ROYAL EMBASSY OF SAUDI ARABIA
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سفارة المملكة العربية السعودية
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ATTORNEY WORK PRODUCT

INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

(REQUEST FOR ADVISORY OPINION)

WRITTEN COMMENTS OF THE
KINGDOM OF SAUDI ARABIA

15 August 2024

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CHAPTER 1. INTRODUCTION

1.1. The Kingdom of Saudi Arabia ("Kingdom") hereby reaffirms all that is said in the Kingdom's 22 March 2024 Written Statement. In these Written Comments, the Kingdom develops certain points from its Written Statement, having regard to the Written Statements of other States, and addresses certain, selected issues raised therein. The fact that the Kingdom does not comment on all that other States have said does not mean that it necessarily agrees.

1.2. As was confirmed by the Kingdom and in the Written Statements of many States, the international legal obligations of States to ensure the protection of the climate system from greenhouse gas emissions are set out in the specialized treaty regime on climate change, which has reached nearly universal acceptance by States. The specialized regime comprises the United Nations Framework Convention on Climate Change ("UNFCCC"), the Kyoto Protocol, and the Paris Agreement, and is referred to herein as "the specialized treaty regime on climate change". In addition, as the Kingdom and many other States made clear in their Written Statements, any potential legal consequences under these obligations are dealt with in this specialized treaty regime on climate change[1]. Furthermore, as the Kingdom and other States explained in their Written Statements, there are also certain sector-specific or non-climate change subjects related to greenhouse gases that are operationalized in Annex VI to the International Convention for the Prevention of Pollution from Ships ("MARPOL"), Annex 16 to the Chicago Convention, and the 1985 Vienna Convention for the Protection of the Ozone Layer, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, and the 2016 Kigali Amendment (the "Ozone regime").

1.3. Through the specialized treaty regime on climate change, all States recognize the urgency and seriousness of the common threat of climate change and negotiated unique

[1] Written Statement of the Kingdom of Saudi Arabia, paras. 4.90-4.93; Written Statement of Indonesia, para. 51 (the UNFCCC, Kyoto Protocol and Paris Agreement "constitute the global governance for climate change").

and specific principles and obligations to address the inherent complexities in responding to the threat of climate change.

1.4. Anthropogenic emissions of greenhouse gases originate from diverse sources worldwide, spanning various human activities such as power generation, transportation, agriculture, and industrial processes. But as some States explain, emissions are not solely attributable to the modern global economy. The root causes of greenhouse gas emissions contributing to climate change go back to the early stages of the industrial revolution, which significantly benefitted many now-developed States.

1.5. The multiplicity of causes of climate change makes it impossible to establish causal connections between the greenhouse gas emissions of individual States and climate change, including, for example, severe weather events. While attribution science has improved and there are ways to estimate greenhouse gas emissions from human activities, the Kingdom agrees with those States that point out that these methods are not always reliable due to, among other issues, inaccuracy in reporting, differences in emission intensity estimates and difficulties in separating natural and anthropogenic sources and sinks[2].

1.6. Addressing the magnitude and complexity of climate change therefore demands concerted action that must account for these complexities. While all States must engage in responding to the threat of climate change, States acknowledge that they do so on a differentiated basis. States acknowledge common but differentiated responsibilities and respective capabilities ("CBDR-RC") under the specialized treaty regime on climate change. States are guided by their individual Nationally Determined Contributions ("NDCs"), including NDCs covering adaptation and mitigation.

1.7. The specialized treaty regime on climate change details how this differentiated approach should be implemented, on the basis of an agreed framework of principles

[2] Written Statement of the United States of America, paras. 2.20-2.26; Written Statement of the United Kingdom para. 137.4.3; see also Written Statement of the Russian Federation, p. 17.

and obligations, and provides a foundation for international policy negotiations that accommodates the diverse perspectives of States.

1.8. Some States in their Written Statements seek to expand States' obligations beyond what is agreed in the specialized treaty regime on climate change. However, these alleged additional obligations, which they seek to derive from a whole range of other international treaties, rules of customary international law, or 'the general principles of law recognized by civilized nations', do not address the questions before the Court concerning the protection of the climate system from greenhouse gas emissions.

1.9. These purported additional obligations and legal consequences advanced by some States are not international legal obligations related to the protection of the climate system and greenhouse gas emissions, as the Kingdom and many other States made clear in their Written Statements[3]. Many of these purported obligations, such as a so-called 'duty of due diligence', are not self-standing international legal obligations at all[4]. Others, such as obligations under human rights treaties or on significant transboundary environmental harm, while obligatory within their scope of application, are not intended to, and do not in fact, add to the specialized treaty regime on climate

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[3] Written Statement of Japan, para. 11 ("Except for the UNFCCC and the Paris Agreement, the other sources mentioned in the chapeau do not govern climate change issues directly and specifically. This is the case of the environmental treaties and also of the principles of customary international law invoked, such as the duty of due diligence, the obligation of prevention of significant transboundary harm or harm to the environment, the duty to protect and preserve the marine environment. These principles, which contain obligations of conduct, are by nature, general in scope and circumstantial in their application, and they call for an assessment *in concreto*"); see also Written Statement of Australia, paras. 2.2, 2.62; Written Statement of Brazil, para. 10; Written Statement of Canada, para.11; Written Statement of the Dominican Republic, para. 4.21; Written Statement of India, para. 19; Written Statement of the United Arab Emirates, paras. 16-17; Written Statement of the Organization of the Petroleum Exporting Countries, para. 9.

[4] Written Statement of Australia, para. 4.13-4.15 ("[Due diligence . . . is not a self-standing obligation . . . [t]he precise content and application of the due diligence standard is variable and context dependent."); Written Statement of the United States, para. 4.3 ("[E]ven if an obligation of due diligence were found to apply to anthropogenic GHG emissions, it would be satisfied by a State's implementation of its obligations under the UN climate change regime, including the Paris Agreement").

change[5]. They do not create legal obligations for States to ensure protection of the climate system from greenhouse gas emissions[6]. Nor could they interpose a liability allocation mechanism on to this regime. Any other approach would undermine the carefully negotiated specialized treaty regime on climate change which is designed as a transparent, non-adversarial and non-punitive compliance and dispute resolution mechanism. As noted by the Kingdom, Australia and Argentina, the Court is invited "to consider *existing* obligations of all States to ensure the protection of the climate system" and "clarify the scope of those obligations"[7]. The Court, "when answering the questions cannot legislate"[8].

1.10. These Written Comments are divided into six Chapters. Following this Introduction:

- **Chapter 2** addresses the applicable law and the role of the Court in the present advisory proceedings.
- **Chapter 3** focuses on the specialized treaty regime on climate change and the interaction among the agreements within it.
- **Chapter 4** turns to Question (a), noting that obligations to protect the climate system from greenhouse gases are set forth in the specialized treaty regime on climate change that consists of the UNFCCC, the Kyoto Protocol, and the Paris

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5 Written Statement of China, para. 123; Written Statement of Indonesia, para. 44; Written Statement of New Zealand, para. 118; Written Statement of the Russian Federation, pp. 9-11; Written Statement of the Kingdom of Saudi Arabia, paras. 4.97-98; Written Statement of Switzerland, para. 61.

6 Written Statement of Australia, paras. 3.58-3.59; Written Statement of China, para. 115; Written Statement of Denmark Finland, Iceland, Norway, & Sweden, paras. 83-85; Written Statement of Iran, para. 131; Written Statement of New Zealand, para. 114; Written Statement of the Russian Federation, p. 10; Written Statement of Switzerland, paras. 61-62; Written Statement of the United Kingdom, para. 122.

7 Written Statement of Australia, paras. 1.30-1.31; see also Written Statement of the Kingdom of Saudi Arabia, para. 3.10.

8 Written Statement of Argentina, para. 35 (*citing* ICJ, *Legality of threat or the use of nuclear weapons,* Advisory Opinion, ICJ Reports 1996, p. 237, para 18; ICJ, *Western Sahara,* Advisory Opinion, ICJ Reports 1975, 12, para 33; ITLOS, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal),* Advisory Opinion, 2 April 2015, ITLOS Reports 2015, paras. 73-74 ("*The Tribunal also wishes to make it clear that it does not take a position on issues beyond the scope of its judicial functions*")).

Agreement, as the Kingdom and numerous States explain in their Written Statements.

- **Chapter 5** then turns to Question (b), explaining that the specialized treaty regime on climate change addresses the legal consequences if significant harm occurs. States have agreed in the specialized treaty regime how to address any consequences. State responsibility would not arise from the emission of greenhouse gases, as this does not constitute an internationally wrongful act. Nor, indeed, could these rules sensibly be applied in this context, where issues of causation and attribution differ dramatically from damage caused to a particular State by point source pollution.

- **Chapter 6** sets out the Kingdom's conclusions.

Chapter 2. APPLICABLE LAW

2.1. The Kingdom set out in its Written Statement its views on the applicable law and the role and approach of the Court[9]. As has been clear since the debate in the UN General Assembly at which resolution 77/276 was adopted, the correct determination of the applicable law is fundamental to the present advisory opinion.

2.2. Essential points in the Written Statement of the Kingdom have also been made in the Written Statements of many other States. These include:

- That the Court, being a court of law, has as its function the application of existing international law, as set forth in Article 38, paragraph 1 of its Statute, which applies to advisory proceedings just as it does to contentious proceedings[10]. It is not a part of the Court's function to act as a legislator. Nor is it the function of the Court, as some participants seem to suggest, to assume the role of the negotiating States, to "re-interpret" the law, or to impose new or more stringent obligations on States beyond those agreed in the negotiations and accepted in the treaties[11]. To do so would seriously endanger the ongoing negotiation process taking place within the specialized treaty regime on climate change[12]. The treaty regime establishes institutional arrangements for the

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9 Written Statement of the Kingdom of Saudi Arabia, Chapter 3.

10 PELLET, MÜLLER, IN ZIMMERMANN ET AL, THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE. A COMMENTARY (3rd ed., 2012), pp. 837-839, paras. 58-61.

11 Written Statement of China, para. 123 ("The obligations derived from international human rights law, such as mitigating and adapting to climate change, are applicable only to the extent that the provisions of international human rights law are compatible with those of the UNFCCC regime. They should not go beyond the scope of the obligations under the UNFCCC regime, which is specially designed to deal with climate change issue")

12 Written Statement of the Kingdom of Saudi Arabia, paras. 1.10, 1.19, 3.2, 3.5-3.13; see, for example, Written Statement of Canada, para. 23 ("It is imperative to protect the UN Climate Change process, as it is within this process that States have created the specific framework and institutions to tackle the global problem of climate change. The Conference of the Parties to the Convention and the Conference of the Parties serving as the meeting of the States Parties to the Paris Agreement are best placed to assess how to use the evolving science to inform global actions and establish new standards. In addition, the meetings of the governing bodies allow States which want to do more to engage in actions that can go beyond what the governing bodies might have agreed to. This has led to initiatives such as the Global Methane Pledge and the Powering Past Coal Alliance. Canada's longstanding view is that negotiation between States is the best way to achieve international

climate change intergovernmental process, with the Conference of the Parties serving as the meeting of the Parties. They meet on an annual basis: UNFCCC ("COP"), the Kyoto Protocol ("CMP"), and the Paris Agreement ("CMA"). There are also intersessional meetings and negotiations involving UNFCCC subsidiary bodies that occur throughout each year, and constant bilateral and multilateral discussions among States outside formal UNFCCC negotiations[13].

- That the matters mentioned in the chapeau to the questions (such as human rights treaties or the no-harm principle) are not relevant to the Court's eventual opinion, or even, in some cases, a proper reflection of international law. For example, "duty of due diligence" does not exist as a distinct obligation. Rather, due diligence is a standard that defines an obligation of conduct, which is applied contextually to primary rules of international law)[14].

- That the Court will no doubt wish to adopt its usual approach in advisory proceedings and exercise its undoubted discretion "to answer rationally and effectively 'the legal questions really in issue'"[15].

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progress to deal with the climate crisis, and the UN Climate Change process, created by the global community over many years of work, remains the best place to have those negotiations"); ibid., para. 36 ("Climate change is a global challenge, for which States have established, over many years of negotiation, a UN Climate Change process, through the Convention and the Paris Agreement. Processes under these agreements involve the whole of the international community: this is the only viable route to effectively addressing the climate change crisis"); Written Statement of the United Kingdom, para. 4.6 ("[T]he Climate Change Treaties and their operational elements (including the annual decisions of the Conferences of the Parties ('COPs') thereunder) are a dynamic system. That system is the product of complex negotiations resulting in careful compromise and balancing competing objectives and interests within and between States. Accordingly, the Court must pay particularly careful regard to the scope of its judicial function and recognise both the significance and the dynamic character of the UN legal regime concerning climate change, as well as the delicate balances inherent in and managed through that regime"); ibid., para. 24.3 ("The sponsors of the Request intend that the Court's advisory opinion will enhance existing international cooperation and promote the ongoing processes within the framework of the UN climate change regime, not undermine them"); Written Statement of the United States, paras. 6.4-6.5.

13 Written Statement of the Kingdom of Saudi Arabia, para. 3.11.

14 Written Statement of the Kingdom of Saudi Arabia, para. 3.3; see also Written Statement of the United Kingdom, paras. 27.4-27.5.

15 *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion of 20 July 1982, I.C.J. Reports 1982*, p. 325, at pp. 348-349, paras. 46-47; see also Written Statement of China,

2.3. Insofar as concerns the applicable law, a few States have advocated the application of "the entire corpus of international law", including but not limited to all the miscellaneous documents and principles mentioned in resolution 77/276[16]. This is an unrealistic proposition; most of the rules of international law have no application in relation to climate change[17]. For example, as the United Kingdom notes, "human rights treaties are not directly responsive to, and do not provide an answer to, the question posed by the United Nations General Assembly"[18]. Moreover, it is for the Court to decide on the law applicable to the questions before it, not the Assembly; many of the instruments and principles mentioned in the resolution are not law, while others are not relevant to the questions posed by the Assembly[19].

2.4. As the Kingdom has explained in Chapter 1 above and in its Written Statement, the applicable law is to be found in the specialized treaty regime on climate change (the UNFCCC, the Kyoto Protocol, and the Paris Agreement)[20]. Many other States agree[21]. The questions before the Court ask it to assess the obligations of States with respect to

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para. 11 ("China hopes that the Court, in fulfilling its functions and role as the main judicial organ of the United Nations, will focus on addressing legal issues rather than factual issues; identify, interpret and apply relevant *lex lata* on climate change; and refrain itself from creating new laws or imposing new obligations on States, thereby helping to achieve the purposes and objectives of the United Nations, strengthening international peace, security and cooperation, and promoting peaceful resolution of differences"); Written Statement of the Kingdom of Saudi Arabia, paras. 3.1-3.16.

16 Written Statement of Argentina, paras. 32-34; Written Statement of the Dominican Republic, paras. 4.4-4.6; Written Statement of Egypt, paras. 68-75; Written Statement of Indonesia, para. 34; Written Statement of Sierra Leone, para. 3.2; Written Statement of Thailand, para. 4.

17 Written Statement of Japan, para. 11; Written Statement of the United Kingdom, paras. 27.4-27.5.

18 Written Statement of the United Kingdom, para. 33.

19 Written Statement of Japan, paras. 8-11; Written Statement of the United Arab Emirates, paras. 16-17; Written Statement of the United Kingdom, paras. 27.4-27.5, 33.

20 Written Statement of the Kingdom of Saudi Arabia, paras. 1.7, 3.3, 3.15-3.17, 4.2.

21 Written Statement of Australia, para. 2.2; Written Statement of Brazil, para. 10; Written Statement of the Dominican Republic, para. 4.21; Written Statement of India, para. 19; Written Statement of Japan, paras. 11-18; Written Statement of the Republic of Korea, paras. 14, 17; Written Statement of Kuwait, para. 8; Written Statement of New Zealand, paras. 18, 21; Written Statement of the Russian Federation, pp. 5-7; Written Statement of Singapore, para. 3.27; Written Statement of South Africa, paras. 16-17; Written Statement of Timor-Leste, paras. 83, 92; Written Statement of the Kingdom of Tonga, para. 124; Written Statement of the United Arab Emirates, paras. 16-17; Written Statement of the United Kingdom, para. 4.3; Written Statement of the United States, para. 1.3; see also Written Statement of the Organization of the Petroleum Exporting Countries, para. 9.

climate change and greenhouse gas emissions, and the legal consequences under these obligations, under existing rules of international law. Those existing rules were specifically negotiated in the specialized treaty regime on climate change[22]. The specialized treaty regime includes the only treaties to which almost all States have agreed, which by their plain language directly address climate change and under which the Parties have agreed to certain conduct to address climate change.

2.5. These important points have been taken up and developed in many Written Statements. What follows are just a few examples.

