting the wording of Article 3 of the CBD.

277. As a signatory to the CBD, and under customary international law, Timor-Leste has a sovereign right to exploit its natural resources pursuant to its own environmental policies and its obligations under international law.

278. The permanent right of a State to exploit their natural resources in accordance with international law is necessarily intertwined with peoples’ right to self-determination.<sup>348</sup>

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344 *Charter of the United Nations*, opened for signature 26 June 1945, 1 UNTS XVI (entered into force 24 October 1945), arts 1(2), 2(1), 2(2) and 2(4), and 55 (*‘UN Charter’*); see also *Rio Declaration* (n 146) principle 2; *Stockholm Declaration* (n 171) principle 21; Teresa Fajardo del Castillo, ‘The General Principles of International Law and the Principles of International Environmental Law in Biodiversity-Related Conventions’ in *Biological Diversity and International Law*, Mar Campins Eritja and Teresa Fajardo del Castillo (eds) (Springer, 2021).

345 *1962 Permanent sovereignty over natural resources resolution* (n 338).

346 United Nations Conference on the Human Environment, *Establishment of the Working Group on the Declaration on the Human Environment*, UN Doc A/CONF.48/PC/WG.1(II)/CRP.5 (June 1972) [74], [77].

347 United Nations Conference on the Human Environment, *Joint Proposal of Brazil, Egypt and Yugoslavia*, UN Doc A/CONF.48/PC/WG.1(II)/CRP.3/Rev.1 (5 January 1972) 2.



The right is of critical importance to developing States and is further enunciated in **Chapter IX, Part D**.

279. For Timor-Leste, being an LDC and a SIDS, PSNR is particularly applicable and necessary for fulfilling Timor-Leste's peoples' right to self-determination, including its ability to pursue sustainable economic development.

*Limits to the sovereign right to use biological resources*

280. PSNR is not without limitation. Article 3 of the CBD creates a duty to “*ensure that activities within State jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction*”. Article 3 thus reflects the obligations of States to prevent significant transboundary harm (see **Chapter VI, Part G**) within the biodiversity context.<sup>349</sup>

281. In essence, Article 3 provides that obligations in the CBD, do not infringe upon a States' right to exploit resources within the limits of their national jurisdiction, and which they can choose to regulate.<sup>350</sup> As such, States retain the discretion to regulate their biodiversity in accordance with their domestic laws and policy. The specific obligations in Articles 6, 8, and 10 of the CBD emphasise that States have responsibility for the sustainable use and conservation of their natural resources, particularly through use of the term “*shall, as far as possible and as appropriate*”.<sup>351</sup> While “shall” creates an obligation for States, “as far as possible and as appropriate” caveats that obligation to the reasonable limitations of the State, similar to the aforementioned principle of CBDR-RC.

**C. States have obligations to cooperate on the conservation and sustainable use of biological diversity, particularly in areas beyond national jurisdiction**

282. As referred to above, the duty to cooperate is a fundamental principle of international environmental law. The CBD notes in its preamble that “*biological diversity is a*

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<sup>349</sup> Secretariat of the Convention on Biological Diversity, ‘Handbook of the Convention on Biological Diversity’ (2005) 133 (‘*CBD Handbook of the Convention on Biological Diversity*’); see also *Stockholm Declaration* (n 171) principle 21; *1962 Permanent sovereignty over natural resources resolution* (n 338).

<sup>350</sup> Christine Willmore ‘Sovereignty, conservation and sustainable use’ in E. Morgera & J. Razzaque (eds), *Elgar Encyclopedia of Environmental Law: Volume 3: Biodiversity and nature protection law* (Edward Elgar Publishing, 2014) vol. 3, 31–43.

<sup>351</sup> *Convention on Biological Diversity* (n 310) arts 6, 8, 10.

*common concern of humankind*”, as well as stressing the importance of “*global cooperation among States and intergovernmental organisations*” for the conservation of biological diversity and the sustainable use of its components.<sup>352</sup> In areas beyond national jurisdiction,<sup>353</sup> international cooperation to ensure conservation is imperative to address concerns for future sustainability.<sup>354</sup>

283. With regard to conservation and sustainable use of biological diversity, the duty to cooperate is two-fold:

283.1 the duty to cooperate for conservation and sustainable use of biological diversity; and

283.2 the duty to cooperate in the procedures of the CBD and the Agreement under UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (**BBNJ Agreement**).

*Duty to cooperate for the conservation and sustainable use of biological diversity*

284. The CBD, being a framework agreement, serves to “*structure a legal regime ... with a forward-looking vision*”.<sup>355</sup> This framework’s principles serve as a basis for cooperation between States Parties, who are then charged with defining the details of cooperation in separate agreements (through the CBD COP).<sup>356</sup>

285. The CBD contains several provisions which expressly recognise the duty to cooperate in the context of obligations in the Convention.<sup>357</sup> For example, in Article 5:

*“Each Contracting Party shall, as far as possible and as appropriate, cooperate with other Contracting Parties, directly or, where appropriate, through*

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<sup>352</sup> Ibid preamble.

<sup>353</sup> Being the high seas and the Area; *Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction*, GA Res 77/321, UN Doc A/77/L.82 (adopted 1 August 2023) art 1 (*‘BBNJ Agreement’*).

<sup>354</sup> Byomkesh Talukder, Keith W Hipel, Gary W van Loon, ‘Slow-onset events (SOEs) and future sustainability’ (2022) 58 *Current Opinion in Environmental Sustainability*, 10, 12, 13; *Transboundary Water Management Cooperation Crucial for Sustainable Development, Peace, Security, Speakers Stress at Conference’s Fourth Interactive Dialogue*, UN Doc ENV/DEV/2056 (23 March 2023).

<sup>355</sup> Teresa Fajardo del Castillo, ‘Principles and Approaches in the Convention on Biological Diversity and Other Biodiversity-Related Conventions in the Post-2020 Scenario’ in Mar Campins Eritja and Teresa Fajardo del Castillo (eds) *Biological Diversity and International Law* (Springer, 2021); Laurence Boisson de Chazournes and Sandrine Maljean du Bois, ‘Principes de Droit International de l’Environnement’ (2010) *Jurisclasseur Environnement et Développement Durable Fasc 1*, 1–22.

<sup>356</sup> del Castillo, ‘Principles and Approaches in the Convention on Biological Diversity and Other Biodiversity-Related Conventions in the Post-2020 Scenario’ (n 355).

<sup>357</sup> *Convention on Biological Diversity* (n 310) arts 5, 8, 9, 10, 12, 13(b), 18(1)–(3), and 28(1).

*competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity”.*

286. Article 8 of the BBNJ Agreement provides a stronger commitment for States to cooperate to achieve the BBNJ Agreement’s objectives:

*“Parties shall cooperate under this Agreement for the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including through strengthening and enhancing cooperation with and promoting cooperation among relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies in the achievement of the objectives of this Agreement”.*

287. As stated above at **paragraph 267**, the use of the word “shall” in Articles of the CBD and Article 8 of the BBNJ Agreement indicates a legal obligation. Within the context of the above instruments, the obligation to cooperate on matters of biological diversity – both terrestrial and marine – is an obligation of conduct.<sup>358</sup>

*Duty to cooperate in the procedures of the CBD and the BBNJ Agreement*

288. The principle of international cooperation in international environmental law includes a duty to promote the negotiation of treaties and other international instruments.<sup>359</sup> States are obliged under Articles 23 and 28 of the CBD to cooperate within the CBD COP, and to formulate and adopt protocols to the CBD. The BBNJ Agreement provides that *“Parties shall cooperate in order to prevent disputes”*,<sup>360</sup> creating a positive obligation for the Parties to actively cooperate on issues of biological diversity beyond national jurisdictions to avoid disputes.

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<sup>358</sup> See Rajamani, ‘Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics’ (n 118) 493– 514; Bodansky, ‘The Legal Character of the Paris Agreement’ (n 118) 142– 150; Bodle and Oberthür, ‘The Legal Form of the Paris Agreement and Nature of its Obligations’ (n 118) 91– 103.

<sup>359</sup> del Castillo, ‘Principles and Approaches in the Convention on Biological Diversity and Other Biodiversity-Related Conventions in the Post-2020 Scenario’ (n 355).

<sup>360</sup> *BBNJ Agreement* (n 353) art 56.

**D. Developed States have obligations to provide technical, scientific and financial assistance to assist developing States to satisfy their obligations under the Convention on Biological Diversity**

289. The CBD obliges developed States Parties to provide assistance to developing States Parties:

*“[t]he extent to which developing country Parties will effectively implement their commitments under this Convention will depend on the effective implementation by developed country Parties of their commitments under this Convention related to financial resources and transfer of technology”.*<sup>361</sup>

290. The specific obligations imposed on developed States Parties under the CBD to share and facilitate technology and training for developing States<sup>362</sup> are set out in several Articles.<sup>363</sup>

291. The language in CBD Article 8 (“[e]ach Contracting Party *shall*, as far as possible and as appropriate ... (m) Cooperate in providing financial and other support... particularly to developing countries” (emphasis added))<sup>364</sup> indicates that the obligation to provide financial support for developing countries’ conservation efforts is an obligation of conduct. In Decision II/7, the CBD COP emphasised and stressed the importance of capacity-building and adequate financial support to enable developing countries to meet their conservation commitments under the CBD.<sup>365</sup> This was reaffirmed in Decision III/9.

292. The specific obligation in Article 12 requires States to consider the needs of developing States and to “*cooperate in the use of scientific advances in biological diversity research*” as well as “*promote and encourage*” research targeted toward the conservation and sustainable use of biological diversity, particularly in developing States. Article 12 has been interpreted as a “cornerstone” of the CBD owing to its focus on research and training as is directly relevant to all other obligations.<sup>366</sup>

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<sup>361</sup> *Convention on Biological Diversity* (n 310) art 20(4).

<sup>362</sup> *CBD Handbook of the Convention on Biological Diversity* (n 349) 201.

<sup>363</sup> See also *Convention on Biological Diversity* (n 310) arts 8, 9, 12, 16(1), 20(2), 20(5), 20(6), 20(7).

<sup>364</sup> See also *ibid* art 9(e).

<sup>365</sup> *Consideration of Articles 6 and 8 of the Convention*, UNEP/CBD/COP/DEC/II/7 (6-17 November 1995).

<sup>366</sup> Glowka et al. ‘A Guide to the Convention on Biological Diversity’ (n 366) 65.

293. Decision XIII/23 of the CBD COP concerns States' obligations with regard to capacity building, technical, and scientific cooperation.<sup>367</sup> It encourages developed States Parties to implement Article 12 of the CBD, and further provide a "short-term action plan" (being from 2017-2020) to meet the obligations in Article 12.<sup>368</sup> The final report on the implementation of the short-term action plan measured success against the Aichi Biodiversity Targets. It concluded that the plan was largely successful for those Parties who implemented activities. However, the list of States Parties was short, being: Japan, the Republic of Korea, Germany, Sweden, and the European Union.<sup>369</sup> Subsequently, the CBD COP highlighted that the lack of adequate means for implementation of the CBD is a persistent obstacle for developing States meeting their obligations and called, in this context, for increased international cooperation.<sup>370</sup>
294. With regard to Articles 16, 17, and 18 of the CBD, which address obligations in relation to capacity-building in technology, information, and science, Decision XV/8 of the CBD COP implements the "*long-term strategic framework for capacity-building and development*", with a vision that by 2050, all societies will "*effectively live in harmony with nature*".<sup>371</sup> Acknowledging the capability gaps between developed and developing States, the long-term vision ultimately seeks to support the effective and sustainable implementation of the Kunming-Montreal Framework.<sup>372</sup>
295. Part V of the BBNJ Agreement also creates specific obligations for States to cooperate and ensure capacity-building for developing States Parties to achieve marine conservation goals.<sup>373</sup> Article 40 specifically provides for support to "*developing States Parties, in particular the least developed countries, ... small island developing states, ... through capacity-building and the development and transfer of marine*

<sup>367</sup> *Capacity-building, technical and scientific cooperation, technology transfer and the clearing-house mechanism*, UN Doc UNEP/CBD/COP/DEC/XIII/23 (16 December 2016).

<sup>368</sup> *Ibid* Annex.

<sup>369</sup> *Final Report on the Implementation of the Short-term Action Plan (2017-2020) to Enhance and Support Capacity Building for the Implementation of the Convention and its Protocols*, UN Doc UNEP/CBD/COP/15/INF/5 (24 November 2022) [4]-[5].

<sup>370</sup> *Review of progress in the implementation of the Convention and the Strategic Plan for Biodiversity 2011-2020 and the achievement of the Aichi Biodiversity Targets*, UN Doc UNEP/CBD/COP/DEC/15/3 (19 December 2022) [5].

<sup>371</sup> *Capacity-building and development and technical and scientific cooperation*, UN Doc UNEP/CBD/COP/DEC/15/8 (19 December 2022).

