RESPONSE OF THE STATE OF KUWAIT TO THE QUESTIONS PUT FORYH BY THE ESTEMMED JUDGES DURING THE PUBLIC HEARINGS OF THE ADVISORY OPINION ON "OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE"

1. Question put by Judge Cleveland

"During these proceedings, a number of participants have referred to the production of fossil fuels in the context of climate change, including with respect to subsidies. In your view, what are the specific obligations under international law of States within whose jurisdiction fossil fuels are produced to ensure protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases, if any?"

The response of the State of Kuwait

1.1. In view of the reasons stated below, it is the State of Kuwait's view that:

1.1.1. The scope of the questions to the Court in UN General Assembly Resolution 77/276 of 29 March 2023 requesting this advisory opinion is, **"obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases"** and 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"**. It is noted that this scope focuses on anthropogenic greenhouse gases (GHG) emissions in context of only the current international treaties relating to climate change, which are the UNFCCC, Kyoto Protocol and the Paris Agreement **(hereinafter "Climate Change Treaties").** International laws relating to environmental laws other than the Climate Change Treaties are not applicable to climate change. There are consequently no additional obligations on States within whose jurisdiction fossil fuels are produced in respect of climate change. Therefore, no separate obligations can be imposed on fossil fuel use and consumption. Creating such separate category of obligations on States risks establishing international law rules (lex ferenda) rather than clarifying them (lex lata).

1.1.2. Most sources of anthropogenic GHG emissions are not hydrocarbons.[1] The obligations of states in the area of greenhouse gas emissions – are governed and limited by the specialized treaty regime on climate change which comprises the UNFCCC, the Kyoto Protocol and the Paris Agreement. However, this does not mean that other relevant treaties and customary rules cannot be used to interpret the

[1] Timor-Leste stated in its oral proceedings, that the energy sector is responsible for 34% of the emissions, and 66% of the emissions result from other sectors including the agricultural and transportation sectors.

obligations contained in this treaty regime, but these other rules cannot displace or amend the specific obligations contained in the climate change treaties.[2]

1.2. States have a right to permanent sovereignty over natural resources, but no specific obligations under the international law to limit or cease the production of fossil fuels.

1.2.1. If the Court were nevertheless to consider the question, States that produce fossil fuels in their jurisdiction, or provide related subsidies, do not have specific obligations under general international law in this regard.

1.2.2. Climate Change Treaties primarily regulate State obligations with respect to greenhouse gas emissions and climate change. There is no specific obligation to cease fossil fuel production in the Climate Change Treaties. In fact, Climate Change Treaties does not impose specific obligations of any kind on States within whose jurisdiction fossil fuels are produced. To the contrary, the Climate Change Treaties require consideration of developing countries' unique challenges and costs of moving away from fossil fuels.

1.2.3. Only reference of fossil fuel production is in the preamble of the UNFCCC, which is only in the context of "recognizing the special difficulties of those countries, especially developing countries, whose economies are particularly dependent on fossil fuel production, use and exportation, as a consequence of action taken on limiting greenhouse gas emissions." States' obligations to protect the climate system must account for the differing positions of late-industrializing, fossil-fuel-dependent economies, which require space to develop and utilize their resources. To address these disparities, the principle of common but differentiated responsibilities and respective capabilities serves as a cornerstone of the climate change treaty regime.

1.2.4. In Article 4.8 of the UNFCCC, specific national circumstances of developing States are identified that should be given consideration by all States when implementing their Article 4 obligations. Specifically, Article 4.8 (h) stipulates a specific circumstance for States "whose economies are highly dependent on income generated from the production, processing and export, and/or on consumption of fossil fuels". It is clear from this Article 4.8 (h) that none of these specialized treaty obligations can be construed to require States to cease, for example, fossil fuel production, use and export.[3] Similarly, it is required in Article 4.10 of the UNFCCC that when implementing the commitments, parties consider the situation of the States, particularly developing States, whose economies are vulnerable to the impacts of measures addressing climate change, including those reliant on fossil fuels and energy-intensive products, or facing challenges in transitioning to alternatives.

[2] See para 2 of Part IV of the oral submission dated 6 December 2024 of the State of Kuwait.
[3] See para 5-7 of Part IV of the oral submission dated 6 December 2024 of the State of Kuwait.

1.2.5. Other than as stated above, Climate Change Treaties does not address the production of fossil fuels in the context of climate change, including with respect to the subsidies. Instead, obligations under the specialized treaty regime on climate change focus on mitigation of greenhouse gas emissions and adaptation, along with financing and technology and capacity cooperation.