2.6. As the United Kingdom notes, the specialized treaty regime on climate change comprises "the treaties by which States have agreed that harm to the climate system caused by [greenhouse gas "GHG"] emissions is to be addressed and the risk of future harm is to be lessened or avoided"[23].

2.7. The United States says that "States' implementation of their obligations under the UN climate change regime—especially through the Paris Agreement's mechanism for driving increasingly ambitious climate action over time—provides the best hope for protecting the climate system for the benefit of present and future generations"[24].

2.8. Australia states that "[o]ther international treaties or customary rules, which were not negotiated or did not develop in order to address the threat posed by climate change, should not be interpreted as operating inconsistently with, or as going beyond, the UNFCCC and Paris Agreement. To do so would alter the delicate balancing of interests that has allowed the international community to reach agreement to cooperate in the manner that is critical to meeting the challenge of climate change"[25].

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22 Written Statement of the Kingdom of Saudi Arabia, paras. 3.12, 3.15-3.16.

23 Written Statement of the United Kingdom, para. 4.3.

24 Written Statement of the United States, para. 1.3.

25 Written Statement of Australia, para. 2.62.

2.9. As various other States explain in their Written Statements, given the universally accepted nature of the specialized treaty regime on climate change and the way this regime facilitates ongoing negotiations among States[26], rules external to the regime cannot be used to respond to the questions posed to the Court[27].

2.10. The United States explains that "[i]n providing an advisory opinion that underscores the centrality of States' obligations under the UN climate change regime, and that is mindful of the careful balance struck in the Paris Agreement to attract broad participation while also delivering increasingly ambitious climate action over time, the Court can reinforce the UN climate change regime and States' ongoing efforts as part of the Paris Agreement's ambition mechanism. It is in this manner, at this important stage in the Paris Agreement's implementation, that the Court through its advisory opinion could support—and not disrupt—the vital and impactful efforts of States to address anthropogenic climate change through the UN climate change regime and particularly the Paris Agreement"[28].

2.11. The Kingdom next turns to the law of the sea. It agrees with these statements, which underscore that, in rendering its advisory opinion, the Court should apply the specialized treaty regime on climate change as the existing international law applicable to greenhouse gas emissions[29].

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[26] Written Statement of the United States, para. 2.59 ("[T]he UN climate change regime has not been static: from its inception, it was designed to evolve, and the Paris Agreement is itself designed to drive over time increasingly ambitious action by Parties to mitigate GHG emissions. . . Parties' implementation of the Paris Agreement already has led to increasingly ambitious climate action, with the expectation that the iterative aspect of the Agreement's ambition mechanism will result in the continued evolution and strengthening of broad-based climate action"); see also ibid., para. 3.36 ("The Agreement is dynamic and provides, by design, for the UN climate change regime's continued progressive development in practice through the political and diplomatic action of Parties."); Written Statement of Canada, para. 23; Written Statement of the Kingdom of Saudi Arabia, paras. 1.19, 3.5-3.8; Written Statement of the United Kingdom, para. 4.6.

[27] Written Statement of Canada, paras. 22-23, 36; Written Statement of Japan, paras. 17-18; Written Statement of the United Kingdom, para. 4.3.

[28] Written Statement of the United States, paras. 6.4-6.5.

[29] Written Statement of the Kingdom of Saudi Arabia, paras. 1.6, 1.9, 1.15, 1.16, 3.3, 3.9-3.16.

2.12. As the Kingdom noted in its Written Statement, the law of the sea should not be interpreted as imposing obligations with respect to anthropogenic greenhouse gas emissions that are inconsistent with or go beyond those agreed in the specialized treaty regime on climate change[30]. The specialized treaty regime on climate change comprises the only specific treaties under which States Parties have agreed to regulate conduct vis-à-vis anthropogenic greenhouse gas emissions in the context of climate change.

2.13. While the Kingdom does not agree with everything that is said in the Advisory Opinion rendered by the International Tribunal for the Law of the Sea ("ITLOS") on 21 May 2024 (the "Advisory Opinion"), the Kingdom agrees with the recognition in the Advisory Opinion of the central role of the specialized treaty regime, when it notes that "there is an extensive treaty regime addressing climate change" and that the "UNFCCC and the Paris Agreement stand out in this regard as primary treaties addressing climate change"[31]. The Advisory Opinion confirms that "[t]he Convention [*i.e.*, the United Nations Convention on the Law of the Sea ("UNCLOS")] and the Paris Agreement are separate agreements, with separate sets of obligations"[32], and that the UNFCCC is "at the core" of the international agreements negotiated and adopted to address the issue of anthropogenic greenhouse gas emissions and climate change[33].

2.14. The Kingdom also agrees with the Advisory Opinion's focus on UNCLOS and close adherence to the language of UNCLOS in determining States' obligations under UNCLOS[34]. And it agrees with the Advisory Opinion's acknowledgment that the Paris

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30 Written Statement of the Kingdom of Saudi Arabia, para. 4.95; see also Written Statement of Australia, para. 3.5.

31 *Request for Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion, 21 May 2024, ITLOS Reports 2024* ("ITLOS Advisory Opinion of 21 May 2024"), to be published, paras. 137, 214; see also ibid. paras. 140, 222; see also Written Statement of Australia, para. 3.6.

32 ITLOS Advisory Opinion of 21 May 2024, para. 223.

33 ITLOS Advisory Opinion of 21 May 2024, para. 67.

34 See ITLOS Advisory Opinion of 21 May 2024, para. 142 ("The Tribunal concludes that it is requested to render an advisory opinion on the specific obligations of States Parties under the Convention. In order to

Agreement "does not require the Parties to reduce GHG emissions to any specific level according to a mandatory timeline but leaves each Party to determine its own national contributions in this regard"[35].

2.15. Even though the Advisory Opinion recognizes the central role of the specialized treaty regime on climate change, it does not consider fully the implications for UNCLOS of what States agreed to regarding climate change, economic development and poverty eradication after careful negotiations, including at sessions of COP to the UNFCCC, intersessional meetings and negotiations involving UNFCCC subsidiary bodies, and through constant bilateral and multilateral discussions among States outside formal negotiations. As the Kingdom stated in its Written Statement, through these negotiations, States developed the specialized treaty regime on climate change that, at its core, emphasizes the need for climate action to take account of "economic development to proceed in a sustainable manner" and "the basis of equity, and [] the context of sustainable development and efforts to eradicate poverty"[36]. It is central to the UNFCCC that climate change responses are to be coordinated with social and economic development, taking into account economic growth and poverty eradication needs[37].

2.16. The Advisory Opinion, when interpreting UNCLOS, should also have given more consideration to the Paris Agreement's provisions concerning how actions are taken to respond to the threat of climate change including the relevance of obligations under those agreements. The Advisory Opinion should have considered the consequences for UNCLOS of the Parties' obligations to take into account economic development and

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identify these obligations and clarify their content, the Tribunal will have to interpret the Convention *and, in doing so*, also take into account external rules, as appropriate") (emphasis added).

35 ITLOS Advisory Opinion of 21 May 2024, para. 222.

36 Written Statement of the Kingdom of Saudi Arabia, para. 4.14; United Nations Framework Convention on Climate Change ("UNFCCC"), 21 March 1994, Article 2; Paris Agreement to the United Nations Framework Convention on Climate Change ("Paris Agreement"), 12 December 2015, Article 4(1).

37 Written Statement of the Kingdom of Saudi Arabia, para. 4.14; UNFCCC, preamble.

poverty elimination goals as well as the discretion afforded by the Paris Agreement to States to determine their own national contributions to the response to the threat of climate change in light of their particular national circumstances[38]. As the Kingdom noted in its Written Statement, the Paris Agreement affords flexibility for each State to design its own just transition in pursuit of a common goal[39]. The energy trilemma of energy security, equity (accessibility and affordability), and sustainability plays a central role in effecting the emissions transition. These considerations are better reflected in the operative conclusions in paragraph 441 than in other parts of the Advisory Opinion.

2.18 UNCLOS – a treaty that nowhere refers to climate change – cannot be read to override the careful balance struck in the specialized treaty regime on climate change[40]. As explained by the Kingdom and other States, compliance with the obligations defined and limited by the specialized climate treaty regime satisfies a State's international law obligations to address anthropogenic greenhouse gas emissions in relation to climate change[41]. To interpret UNCLOS to impose obligations relating to greenhouse gas emissions which go beyond that treaty regime would undermine the balance carefully struck by States to address climate change while also meeting other global priorities of economic development and poverty elimination, thereby allowing States the flexibility to determine their national contributions in light of their stage of development and other national circumstances.

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38 Paris Agreement, preamble, paras. 8-10; Article 3.

39 Written Statement of the Kingdom of Saudi Arabia, para. 4.55; see also Decision 1/CMA.5, Outcome of the first global stocktake, paras. 10, 28(h), 42, 140, 151, 152, in Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on its fifth session, held in the United Arab Emirates from 30 November to 13 December 2023, FCCC/PA/CMA/2023/16/Add.1, 15 Mar. 2024, p. 3, 6, 7, 17, 18.

40 Written Statement of the Kingdom of Saudi Arabia, paras. 4.92, 4.94-4.95; see also Written Statement of Australia, para. 3.5.

41 Written Statement of the Kingdom of Saudi Arabia, para. 4.95; see also Written Statement of Australia, para. 3.19; Written Statement of the Republic of Korea, para. 27; Written Statement of New Zealand, para. 91; Written Statement of Singapore, para. 3.56(d).

2.17. The Kingdom does not agree with the Advisory Opinion's unqualified suggestion that "the best available science is found in the works of the [Intergovernmental Panel on Climate Change ("IPCC")] which reflect the scientific consensus"[42]. While the IPCC's Member States consider its reports credible and policy-relevant, Decision 19/CMA.1 in relation to conducting the Global Stocktake under the Paris Agreement "decide[d] that equity and the best available science will be considered in a Party-driven and cross-cutting manner, throughout the Global Stocktake", and it further identified a multitude of sources of input including "the latest reports of the Intergovernmental Panel on Climate Change" as well as "[r]elevant reports from United Nations agencies and other international organizations" and "[r]elevant reports from regional groups and institutions," among others[43]. The Kingdom agrees with the Written Statement of the Organization of the Petroleum Exporting Countries, which refers to projections from the World Oil Outlook report as an example of science-driven views on how the future energy landscape may evolve. The Outlook projects "sustainable paths that enable economic growth, enhance social mobility, boost energy access, and reduce emissions at the same time."[44] These projections, which builds on the Organization's credible expertise and authority in this regard, differ from projections of other reports, which demonstrates that the "best available science" is not limited to any one scientific body[45].

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42 ITLOS Advisory Opinion of 21 May 2024, para. 208.

43 Decision 19/CMA.1, Matters relating to Article 14 of the Paris Agreement and paragraphs 99–101 of decision 1/CP.21, paras. 2, 37, in Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on the third part of its first session, held in Katowice from 2 to 15 December 2018, Addendum, Part two: Action taken by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, FCCC/PA/CMA/2018/3/Add.2 (19 March 2019), pp. 53, 57-58.

44 OPEC, *World Oil Outlook 2025* (2023), Executive Summary, p. 1.

45 Written Statement of the Organization of the Petroleum Exporting Countries, paras. 25-30.

Chapter 3. THE UNFCCC, KYOTO PROTOCOL AND PARIS AGREEMENT

3.1. The Kingdom's Written Statement described in some detail the specialized treaty regime on climate change (comprising the UNFCCC (as a framework convention), the Kyoto Protocol and the Paris Agreement), which sets out States Parties' obligations in respect of greenhouse gas emissions and the climate system[46]. Most Written Statements contain similar descriptions[47].

3.2. The present Chapter addresses two points where other Written Statements appear to misconstrue aspects of the specialized treaty regime. Section I clarifies that the specialized treaty regime on climate change takes account of greenhouse gas emissions that occurred before its entry into force, contrary to the view expressed by a few States that it does not address conduct predating its entry into force. Section II refutes the assertion that the UNFCCC, a framework convention, is somehow superseded by the Paris Agreement.

I. The specialized climate treaty regime on climate change addresses greenhouse gas emissions predating its entry into force

3.3. The Kingdom described in its Written Statement how the specialized climate treaty regime addresses historical emissions[48]. Other States agree[49]. The specialized treaty regime on climate change explicitly takes into account historic emissions and the differentiated positions of States in regard to them.

3.4. The obligations of developed States under the specialized climate treaty regime are based in part on their actions predating the entry into force of the treaty regime. The

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46 Written Statement of the Kingdom of Saudi Arabia, Chapter 4.

47 Written Statement of Canada, para. 11; Written Statement of India, para. 19; Written Statement of Japan, para 12; Written Statement of the United Arab Emirates, paras. 16-17; see also Written Statement of the Organization of the Petroleum Exporting Countries, para. 9.

48 Written Statement of the Kingdom of Saudi Arabia, paras. 1.12, 2.5, 4.11, 4.13, 4.101, 5.3, 5.13.

49 See, e.g., Written Statement of India, para. 25; Written Statement of Timor-Leste, para. 130.2.

UNFCCC in its preamble recognizes "that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries"[50]. As India notes, this explains the context in which "[t]he obligations applicable to 'all Parties' are subject to [common but differentiated responsibilities ("CBDR")] and developmental priorities of individual States Parties"[51]. Therefore, as India continues, "the 'lead' that developed countries are expected to take" is based, in large part, on "their historical contribution to the problem"[52]. As China put it, the specialized climate treaty regime's CBDR principle means that "developed countries with historical responsibility and their capability advantages should take the lead in tackling climate change, shoulder more responsibility for emissions reduction, and help developing countries in mitigation and adaptation by providing technical and financial support"[53].

3.5. Greenhouse gas emissions before the regime's entry into force play an important role in balancing responsibilities between Annex I and non-Annex I Parties throughout the specialized treaty regime on climate change. States recognize under Articles 4(2)(a) and (b) of the UNFCCC, that "the return by the end of the present decade to earlier levels of anthropogenic emissions of carbon dioxide and other greenhouse gases" would contribute to modifying longer-term trends in anthropogenic emissions consistent with the objective of the UNFCCC. On this basis, each of the Annex I Parties undertake to "adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs", and to communicate information "with the aim of returning individually or jointly to their 1990 levels" of anthropogenic emissions of carbon dioxide and other greenhouse gases[54]. Similarly, the Kyoto

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50 UNFCCC, preamble; Written Statement of India, para. 25.

51 Written Statement of India, para. 25.

52 Written Statement of India, para. 25.

53 Written Statement of China, para. 35.

54 UNFCCC, Article 4(2)(a) ("These policies and measures will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions consistent with the objective of the Convention, recognizing that the return by the end of the present decade to earlier levels of anthropogenic

Protocol provided that Annex I Parties shall "ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases . . . do not exceed their assigned amounts . . . with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels"[55].

3.6. In contrast, non-Annex I Parties, acknowledged to have a smaller share of historical emissions, are not required to return to their 1990 emission levels. Instead, States Parties to the UNFCCC recognized that their share of greenhouse gas emissions "will grow to meet their social and development needs"[56].

II. The UNFCCC is further operationalized by the Paris Agreement and not superseded

3.7. The Paris Agreement does not supersede the UNFCCC, nor do any of its provisions conflict with obligations in the UNFCCC, contrary to the views expressed by a few States[57].

3.8. The UNFCCC is a framework convention, as indicated by its title as well as by provisions such as Article 2, Article 7.2 and Article 14.8, each of which refers to "related legal instruments that the Conference of the Parties may adopt" and highlights how closely related such instruments are to the UNFCCC.

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emissions of carbon dioxide and other greenhouse gases not controlled by the Montreal Protocol would contribute to such modification, and taking into account the differences in these Parties' starting points and approaches, economic structures and resource bases, the need to maintain strong and sustainable economic growth, available technologies and other individual circumstances, as well as the need for equitable and appropriate contributions by each of these Parties to the global effort regarding that objective").

55 Kyoto Protocol to the United Nations Framework Convention on Climate Change ("Kyoto Protocol"), 11 December 1997, Article 3(1).

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

57 See, e.g., Written Statement of Denmark, Finland, Iceland, Norway and Sweden, para. 52; Written Statement of the United Kingdom, paras. 40-42; Written Statement of the United States, paras. 3.3, 3.11, 3.20, 3.23-3.30.

- Article 2 provides that the UNFCCC and any such "related legal instruments" share the same "ultimate objective", which is "to achieve, in accordance with the relevant provisions of the [UNFCCC], stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system"[58].

- Article 7.2 provides that the UNFCCC's COP "shall keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt"[59].

- Article 14.8 provides that the UNFCCC's dispute settlement provisions apply to such "related legal instrument[s]"[60]. The Paris Agreement, which was adopted by the UNFCCC's COP[61], is such a "related legal instrument" (as is the Kyoto Protocol). Article 2 of the Paris Agreement confirms this, referring to its object and purpose as "enhancing the implementation of the [UNFCCC]"[62].