<sup>372</sup> *Ibid*; see also UNEP/CBD/COP/DEC/VII/29, UNEP/CBD/COP/DEC/VIII/12, UNEP/CBD/COP/DEC/IX/14, UNEP/CBD/COP/DEC/X/15, UNEP/CBD/COP/DEC/X/16, UNEP/CBD/COP/DEC/XII/2 B, UNEP/CBD/COP/DEC/XIII/23 and UNEP/CBD/COP/DEC/XIII/31.

<sup>373</sup> *BBNJ Agreement* (n 353) arts 41, 42.

*technology*” to achieve objectives in relation to marine genetic resources, area-based management tools, and environmental impact assessments. This includes human, technical, institutional, financial, and technological capacity-building.<sup>374</sup> The BBNJ Agreement envisages capacity-building endeavours such as data sharing, training, transfer of technological resources, financial support, or knowledge exchange programs.<sup>375</sup>

## CHAPTER IX. HUMAN RIGHTS

### A. Climate change has significant effects on the enjoyment of human rights and States have a duty to take action to prevent or respond to the effects of climate change on human rights

296. 2015 represented a clear tipping point in the relationship between human rights and climate change. The Preamble to the Paris Agreement expressly recognises this relationship:

*“Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity”*.<sup>376</sup>

297. This is the first time such a provision has been included in a treaty that addresses climate change.<sup>377</sup> The Paris Agreement signifies that the international community considers that *“climate change does interfere with the enjoyment of human rights protected by international law, and that this interference will greatly increase over time unless current climate policy dramatically changes”*.<sup>378</sup>

298. The effects of climate change may infringe on several human rights, including the right to life, the right to a clean, healthy, and sustainable environment, the right to food,

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<sup>374</sup> Ibid Part V.

<sup>375</sup> Ibid art 44.

<sup>376</sup> *Paris Agreement* (n 106) preamble.

<sup>377</sup> Klein et al., *The Paris Agreement on Climate Change: Analysis and Commentary* (n 118) 114; John H Knox, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc A/HRC/31/52 (1 February 2016), 6 [20].

<sup>378</sup> John H Knox, ‘Human Rights Principles and Climate Change’ in Kevin R Gray et al. (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press, 2016) 215.

water, and housing, the right to work, the right to development, the right to self-determination, and the rights of the child. In the interest of brevity, Timor-Leste will only focus in this submission on a few rights: the right to work, the right to development, the right of self-determination, and the rights of the child. In some of these contexts, as will be explained, the capacities and level of development of the particular States bare on the content of the human rights obligations.

**B. States’ response to climate change mitigation and adaptation must not infringe on the right to work, and must provide for just and favourable conditions of work**

299. Article 6(1) of ICESCR provides that States Parties “*recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right*”. Tied to the right to work in Article 6, is the right of all to enjoy “*just and favourable conditions of work*” as detailed in Article 7. The right to work is essential for the realisation of other human rights and contributes to the survival of individual citizens and to that of their family.
300. As a preliminary consideration, Articles 2(1) and 4 of ICESCR provide important contextualisation to the obligation of States in fulfilling the right to work. Article 2(1) recognises that States Parties will cooperate “*with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures*” (emphasis added). Article 4 further provides that States may “*subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society*” (emphasis added).
301. Developing States, in particular LDCs, face several competing priorities including poverty alleviation, achieving social and economic development, and also enhancing respect for human rights. Whilst developing States make substantial efforts to fulfil their human rights obligations, it is important to recognise that a developing State’s ability to fulfil their obligations to promote human rights must be considered in the context of the respective capabilities and level of development. Consequently, the

realisation of rights under ICESCR can be reflected progressively and in accordance with a States' available resources so as not to compromise its social and economic development. In this sense, such considerations under human rights law are similar to those underpinning the CBDR-RC principle in the Climate Change Regime (as discussed above at **Chapter VI, Part D**).

302. As discussed above at **Chapter VI, Part E**, States' responses to the adverse effects of climate change must avoid unfairly prejudicing developing States, and in particular LDCs. This must be taken into account when interpreting the scope of a States' human rights obligations. Just as other bodies of law may be relevant to the correct interpretation of the Climate Change Regime, so too may the Climate Change Regime be relevant for the correct interpretation of human rights obligations.
303. The preamble to the Paris Agreement reinforces the need to take into account "*the imperatives of a just transition of the workforce and the creation of decent work and quality jobs in accordance with nationally defined development priorities*".
304. As we approach 2030, greater action is needed to implement mitigation and adaptation projects. In its 2023 annual resolution on *Protection of global climate for present and future generations of humankind*, the UNGA stated that "*low greenhouse gas emission development can create employment opportunities and quality jobs*".<sup>379</sup> However, the transition will also see jobs in high polluting industries, such as fossil fuels or the agricultural sector, be eliminated or rendered obsolete.
305. Timor-Leste is reliant on revenues generated from fossil fuel production to provide basic services to its people and pursue its sustainable economic development. Crude petroleum and other petroleum products constitute Timor-Leste's primary export market and have comprised as much as 90 percent of Timor-Leste's exports in recent years.<sup>380</sup> The oil and gas industry has been for some time, and continues to be, Timor-Leste's greatest source of State budget revenue, and the role it has played in kick-

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<sup>379</sup> 2023 *Global Climate and Future Generations Resolution* (n 4) preamble.

<sup>380</sup> *WTO Timor-Leste Profile* (n 68).



starting and developing Timor-Leste's nascent economy following its independence has been critical.<sup>381</sup>

306. Further, Timor-Leste faces high unemployment rates. Much of Timor-Leste's population does not currently have the necessary skills and / or training to move into jobs created as part of the transition to net zero.
307. It is thus fundamental that the right to work is respected as part of the transition to net zero. As discussed above in **Chapter VI, Part E**, the ability of developing States to adopt climate adaptation technologies is conditional on developed States meeting their obligations to provide technical, financial, and capacity building resources in accordance with their obligations under the Climate Change Regime.<sup>382</sup>
308. As stated in Article 4(10) of the UNFCCC, States must take into consideration the implementation of commitments made under the UNFCCC, particularly for "*economies that are highly dependent on income generated from the production, processing and export, and/or consumption of fossil fuels and associated energy-intensive products and/or the use of fossil fuels for which such Parties have serious difficulties in switching to alternatives*".<sup>383</sup>
309. When interpreting the right to work in the context of climate change, it is important to consider the role Article 6 of the UNFCCC and Articles 11 and 12 of the Paris Agreement play in informing the content of the right work.
310. Article 6 of the UNFCCC promotes education, training and public awareness. States are required to promote the "*training of scientific, technical, and managerial personnel*"<sup>384</sup> and cooperate in "*the development and implement of education and training programmes ... in particular for developing countries*".<sup>385</sup>

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<sup>381</sup> *Strategic Development Plan* (n 46) 136.