3.9. The preamble to the Paris Agreement further confirms that the Paris Agreement is to be read "in pursuit of the objective of the Convention, and being guided by its principles, including the principle of equity and CBDR-RC, in the light of different national circumstances"[63]. The Paris Agreement is thus intended to be governed by the

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58 UNFCCC, Article 2 ("The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system").

59 UNFCC, Article 7.2 ("The Conference of the Parties, as the supreme body of this Convention, shall keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention").

60 UNFCCC, Article 14.8 ("The provisions of this Article shall apply to any related legal instrument which the Conference of the Parties may adopt, unless the instrument provides otherwise").

61 Decision 1/CP.21, Adoption of the Paris Agreement, para. 1, in Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015, FCCC/CP/2015/10/Add.1, 29 Jan. 2016, p. 11 ("Decides to adopt the Paris Agreement under the United Nations Framework Convention on Climate Change (hereinafter referred to as "the Agreement") as contained in the annex").

62 Paris Agreement, Article 2.

63 Paris Agreement, preamble.

object and purpose, implementation mechanism and dispute resolution mechanism of the UNFCCC as the framework convention. The objective of the specialized treaty regime on climate change as a whole is to be considered when addressing State obligations with respect to climate change[64], particularly with respect to the principle of CBDR[65].

3.10. The UNFCCC provides a framework for "related legal instruments" which are considered to be compatible with the UNFCCC; accordingly, the UNFCCC's provisions continue to apply. In light of the above-referenced provisions of the UNFCCC, the relation of the Paris Agreement to the UNFCCC is not a case falling under the *lex posterior* rule codified in Article 30(3) of the Vienna Convention on the Law of Treaties ("VCLT").

3.11. Indeed, as many States recognize in their Written Statements, the Paris Agreement was adopted "under the UNFCCC"[66]. Russia points out that "the Paris Agreement is an implementing treaty to the UNFCCC, as it is intended to enhance its implementation"[67]. Singapore describes this relationship as one in which "the Paris Agreement is the most recent treaty adopted under the auspices of the UNFCCC to enhance its

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64 Written Statement of Indonesia, para. 51 ("The UNFCCC, followed by the Kyoto Protocol and the Paris Agreement, constitute the global governance for climate change"); Written Statement of New Zealand, para. 21 ("The UN climate change treaty regime, which includes the 1992 UNFCCC, the 1998 Kyoto Protocol ('the KP'), and the 2015 [Paris Agreement] (collectively 'the climate change treaty regime'), is the key multilateral framework which defines the nature and scope of the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of GHGs for present and future generations"); see also Written Statement of India, para. 19.

65 Paris Agreement, Articles 2(2), 3, 4; Written Statement of China, paras. 63-65; Written Statement of India, paras. 61, 71.

66 Written Statement of South Africa, paras. 34-35 ("Both the Kyoto Protocol and Paris Agreement are thus under the UNFCCC. It is additionally important to underscore that the Paris Agreement did not replace the UNFCCC or its Kyoto Protocol. There is no provision in the Paris Agreement that suggests that it supersedes either the UNFCCC or the Kyoto Protocol".); see also Written Statement of China, para. 39; Written Statement of Iran, para. 115; Written Statement of New Zealand, paras. 24, 26; Written Statement of Timor-Leste, para. 189; Written Statement of the United Arab Emirates, para. 12; see also Decision 1/CP.21, Adoption of the Paris Agreement, para. 1, in Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015, FCCC/CP/2015/10/Add.1, 29 Jan. 2016, p. 11.

67 Written Statement of the Russian Federation, p. 6.

implementation"[68]. As Australia explains, the negotiations for the Paris Agreement were "launch[ed] [as] a process to develop a protocol, another legal instrument or an agreed outcome with legal force *under* the UNFCCC applicable to all Parties through a subsidiary body under the [UNFCCC]"[69]. The ultimate text agreed "has been described as creating 'cascading levels' of obligations that are designed collectively to meet the purpose of the [UNFCCC]"[70]. The Paris Agreement cannot be viewed as separate from the UNFCCC; it was specifically adopted to implement and operationalize the obligations of the UNFCCC.

3.12. As States such as New Zealand, Timor-Leste and Tonga highlight, the relationship among the UNFCCC, Kyoto Protocol and Paris Agreement is one where "[t]hree principal treaties regulate anthropogenic greenhouse gas emissions:

> The UNFCCC – a broad framework which establishes guiding principles to regulate climate change;
>
> The Kyoto Protocol – imposes binding substantive obligations of result requiring developed countries to achieve greenhouse gas mitigation targets and timetables; and
>
> The Paris Agreement – sets procedural obligations and obligations of conduct regarding greenhouse gas mitigation and adaptation on all States Parties"[71].

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68 Written Statement of Singapore, para. 3.27.

69 Written Statement of Australia, para. 2.8 (emphasis added).

70 Written Statement of Australia, para. 2.10.

71 Written Statement of Timor-Leste, para. 94; see also Written Statement of the Kingdom of Tonga, para. 138; Written Statement of New Zealand, para. 24 ("The [Kyoto Protocol] and the [Paris Agreement] are 'related instruments' adopted under the UNFCCC and in pursuit of the same objective").

Chapter 4. QUESTION (A) – THE OBLIGATIONS OF STATES TO PROTECT THE CLIMATE SYSTEM FROM ANTHROPOGENIC EMISSIONS OF GREENHOUSE GASES

4.1. Question (a) reads as follows:

> What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations?[72]

4.2. In its Written Statement, the Kingdom explained that specific obligations with respect to climate change are set out in the specialized treaty regime on climate change[73]. Sections I through III of the present Chapter show that many other States in their Written Statements share this view. These sections deal in turn with differentiation, the NDC mechanism, and adaptation obligations.

4.3. Sections IV and V address arguments presented by certain States that advocate a broader approach. These sections explain that there is no basis for deducing legal obligations beyond those specifically agreed in the UNFCCC, the Kyoto Protocol, and the Paris Agreement, including because doing so would go beyond the intentions of the Parties to this specialized treaty regime on climate change and is not possible due to the global nature of climate change[74].

I. Differentiation

4.4. While pursuing the common goals under the specialized treaty regime on climate change, obligations of Parties included in Annex I to the UNFCCC and those not

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

[73] Written Statement of the Kingdom of Saudi Arabia, para. 5.2.

[74] Written Statement of the Kingdom of Saudi Arabia, para. 5.4.

included in Annex I are differentiated, including through CBDR-RC, as many States recognized in their Written Statements[75].

4.5. Differentiation reflects several realities. One is that effects of greenhouse gases are cumulative and multifaceted, occur over an extended period of time, and are not easily allocated or subject to quantification. Another is the reality that certain States' historic land use changes and industrial activities are the primary source of the accumulation of greenhouse gases in the atmosphere, and contributed to these States' early development, making them better able to respond to the threat of climate change. They are thus to take the lead in addressing climate change. As the United Arab Emirates said, differentiation "requires that due regard be had to the historical contributions of developed countries towards anthropogenic GHG emissions"[76].

4.6. As the Kingdom and many other States explain in their Written Statements, the differentiation of obligations among States was first agreed in the UNFCCC and continues in the Kyoto Protocol and the Paris Agreement[77]. Within the UNFCCC, Parties listed in Annex I have distinct responsibilities compared to those not listed in Annex I. In addition, Parties listed in Annex II have distinct responsibilities, particularly in relation to financial support. The principle of differentiation is at the core of the specialized treaty regime on climate change, designed to address the complexities of collective climate action based on the differing positions of States. As India says, "[t]he Convention differentiates between the obligations of the parties using two principle categories – developed countries Parties and other Parties included in

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75 Written Statement of Argentina, para. 40; Written Statement of Brazil, para. 37; Written Statement of Ecuador, para. 3.69; Written Statement of India, para. 22-27; Written Statement of Kuwait, para. 22-24; Written Statement of the Philippines, para. 102.

76 Written Statement of the United Arab Emirates, paras. 146-152.

77 Written Statement of the African Union, paras. 133, 138; Written Statement of Bolivia, para. 42; Written Statement of Brazil, paras. 12, 36; Written Statement of India, paras. 22, 36; Written Statement of Kuwait, para. 137; Written Statement of Micronesia, para. 68; Written Statement of Portugal, paras. 46-50; Written Statement of Sierra Leone, para. 3.39; Written Statement of the Solomon Islands, para. 100; Written Statement of the Kingdom of Tonga, para. 163; Written Statement of the United Arab Emirates, paras. 149; Written Statement of Vietnam, paras. 16-17.

Annex I, and the developing country Parties (non-Annex Parties) . . . [A]s also well-enshrined in the UNFCCC, its Kyoto Protocol and its Paris Agreement, the responsibilities of States, while common, are differentiated for developing countries and developed countries"[78].

4.7. Correctly applied, differentiated responsibilities determine the obligations of States when taking collective climate action. For Annex I Parties, developed States, the UNFCCC provides that they "should take the lead in combating climate change and the adverse effects thereof"[79]. As India states, "the 'lead' that developed countries are expected to take is on the basis of their historical contribution to the problem, as well as their capacity (economic and technological) to address the problem"[80]. China explains that "Article 4 of the UNFCCC and Article 4(4) of the Paris Agreement, clearly stipulate[] the obligations and responsibilities of developed countries to take the lead in substantially reducing emissions, and providing financial resources and technology transfer to developing countries"[81]. Thus, Annex I Parties must: take the lead to pursue economy-wide emission reductions[82], bear more adaptation obligations[83], provide financial resources (in particular Annex II States Parties)[84], transfer technology[85], support capacity-building[86], and bear greater obligations on communicating implementation information[87].

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78 Written Statement of India, paras. 22, 36.

79 UNFCCC, Article 3(1).

80 Written Statement of India, para. 25.

81 Written Statement of China, para. 37.

82 UNFCCC, Articles 3(1), 4(2); Kyoto Protocol, Article 3(1); Paris Agreement, Article 4(4); Written Statement of China, para. 52.

83 UNFCCC, Article 4(4); Paris Agreement, Article 9(1); Written Statement of China, para. 70.

84 UNFCCC, Article 4(3); Paris Agreement, Article 9(1); Written Statement of China, para. 73.

85 UNFCCC, Article 4(5); Written Statement of China, para. 74.

86 Paris Agreement, Article 11(3); Written Statement of China, para. 75; Written Statement of Sierra Leone, para. 3.130.

87 UNFCCC, Article 12(2); Kyoto Protocol, Article 7; Paris Agreement, Articles 9(5), 9(7), 13(9).

4.8. Obligations of non-Annex I Parties are to be balanced against other goals, including those related to national circumstances, sustainable development, economic development, poverty eradication and food security, among others. Differentiation "remains a necessary guarantee for developing countries to achieve equitable development", as China notes[88]. As India underlines, "obligations applicable to 'all Parties' are subject to CBDR-RC and developmental priorities of individual State parties"[89]. That is, "[d]ue to uncontrolled GHG emissions since the industrial revolution, developed countries have achieved industrialization and urbanization and already peaked GHG emissions, gaining significant economic and technological advantages. On the contrary, developing countries are faced with multiple challenging tasks, including poverty eradication, economic development, livelihoods improvement, and pollution control. They suffer from unbalanced and insufficient development, lacking necessary resources and capacity to respond to climate change"[90]. Indeed, as many States have stressed, the obligations of non-Annex I Parties "will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties"[91]. The Kingdom agrees with these States.

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88 Written Statement of China, para. 66.

89 Written Statement of India, para. 25.

90 Written Statement of China, para. 66.

91 UNFCCC, Article 4(7); see also Written Statement of Cameroon, para. 16; Written Statement of Egypt, para. 141; Written Statement of Kenya, para. 5.23; Written Statement of South Africa, paras. 51, 129 ("Climate change is a serious threat to sustainable [development]. Accordingly, in implementing the objective and obligations as required under the UNFCCC, Parties should promote sustainable development. The UNFCCC provides that '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'. . . legal obligations of States Parties to the UNFCCC, Kyoto Protocol and Paris Agreement must be viewed through the lens of important guiding principles, in particular, that of equity and common but differentiated responsibilities and respective capabilities, as well as sustainable development. It has the effect that legal obligations in relation to climate change are nuanced and different States have different legal obligations.").

4.9. The Paris Agreement equally recognizes that obligations of States are based on differentiation, as the Kingdom and many other States, including Brazil, China, and Timor-Leste, noted in their Written Statements[92]. The plain language of the Paris Agreement states it "will be implemented" to reflect the principles of equity and CBDR-RC[93]. Numerous provisions of the Paris Agreement recognize differentiation with respect to States' responsibilities[94]. To achieve the objective of the Paris Agreement, States Parties are to take into account "different national circumstances"[95] and "the specific needs and special circumstances of developing country Parties"[96]. Thus, States have not made the distinction between Annex I and non-Annex I Parties under the UNFCCC obsolete, in favour of a more fluid or dynamic conception of developed and developing States. Instead, differing national circumstances of non-Annex I States Parties continue to be relevant to actions these States take pursuant to the specialized climate treaty regime. The distinction between Annex I and non-Annex I Parties remains. Indeed, as the Kingdom explains in Chapter 3, Section II of these Written Comments, the Paris Agreement was adopted under the UNFCCC. If the Parties want to amend the list in Annex I to reflect changes in their level of socio-economic development over time, they are able to do so pursuant the amendment mechanism under Article 16 of the UNFCCC.

4.10. The Paris Agreement does not depart from the UNFCCC or Kyoto Protocol on differentiation, as the Kingdom and numerous States explained in their Written Statements[97]. First, as China states, "the rules for the application of the principle of

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92 Paris Agreement, preamble, para. 3; Articles 2(2), 3, 4; Written Statement of Brazil, para. 25; Written Statement of China, para. 63; Written Statement of Timor-Leste, paras. 129, 135.

93 Paris Agreement, Article 2(2).

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

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

96 Paris Agreement, preamble, para. 5.

97 Written Statement of the Kingdom of Saudi Arabia, para. 4.49; see also Written Statement of Brazil, para. 25; Written Statement of China, para. 63; Written Statement of India, para. 36, 43; Written Statement of Japan, para. 22; Written Statement of the Russian Federation, para. 1.1; Written Statement of South Africa,

CBDR-RC remain unchanged" as both the UNFCCC and Paris Agreement stress that "actions to address climate change should be based upon the differentiation of responsibilities of developed countries and developing countries", acknowledging their different national circumstances[98]. Second, "the factual basis underlying the principle of CBDR-RC remains unchanged"; "[h]istorical cumulative CO2 emissions is the main drive of current global warming and will continue to contribute to the global temperature rise"[99]. As India underlines, "human-induced climate change is a consequence of more than a century of net-GHG emissions from unsustainable energy-use, land use and land-use change, lifestyle and patterns of consumption and production"[100]. Third, "the pressing need to apply the principle of CBDR-RC becomes more pronounced" and "[t]he principle of CBDR-RC remains a necessary guarantee for developing countries to achieve equitable development"[101].

4.11. Accordingly, the Kingdom and many other States explain in their Written Statements, CBDR-RC stands as the cornerstone of obligations under the specialized treaty regime on climate change[102]. As China states, "the Paris Agreement confirms the differentiation between developed and developing countries in terms of obligations and responsibilities, particularly regarding mitigation, adaptation and support"[103].

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para. 47, 54-55, 68, 75; Written Statement of Timor-Leste, paras. 129, 135; Written Statement of the United Arab Emirates, paras. 139-142.

98 Written Statement of China, para. 64.

99 Written Statement of China, para. 65.

100 Written Statement of India, para. 61.

101 Written Statement of China, para. 66.

102 Written Statement of the Kingdom of Saudi Arabia, paras. 4.11-4.13, 4.38, 4.49-4.51, 4.101; see also Written Statement of Brazil, para. 36; Written Statement of Egypt, para. 140; Written Statement of Iran, paras. 35-36; Written Statement of Japan, para. 22; Written Statement of Kenya, para. 5.23; Written Statement of Namibia, para. 75; Written Statement of Sierra Leone, para. 3.39; Written Statement of the United Arab Emirates, paras. 137-145; Written Statement of Vietnam, paras. 16-17.

103 Written Statement of China, para. 63.

II. Nationally determined contributions mechanism

4.12. There is general agreement among States that the NDC mechanism is at the core of the obligations of the specialized treaty regime on climate change[104]. States acknowledge that Article 4(2) is the "heart" of the Paris Agreement[105]. As Kuwait notes, "NDCs are the means by which States Parties intend to achieve the aims of the Paris Convention through each State Party preparing and communicating its NDC and submitting successive NDCs every five years"[106]. The Kingdom made the same point in its Written Statement[107].

4.13. States generally agree that the NDC mechanism—beyond the formulation, communication, and maintenance of NDCs—requires good faith effort, and does not impose an obligation of result[108]. The United States says that "[a]lthough Parties have an obligation to formulate, communicate and maintain successive NDCs, the Paris Agreement deliberately does not require parties to achieve their NDCs"[109]. Russia confirms that "[t]he Paris Agreement does not establish direct responsibility of every Party for the achievement of the objectives established under the NDCs"[110].

4.14. Nevertheless, the Paris Agreement includes important, best effort requirements for NDCs to contain many elements beyond mitigation, which have to be applied in good

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104 Written Statement of Australia, para. 2.18; Written Statement of Brazil, para. 48; Written Statement of China, paras. 39, 47; Written Statement of Denmark, Finland, Iceland, Norway and Sweden, para. 54; Written Statement of France, paras. 26-28; Written Statement of Germany, para. 56; Written Statement of Grenada, para. 31; Written Statement of India, para. 33; Written Statement of New Zealand, para. 53; Written Statement of the Russian Federation, p. 7; Written Statement of the United Kingdom, paras. 64-70.

105 Written Statement of Australia, para. 2.18; see also Written Statement of Kuwait, paras. 33-34.

106 Written Statement of Kuwait, para. 33.

107 Written Statement of the Kingdom of Saudi Arabia, paras. 1.8, 4.64-4.65.

108 Written Statement of China, para. 48; see also Written Statement of Indonesia, para. 54; Written Statement of Kuwait, para. 137(4)(ii); Written Statement of New Zealand, para. 61; Written Statement of Timor-Leste, paras. 105, 108, 113; Written Statement of the Kingdom of Tonga, paras. 147-148; Written Statement of the United States, paras. 2.55, 3.17.

109 Written Statement of the United States, para. 3.17.

110 Written Statement of the Russian Federation, p. 8.

faith. Article 3 of the Paris Agreement sets the general framework for the contributions that Parties will make towards the overall goals of the Paris Agreement, including through their NDCs. Article 3 does not set end-goals, but instead mandates that Parties through their NDCs are to "undertake and communicate ambitious efforts" which will "represent a progression over time"[111]. Such "efforts" crosscut mitigation (Article 4), adaptation (Article 7), finance (Article 9), technology (Article 10), capacity-building (Article 11) and transparency (Article 13), and are nationally determined. That means it will be up to each Party to decide how it wishes to undertake them. Then, under Article 4 of the Paris Agreement, each Party has procedural obligations to achieve the objectives of the NDCs, to "prepare, communicate and maintain successive nationally determined contributions that it intends to achieve", and each Party "shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions"[112].

4.15. The Written Statement of the Kingdom and those of many other States explain how each State has flexibility in determining the content of NDCs to reflect the need for each State to weigh and balance the multiplicity of competing interests in their societies[113]. As the text of the Paris Agreement makes clear, the NDC mechanism provides Parties with flexibility to decide the type and scope of their contributions[114]. As Kuwait notes, "[i]t is left solely to each Party to prepare and decide on the content of its NDC which it aims to achieve. Indeed, various NDCs submitted thus far are formulated in a variety of ways"[115]. But importantly each Party's successive NDC "will

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111 Paris Agreement, Article 3.

112 Paris Agreement, Articles 3, 4(2).

113 Written Statement of the Kingdom of Saudi Arabia, paras. 4.64-4.69; see also Written Statement of China, paras. 39, 48; Written Statement of Denmark, Finland, Iceland, Norway and Sweden, para. 57; Written Statement of Kuwait, para. 36; Written Statement of New Zealand, para. 54; Written Statement of the United Kingdom, para. 130.

114 See Paris Agreement, Articles 3, 4(19), 7(10), 13(1).

115 Written Statement of Kuwait, para. 35.

represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition", reflecting its CBDR-RC[116].

III. Adaptation obligations

4.16. The Kingdom explained in its Written Statement that, under the specialized climate treaty regime's global goal on adaptation, States Parties have obligations to "engage in adaptation planning processes and the implementation of actions"[117], with the goal of "enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change, with a view to contributing to sustainable development and ensuring an adequate adaptation response in the context of the temperature goal referred to in Article 2"[118]. Article 3 mandates with respect to adaptation that State Parties undertake and communicate ambitious efforts to take measures of adaptation to climate change[119]. Adaptation is linked to the NDC mechanism because Paris Agreement Article 3 on NDCs references Paris Agreement Article 7 on adaptation in the list of efforts to be undertaken and communicated as NDCs[120]. As New Zealand confirms, "some of the adverse impacts of climate change are unavoidable, and, as a result, States will still need to adopt adaptation measures alongside mitigation measures"[121]. Other States reach a similar conclusion[122].

4.17. Mitigation and adaptation are interconnected. Kuwait notes that the Paris Agreement "recognises the 'global goal on adaptation' and the importance of adaptation in the

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116 Paris Agreement, Article 4(3).

117 Paris Agreement, Article 7(9); see also Written Statement of the Kingdom of Saudi Arabia, para. 4.63.

118 Paris Agreement, Article 7(1); see also Written Statement of the Kingdom of Saudi Arabia, para.4.53.

119 Paris Agreement, Article 3.

120 Paris Agreement, Article 3.

121 Written Statement of New Zealand, para. 28.d.

122 Written Statement of Australia, paras. 2.24-2.29; see also Written Statement of Canada, para. 17; Written Statement of China, paras. 68-70; Written Statement of Egypt, paras. 153-165; Written Statement of India, paras. 34-35; Written Statement of Kuwait, paras. 43-44; Written Statement of Madagascar, para. 56; Written Statement of the Russian Federation, p. 10; Written Statement of Singapore, para. 3.37; Written Statement of South Africa, paras. 79-82; Written Statement of the Kingdom of Tonga, para. 142; Written Statement of the United States, para. 3.10.

long-term global response to climate change"[123]. Egypt notes that a "direct link as indicated under the Paris Agreement, exists between mitigation and adaptation" with reference to Article 7(4) of the Paris Agreement: "Parties recognize that the current need for adaptation is significant and that greater levels of mitigation can reduce the need for additional adaptation efforts, and that greater adaptation needs can involve greater adaptation costs"[124].

4.18. As China indicates, pursuant to this global goal on adaptation, "[c]ommon obligations or responsibilities of States involve undertaking adaptation activities as appropriate. States are required to formulate, implement, publish, and regularly update their national adaptation plans, to implement actions, to submit periodically adaptation communications, and to cover adaptation in nationally determined contribution"[125]. The Netherlands underlines "[p]arties have affirmed that adaptation must be addressed with the same level of priority as mitigation and adopted, to this end, the Cancun Adaptation Framework"[126].

4.19. Nevertheless, the Annex I Parties have greater adaptation obligations under the specialized climate treaty regime[127]. As China states, "[d]eveloped countries bear more adaptation obligations"[128]. Australia says that, with respect to adaptation, the Paris Agreement "sets out the obligation of developed country Parties to provide financial resources to assist developing country Parties to mitigate and adapt to climate change",

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123 Written Statement of Kuwait, para. 43.

124 Written Statement of Egypt, para. 159.

125 Written Statement of China, para. 69.

126 Decision 1/CP.16 The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention in Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010, FCCC/CP/2010/7/Add.1, 15 March 2011; Written Statement of Netherlands, para. 4.5.

127 Written Statement of Egypt, paras. 151, 156, 162-164, 263; Written Statement of Kuwait, para. 45; Written Statement of New Zealand, para. 35; Written Statement of Sierra Leone, paras. 3.9, 3.29, 4.6; Written Statement of Timor-Leste, para.162.2.

128 Written Statement of China, para. 70.

which "resources should aim to achieve a balance between adaptation and mitigation"[129].

4.20. Adaptation measures require critical financing from Annex I Parties. As Russia clarifies, "in addition to mitigation measures, the UNFCCC and the Paris Agreement provide for obligations of States to take measures of adaptation to climate change", and "climate change adaptation measures … have a direct impact (in the short or medium term) on a specific group of individuals currently living under the jurisdiction of a particular State"[130]. Egypt explains that any "violation by developed countries of their obligation to provide finance to developing countries for adaptation to climate change hinders the latter's ability to adapt to and mitigate climate change"[131].

IV. States do not have obligations to take action beyond the specific obligations they undertook in the specialized climate treaty regime itself

4.21. Some Written Statements assert that the specialized climate treaty regime should be interpreted as imposing a temperature goal or a reduction of fossil fuel production or export as obligations of States. The Kingdom addresses each of these arguments in turn.

A. Temperature goals are not a legal obligation

4.22. As the Kingdom explained in its Written Statement, the overarching aim of the Paris Agreement is "'to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty' by, amongst other things, setting a target of 'holding the increase in the global average temperature to well below 2 degrees Celsius above pre-industrial levels and pursuing efforts to limit the

[129] Written Statement of Australia, para. 2.35.

[130] Written Statement of the Russian Federation, p. 11.

[131] Written Statement of Egypt, para. 343.

temperature increase even further to 1.5 degrees Celsius above pre-industrial levels'"[132].

4.23. The text of the Paris Agreement is clear: the well below 2°C temperature is a goal, representing the "aims" of States Parties, and the reference to 1.5°C is an aspiration of "pursuing efforts to achieve that temperature increase goal". Neither of these temperature references create a legal requirement to limit the global average temperature increase to below 2°C or 1.5°C above pre-industrial levels[133].

4.24. Many States express similar views, explaining how the temperature goal is a collective goal, and is not a legal obligation or individual goal[134]. China underscores that the temperature goal is "a joint political commitment of the international community, instead of enunciating a concrete legal obligation for individual States"[135]. New Zealand explains that "the Article 2 temperature goal[] does not create obligations" and that the Paris Agreement "does not oblige Parties collectively to achieve the temperature goal"[136].

4.25. One Written Statement claims that a 2021 decision from the 26th session of the UNFCCC COP and the 3rd CMA reflects agreement among States to achieve a normative expectation for State Parties to align with the 1.5°C temperature goal[137]. However, it is clear from the text of the decision, as well as the COP's mandate, that the decision does not establish legally binding temperature obligations. Nor does the COP decision use language creating legal obligations with regard to temperature goals. It reads:

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132 Written Statement of the Kingdom of Saudi Arabia, para. 1.7 (quoting Paris Agreement, Article 2(1)).

133 Paris Agreement, Article 2(1).

134 Written Statement of Canada, para. 17; see also Written Statement of China, paras. 22-24; Written Statement of New Zealand, paras. 48-49, 52, 61; Written Statement of Singapore, para. 3.30.

135 Written Statement of China, para. 24.

136 Written Statement of New Zealand, paras. 52, 61.

137 Written Statement of Vanuatu, paras. 400-405.

> 20. *Reaffirms* the Paris Agreement temperature goal of 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; [and]
>
> 21. *Recognizes* that the impacts of climate change will be much lower at the temperature increase of 1.5 °C compared with 2 °C, and resolves to pursue efforts to limit the temperature increase to 1.5 °C[138].

4.26. The key verbs of the COP statement – "*Reaffirms*" and "*Recognizes*" – are not the language of legal obligation. Nor does what follows ("resolves to pursue efforts") set forth a legal obligation.

4.27. Even if the COP language had been otherwise, COP decisions alone cannot create international legal obligations unless the UNFCCC, Kyoto Protocol or Paris Agreement expressly provides that they are to do so. The COP's mandate does not provide for the COP to legally bind States, interpret treaties, express subsequent agreement among the States, or otherwise amend or modify the specialized climate treaty regime[139]. Article 7.2 of the UNFCCC provides that the COP "shall keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention"[140]. The COP's role is principally to keep under regular review the UNFCCC and "any related legal instruments", and to articulate goals that States may work toward. These decisions are not legally binding[141]. Indeed, the fact that the States elected to resort to a separate protocol (i.e., the Kyoto Protocol) in order to adopt legally binding mitigation commitments, and a separate agreement (i.e., the Paris Agreement) to enhance implementation of the UNFCCC and strengthen the global response to the threat of

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138 Decision 1/CMA.3, Glasgow Climate Pact, paras. 20-21, in Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on its third session, held in Glasgow from 31 October to 13 November 2021, FCCC/PA/CMA/2021/10/Add.1, p. 19-20.

139 UNFCCC, Article 7.2.

140 UNFCCC, Article 7.2.

141 Written Statement of Australia, para. 2.11; Written Statement of Kuwait, paras. 11, 52-59.

climate change is telling. It demonstrates that States do not view the decision-making power vested in the COP by the UNFCCC as sufficient to produce a legally binding outcome, interpret treaties, or produce subsequent agreements.

4.28. Furthermore, each of the instruments that make up the specialized climate treaty regime has provisions allowing for modification, none of which make provision for the modification or the expression of a subsequent agreement solely by a COP decision[142].

4.29. COP decisions such as the 2022 COP decision referenced above from the 26th session of the COP in Glasgow that included references to temperature measurements, or the more recent COP decision from the 28th session of the COP in Dubai that detailed the Outcome of the First Global Stocktake ("Outcome of the first Global Stocktake") and referred to temperature measurements, do not create legally binding obligations on States. As Australia points out, "[d]ecisions of the COP and CMA are generally not legally binding"[143]. Kuwait similarly explains how the Outcome of the first Global Stocktake resulted in "certain non-binding decisions adopted by the most recent UNFCCC Conference of Parties"[144].

4.30. While States may agree to legal obligations based on scientific findings concerning temperature measurements, and indeed science is reflected in the specialized climate treaty regime that States have consented to, science could not be equated to a *legal obligation* under international law with respect to temperature measurements or otherwise[145]. It is the treaty regime that creates the obligation, not the science. As India

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142 UNFCCC, Article 15; Kyoto Protocol, Article 20; Paris Agreement, Article 22.

143 Written Statement of Australia, para. 2.11.

144 Written Statement of Kuwait, paras. 11, 52-59.

145 While the Kingdom acknowledges the importance of science to factual inquiries, the Kingdom stresses that untested "expert" reports attached to Written Statements cannot serve as a basis for the Court's advisory opinion in this proceeding. See also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports* 1996, p. 237, para. 15 ("The Court does not consider that, in giving an advisory opinion in the present case, it would necessarily have to write "scenarios", to study various types of nuclear weapons and to evaluate highly complex and controversial technological, strategic and scientific information. The Court will simply address the issues arising in all their aspects by applying the legal rules relevant to the situation"); *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports* 2010, p. 73, para. 168

affirms, "[t]he science of climate change has been reflected and operationalized in the principles, objective and obligations under the UNFCCC and its instruments – Kyoto Protocol and Paris Agreement"[146]. As the International Tribunal of the Law of the Sea explained in its 2024 advisory opinion, "science alone [does not] determine the content of necessary measures . . . there are other relevant factors that should be considered and weighed together with the best available science"[147].

B. The specialized climate treaty regime does not impose obligations to reduce fossil fuel production or exports[148]

4.31. The assertion in certain Written Statements that international law requires a reduction in fossil fuel production or export[149] is contradicted by the plain text of the specialized treaty regime on climate change.

4.32. As the Kingdom explained in its Written Statement[150], Article 4(8)(h) of the UNFCCC, for example, provides that in implementing their commitments under Article 4, Parties shall give "full consideration to what actions are necessary under the Convention . . . to meet the specific needs and concerns of developing country Parties arising from . . . the implementation of response measures, especially on: . . . [c]ountries whose economies are highly dependent on income generated from the production, processing and export, and/or on consumption of fossil fuels and associated energy-intensive products"[151].

(noting that "in keeping with its practice, the Court will make its own determination of the facts, on the basis of the evidence presented to it, and then it will apply the relevant rules of international law to those facts which it has found to have existed").

146 Written Statement of India, para. 106(viii).

147 ITLOS Advisory Opinion of 21 May 2024, para. 212.

148 Written Statement of the United States, para. 3.18.

149 Written Statement of Vanuatu, paras. 256, 273; see also Written Statement of Tuvalu, para. 105.

150 Written Statement of the Kingdom of Saudi Arabia, paras. 4.17-4.19.

151 UNFCCC, Article 4(8)(h); see also UNFCCC, Article 4(10) ("The Parties shall, in accordance with Article 10, take into consideration in the implementation of the commitments of the Convention the situation of Parties, particularly developing country Parties, with economies that are vulnerable to the adverse effects of the implementation of measures to respond to climate change. This applies notably to Parties with economies that are highly dependent on income generated from the production, processing and export, and/or

4.33. Other States take the same position. For instance, Bolivia stresses that the specialized climate treaty regime requires consideration of States' "highly dependent on income generated by the production, processing and export of fossil fuels"[152] as included in the UNFCCC. China states that taking account of national circumstances and capabilities of developing countries "includes the needs for development and poverty eradication, and, in particular, the special difficulties in emission reduction in terms of higher costs of green transition due to their economies being highly dependent on fossil fuels"[153]. India similarly underlines that the UNFCCC "repeatedly affirm[s] . . . [s]pecial difficulties of 'developing countries', whose developing economies are particularly dependent on fossil fuel production, use and exportation, as a consequence of action taken on limiting greenhouse gas emissions"[154]. Timor-Leste explains how, under the specialized climate treaty regime, "[t]he 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"[155]. Kuwait clarifies that "when all States Parties are engaged in formulating GHG mitigation measures to be implemented in their social, economic and environmental policies and actions pursuant to Article 4.1(f), then, for example, pursuant to Article 4.8(h) they 'shall give full consideration' to ensure such policies and actions do not impact developing countries whose economies are 'highly dependent on income generated from', or 'on consumption of', fossil fuels' and that "the position of developing States here compared to developed States – especially those whose economies and economic development rely heavily on production and export of fossil fuels and those whose economies rely heavily on their

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").