<sup>382</sup> See for example, **Chapter VI, Part F**.

<sup>383</sup> See discussion on article 4(10) above at **Chapter VI, Part E**.

<sup>384</sup> *UNFCCC* (n 104) art 6(a)(iv).

<sup>385</sup> *Ibid* art 6(b)(ii).

311. Under Article 11(3) of the Paris Agreement, States should cooperate to enhance capacity in developing States to implement the Paris Agreement.
312. Education is fundamental to help the citizens of developing countries to learn the necessary skills to participate in a changing work environment. Training is critical to transfer skills and knowledge to enhance human resources required to address climate change impacts and participate in the workforce.
313. States are obliged to adopt measures aimed at achieving full employment. In seeking to provide citizens with the right to work, States must formulate and implement “*an employment policy with a view to ‘stimulating economic growth and development, raising levels of living, meeting manpower requirements and overcoming unemployment and underemployment’*”.<sup>386</sup> Further, in protecting and facilitating the right to work, States must “*take positive measures to enable and assist individuals to enjoy the right to work and to implement technical and vocational education plans to facilitate access to employment*”.<sup>387</sup>
314. In the context of climate change, the right to work and the right to just and favourable conditions of work can be severely impaired by the impacts the transition to net zero may have on developing States. As developed States move away from more emission-intensive jobs and technologies to “green” jobs and technologies, it is critical developing States are not left behind. Protecting the right to work in developing States is contingent on developed States’ cooperation in assisting with training, upskilling, and educating citizens of developing States in these new technologies. Without doing so, citizens of developing States will not have the knowledge or skills to gain meaningful employment which may prevent citizens from earning “[a] *decent living for themselves and their families*”.<sup>388</sup>
315. States should not be placed in a difficult position where they must choose between guaranteeing their citizens the right to earn a living and participating in the transition

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<sup>386</sup> Committee on Economic, Social, and Cultural Rights, *General Comment No. 18 (2005): The Right to Work*, UN ESCOR, 35<sup>th</sup> sess, Agenda Item 3, UN Doc E/C.12/GC/18 (24 November 2005) 7 [26].

<sup>387</sup> *Ibid* 8 [27].

<sup>388</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1966), art 7(a)(ii) (‘ICESCR’).

to net zero. If a State is to achieve both, the right to work and the right to just and favourable conditions of work requires developed and developing States to cooperate to deliver appropriate education, training, and knowledge transfer to their citizens to provide opportunities for those citizens to earn a living.

**C. People have a right to development and the climate response should not prejudice that right, particularly for people in LDCs and developing States**

316. Climate change and the right to development are inherently linked. An appropriate level of economic development is a prerequisite for adopting concrete control measures to address climate change. There is therefore a risk that the climate response may leave developing States behind, as discussed at **Chapter VI, Part E**.

317. The United Nations Declaration on the Right to Development defines the right to development as an “*inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized*”.<sup>389</sup> Importantly, States bear the primary responsibility for the “*creation of national and international conditions favourable to the realization of the right to development*”.<sup>390</sup> States also have a “*duty to co-operate with each other in ensuring development and eliminating obstacles to development*”,<sup>391</sup> and a duty to “*take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development*”. The characterisation of the right to development thus incorporates both horizontal and vertical international obligations for States.

318. Climate change hinders the right to development. Developed and high emitting States, being largely responsible for climate change, have benefitted the most from historic emissions and suffered the least. On the other hand, developing States – and LDCs in particular – have seen minimal benefits while suffering the most from its effects, further

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<sup>389</sup> *Declaration on the Right to Development*, GA RES 41/128, UN Doc A/RES/41/128 (4 December 1966), art 1(1) (*‘Declaration on the Right to Development’*).

<sup>390</sup> *Ibid* art 3.

<sup>391</sup> *Ibid* art 3(3).

exacerbating disparities between the standard of living between developing and developed States.<sup>392</sup>

319. The right to development and the concept of sustainable development are interrelated. In the case of climate change and the right to development, the right to development should be interpreted as containing two limbs:

319.1 *first*, balancing economic inequalities; and

319.2 *second*, achieving environmental sustainability.

*Balancing economic inequalities*

320. Since 2018, the UNGA has adopted annual resolutions in respect of the right to development. In its most recent 2023 resolution, the UNGA acknowledged “*the negative impact on the realization of the right to development owing to the further aggravation of the economic and social situation, in particular of developing countries, as a result of the effects of international energy, food and financial crises, as well as the increasing challenges posed by global climate change and the loss of biodiversity*”<sup>393</sup> (emphasis added).

321. The right to development reflects the realities of the decolonisation process and the quest for newly independent and developing States to gain economic independence and control over their natural resources.<sup>394</sup> LDCs and SIDS are already experiencing development and adaptation deficits. The adverse effects of climate change disproportionately impact LDCs and SIDS. With scarce economic resources, these States must rely on the resources they have available.

322. Timor-Leste is a nation that is just 22 years old. It is still experiencing the legacy impacts of colonisation and occupation as it pursues its sovereign rights within settled

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<sup>392</sup> Mizen R. Khan, ‘Right to Development and Historical Emissions: A Perspective from the Particularly Vulnerable Countries’ in Lukas H. Meyer and Pranay Sanklecha (eds) *Climate Justice and Historical Emissions* (Cambridge University Press, 23 February 2017) 226.

<sup>393</sup> *The Right to Development*, GA RES 78/203, UN Doc A/RES/78/203 (22 December 2023, adopted 19 December 2023) 9 [30].

<sup>394</sup> Roman Girma Teshome, ‘The Draft Convention on the Right to Development: A New Dawn to the Recognition of the Right to Development as a Human Right?’ (2022) 22(2) *Human Rights Law Review* 1, 9; see also Nicolaas Schrijver, ‘Self-determination of Peoples and Sovereignty over Natural Wealth and Resources’ in the *Realizing the Right to Development – Essays in Commemoration of 25 years of the United Nations Declaration on the Right to Development* (United Nations, 2013) (Web Page) <[https://www.un-ilibrary.org/economic-and-social-development/realizing-the-right-to-development\\_49006c2a-en](https://www.un-ilibrary.org/economic-and-social-development/realizing-the-right-to-development_49006c2a-en)>.

maritime boundaries. Timor-Leste has experienced periods of social unrest as it sought to build the State. Despite significant challenges, and cycles of violence and unrest in the early years following the restoration of independence, Timor-Leste is consolidating peace and is an open, free, and democratic society. Nevertheless, it remains fragile with a need to strengthen State capacity and meet the basic needs of its people.