152 Written Statement of Bolivia, para. 32.

153 Written Statement of China, para. 56.

154 Written Statement of India, para. 39(vii).

155 Written Statement of Timor-Leste, para. 155.

use – requires even greater emphasis given the key provisions of the UNFCCC and Paris Agreement"[156].

4.34. These complexities serve to explain why the Outcome of the first Global Stocktake recognized that there is no one-size-fits-all solution. Paragraph 28 of the Outcome of the first Global Stocktake "calls on" States Parties to contribute to global efforts "in a nationally determined manner, taking into account the Paris Agreement and their different national circumstances, pathways and approaches"[157]. While what follows in this COP decision are a variety of strategies for States to contribute to global efforts – including transitioning away from fossil fuels in energy systems but also for example tripling renewable energy capacity, doubling energy efficiency, accelerating zero- and low-emission technologies, and reducing methane emissions—these efforts are not mandatory[158]. The key verb of the Outcome of the first Global Stocktake – "calls on" – is not the language of a legal obligation.

4.35. Nor could these listed strategies for global efforts be mandatory in any shape or form. The strategies outlined in the Outcome of the first Global Stocktake may not be suitable for every State, considering national circumstances such as resources, level of development, economic structure, energy needs, technological capabilities, geographical and climatic conditions, and socioeconomic conditions, among others.

4.36. Accordingly, the Outcome of the first Global Stocktake "calls on" States to "contribute" to the "efforts" listed in the decision "in a nationally determined manner" and "taking into account different national circumstances, pathways and approaches"; it reflects that

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156 Written Statement of Kuwait, paras. 20, 58 (emphasis omitted).

157 Decision 1/CMA.5, Outcome of the first global stocktake, para. 28, in Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on its fifth session, held in the United Arab Emirates from 30 November to 13 December 2023, FCCC/PA/CMA/2023/16/Add.1, 15 Mar. 2024, p. 5.

158 Decision 1/CMA.5, Outcome of the first global stocktake, para. 28, in Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on its fifth session, held in the United Arab Emirates from 30 November to 13 December 2023, FCCC/PA/CMA/2023/16/Add.1, 15 Mar. 2024, p. 5.

each State's contribution will differ depending on these elements[159]. "[D]ifferent national circumstances" must have regard to each State's resources and level of development, for example. "[P]athways" requires taking into account a State's modeling and projections of different emission scenarios, mitigation strategies, and adaptation strategies, which may depend on a State's energy mix, technological capabilities, geographical and climatic conditions, and socioeconomic conditions. With respect to "approaches," it includes the mix of policies and solutions each State may elect to adopt informed by the State's own circumstances[160]. Therefore, a State may decide to pursue carbon capture technologies, or nuclear, or a transition away from fossil fuels, or it may not, depending on the State's different national circumstances, pathways and approaches. This aligns with the expectations outlined in Paris Agreement Article 3, that the "efforts" State Parties are to undertake are nationally determined, leaving it up to each State Party to decide how it wishes to undertake them[161].

4.37. Importantly, as Egypt points out, "neither the UNFCCC, nor the Paris Agreement make the production, and or use of fossil fuels illegal per se. This was clearly intentional – namely to focus on emissions' reduction, rather than on the source of emissions – in acknowledgment of the fact that fossil fuels have been essential to economic growth and development"[162].

4.38. Indeed, the questions put to the Court by the UN General Assembly in Resolution 77/276 refer only to anthropogenic emissions, not to production or export of any natural resource, including fossil fuels. The words "fossil fuels", "production" and "export"

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159 Decision 1/CMA.5, Outcome of the first global stocktake, para. 28, in Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on its fifth session, held in the United Arab Emirates from 30 November to 13 December 2023, FCCC/PA/CMA/2023/16/Add.1, 15 Mar. 2024, p. 6.

160 Decision 1/CMA.5, Outcome of the first global stocktake, para. 28, in Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on its fifth session, held in the United Arab Emirates from 30 November to 13 December 2023, FCCC/PA/CMA/2023/16/Add.1, 15 Mar. 2024, p. 6.

161 Paris Agreement, Article 3.

162 Written Statement of Egypt, para. 137.

are not included in the questions, or indeed anywhere in resolution 77/276 that contains the questions. The word "emissions", however, is used repeatedly in the questions and resolution. This was intentional because the States did not ask the Court to consider fossil fuel production or export, and instead asked the Court to consider anthropogenic greenhouse gas emissions. Against this background, Written Statements that address fossil fuel production or export are misconceived. The questions put to the Court focus on anthropogenic greenhouse gas emissions, rather than fossil fuel production or export.

V. Obligations of States in respect of climate change are not supplanted or altered by instruments and principles outside the specialized treaty regime on climate change

A. Instruments and principles outside the specialized treaty regime: general observations

4.39. Contrary to suggestions by some States in their Written Statements, principles or legal instruments outside the specialized treaty regime on climate change such as human rights treaties and the principle of the prevention of significant transboundary harm are not relevant to determining the obligations of States in relation to anthropogenic greenhouse gas emissions and climate change.

4.40. As the Kingdom stated in its Written Statement, and as is reiterated by many other States, it is the universally accepted specialized treaty regime on climate change that sets out States' obligations in relation to the climate system and greenhouse gas emissions[163]. Instruments and principles outside the specialized treaty regime on climate change do not supplant, alter, or impose obligations upon States in relation to climate change[164]. As China states, "international climate change law is tailor-made to

[163] Written Statement of the Kingdom of Saudi Arabia, paras. 4.2, 4.98, 4.90; see also Written Statement of Canada, paras. 23, 36 ("Climate change is a global challenge, for which States have established, over many years of negotiation, a UN Climate Change process, through the Convention and the Paris Agreement. Processes under these agreements involve the whole of the international community: this is the only viable route to effectively addressing the climate change crisis."); Written Statement of New Zealand, paras. 27-28.

[164] Written Statement of Australia, para. 2.2; Written Statement of Brazil, para. 10; Written Statement of Canada, para.11; Written Statement of China, para. 19; Written Statement of the Dominican Republic, para. 4.21;

regulate the rights and obligations of States on controlling GHG emissions and its adverse effects. It ought to play a foundational and primary role in this regard"[165]. The United States underscores that "[a] determination of what measures are 'appropriate' necessarily should be informed by what actions States have taken to address a particular problem. Where States have decided almost universally on a particular approach to addressing a problem—which is the case with respect to the Paris Agreement's nationally determined approach to mitigation of anthropogenic GHG emissions—that approach should be considered a reasonable or appropriate approach"[166].

4.41. Some participants seek in their Written Statements to invoke, without any serious analysis, what they refer to as a principle of 'systemic integration' with particular reference to Article 31(3)(c) of the VCLT[167]. Yet neither 'systemic integration' nor the element of the general rule of treaty interpretation reflected in Article 31(3)(c) of the VCLT has the effects that they claim. They do not provide a freestanding basis to incorporate extraneous legal instruments and rules of law into a treaty regime or to impose varied or supplementary obligations on State parties thereto. Article 31(3)(c) is relevant only to the interpretation of applicable treaty provisions Treaties concluded on different topics are not intended, nor can they be used, to widen the scope of obligations contained within the specialized treaty regime on climate change, nor to narrow their specific content[168].

4.42. On the basis of these general observations, the following sections explain why, contrary to the positions taken by certain States, external instruments and principles mentioned

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Written Statement of India, para. 19; Written Statement of Japan, para. 11 Written Statement of the United Arab Emirates, paras. 16-17; Written Statement of OPEC, para. 9.

165 Written Statement of China, para. 19; see also UN General Assembly resolution 74/219, 19 December 2019, preamble, para. 2 ("Recalling also the United Nations Framework Convention on Climate Change and the Paris Agreement adopted under the Convention, acknowledging that they are the primary international, intergovernmental forums for negotiating the global response to climate change . . ."); UN General Assembly resolution 76/205, 17 December 2021, preamble, para. 2 (same).

166 Written Statement of the United States, para. 4.24.

167 Written Statement of Sierra Leone, para. 3.1; Written Statement of the Solomon Islands, paras. 56-57; Written Statement of Thailand, para. 5; Written Statement of Vanuatu, paras. 225-227.

168 Written Statement of Germany, paras. 36-37.

in resolution 77/276 or in the chapeau of the questions put to the Court do not address climate change related to anthropogenic greenhouse gas emissions in a manner that can add to or override the specialized treaty regime on climate change.

B. Human rights do not establish State obligations with respect to climate change beyond those in the specialized climate treaty regime to which States have agreed

4.43. Several States in their Written Statements seek to argue that international human rights law requires States to take measures to reduce greenhouse gas emissions or adapt to climate change. As the Kingdom made clear in its Written Statement, such arguments are misconceived as a matter of law[169].

4.44. Anthropogenic greenhouse gas emissions are addressed by the specialized treaty regime[170]. In that regime, the only reference to human rights obligations is in the eleventh preambular paragraph of the Paris Agreement, which provides that "Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights . . ."[171]. This language cannot be interpreted to increase the obligations of States Parties, as some States suggest[172]. As France notes, "[t]he preamble to the Paris Agreement does not create a new human rights obligation for the States Parties"[173]. Rather, as Australia and many other States acknowledge, the preambular paragraph simply notes that "when States take action to address climate change, they must do so consistently with their obligations under international human rights law"[174]. The reference to human rights in the Paris

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169 Written Statement of the Kingdom of Saudi Arabia, para. 4.98.

170 Written Statement of the Kingdom of Saudi Arabia, paras. 4.2, 4.90.

171 Paris Agreement, preamble, para. 11.

172 See Written Statement of the Dominican Republic, para. 4.48; Written Statement of Ghana, para. 27; Written Statement of Mauritius, paras. 158-160; Written Statement of Singapore, para. 3.73; Written Statement of Slovenia, para. 22.

173 Written Statement of France, para. 114.

174 Written Statement of Australia, para. 3.62. See also Written Statement of the United Kingdom, para. 129 (pointing out that the preamble only recommends that Parties "*respect, promote and consider*" human rights, and the several other matters that it lists, "when taking such action" and does not use language that would

Agreement does not invite systemic interpretation of the Paris Agreement on the basis of human rights, nor could human rights obligations otherwise guide the well-established obligations under the specialized treaty regime on climate change.

4.45. States have human rights obligations under the ICCPR, the ICESCR and other UN and regional treaties, provided they are parties to these treaties. But many States in their Written Statements recognize, rightly so, that these treaties do not create legal obligations for States to mitigate or adapt to climate change[175]. As the United States explains, "States Parties to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) have obligations under those treaties that are relevant to the problem of climate change, including the protection of those individuals exercising their human rights while working on environmental issues, including climate change. However, neither the ICCPR nor the ICESCR creates legal obligations requiring States Parties to ensure protection of the climate system from anthropogenic GHG emissions"[176]. If States had intended for this to be the case, this would have been reflected in the language of the specialized treaty regime. Furthermore, as Canada states, "[t]he positive impact that climate change action can have on human rights cannot be relied on to broaden the scope of States' obligations under international human rights law"[177].

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imply an obligation beyond that which already exists.); Written Statement of the United States para. 4.38 (noting that "the phrase '*their respective obligations*' makes clear that the paragraph does not create any new legal obligations or modify or expand existing obligations, and it also indicates that not all States have the same international obligations in respect of the issues that follow that phrase, including with respect to human rights").

175 Written Statement of Australia, paras 3.58-3.59 (noting that "[t]he ICCPR, the ICESCR and the UDHR do not contain any express or direct obligations to 'ensure the protection of the climate system'" and that "[t]he primary source of States' obligations concerning the protection of the climate system from anthropogenic emissions of greenhouse gases are the specialized climate change treaties . . ."); Written Statement of China, para. 115; Written Statement of Denmark, Finland, Iceland, Norway and Sweden, paras. 84-85; Written Statement of France, para. 129; Written Statement of Indonesia, paras. 36, 39; Written Statement of the Netherlands, para. 3.24; Written Statement of New Zealand, para. 114; Written Statement of Switzerland, paras. 61-62; Written Statement of the United Kingdom, para. 122; Written Statement of the United States, paras. 4.39, 4.43-4.53.

176 Written Statement of the United States, para. 4.39; Written Statement of the Republic of Korea, para. 31.

177 Written Statement of Canada, para. 27.

It remains the prerogative of negotiating States to choose whether to expand the specialized treaty regime and develop the law in this way.

4.46. Similarly, States have not agreed to address climate policy under the human rights framework[178]. As the United States and many other States make clear, although "the UN Human Rights Council (HRC) and the UN General Assembly (UNGA) 'recogniz[ed] the right to a clean, healthy and sustainable environment'[179] neither provide evidence of a pre-existing right to a clean environment in customary international law nor create a new right"[180]. Nor do the reports or decisions of UN treaty bodies, special rapporteurs or agencies that seek to link human rights and climate change have legal consequences for the role, if any, of human rights in relation to the protection of the climate system. In any event, caution is required in attaching weight to the views of UN treaty bodies, rapporteurs and agencies[181]. While they may be entitled to respect and due consideration, neither States nor the Court are bound by them[182].

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178 Written Statement of China, para. 115 ("International human rights law does not explicitly provide for specific obligations of States to address climate change. Instead, it mainly provides for the obligations of States to respect, protect and fulfil human rights within its territory or jurisdiction. It focuses on protecting individuals rather than climate system and environment"); Written Statement of New Zealand, para. 114 ("The international human rights law framework does not contain provisions requiring States to take steps to protect the climate system and other parts of the environment from anthropogenic climate change").

179 See UN General Assembly resolution 76/300, adopted by a vote on 28 July 2022, "The human right to a clean, healthy and sustainable environment". There were eight abstentions, including China and the Russian Federation; UN Human Rights Council resolution 48/13 of 8 Oct. 2021, "The human right to a clean, healthy and sustainable environment".

180 Written Statement of the United States, para. 4.57 (citing what many States said in the General Assembly).

181 ILC, *Draft Conclusions on Identification of Customary International Law, with Commentaries*, YBILC (2018), vol II (2), pp. 96-98, Conclusion 4 and para. 7 of the commentary thereto.

182 Written Statement of the United States, para. 4.42 fn. 353 ("To the extent it might be argued that the views of the treaty bodies or the Special Procedures reflect an attempt to fill what they might consider to be gaps in the reach and coverage of the Covenants, the proper approach to fill such perceived gaps is to rely on the mechanisms for change in the instruments, namely by proposing amendments to the treaty and seeking the Parties' consent to be bound by any new obligations. See ICCPR, Article 51; ICESCR, Article 29. Special Procedures are mechanisms established by the UN Human Rights Council to report and advise on human rights from a thematic and country-specific perspective. Special Procedures mandate-holders are either an individual (called a Special Rapporteur or Independent Expert) or a Working Group"); *North Sea Continental Shelf, Judgment of 20 February 1969, I.C.J. Reports 1969,* para. 77.

4.47. That obligations to protect the climate system are regulated in a regime separate from human rights reflects the nature of climate change; its global scope, and the absence of effective control by any single State and of specific harm to any particular individual preclude the invocation of international human rights law to address it.

4.48. International human rights law does not generally define obligations among States that relate to what occurs outside a State's territory or jurisdiction. The application of human rights law is territorial or jurisdictional[183]. As New Zealand explains, "[t]he jurisdictional limits of international human rights law mean it is ill-equipped to address impacts on the enjoyment of human rights caused by the cumulative emissions of all States since the start of the industrial revolution"[184]. That is because (1) the source of greenhouse gas emissions presenting harm to citizens is often outside the jurisdiction and control of that State, and (2) reductions of domestic emissions may have no significant effect to protect persons within a State's jurisdiction[185]. These limits in the territorial or jurisdictional application of human right treaties contrast with the specialized climate treaty regime's scope of application and is another reason why human rights treaties cannot impose climate system protection obligations on States.