323. Timor-Leste is also a founding member of the g7+, an intergovernmental organisation of 20 countries affected by, or recovering from, conflict and fragility in Africa, Asia, the Pacific, and the Caribbean. The g7+ provides a platform to conflict-affected countries to collectively voice the need for national dialogue and reconciliation to address conflicts; advocate for effective development cooperation founded on the principles of country ownership and leadership; and share first-hand experience with one another. The g7+ was formed in response to a gap that fragile and conflict-affected States identified about the ways in which they could achieve Millennium Development Goals – global goals established by the UN which aimed to eradicate extreme poverty and hunger.<sup>395</sup> Timor-Leste’s international obligations must be read in this context.
324. With a GDP per capita of just over 2,300 US Dollars,<sup>396</sup> and little to no climate-related technical or financial assistance from high emitting States, the challenge for Timor-Leste to protect the climate system without compromising the social security of its people, is immense.
325. Such economic inequalities can be further compounded in cases of climate change-induced natural disasters or weather events. In April 2021, tropical cyclone Seroja struck Timor-Leste. The estimated cost of the damage caused ranged as high as USD 420 million – an amount equal to approximately 11.6 percent of Timor-Leste’s GDP in 2021,<sup>397</sup> as reported by the World Bank.<sup>398</sup> A country like Timor-Leste with a small GDP must already make difficult decisions on how best to allocate its limited financial resources to deliver social welfare for its people. Climate-induced events, like Seroja, widen the economic inequalities between developed and high-emitting States and low-

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<sup>395</sup> ‘Our Story’, g7+ (Web Page) <<https://www.g7plus.org/our-story/>>.

<sup>396</sup> ‘GDP Per Capita (Current US\$) – Timor-Leste’, *The World Bank* (Web Page) <<https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=TL>>.

<sup>397</sup> *World Bank Data on Timor-Leste* (n 58).

<sup>398</sup> *World Bank Coverage of Cyclone Seroja* (n 57).

emitting developing States. The disproportionate financial impact on a LDC's GDP, requiring the redirection of funds allocated for advancement to instead focus on rebuild and recovery efforts, prevents them from alleviating poverty and advancing human rights.

Achieving environmental sustainability

326. The right to development includes sustainable development. Sustainable development refers to development that meets the needs of the present without compromising the ability of future generations to meet their own needs.
327. The notion of sustainable development is reflected in Article 3(4) of the UNFCCC. Article 3(4) provides that Parties:
- “... have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change”* (emphasis added).
328. Achieving sustainable development in LDCs requires developed States to take responsibility for their disproportionate share of historical emissions. These emissions enabled the industrial countries, many of which were colonial powers with access to vast natural resources, to advance their economic growth and standard of living.
329. For developing States, and particularly LDCs, protecting the climate system from the adverse effects of climate change is costly. Owing to scarce financial resources, they must carefully balance between allocating financial resources for contemporary basic human needs whilst also promoting long-term sustainable environmental protection. The ability of LDCs to promote environmentally sustainable development is thus curtailed by the lack of resources to provide the basic needs of its population.
330. For some LDCs and developing countries, including Timor-Leste, natural resources are a critical source of funds. They are vital for its existence. Economic growth today is difficult *“without a significant use of fossil fuels responsible for most greenhouse gas*

*emissions*”.<sup>399</sup> As discussed above in detail at **Chapter VI, Part E**, the climate response must not disproportionately affect developing States, and in particular LDCs, that are highly dependent on fossil fuel production and exportation.

331. To avoid an interpretation of the right to development as being a right to pollute, arguably a distinction can be drawn between subsistence pollution and luxury pollution.<sup>400</sup> Subsistence pollution comprises degradation of nature for survival needs. These are inescapable emissions that LDCs and other developing States cannot do without and are necessary to avoid degradation of human life and other basic human rights. Subsistence emissions are accounted for in the preamble and Article 4(10) of the UNFCCC. Conversely, luxury emissions are those that are not indispensable to the individual’s survival, and that could be reduced without endangering the population’s standard of living and respecting basic human rights. In making this distinction, the right to development can be read in accordance with States’ obligations under the Climate Change Regime and is consistent with the CBDR-RC principle. As such, these obligations should be interpreted to allow LDCs and developing countries a wide margin for subsistence emissions (as reflected in Article 4(10) UNFCCC) to provide a decent standard of living and achieve a threshold of sufficient economic growth.<sup>401</sup>
332. Further, the right to development, with an emphasis on sustainable development, goes hand-in-hand with developed States’ obligations under the Climate Change Regime to provide technical and financial assistance to developing States to assist in climate mitigation and adaptation initiatives (as discussed in detail at **Chapter VI, Part F**).<sup>402</sup> States’ obligations to protect the climate system, particularly under the Climate Change Regime, should be read taking into account the right to development and that developing States have, as their main priority, alleviating poverty and achieving social and economic development.

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<sup>399</sup> Thierry Ngosso, ‘The Right to Development of Developing Countries: An Argument against Environmental Protection?’ (2013) 5(2) *Public Reason* 41, 46.

<sup>400</sup> Henry Shue, ‘Subsistence Emissions and Luxury Emissions’ (1993) 15(1) *Law & Policy* 39.

<sup>401</sup> *Ibid* 43.

<sup>402</sup> See further discussion at **Chapter VI, Part F**.

**D. People have a right to self-determination which includes the ability to freely dispose of their natural wealth and resources and to not be deprived of their own means of subsistence**

333. The right to development (as discussed above at **Chapter IX, Part C**) is closely interlinked to the struggles of peoples to exercise their right to self-determination.<sup>403</sup>

Common Article 1(1) of the ICCPR and ICESCR provides:

*“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.*

334. Respect for the right of self-determination is one of the purposes of the United Nations.<sup>404</sup> Its legal status was cemented in the UNGA’s Declaration on Friendly Relations,<sup>405</sup> which was adopted unanimously in 1970, and has been held by the Court to reflect customary international law.<sup>406</sup> The Declaration on Friendly Relations referred to the content of right to self-determination in the following terms:

*“all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter”.*

335. The Court has emphasised that the proper exercise of self-determination pays regard to the express free will of peoples,<sup>407</sup> and is an obligation *erga omnes*<sup>408</sup> and a *jus cogens* right.<sup>409</sup>

336. A key component of the right to self-determination is the right to permanent sovereignty over natural resources. Both the ICCPR and ICESCR acknowledge that:

*“All peoples may, for their own ends, freely dispose of their natural wealth and*

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<sup>403</sup> Declaration on the granting of independence to colonial countries and peoples, GA Res 1514(XV), UN Doc A/RES/1514(XV) (adopted 14 December 1960); Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, GA Res 2625(XXV), UN Doc A/RES/2625(XXV) (24 October 2017) (‘Declaration on Principles of International Law concerning Friendly Relations and Cooperation’).

<sup>404</sup> UN Charter (n 344) art 1(2).

<sup>405</sup> Declaration on Principles of International Law concerning Friendly Relations and Cooperation (n 403).

<sup>406</sup> Chagos (n 3) 132 [152]; Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Advisory Opinion) (2010) ICJ Rep 403, 437 [80]; Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) (Merits) (1986) ICJ Rep 14, 98 [188] (‘Military and Paramilitary Activities in and Against Nicaragua’).

<sup>407</sup> Western Sahara (Advisory Opinion) [1975] ICJ Rep 12, 31 [55]; Chagos (n 3) 134 [157].

<sup>408</sup> East Timor Case (n 18) 102 [29]; Construction of a Wall (n 5) 171 [88]; Chagos (n 3) 139 [180].

<sup>409</sup> It is listed in the annex to the ILC’s draft conclusions on Identification and legal consequences of peremptory norms of general international law (*jus cogens*), adopted on second and final reading in 2022. See also, Construction of a Wall (n 5) 171 [88].



*resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence*<sup>410</sup> (emphasis added).

337. This principle has been articulated in the UNGA Declaration on PSNR,<sup>411</sup> and the Charter of the Economic Rights and Duties of States.<sup>412</sup> Further, the Declaration on the Right to Development provides that the right to self-determination includes “*the exercise of [peoples’] inalienable right to full sovereignty over all their natural wealth and resources*”.<sup>413</sup>

338. PSNR is a fundamental component of the right to self-determination for newly independent, particularly former colonial States: “[a] nation’s ability to adopt the social and economic system of its choice and to pursue economic independence from a former colonial power... [are] core elements of self-determination”.<sup>414</sup>

*The climate response disproportionately affects developing States’ ability to “freely dispose of their natural wealth and resources”*

339. As discussed above in detail at **Chapter VI, Part E**, the climate response must not disproportionately affect developing States, and in particular LDCs, from freely developing their natural resources, in exercising their right to self-determination, particularly those that are highly dependent on the production and exploitation of a singular resource.

340. As early as 1952, the UNGA recognised a States’ right to freely exploit its natural wealth and resources. In Resolution 626(VII), the UNGA recommended that:

*“all Member States, in the exercise of their right freely to use and exploit their natural wealth and resources wherever deemed desirable by them for their own progress and economic development, to have due regard, consistently with their sovereignty, to the need for maintain the flow of capital in conditions of security, mutual confidence and economic co-operation among nations*”<sup>415</sup> (emphasis

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<sup>410</sup> ICESCR (n 388) art 1(2); *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 1(2).

<sup>411</sup> *Permanent Sovereignty over Natural Resources*, GA Res 1803(XVII), UN Doc A/RES/1803(XVII) (14 December 1962).

<sup>412</sup> *Charter of Economic Rights and Duties of States*, annexed to UN Doc A/RES/3281(XXIX) (12 December 1974).

<sup>413</sup> *Declaration on the Right to Development* (n 389) art 1(2).

<sup>414</sup> Idriss Paul-Armand Fofana, ‘Afro-Asian Jurists and the Quest to Modernise the International Protection of Foreign-Owned Property, 1955–1975’ (2021) 23 *Journal of the History of International Law/Revue d’histoire du droit international* 80, 103.

<sup>415</sup> *Right to exploit freely natural wealth and resources*, GA RES 626(VII), UN Doc A/RES/626(VII) (21 December 1952) 18 [1].

added).

341. As set out earlier in this submission, LDCs and other developing States have, as their main priority, alleviating poverty and achieving social and economic development. This was expressly recognised in the negotiations of the UNFCCC and is reflected in Article 4(10) of the UNFCCC. Alleviating poverty and progressing a States' social and economic development requires substantial capital flows and a State must rely on its available resources to generate revenue to provide its people with basic social services.
342. The right to self-determination of developing States experiencing the legacy impacts of colonisation includes suitable access to natural resources to facilitate social and economic development. In the case of Timor-Leste, a foreign occupation specifically targeted the exploitation of its peoples' natural resources.
343. As discussed above, Timor-Leste is still experiencing the legacy impacts of colonisation and occupation as it pursues its independence as a newly formed State. For years, Timor-Leste fought hard to secure sovereignty over its seas to achieve a permanent maritime boundary with Australia, which included the allocation of certain proved resource rights in the Timor Sea. Timor-Leste is now in a position to pursue the development of those resources, and to do so in an environmentally responsible way, to deliver long term social and economic benefits to its people.
344. Timor-Leste has pursued the development of its natural resources, taking into account its environmental obligations. As mentioned above, the development of such resources led to the establishment of the Petroleum Fund which is "*used for the benefit of both current and future generations*".<sup>416</sup> It is these funds that allow Timor-Leste to build basic infrastructure, schools, and hospitals, and provide other fundamental services.
345. Timor-Leste has limited avenues to generate revenue to support its people. The reality is that for the Timorese people to freely pursue their economic, social, and cultural development – to fulfil their *jus cogens* right to self-determination – they must be able

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<sup>416</sup> *Petroleum Fund Law* (n 183) preamble.

to pursue their right to development and exercise their sovereign right to exploit their natural resources.

**E. States have an obligation to realise the rights of the child, taking into account the impacts of the adverse effects of climate change**

346. States' obligations to protect the climate system for the benefit of present and future generations are considered above in **Chapter VI, Part H**. The principle of intergenerational equity at the heart of those considerations is brought into even sharper focus in the existing framework of international law that safeguards the rights of children. While children are the most vulnerable among us in general, they are particularly vulnerable in the context of climate change in that they are those most likely to suffer the worse effects of climate change of all present generations. In many ways, they are a bridge between present and future generations.
347. The CRC gives rise to several obligations of particular significance in the context of children and climate change, including:
- 347.1 *first*, the obligation imposed upon States to afford primary consideration to the best interests of the child and the corresponding right of the child to have their best interests considered;
- 347.2 *second*, the related rights of the child to education and to rest, leisure and play, and their consequences for the obligations of States in respect of the development of the child; and
- 347.3 *third*, the right of the child to be heard, and its consequences for the obligations of States to ensure effective access to justice.
348. The effects of climate change to the health and development of children are, and will continue to be, felt with greatest force in States with young populations, many of which are developing States and LDCs. Currently, 11.9 percent of Timor-Leste's population is under the age of five, and about 64.6 percent of the population is currently below age 30.<sup>417</sup> Thus, Timor-Leste's particular vulnerability to the adverse effects of climate

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<sup>417</sup> Timor-Leste National Institute of Statistics, *Timor-Leste Population and Housing Census 2022* (Report, May 2023) 24.

change is to be found not only in its socioeconomic and geopolitical circumstances, but also in its demographics.