4.49. Seeking to address climate change as a human rights issue would further raise insoluble issues of causation. As Germany observes, "States can [] not be held responsible for human rights violations caused by climate change, unless it can be established that the harmed person is specifically, and directly, affected as an individual in his or her human

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183 Written Statement of Australia, paras. 3.64-3.65 (noting that "[t]he territorial and jurisdictional limit just identified is important when ascertaining the obligations of States with respect to climate change under international human rights law because, due to the collective nature and multiple causes of climate change, its adverse human rights impacts cannot be fully mitigated by a State alone (even for individuals within its territory or jurisdiction)"); Written Statement of Canada, para. 28 (noting that "[u]nder international human rights law, States Parties to treaties are obligated to respect, protect and promote the rights of rights-holders, i.e., persons *who are subject to their jurisdiction* . . . the jurisdictional competence of a State is *primarily territorial*" (emphasis added)); Written Statement of France, paras. 133-134 ("[i]n the context of climate change, the human rights obligations of States can thus only apply with regard to the circumstances of persons under their jurisdiction"); Written Statement of New Zealand, para. 116(a).

184 Written Statement of New Zealand, para. 116(a).

185 Written Statement of New Zealand, para. 116(a).

rights protected by international law by acts or omissions of a *specific* State"[186]. Establishing this link is not possible as "no single State can individually be held responsible"[187].

4.50. The European Court of Human Rights' recent judgment in *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* provides the Court with no assistance in resolving these issues[188]. This was a ruling from a regional court, applying a regional human rights instrument, in light of its own specific treaty provisions, case-law, and execution procedures. The Committee of Ministers has not yet exercised its functions relating to the execution of the ruling. The judgment has not created international law binding on States, even on Parties to the European Convention on Human Rights. Regional and national courts do not affect general international law—unless there is a widespread, predominant acceptance among States world-wide that the law is as set out in the judgment—which is far from being the case here[189]. In the present case, the Court's decision to "adapt" its approach to "the question of causation and positive obligations in the climate change context" and dispense with the requirement of a "strict *conditio sine qua non* requirement" was based on "the Court's assessment of victim status [under Article 34 of the European Convention] and the applicability of the relevant Convention provisions"[190]. This was essentially a reference to the specific jurisdictional provisions, contained in Section II of the European Convention, which sets out the specific rules and jurisdiction of the European Court of Human Rights. This is not a point of substantive law that could influence, by way of parity of reasoning or otherwise, the

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186 Written Statement of Germany, para. 97.

187 Written Statement of Germany, para. 98; see also Written Statement of the United Kingdom, para. 126 ("it is not possible to establish causation linking the GHG emissions of a particular country, or its failure to adopt mitigation measures, with either climate change itself or with a specific climate change impact, such as a severe weather event").

188 *Verein KlimaSeniorinnen Schweiz and Others* v. *Switzerland*, ECtHR, App. No. 53600/20, 9 April 2024.

189 *North Sea Continental Shelf, Judgment of 20 February 1969, I.C.J. Reports 1969*, para. 77; International Law Commission, *Draft conclusions on identification of customary international law, with commentaries*, A/73/10 (2018), Conclusions 4 and 9.

190 *Verein KlimaSeniorinnen Schweiz and Others* v. *Switzerland*, ECtHR, App. No. 53600/20, 9 April 2024, paras. 437-440.

issue of causation under international human rights law more generally. On 5 and 12 June 2024, both chambers of the Swiss Parliament adopted identically-worded declarations calling upon the Swiss Government to inform the Committee of Ministers of the Council of Europe that Switzerland sees no reason to implement the judgment. In the declarations, the Parliament expressed its concern that by exceeding "the limits of permissible progressive development of the law by an international court", the European Court of Human Rights engaged in "undue and inappropriate judicial activism" calling into question its legitimacy[191].

4.51. Impediments that exist to interpreting the obligations of States to protect the climate system from anthropogenic greenhouse gas emissions by invoking human rights law apply equally to the right to self-determination, contrary to arguments put forward in

[191] Declaration by the Council of States [Switzerland], Judgment of the ECtHR "Verein Klimaseniorinnen Schweiz and Others v. Switzerland", 5 June 2024, Official Bulletin No. 24,053 (relevant excerpt from original French text: "Le Conseil des Etats . . . prend connaissance de l'arrêt de la Cour du 9 avril 2024 dans l'affaire 'Verein KlimaSeniorinnen Schweiz et autres c. Suisse', constate avec inquiétude – que l'arrêt, résultat de la méthode d'interprétation de la CEDH comme 'instrument vivant', dépasse les limites de l'interprétation dynamique, – que, ce faisant, la Cour outrepasse les limites du développement du droit par une juridiction internationale, – qu'en interprétant la CEDH de cette manière, la Cour s'expose au reproche d'exercer un activisme judiciaire inapproprié et inadmissible, – que la Cour accepte ainsi que sa légitimité soit remise en question non seulement par la communauté des Etats du Conseil de l'Europe, mais aussi par les acteurs politiques nationaux dans les Etats parties . . . . Il invite le Conseil fédéral à s'engager activement au sein des organes concernés du Conseil de l'Europe pour défendre les intérêts de la Suisse, au sens de la présente déclaration, et à transmettre au Comité des Ministres les informations ci-dessous concernant le contenu du plan d'action de la Suisse, conformément à l'article 46 CEDH: . . . la Suisse ne voit donc aucune raison de donner d'autres suites à l'arrêt de la Cour du 9 avril 2024, étant donné que ses efforts passés et actuels en matière de politique climatique remplissent les exigences en termes de droits humains qui sont formulées dans l'arrêt") (English translation: "The Council of States . . . takes note of the judgment of the Court of Justice of 9 April 2024 in the case of 'Verein Klimaseniorinnen Schweiz v. Switzerland', and notes with concern – that the judgment, as a result of the method of interpreting the Convention as a 'living instrument', exceeds the limits of dynamic interpretation, – that the Court thereby overextends the limits of permissible progressive development of the law by an international court, – that this manner of treaty interpretation exposes the Court to the accusation of undue and inappropriate judicial activism, – that the Court thereby accepts that its legitimacy is called into question not only by the community of States of the Council of Europe but also by domestic political actors in the Contracting States . . . . It calls on the Federal Council, with a view to safeguarding Swiss interests, to actively participate in the relevant bodies of the Council of Europe in accordance with this declaration and to inform the Committee of Ministers in the Swiss action plan under Article 46 of the ECHR as follows: . . . That Switzerland therefore sees no reason to implement the judgment of the Court of Justice of 9 April 2024, since Switzerland's current and ongoing climate policy efforts have fulfilled the human rights requirements of the judgment"); Declaration by the National Council [Switzerland], Judgment of the ECtHR "Verein Klimaseniorinnen Schweiz and Others v. Switzerland", 12 June 2024, Official Bulletin No. 24,054 (same).

some Written Statements[192]. It must first be recalled that common Article 1 (right of self-determination) to the two UN human rights Covenants provides in paragraph 2 that:

> 2. All peoples may, for their own ends, freely dispose of their natural wealth and 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[193].

In fact, the right to self-determination does not address the protection of the climate system[194]. At most, as Timor-Leste explains, 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" and that the "climate response must not disproportionately affect developing States, and in particular [least developed countries], 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"[195]. This explanation fits squarely within the emphasis the UNFCCC places on the sovereign right of States, in accordance with the Charter of the United Nations, to exploit their own resources[196]. Implementing that right, Article 4(1) of the UNFCCC provides for flexibility in the implementation of Parties' commitments by allowing Parties to "tak[e]

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192 Written Statement of Kiribati, paras. 136-138; Written Statement of Madagascar, para. 59; Written Statement of Mauritius, paras. 167-168; Written Statement of Micronesia, para. 87; Written Statement of Nauru, paras. 40-41; Written Statement of Saint Lucia, para. 39(ii); Written Statement of Saint Vincent and the Grenadines, para. 109; Written Statement of the Solomon Islands, paras. 171-172; Written Statement of Tuvalu, paras. 74-75.

193 International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, Article 2; International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 Article 2.

194 Written Statement of New Zealand, paras. 111, 118.

195 Written Statement of Timor-Leste, paras. 337, 339 (quoting the Declaration on the Right to Development, Article 1(2)).

196 See UNFCCC, preamble, para. 8.

into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances"[197].

4.52. In summary, the Kingdom agrees with other States such as New Zealand, which "does not consider international human rights law currently imposes a generalised obligation on States to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of GHGs"[198].

C. Neither the 'no-harm' principle nor the precautionary principle applies to the questions before the Court

4.53. As the Kingdom noted in its Written Statement, environmental law principles, including the principle of prevention of significant transboundary harm (also referred to as the 'no-harm' principle) and the precautionary principle, do not address climate change[199]. These principles are not relevant to the questions before the Court, which are limited to the obligations of States concerning greenhouse gas emissions; by contrast, the environmental impacts that these principles seek to address are not characterized by the global nature and complex chain of events associated with climate change and the cumulative impact of anthropogenic emissions of greenhouse gases. Many States explain this in their Written Statements, citing the unique, collective nature of climate change and its causes and impacts[200]. The Kingdom agrees with these States.

4.54. The principle of prevention of significant transboundary harm is a rule of customary international law addressing States' obligations to prevent, reduce and control the risk

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197 UNFCCC, Article 4(1). Article 4(8) of the UNFCCC further requires Parties to consider actions necessary to meet the specific needs and concerns of Parties not listed in Annex I that are affected by response measures to climate change, including countries whose economies are highly dependent on fossil fuel production and export.

198 Written Statement of New Zealand, para. 118.

199 Written Statement of the Kingdom of Saudi Arabia, para. 3.3.

200 Written Statement of Australia, paras. 4.10-4.11; Written Statement of China, paras. 127-128; Written Statement of Denmark, Finland, Iceland, Norway and Sweden, paras. 64-76; Written Statement of India paras. 9-18; Written Statement of New Zealand, paras. 96-107; Written Statement of the United States, paras. 4.15-4.28.

of significant environmental harm to other States. Under this principle, a State must exercise due diligence in regulating actions within its territory that may cause significant transboundary harm to another State[201].

4.55. Obligations related to climate change and anthropogenic greenhouse gas emissions differ from obligations related to significant transboundary environmental harm, as climate change is characterized by a cumulative and complex chain of events from anthropogenic emissions of greenhouse gases and to physical impact that may result therefrom. Various States, including the United States, explain how, unlike climate change, environmental harm cases pertain to specific, identifiable sources of harm to specific affected States[202]. Accordingly, the 'no-harm' principle involves a clear link between the source of harm attributable to a particular State and the individual affected State. Indeed, in all significant transboundary harm cases, as the United States explains, the concerned sources of harm "could be traced to specific, identifiable 'point' sources: a smelter, a nuclear weapon detonation, construction of a dam, the operation of a railway, two pulp mills on a river, construction and operation of a hydroelectric plant, the dredging of a river, and construction of a road"[203]. As the United States underlines,

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201 See *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment of 20 Apr. 2010, I.C.J. Reports 2010*, p. 14, at pp. 55-56, para. 101 ("[T]he principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. . . . A State is thus obliged 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"); see also *Trail Smelter (U.S.* v. *Canada), Decision, 3 RIAA 1938*, p. 1965 (11 Mar. 1941) ("[U]nder the principles of international law, . . . no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence").

While several States in their Written Statements suggest that due diligence is a duty or obligation, or even a rule of customary international law, these statements misconstrue the principle of due diligence. As Japan points out, "These principles, which contain obligations of conduct, are by nature, general in scope and circumstantial in their application, and they call for an assessment *in concreto*". Written Statement of Japan, para. 11.

202 Written Statement of the United States, paras. 4.15-4.28.

203 Written Statement of the United States, para. 4.15 (citing *Trail Smelter (U.S.* v. *Canada)*, Decision of 11 March 1941, 3 RIAA 1938; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996*, p. 226, at pp. 241-242, para. 29; *Gabčíkovo-Nagymaros Project (Hungary* v. *Slovakia), Judgment of 25 September 1997, I.C.J. Reports 1997*, p. 7, at p. 41, para. 53; *In the Arbitration Regarding the Iron Rhine ("Ijzeren Rijn") Railway (Belgium* v. *Netherlands)*, Award of 24 May 2005, 27

"these examples are unlike the challenge posed by anthropogenic global warming, which results from the varied and diffuse activities that emit GHGs over a long period of time"[204].

4.56. Singapore also clearly notes the distinction between climate change and "significant transboundary environmental harm, which typically involve[s] discharges of harmful substances into the territory of neighboring States or shared resources", noting that, conversely, "each instance of anthropogenic emission of GHG may not on its own cause significant deleterious effects, especially when GHG naturally exist in the Earth's atmosphere. Instead, in this context any alleged harm is caused by the cumulative impact of global anthropogenic GHG emissions"[205].

4.57. As Denmark, Finland, Iceland, Norway and Sweden explain, because "there is no generally accepted standard, scientific or legal, for determination of the effects of a specific act of anthropogenic emissions on the climate system and other parts of the

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R.I.A.A. 35, para. 222 (Perm. Ct. Arb.); *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment of 20 April 2010, I.C.J. Reports 2010*, p. 14, at pp. 55-56, para. 101; *In re Indus Waters Kishenganga Arbitration (Pakistan* v. *India), Partial Award of 18 February 2013, 31 R.I.A.A. 55* (Perm. Ct. Arb.); *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 of 16 December 2015, I.C.J. Reports 2015*, p. 665, at p. 711, paras. 117-118).

[204] Written Statement of the United States, paras. 4.15-4.19 ("The circumstances of activities that emit GHGs differ in at least three ways from those of the point source activities or pollution at issue in the Court's and other international tribunals' decisions to date. First, in contrast to the specific, identifiable sources of transboundary harm at issue in those proceedings, the emission of GHGs is a diffuse, universal activity, with countless sources in every country and every part of the world, and with emissions coming from an extremely wide range of activities that include the combustion of fossil fuels; certain industrial processes; and human-induced land use, land-use change, and deforestation. Second, in contrast to the transboundary harms at issue in those proceedings, which primarily involved harms in neighboring or nearby States, the harm caused by anthropogenic climate change is more than just transboundary: it is truly global in its impact. Third, in past proceedings, the link between the complained-of activity and the alleged harm was relatively direct in time and space. In contrast, the link between GHG emissions and harms to human health and the environment is very long and complex") (emphasis omitted); see also Written Statement of China, para. 128; Written Statement of Denmark, Finland, Iceland, Norway and Sweden, para. 68; Written Statement of Indonesia, paras. 61-63 ("in the context of climate change and biodiversity protection, the applicability of the principle of prevention and its legal consequences to individual States remains ambiguous. This is because the harm to another State or to the climate system and biodiversity does not stem from the actions or inactions of a single State, but from the collective actions or inactions of all States").

[205] Written Statement of Singapore, para. 3.15.

environment, the existing obligation under customary international law regarding transboundary environmental harm may not be transposed to the case of climate change"[206].

4.58. Accordingly, as India states, "environmental pollution and climate change must not be conflated . . . climate change cannot be dealt [with] like the transboundary harm on environment, but is dealt with under a distinct regime of UNFCCC and its two instruments"[207].

4.59. Despite these significant challenges relating to causation, attribution and a nexus to alleged harm, some States still assert that the customary international law rule regarding significant transboundary harm can be applied in the context of climate change. Yet, as Denmark, Finland, Iceland, Norway and Sweden highlight, that rule of customary international law "has never been applied outside that context [the context of 'direct and manifested injury in bilateral affairs'] to cases of alleged injury to natural systems or other more abstract elements that *might* in turn lead to consequences somewhere on the planet"[208].

4.60. The Kingdom agrees that rules associated with significant transboundary harm prevention do not apply to climate change. As the Court noted in its 2010 judgment in a transboundary environmental dispute, *Pulp Mills on the River Uruguay*, this rule "has its origins in the due diligence that is required of a State in its territory"[209]. Unlike the no-harm principle, which requires States to ensure their activities do not cause damage to the environment of other States, the specialized treaty regime on climate change

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206 Written Statement of Denmark, Finland, Iceland, Norway and Sweden, para. 71.

207 Written Statement of India, para. 17.

208 Written Statement of Denmark, Finland, Iceland, Norway and Sweden, para. 70.

209 *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment of 20 April 2010, I.C.J. Reports 2010*, p. 14, at pp. 55-56, para. 101. See note 201 above.

mandates that States respond to the threat of climate change by fulfilling their obligations under the UNFCCC and Paris Agreement. As New Zealand points out,

> to the extent the obligation to prevent transboundary harm applies in a climate change context, good faith compliance with the obligations under the UNFCCC and the PA and good faith engagement in ongoing negotiations in the climate change treaty system would constitute the necessary standards of conduct for States in relation to climate change-related transboundary harm[210].

4.61. The precautionary principle does not impose climate mitigation or adaptation obligations upon States that are separate from the specialized treaty regime. The precautionary principle is not an independent rule of customary international law[211]. Instead, the precautionary principle, has been "subsumed, integrated, and applied by the UNFCCC, Kyoto Protocol, and Paris Agreement"[212]. UNFCCC Article 3(3) notes that "[t]he Parties *should* take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effect"[213]. As explained by Kuwait,

> the use of the word 'should' here rather than 'shall' is important since it means the provision does not embody a binding obligation on States but is rather hortatory. For present purposes this has the consequence that the precautionary principle applies within the specific context of Article 3(3) of the UNFCCC, but only in a way that is non-binding and that is consistent with the UNFCCC's other terms[214].

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210 Written Statement of New Zealand, para. 105.

211 Written Statement of Statement of Denmark, Finland, Iceland, Norway, and Sweden, para. 76; Written Statement of Indonesia, paras. 62-63.

212 Written Statement of Kuwait, paras. 65-71; Written Statement of Mexico, paras. 54-55 ("UNFCCC incorporates the precautionary principle . . . this principle is echoed across various international treaties").

213 UNFCCC, Article 3 (emphasis added).

214 Written Statement of Kuwait, para. 67 (emphasis omitted).

4.62. In the context of the UNFCCC, the precautionary principle sets the stage for State obligations to prevent or minimize greenhouse gas emissions, encouraging implementation of State's NDCs under the Paris Agreement.

4.63. Political declarations concerning prevention of transboundary harm or the precautionary principle are not a source of climate change obligations. The Stockholm Declaration and the Rio Declaration are political statements adopted at international conferences and, as such, do not create State obligations under international law. Germany affirms that "[n]either declaration constitutes a treaty; they are therefore not legally binding under international law"[215]. As Denmark, Finland, Iceland, Norway and Sweden stress, "[t]he Stockholm Declaration is a diplomatic conference declaration which is not legally binding"[216].

4.64. The Kingdom agrees. In the Kingdom's view, the Stockholm Declaration and Rio Declaration are nonbinding documents with broadly worded principles that cannot be equated with treaties. The Rio Declaration and the UNFCCC were both achievements of the same June 1992 UN Conference on the Environment and Development. Had States intended the Rio Declaration or principles related to preventing significant transboundary environmental harm to impose obligations with respect to climate change, then States would have so stated in the text of the UNFCCC. Instead, States incorporated Rio Principle 2 in the preamble of the UNFCCC, recalling its importance without imposing any obligations on States under it with regard to climate change[217]. Principles which States wanted to transform into obligations with regard to climate

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215 Written Statement of Germany, para. 76.

216 Written Statement of Denmark, Finland, Iceland, Norway and Sweden, para. 67.

217 UNFCCC, preamble ("*Recalling also* 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 and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction").

change were incorporated into the body of the UNFCCC, including Rio Principle 7 on CBDR[218].

4.65. This inapplicability of the rules of customary international law on significant transboundary environmental harm and the precautionary principle to climate change are among the reasons why States adopted a specific treaty regime to address climate change. It is this specialized treaty regime that sets out States' climate change obligations under international law, rather than the 'no-harm' principle or the precautionary principle, or political statements such as the Stockholm and Rio Declarations.

[218] For example, Rio Principle 3 is reflected in UNFCCC, Article 3, Rio Principle 6 in UNFCCC, Article 3(2) and 3(4), and Rio Principle 7 in UNFCCC, Article 3(1).

Chapter 5. QUESTION (B) – THE LEGAL CONSEQUENCES FOR STATES WHERE THEY "HAVE CAUSED SIGNIFICANT HARM TO THE CLIMATE SYSTEM … WITH RESPECT TO STATES, PEOPLES AND INDIVIDUALS"

5.1. Question (b) reads as follows:

> What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:
>
> (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?[219]

5.2. In its Written Statement, the Kingdom explained that the legal consequences of the obligations of States to protect the climate system and other parts of the environment from anthropogenic greenhouse gas emissions are those set out in the specialized treaty regime on climate change[220]. In this context, Section I of this Chapter addresses the scope of Question (b), as posed to the Court, commenting on the Written Statements of other States. Section II explains in greater detail that the law of State responsibility, even if it were applicable in the context of greenhouse gas emissions, cannot adequately address the legal consequences envisaged in Question (b). Section III addresses certain challenges arising from the focus of the second part of Question (b) on harm with

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[219] UN General Assembly, Resolution A/RES/77/276, 4 April 2023. The question reads as follows in French:

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

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

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

[220] Written Statement of the Kingdom of Saudi Arabia, para. 6.3.

respect to 'peoples and individuals of the present and future generations' as distinct from States. Section IV discusses views expressed by other States on how the specialized treaty regime on climate change addresses the legal consequences envisaged in Question (b).

I. Scope of the Question posed to the Court

5.3. Question (b) is to be answered by reference to the specialized treaty regime on climate change. In its Written Statement, the Kingdom explained that the obligations of States to protect the climate system are set out in that regime, and that the legal consequences, if significant harm occurs, must be determined by reference to the regime[221]. The Kingdom further noted that the compliance and dispute resolution mechanisms of the Paris Agreement are "transparent, non-adversarial and non-punitive"[222].

5.4. The Kingdom notes, in addition, that when the General Assembly adopted resolution 77/276, many States, including the resolution's chief proponents, made clear that the questions posed were not intended to require the Court to consider the specific responsibility or liability of individual States[223]. Against this background, it is regrettable that a small group of participants now argue that the Court should address the responsibility or liability of particular States, having taken the opposite position

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221 Written Statement of the Kingdom of Saudi Arabia, para. 6.3.

222 Written Statement of the Kingdom of Saudi Arabia, para. 6.5.

223 See Statement after the adoption of the resolution by the European Union and its 27 Member States, U.N. Doc. A/77/PV.64, p. 8 ("welcom[ing] the explanation provided by Vanuatu that its intention in leading this effort has been that the Court 'will not place additional obligations or responsibilities' on States . . . The resolution does not prejudge whether and when breaches have occurred, are occurring or will occur in the future but rather focuses on the consequences thereof for all States"); see also Iceland, ibid, p. 24 ("The questions to the International Court of Justice and the resolution as a whole do not prejudge the nature of such obligations and do not pertain to whether breaches have occurred, are occurring or will occur"); Republic of Korea, ibid, p. 22 ("[T]he questions in the resolution do not presuppose any existence of obligation or breach"); Norway, ibid., p. 26 ("[T]he questions are related to obligations and possible legal consequences for all States, and are not limited to a specific State or group of States. . . . We also note that the questions posed to the Court do not prejudge the nature of such obligations or their consequences, but are openly paraphrased. Furthermore, we note that the questions do not assume that breaches of any relevant obligations have already occurred or are occurring now . . ."); see further El Salvador, ibid., p. 32 ("[T]he advisory opinion is not a form of judicial recourse for States, nor is it intended to be functionally equivalent to it").

when seeking consensus adoption of the draft resolution[224]. It is respectfully submitted that the Court should approach Question (b) in light of the understanding that the questions were not intended to ask the Court to consider responsibility or liability of specific States[225].

5.5. Nor does Resolution 77/276, and Question (b) in particular, refer to responsibility or liability. As the United Kingdom correctly notes, "Question B does not refer, explicitly or implicitly, to a State's breach of the obligations addressed in Question A. Nor does it otherwise refer to or identify the commission of any internationally wrongful act, or international responsibility for any such act". Rather, "Question B asks the Court to identify '*the legal consequences under these obligations*'", which refers to the primary obligations under the specialized treaty regime on climate change[226]. In its recent advisory opinion relating to climate change, where the request for an advisory opinion similarly did not specifically refer to "terms such as 'responsibility' and 'liability'", ITLOS declined to address issues under the law of State responsibility[227]. The Tribunal reasoned that "if the [requesting party] had intended for the Tribunal to address issues

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224 Written Statement of Vanuatu, paras. 8, 485-643; see also Written Statement of Antigua and Barbuda, paras. 529-619; Written Statement of the Bahamas, paras. 233-249; Written Statement of Palau, paras. 19-24; Written Statement of Saint Lucia, paras. 86-95; Written Statement of Saint Vincent and the Grenadines, paras. 128-135; Written Statement of Tuvalu, paras. 112-150; see also Written Statement of COSIS, paras. 146-203.

225 Written Statement of Indonesia, para. 75 ("it is not within the purview of the Court to examine whether individual State's acts or omissions could potentially cause harm to the climate system. In other words, whether or not the State's acts or omissions factually cause harm to the climate system and lead to climate change is not something that the Court needs to determine in this advisory opinion"); Written Statement of the United Kingdom, paras. 135-136 ("[T]he question for the Court is what Question B means on an objective interpretation of its terms . . . That is not a matter addressed by secondary rules of international law concerning State responsibility. It is addressed by the Climate Change Treaties, which identify the legal consequences of such conduct in the form of primary treaty obligations. It is those specific treaty obligations which are responsive to Question B").

226 Written Statement of the United Kingdom, paras. 137.2-137.3.

227 ITLOS Advisory Opinion of 21 May 2024, para. 148 ("In the present case, the Tribunal will confine itself to primary obligations"). ITLOS went on to qualify its conclusion, stating: "However, to the extent necessary to clarify the scope and nature of primary obligations, the Tribunal may have to refer to responsibility and liability". Ibid. In the event, ITLOS referred to State responsibility only in passing, focusing its analysis narrowly on specific primary obligations arising under Articles 194(1), 213, 222 and 235(2) of UNCLOS. Ibid., paras. 223, 284, 286. There are not any comparable primary obligations under the specialized treaty regime on climate change.

of responsibility and liability, it would have expressly formulated the Request accordingly"[228].

II. The legal consequences of significant harm to the climate system cannot be adequately addressed by the law of State responsibility

5.6. The law of State responsibility cannot adequately address consequences for harm to the climate system because the emission of greenhouse gas in and of itself is not an internationally wrongful act and complicated causation issues would arise if it were sought to attribute responsibility to States for cumulative anthropogenic greenhouse gas emissions.

A. The law of State responsibility does not apply in the event of a breach of an obligation under the specialized treaty regime on climate change

5.7. For responsibility to be engaged, there must have been an internationally wrongful act, that is, a breach of an international obligation, attributable to a particular State. In the context of climate change, a State would have to breach an obligation under the specialized treaty regime on climate change, for example by failing to prepare, communicate, or maintain NDCs as required by Article 4 of the Paris Agreement. In any event, the rules of international law on State responsibility would apply only as a fallback secondarily and if necessary, as the Kingdom explained in its Written Statement. As discussed below in Section IV, the specialized treaty regime on climate change provides for specific compliance and dispute settlement mechanisms to address such breaches, including under Article 14 of the UNFCCC or the compliance mechanisms in the Kyoto Protocol or the Paris Agreement[229].

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[228] ITLOS Advisory Opinion of 21 May 2024, para. 146.

[229] Written Statement of the Kingdom of Saudi Arabia, paras. 6.5-6.6.

B. State responsibility cannot be invoked with respect to the emission of greenhouse gases

5.8. The emission of greenhouse gases in and of itself is not an internationally wrongful act, and, for this reason alone, cannot give rise to State responsibility[230]. States generally agree that the law of State responsibility is not appropriate for dealing with climate change and attempting to apply it would give rise to insurmountable challenges relating to causation, including issues of source attribution and of multiplicity of factors, and injury, including issues related to harm to peoples and individuals of present and future generations[231].

5.9. Even if particular greenhouse gas emissions could be tied to the breach of an international obligation (*quod non*), attributing harm to a single State's emissions is exceedingly difficult. The Court has held that it may award compensation only when there is a proximate causal link between the State's wrongful act and the injury suffered by the other State:

> In accordance with the jurisprudence of the Court, compensation can be awarded only if there is 'a sufficiently direct and certain causal nexus between the wrongful act . . . and the injury suffered by the Applicant, consisting of all damage of any type, material or moral'[232].

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230 Part Two of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts ("ARSIWA"); Written Statement of the United Kingdom, para. 13.7.1.

231 Written Statement of France, paras. 170, 178; Written Statement of India, para. 86; Written Statement of New Zealand, para. 140; Written Statement of the United Kingdom, paras. 137-138. Nor is there any scope for any variation of the rules in order to accommodate the nature of greenhouse gas emissions. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. Reports 2007*, p. 43, at pp. 208-209, para. 401 ("The rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*").

232 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment of 9 February 2022, I.C.J. Reports 2022*, p. 13, at p. 48, para. 93 (quoting *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. Reports 2007*, p. 43, at p. 234, para. 462, and citing *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment of 2 February 2018, I.C.J. Reports 2018*, p. 15, at p. 26, para. 32; *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment of 19 June 2012, I.C.J. Reports*

5.10. As the Court has noted, "the causal nexus required may vary depending on the primary rule violated and the nature and extent of the injury"[233].

1. Attribution of impacts to a particular State is not possible on the available science

5.11. The current state of scientific research does not provide sufficient precision to attribute specific impacts caused by greenhouse gas emissions to a particular State. As the United Kingdom notes, "there is currently no single or agreed scientific methodology to attribute climate change to the emissions of individual States or to attribute extreme events caused by climate change to the GHG emissions of any particular State"[234].

5.12. The United States further points out the difficulties that still exist in (1) climate event attribution, the science of determining the extent to which extreme weather events or changes are due to anthropogenic global warming[235], and (2) source attribution, the science of estimating the contributions of greenhouse gas emissions from individual sources to present-day global warming[236].

5.13. As the United States observes, "any causation analysis would have to take into account that climate-related events—both extreme weather events and slow onset events—have multiple causes and are not driven solely by global warming resulting from

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2012, p. 324, at p. 332, para. 14); see also ARSIWA, Article 31, commentary, para. 10 ("[C]ausality in fact is a necessary but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too 'remote' or 'consequential' to be the subject of reparation. In some cases, the criterion of 'directness' may be used, in others 'foreseeability' or 'proximity'. But other factors may also be relevant: for example, whether State organs deliberately caused the harm in question, or whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule") (internal references omitted).

233 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment of 9 February 2022, I.C.J. Reports 2022*, p. 13, at p. 48, para. 93.

234 Written Statement of the United Kingdom, para. 137.4.3; see also Written Statement of the Russian Federation, p. 17.

235 Written Statement of the United States, paras. 2.20-2.22.

236 Written Statement of the United States, paras. 2.23-2.25.

anthropogenic GHG emissions"[237]. For some impacts that may be alleged to be associated with climate change, "such as the increased likelihood of droughts or cyclones, or regional changes in climate, attribution to anthropogenic global warming is much more difficult"[238]. As the United States further explains, "the shorter the timescale or smaller the spatial scale of a particular climate or weather event or change, the greater the uncertainty about the degree to which the event or change can be attributed to anthropogenic global warming"[239].

2. Attribution of impacts to anthropogenic emissions is not possible

5.14. Attribution to *anthropogenic* emissions would require consideration of cumulative greenhouse gas emissions on the basis of various factors including historic emissions as well as contributions from the agricultural, industrial, energy, and transport sectors[240]. An important point complicating an attribution analysis is that "many estimates that seek to assess relative contributions to global warming only consider cumulative historic CO2 emissions from fossil fuels"[241]. As the United States notes, however, only "half of current global warming is due to emissions of non-CO2 GHGs and their precursors"[242]. Accordingly, at most 50 percent of greenhouse gas emissions can be attributed to CO2 emissions. As the sources of CO2 emissions are manifold, including, for example, deforestation and other land use change or degradation aside

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237 Written Statement of the United States, para. 5.10; see also Written Statement of the Russian Federation, p. 17.

238 Written Statement of the United States, para. 2.21; see also Written Statement of the Russian Federation, p. 17 ("climate change is an indirect process"); Written Statement of the United Kingdom, para. 137.4.1 ("[H]arm from GHG emissions is indirect. GHG emissions contribute to climate change, which in turn contributes to the extreme events which may be attributed to climate change. Furthermore, it is the totality of GHG emissions that have caused and continue to cause climate change impacts, not the GHG emissions of any one State").

239 Written Statement of the United States, para. 2.22.

240 Written Statement of the Kingdom of Saudi Arabia, para. 1.12.

241 Written Statement of the United States, para. 2.25.

242 Written Statement of the United States, para. 2.25.

from fossil fuels, CO2 emissions from fossil fuels make up less than 50 percent of all greenhouse gas emissions[243].

3. Multiple factors lead to harm

5.15. Given that the impacts to the climate system or other parts of the environment often result from multiple factors—including the failure to adapt and factors that are beyond any individual State's control—establishing a causal link to the greenhouse gas emissions of any particular State would be highly problematic[244].

5.16. As the Court has noted, "the link between the internationally wrongful act and the alleged injury may be insufficiently direct and certain to call for reparation" where "the damage is attributable to several concurrent causes, including the actions or omissions of the respondent," or where "several internationally wrongful acts of the same nature, but attributable to different actors, may result in a single injury or in several distinct injuries"[245].