349. As an overarching and guiding principle of the CRC, States Parties are under an obligation to consider the best interests of the child as “*a primary consideration*” in taking any action concerning children.<sup>418</sup>
350. A related provision, which provides context to the obligation in Article 3(1), is found in Article 4 of the CRC which is reflective of the CBDR-RC principle. It obligates States Parties to undertake measures for the implementation of the economic, social, and cultural rights of children “*to the maximum extent of their available resources and, where needed, within the framework of international co-operation*”.<sup>419</sup>
351. For developing States and LDCs in particular, it is necessary to maintain the decision-making flexibility to serve equally – if not more – significant needs, such as the immediate health, safety, and welfare of the greater population. Fiscal constraints and the increasing pressures of anthropogenic climate change already limit this flexibility. Furthermore, the urgency with which such needs must be met, and the consequences for failing to meet those needs, often mean that it is neither feasible nor consistent with other State obligations to prioritise policy decisions with long-term timelines.
352. Hence, conduct which may be prejudicial in the long-term to the interests of a child or children in one way, may nonetheless serve other and greater or more immediate interests of those children or children at large. In the context of climate change, the “*best interests of the child*” may be better served by urgently needed social policies and initiatives funded by industries emitting greenhouse gas emissions, when balanced against the present and future harms of climate change. For LDCs reliant on fossil fuels, their exploitation can provide the fiscal capacity to provide critical healthcare and education, amongst other benefits, serving other rights enshrined within the CRC. Importantly for SIDS, this same fiscal space can also fund climate change mitigation

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<sup>418</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3(1) (*‘Convention on the Rights of the Child’*). Note that that the requirement in Article 3(1) is that the “best interests of the child shall be *a* primary consideration” and not “the” primary consideration or “*only*” consideration, see Eran Stthoeger, ‘International Child Abduction and Children’s Rights: Two Means to the Same End’ (2011) 32 *Michigan Journal of International Law* 511, 535.

<sup>419</sup> *Convention on the Rights of the Child* (n 418) art 4.

and adaptation measures, reducing the impact of the adverse effects of climate change upon its people, including its children. In this way, it is important that the obligations of States by reference to the interests of children are not assessed without context, but rather permit an analysis of the differentiated circumstances of the State *and* the other interests that action serves, consistent with the CBDR-RC.

## **PART B**

353. This section responds to Part B of the question put to the Court, namely:

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

- i. States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?*
- ii. Peoples and individuals of the present and future generations affected by the adverse effects of climate change?”*

## **CHAPTER X. STATE RESPONSIBILITY**

**A. States are liable under general international law for breaches of their climate change obligations**

354. It is a well-established principle of customary international law that States bear responsibility for violations of the rules of international law that can be attributed to them.<sup>420</sup> While Question (a) is concerned with identifying the legal obligations of States, Question (b) is concerned with the consequences for States that follow from a failure to meet their obligations identified in Question (a).

355. Many of the rules of customary international law on State responsibility are reflected in the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (**Articles on State Responsibility**).

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<sup>420</sup> *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) annex, art 1 (*‘Responsibility of States for Internationally Wrongful Acts’*); See also, *Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 23; *Gabčíkovo-Nagymaros Project* (n 120) 38 [47].

356. States “remain subject to customary rules of a secondary order, to the extent that those default rules are not altered by the *lex specialis*”.<sup>421</sup> In other words, the Articles on State Responsibility reflect default rules. Other, or special, rules of State responsibility may apply in particular contexts:

*“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”.*<sup>422</sup>

357. Under the customary rules of State responsibility, an injured State may invoke the responsibility of the State that breached an obligation owed to it.<sup>423</sup> A State may also invoke the responsibility of the breaching State if the obligation is owed to a group of States or even the international community as a whole, and where the invoking State is specially affected.<sup>424</sup>

358. A specially affected State, or grouping of States, are those affected by a practice in a manner distinctive from other States. The question of whether a State is specially affected will vary according to the specific circumstances of the case and the authority considering the doctrine.<sup>425</sup> Here, Question (b) explicitly refers to the legal consequences arising under legal obligations particularly owed to States “specially affected” resulting from the adverse effects of climate change.

359. In the context of the questions presently before the Court, specially affected States are those with duties and obligations under international law, distinct from those imposed on States as a whole, to take action in response to climate change. At the same time, States exposed to the risk of harm from climate change to a degree distinct from other States, such as LDCs like Timor-Leste, are also specially affected States.

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<sup>421</sup> Eran Stohoger and Christian J Tams, ‘Swords, Shields and Other Beasts: The Role of Countermeasures in Investment Arbitration’ (2022) 37(1-2) *ICSID Review - Foreign Investment Law Journal* 121, 135.

<sup>422</sup> *Responsibility of States for Internationally Wrongful Acts* (n 420) art 55.

<sup>423</sup> *Ibid* annex, art 42(a).

<sup>424</sup> *Ibid* annex, art 42(b)(i).

<sup>425</sup> See, for example, the consideration of “specially affected” in the context of international humanitarian law: Jean-Marie Henckaerts and Louise Doswald-Beck, ‘Customary International Humanitarian Law’ (2005) 87 *International Review of the Red Cross* 857, 181.

360. Question (b) indeed refers to States that are “particularly vulnerable”, being those which suffer most from the deleterious effects and existential threat of climate change. States Parties to the Paris Agreement have explicitly recognised “developing countries” as a category of States that are “*particularly vulnerable to the adverse effects of climate change*”.<sup>426</sup> This recognition is reflected in paragraph (i) of Question (b).
361. States may be “specially affected” but not be “particularly vulnerable”. In the present case, LDCs and SIDS, including Timor-Leste, are specially affected *and* particularly vulnerable to climate change.<sup>427</sup>
362. Articles 29 and 30 of the Articles on State Responsibility operate as a foundation for States to restore underlying legal relations in the aftermath of the commission of an internationally wrongful act. Article 30(a) establishes the obligation of cessation of an internationally wrongful act.<sup>428</sup> The obligation of cessation applies equally to breaches by omission.<sup>429</sup> In the latter case, cessation may entail taking certain action rather than ceasing an act. Cessation is accompanied by the obligation in Article 30(b) for a State, where relevant, to offer appropriate assurances and guarantees of non-repetition of the wrongful act.<sup>430</sup>
363. State responsibility entails a concomitant obligation to make “*full reparation for the injury*”.<sup>431</sup>
364. Forms of reparation include restitution, i.e., restoring “*the situation which existed before the wrongful act was committed*”, compensation and satisfaction (“*an acknowledgement of the breach, an expression of regret, a formal apology or another*

<sup>426</sup> Report of the Conference of the Parties on its eighteenth session, held in Doha from 26 November to 8 December 2012, Addendum: Part Two: Action taken by the Conference of the Parties at its eighteenth session, Decision 3/CP.18: ‘Approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change to enhance adaptive capacity’, UN DOC FCCC/CP/2012/8/Add.1 (8 December 2012); *The UAE Consensus* (n 108) 3 [11].

<sup>427</sup> Intergovernmental Panel on Climate Change, ‘Sea Level Rise and Implications for Low Lying Islands, Coasts and Communities’ in *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* (Cambridge University Press, 2019); see also, Timor-Leste’s COP28 Statement (n 40) 3.

<sup>428</sup> *Military and Paramilitary Activities in and Against Nicaragua* (n 406) 149; *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment)*[1980] ICJ Rep 3, 44 [95]; *Haya de la Torre (Colombia v Peru) (Judgment)*[1951] ICJ Rep 71, 82; *Construction of a Wall* (n 5) 197 [150].

<sup>429</sup> Commentary to the Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) 89.

<sup>430</sup> *Responsibility of States for Internationally Wrongful Acts* (n 420) art 30(b).

<sup>431</sup> *Ibid* annex, art 31.

*appropriate modality*)”).<sup>432</sup> The type of reparations required are dependent on the circumstances of the particular case, but they must be “*in an adequate form*”.<sup>433</sup>

**B. State responsibility must be assessed in accordance with the principle of common but differentiated responsibilities**

365. Climate change is “*an environmental issue of unrivalled complexity*”<sup>434</sup> and a “*paradigmatic issue of shared responsibility*”.<sup>435</sup> But the shared or common responsibility is differentiated. As explained in **Chapter IV**, it is critical to recognise that the largest share of historic and current global greenhouse gas emissions have been produced by developed States. With the exclusion of present-day high emitting States, developing States, and particularly LDCs and SIDS, including Timor-Leste, have made negligible contributions to global emissions.<sup>436</sup> Therefore, it is developed and high-emitting States that are obligated to take the lead in efforts to reduce emissions and developed States must provide the necessary means of implementation to developing States, including the provision of financial resources, technology transfer and capacity-building.<sup>437</sup>
366. This is true with respect to the understanding of the primary obligations of States, whereas differently situated States have differentiated obligations with respect to mitigation and adaptation. The primary obligations may differ altogether, for example, only developed States have obligations of transfer of technology and financial to developing States under Article 4(3) of the UNFCCC.
367. The principle of CBDR-RC is also relevant with respect to the proper application of the secondary rules of international law. While global cooperation in response to the climate crisis is critical, liability for its causes must be assessed in accordance with the principle of CBDR-RC. Thus, in the context of the Climate Change Regime, there exist “special rules” of State responsibility.

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<sup>432</sup> *Responsibility of States for Internationally Wrongful Acts* (n 420) art 37(2).

<sup>433</sup> *Factory at Chorzów, (Jurisdiction)* [1927] PCIJ (ser A) No. 9, 21.

<sup>434</sup> Jacqueline Pell, ‘Climate Change’ in *The Practice of Shared Responsibility in International Law*, eds. André Nollkaemper and Ilias Plakokefalos (Cambridge University Press, 2017) 1009.

<sup>435</sup> *Ibid* 1010.

<sup>436</sup> Timor-Leste’s contribution to global emissions is 0.003 percent: *NDC Timor-Leste 2022-2030* (n 8) 1.

<sup>437</sup> These obligations are reflected in *Paris Agreement* (n 106) arts 9-11.



368. For example, restitution is not an appropriate form of reparations when it involves “*a burden out of all proportion to the benefit deriving from restitution instead of compensation*”.<sup>438</sup> Thus, in the special case of a LDC and SIDS, the burden of certain restitution measures on their economy may be entirely disproportionate, particularly when the emissions that State produces are minimal.

**C. States are responsible for breaches of obligations with respect to climate change, in particular, those obligations concerning specially affected States**

369. Timor-Leste is of the view that the application of the secondary rules on State responsibility, to determine the “legal consequences” for States that are in breach of their obligations found in reply to Question (a), leads to the following conclusions.

370. Question (b) focuses, in particular, on specially affected States due to their geography and their level of development, including SIDS. In this context, the specialised Climate Change Regime also provides for special rules on State responsibility. These take into account that just as the due diligence standards for obligations of conduct vary on the basis of CBDR-RC and in the light of different national circumstances, so does the application of State responsibility.

371. Here, a failure of a State to meet its mitigation obligations, which will disproportionately affect SIDS and LDCs, such as Timor-Leste, may require developed and high emitting States to provide restitution in the form of enhanced mitigation and assistance toward such States (beyond those obligations required as a matter of primary law). For example, restitution through the Loss and Damage Fund has the propensity to facilitate such specialised rules. Timor-Leste is at the forefront of the global efforts regarding loss and damage resulting from climate change. While the Loss and Damage Fund was a positive step towards greater financial support for LDCs and SIDS, it is currently a voluntary, rather than a mandatory, undertaking by developed States. Greater commitments from developed States are needed to ensure sufficient finances are available for restitution. The Loss and Damage Fund is addressed in detail above at **paragraphs 41 to 45**.

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<sup>438</sup> *Responsibility of States for Internationally Wrongful Acts* (n 420) annex, art 35(b).

372. Furthermore, a breach of obligations entails compensation for “damage” or “injury” caused to States, particularly specially affected States (which includes both small island States and LDCs), resulting from the breach.
373. As seen in Part A, developed States have specific obligations owed to SIDS, such as obligations to:
- 373.1 provide support to developing States for the implementation of Article 4 of the Paris Agreement;<sup>439</sup>
  - 373.2 provide financial resources to assist developing States with respect to both mitigation and adaptation;<sup>440</sup> and
  - 373.3 cooperate in taking measures, as appropriate, to enhance climate change education, training, public awareness, public participation, and public access to information.<sup>441</sup>
374. The rules on cessation and reparations apply to these obligations, as above.

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<sup>439</sup> *Paris Agreement* (n 106) art 4(5).

<sup>440</sup> *Ibid* art 9(1).

<sup>441</sup> *Ibid* art 12.

**CHAPTER XI. CONCLUSION**

375. The current Request before the Court provides an opportunity to clarify the existing obligations of States under general international law on the issue of climate change at a critical juncture in human history. Timor-Leste hopes that the Court will avail itself of this opportunity to the fullest extent.

Dili, Timor-Leste, 22 March 2024

Respectfully submitted

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