5.17. Indonesia explains that "[t]he legal concept of causation requires a clear and direct link between an act or omission and the harm caused, a connection that must be not only foreseeable but also distinctly attributable to the concerned State beyond a reasonable doubt"[246].

5.18. Furthermore, a State's own failure to adapt to climate change may lead to that State causing or exacerbating harm to itself. As the United States explains, "the same exact climate or weather event can have dramatically different effects in different locations

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243 Written Statement of the United States, para. 2.25.

244 Written Statement of the Russian Federation, p. 17.

245 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment of 9 February 2022, I.C.J. Reports 2022*, p. 13, at p. 48, para. 94.

246 Written Statement of Indonesia, para. 74.

depending on what adaptation, resilience, and disaster preparedness efforts have been undertaken"[247].

5.19. Although the specialized treaty regime on climate change takes account of greenhouse gas emissions that occurred before its entry into force, as discussed in Chapter 3, the Kingdom further notes the divergent views expressed by States on issues relating to the temporal dimension of the alleged breach, including the legality of past emissions[248]. These divergent views further illustrate the difficulty of applying the rules of State responsibility to harm to the climate system. Given the significant variation in approaches by States in their Written Statements, it would require the Court to engage in an inappropriate legislative function to reconcile and choose a path – other than the one agreed by the Parties to the specialized climate treaties.

4. The special characteristics of harmful effects caused by greenhouse gases

5.20. Establishing causation with respect to the impact of greenhouse gases, if any, caused by one particular State's greenhouse gas emissions to another State is not possible, as the harmful effects caused by greenhouse gases are multifaceted, occur over an extended period of time, and are not easily allocated or subject to quantification[249].

5.21. For any responsibility to arise, there must be a proximate causal link between a particular breach of the UNFCCC, Kyoto Protocol or Paris Agreement attributable to a particular State or States and the resulting injury incurred by another State. As States acknowledge in their Written Statements:

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247 Written Statement of the United States, para. 2.26.

248 Written Statement of Burkina Faso, paras. 73-75; Written Statement of Germany, paras. 39-40; see also Written Statement of the Russian Federation, p. 16; Written Statement of the United Kingdom, para. 137.4.2; Written Statement of the United States, para. 5.4.

249 Written Statement of France, paras. 174, 184; Written Statement of India, para. 87; Written Statement of Indonesia, para. 74; Written Statement of the Russian Federation, p. 17; Written Statement of the United Kingdom, paras. 137.4.1, 137.4.3; Written Statement of the United States, paras. 2.20-2.25, 5.10.

- Given that the impact resulting from climate change is often attributable to multiple States because greenhouse gases are emitted within the borders of many States, the existence of a causal link to any particular State is exceedingly difficult to establish[250].

- A certain level of greenhouse gas emissions would not by itself result in the breach of an international obligation. It is the accumulation of greenhouse gases that is harmful and this is necessarily impacted by significant historic contributions[251].

5.22. Establishing legal and factual causation to prove that one State's violation of an international obligation caused injury to another State because of climate change thus is exceedingly challenging[252].

5.23. The Court was not invited in these advisory opinion proceedings to make such determination with respect to any specific State, contrary to the suggestions by some[253]. That would require specific evidence of such a violation by a particular State. No such inquiry is anticipated by the questions put to the Court. Nor is it contemplated that the Court would go beyond the provisions of the specialized climate change treaties to create an international obligation and/or remedy beyond those agreed by the Parties in those treaties.

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250 Written Statement of Indonesia, para. 74; Written Statement of the United Kingdom, para. 137.4.3; Written Statement of the United States, para. 5.10.

251 Written Statement of France, para. 184; Written Statement of the United Kingdom, para. 137.4.1.

252 Written Statement of Indonesia, para. 74; Written Statement of the United States, para. 5.10. For the reasons set out above, in Chapter 4, Section V.B, the European Court of Human Rights' approach to causation in *Verein Klimaseniorinnen Schweiz* v. *Switzerland* does nothing to resolve these challenges.

253 Written Statement of Vanuatu, paras. 162-170, 503.

C. Application of the law of State responsibility would disregard foundational principles of the specialized climate treaty regime

5.24. Seeking to allocate responsibility to a State solely based on emissions that originated in its territory and caused harm would disregard foundational principles of the specialized treaty regime on climate change—those of CBDR-RC and equity.

5.25. As Indonesia notes:

> [D]etermining whether State actions or omissions in its environmental obligation have caused significant harm to the climate system poses significant and complex challenges. This is due to the collective nature of climate change obligation that is characterized by shared responsibility based on the principles of equity and CBDR-RC, making it impractical to attribute the causation to the actions or omissions of a single State[254].

5.26. As India explains,

> The question of attributability does not arise in the context of climate change as it exists in other state responsibility cases, because specific actions that contribute to climate change may have been carried out by other States across a long span of time. The issue at hand, therefore, needs to be approached differently. . . . For instance, commitments under the 1997 Kyoto Protocol are an obligation of outcome quantifiable in terms of emission of GHGs. While there is no hierarchy among different violations, the diffused nature of the case of climate change probably warrants a primary focus on the obligations of developed countries[255].

5.27. As South Africa further explains,

> [L]egal obligations of States Parties to the UNFCCC, Kyoto Protocol and Paris Agreement must be viewed through the lens of important guiding principles, in particular, that of equity and common but differentiated responsibilities and respective capabilities, as well as sustainable development. It has the effect that legal obligations in relation to climate change are nuanced and different States have

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[254] Written Statement of Indonesia, para. 74.

[255] Written Statement of India, para. 87.

> different legal obligations. Consequently, it is not possible to conclude that legal consequences flowing from differing obligations will be uniform. Legal consequences cannot be determined in the abstract and it will require an assessment of each unique case, having regard for each specific State's level of development and unique circumstances, to determine firstly if there is a beach of legal obligations, and secondly the legal consequences that flow therefrom. Any advisory opinion by the Court on legal consequences in the abstract would therefore be purely academic and a restatement of the law[256].

5.28. The Kingdom agrees with these statements[257].

5.29. Although the question posed to the Court specifically identifies small island developing States which are "particularly vulnerable to the adverse effects of climate change", the difficulties associated with satisfying the criteria for attributing State responsibility as set out above exist regardless of the identity or circumstances of the alleged injured State.

D. Concluding considerations on the application of the law of State responsibility

5.30. Given the difficulties described above with applying the law of State responsibility to significant harm to the climate system, and the divergence of views, the Kingdom wishes to offer the following summary considerations:

5.31. First, Question (b) does not require the Court specifically to address the various issues with attribution of State responsibility. Indeed, the Court is not being asked to reconcile the law of State responsibility with the nature of greenhouse gas emissions.

5.32. Second, to resolve such issues would run the risk of effectively advising on the legal position of particular groups of States or individual States, which again is not within the scope of the question posed.

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[256] Written Statement of South Africa, paras. 129-130.

[257] See also Written Statement of France, para. 174.

5.33. Finally, if this had been the issue put before the Court, or if the Court had wished to address this issue, it should have been done so explicitly in order to afford States the full and fair opportunity to present their views on these issues.

III. Peoples and individuals of the present and future generations

5.34. Whereas Question (b) (i) concerns harm with respect to States, Question (b) (ii) concerns harm with respect to 'peoples and individuals of the present and future generations'. Yet while States may agree by treaty to confer particular rights on individuals, the specialized climate treaty regime does not confer rights upon individuals or persons other than States.

5.35. Some participants appear to take the view that there are specific international law obligations owed to individuals of future generations and specific legal consequences may arise vis-à-vis individuals of future generations[258]. The Kingdom agrees with New Zealand that "international law currently [does not] prescribe[] any specific legal consequences with respect to future generations, for States who, through their internationally wrongful acts, fail to protect the climate system or other parts of the environment from anthropogenic GHGs"[259]. Indeed, "future generations" is a body of persons too indeterminate to have legal status or standing, or for claims to be made on behalf of such a group[260].

IV. Legal consequences for States concerning climate change are determined by the specialized climate treaty regime

5.36. The Kingdom explained in its Written Statement that "[i]n the event that a Party to the UNFCCC, Kyoto Protocol, or Paris Agreement considers that another Party has failed to abide by its commitments, such as if an Annex I Party allegedly fails to meet its obligation to assist developing country Parties that are particularly vulnerable to the

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258 Written Statement of the Bahamas, paras. 176-182; Written Statement of Barbados, paras. 331-339.

259 Written Statement of New Zealand, para. 144.

260 Written Statement of Germany, paras. 101-102; Written Statement of the Russian Federation, p. 17.

adverse effects of climate change in meeting adaptation costs, or a State allegedly fails to prepare an NDC, recourse may be had to the relevant compliance and dispute settlement mechanisms, including under Article 14 of the UNFCCC or the compliance mechanisms in the Kyoto Protocol or the Paris Agreement"[261].

5.37. Other participants agree that the legal consequences for States that caused significant harm to the climate system are "not a matter addressed by secondary rules of international law concerning State responsibility"[262].

5.38. As the European Union notes, the rules of State responsibility reflected in the ARSIWA may be displaced by *lex specialis*[263]. Indeed, ARSIWA Article 55 expressly provides that "[t]hese 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"[264]. This Court also has recognized that the general rules of State responsibility may "vary with the nature of the wrongful act in question in the [presence] of a clearly expressed *lex specialis*"[265].

5.39. Numerous States agree that the legal consequences for States that caused significant harm to the climate system are "addressed by the Climate Change Treaties, which

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261 Written Statement of the Kingdom of Saudi Arabia, para. 6.5; see also UNFCCC, Article 4(4) (obligation to assist developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting adaptation costs); Paris Agreement, Article 4.2 (obligation to prepare, communicate and maintain successive NDCs).

262 Written Statement of the United Kingdom, para. 136; see also ibid., paras. 139-165; Written Statement of the European Union, paras. 354-355.

263 Written Statement of the European Union, para. 350.

264 ARSIWA, Article 55.

265 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. Reports 2007*, p. 43 at pp. 208-209, para. 401.

identify the legal consequences of such conduct in the form of primary treaty obligations"[266]. As Canada points out,

> Article 15 of the Paris Agreement establishes an implementation and compliance committee. Parties to the Paris Agreement have decided that where a breach of obligations under the Agreement appears to have occurred, the best course of action to remedy that breach is to invoke the committee, which is non-adversarial and non-punitive, to look into the breach with the State Party in question, and determine the appropriate consequences to give to that breach. In addition, Article 14 of the Convention sets out the process in the event of a dispute between Parties concerning the interpretation or application of the Convention[267].

5.40. The specialized treaty regime on climate change also addresses loss and damage, or how States that are injured by, specifically affected by, or particularly vulnerable to the adverse effects of climate change due to their geographical circumstances and level of development can be provided with financial support. This was described in the Kingdom's Written Statement[268].

5.41. Based on efforts beginning in 2010, the Parties to the UNFCCC in 2013 established the Warsaw International Mechanism to address loss and damage[269]. As the Kingdom and other States noted in their Written Statements, States Parties agreed in COP Decision 1/CP.21 adopting the Paris Agreement that the Warsaw International Mechanism "does not involve or provide a basis for any liability or compensation"[270]. Instead, in 2015,

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266 Written Statement of the United Kingdom, para. 136; see also Written Statement of Canada, paras. 33-35 Written Statement of the European Union, para. 351.

267 Written Statement of Canada, paras. 33-34.

268 Written Statement of the Kingdom of Saudi Arabia, paras. 4.81-4.89; see also Written Statement of New Zealand, paras. 126-129.

269 Decision 1/CP.19, Warsaw international mechanism for loss and damage associated with climate change impacts, paras. 5-7 Report of the Conference of the Parties on its nineteenth session, held in Warsaw from 11 to 23 November 2013, FCCC/CP/2013/10/Add.1, 31 Jan. 2014, p. 5-7.

270 Written Statement of the Kingdom of Saudi Arabia, para. 6.7; see also Written Statement of France, para. 230; Decision 1/CP.21, Adoption of the Paris Agreement, para. 51, in Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015, FCCC/CP/2015/10/Add.1, 29 Jan. 2016, p. 6-7.

the Paris Agreement integrated the Warsaw International Mechanism and placed it under the authority and guidance of the COP serving as the meeting of the Parties to the Paris Agreement[271]. At the 27th Session of the COP in November 2022, State Parties agreed to establish a Loss and Damage Fund (the "Fund") "to assist developing countries that are particularly vulnerable to the adverse effects of climate change in responding to economic and non-economic loss and damage associated with the adverse effects of climate change"[272]. At the 28th Session of the COP in November-December 2023, the Parties adopted a mechanism to operationalize the Fund[273]. As of 13 December 2023, pledges to the Fund amounted to USD 792 million[274].

5.42. As China clarifies, "[t]he UNFCCC regime has provided tailor-made solutions to facilitate compliance by States and to effectively address loss and damage"[275]. The United Kingdom expresses a similar position[276].

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271 Paris Agreement, Article 8.

272 Decision 2/CP.27, Funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage, para. 1 in Report of the Conference of the Parties on its twenty-seventh session, held in Sharm el-Sheikh from 6 to 20 November 2022, FCCC/CP/2022/10/Add.1, 17 Mar. 2023, p. 12.

273 Decision 1/CP.28, 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, paras. 1-2, 27, in Report of the Conference of the Parties on its twenty-eighth session, held in the United Arab Emirates from 30 November to 13 December 2023, FCCC/CP/2023/11/Add.1, 15 Mar. 2024, p. 2; Decision 5/CMA.5, Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2-3 of decisions 2/CP.27 and 2/CMA.4, paras. 1-2, 27, in Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on its fifth session, held in the United Arab Emirates from 30 November to 13 December 2023, FCCC/PA/CMA/2023/16/Add.1, 15 Mar. 2024, p. 35.

274 Decision 1/CMA.5, Outcome of the first global stocktake, para. 79, in Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on its fifth session, held in the United Arab Emirates from 30 November to 13 December 2023, FCCC/PA/CMA/2023/16/Add.1, 15 Mar. 2024, p. 2.

275 Written Statement of China, para. 139; see also Written Statement of Indonesia, para. 18.

276 Written Statement of the United Kingdom, para. 136 ("Question B, objectively interpreted, invites the Court to identify the obligations responsive to Question A that apply specifically to "*States where they ... have caused significant harm to the climate system and other parts of the environment*". That is not a matter addressed by secondary rules of international law concerning State responsibility. It is addressed by the Climate Change Treaties, which identify the legal consequences of such conduct in the form of primary treaty obligations. It is those specific treaty obligations which are responsive to Question B") (emphasis in original).

5.43. The Kingdom agrees that the specialized treaty regime on climate change addresses the applicable international legal requirements and the consequences. That cannot be expanded except by each Party's agreement—which is why negotiations continue, taking into account the varying sovereign perspectives.

Chapter 6. CONCLUSION

6.1. The Kingdom of Saudi Arabia hereby reaffirms the Conclusions set out in its Written Statement[277].

6.2. For the reasons given in Chapters 4 and 5 of the present Written Comments, the Kingdom of Saudi Arabia respectfully requests the Court:

To answer Question (*a*) in the following manner

- The international legal obligations of States to ensure protection of the climate system and other parts of the environment from anthropogenic greenhouse gas emissions are primarily set forth in the UNFCCC, Kyoto Protocol, and Paris Agreement, which make up the specialized treaty regime on climate change. There are also certain maritime and aviation sector-specific or non-climate change issues related to greenhouse gases that are operationalized in Annex VI to MARPOL, Annex 16 to the Chicago Convention, and the Ozone regime.

- While pursuing the common goals under the specialized treaty regime on climate change, obligations of States are differentiated. This differentiation is clearly articulated in the language of the specialized climate treaties and the distinction between Annex I Parties and non-Annex I Parties, taking into account overriding priorities of economic and social development and poverty eradication.

- Historic contributions to climate change are accorded proper weight in providing content to the obligations of States in respect of climate change. The international community agreed to an asymmetrical allocation of obligations to respond to the threat of climate change as between States with historical greenhouse gas emissions responsibility that industrialized early listed in Annex I and other Parties, consistent with the principle of CBDR-RC.

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[277] Written Statement of the Kingdom of Saudi Arabia, Chapters 5-6.

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

- All States Parties are to engage in adaptation planning processes and the implementation of actions, contributing to the global adaptation goal of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change, with a view to contributing to sustainable development and ensuring an adequate adaptation response in the context of the temperature goal referred to in Paris Agreement Article 2.

To answer Question (b) in the following manner

- State obligations to protect the climate system and other parts of the environment from anthropogenic greenhouse gas emissions are set out exclusively in the specialized treaty regime on climate change. Thus, the legal consequences under these obligations must be determined by reference to the specialized climate treaty regime, which continues to evolve by negotiations between the State Parties.

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to the Kingdom of the Netherlands

15 August 2024