1.2.6. The fact that States have agreed to these obligations reflects a deliberate balance between competing interests. On one hand, States retain their right to permanent sovereignty over natural resources for sustainable economic development, including a gradual energy transition particularly crucial for developing States reliant on fossil fuels. On the other hand, States bear a responsibility to mitigate harm from greenhouse gas emissions to stabilize emissions and thus protect the climate system.[4]

1.3. Arguments made by some States[5] that States have a duty under the international law to prevent transboundary harm that applies to climate change by curtailing hydrocarbons production, have no foundation under the international law.

1.3.1. Under customary international law, this duty is inapposite, as it pertains to climate change and is not explicitly or implicitly provided within the Climate Change Treaties regime. As The State of Kuwait has earlier submitted, "the Court has accepted in the North Sea Continental Shelf and Nicaragua cases that a treaty in a particular area may derogate from general customary law that would otherwise have governed the relations between parties to a treaty".[6]

1.3.2. This duty applies only in a bilateral context when one State suffers environmental harm clearly caused by a neighboring State, and not to the accumulation of emissions in the global atmosphere creating a cumulative effect on the climate system.[7]

1.3.3. Further, addressing production, rather than emissions, would also create additional difficulties in establishing causality. Customary international law is clear that States that commit wrongful acts are responsible, but only upon a showing of causation between a wrongful act attributed to a State and a certain injury. That fundamental principle of law cannot be dispensed with, regardless of the complexity of the matter. As the Court said in its Judgment on Reparations in Armed Activities on the Territory of the Congo and in earlier cases causation requires a "sufficiently direct and certain causal nexus between the wrongful act . . . and the injury suffered . . .". While the Court noted "that the causal nexus required may vary depending on the primary rule violated and the nature and extent of the injury," the complexity of climate change provides no basis to apply a flexible standard of causation. It would be exceedingly

[4] See Part IV of the oral submission dated 6 December 2024 of the State of Kuwait.
[5] Refer to the oral submissions before the court of Vanuatu, Belize, The Gambia, Ghana and Micronesia.
[6] See Part IV of the oral submission dated 6 December 2024 of the State of Kuwait.
[7] Refer to the oral submissions before the court of the US, UK and India.

difficult to prove a causal link between the production of fossil fuels and a certain injury caused by a specific event, such as flooding or hurricanes.

2. Question put by Judge Tladi

"In their written and oral pleadings, Participants have generally engaged in an interpretation of the various paragraphs of Article 4 of the Paris Agreement. Many Participants have, on the basis of this interpretation, come to the conclusion that, to the extent that Article 4 imposes any obligations in respect of nationally determined contributions, these are procedural obligations. Participants coming to this conclusion have, in general, relied on the ordinary meaning of the words, context and sometimes some elements in Article 31 (3) of the Vienna Convention on the Law of Treaties. I would like to know from the Participants whether, according to them, 'the object and purpose' of the Paris Agreement, and the object and purpose of the climate change treaty framework in general, has any effect on this interpretation and if so, what effect does it have?"

The response of the State of Kuwait

2.1. Based on the general rule of treaty interpretation reflected in Article 31 of the Vienna Convention on the Law of Treaties, and other relevant international law, the ordinary meaning of the terms of the various paragraphs of Article 4 of the Paris Agreement are clear and explicit; neither the object and purpose of the Paris Agreement, nor 'the object and purpose of the climate change treaty framework in general', may be used to alter the clear meaning of those terms[8].

2.2. Further, determining the object and purpose of the Climate Change Treaties is not straightforward; it requires an overall assessment of these treaties. The preamble to the UNFCCC, and the preamble to the Paris Agreement, each set forth a range of considerations that may contribute to the object and purpose of each treaty.

2.3. In addition, Article 2 of the UNFCCC sets out the 'ultimate objective'[9] of the UNFCCC and any related legal instruments that the Conference of the Parties may adopt. It is "to achieve … stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system". Article 2

[8] See, for example, Richard Gardiner, *Treaty Interpretation* (OUP, 2nd ed., 2015), pp. 211-222, citing inter alia *USA, Federal Reserve Bank v Iran, Bank Markasi*, Case A 28 (2000.02), 36 *Iran-US Claims Tribunal Reports* 5, at 22, para. 58 ("Even when one is dealing with the object and purpose of a treaty, which is the most important part of the treaty's context, the object and purpose does not constitute an element independent of that context. The object and purpose is not to be considered in isolation from the terms of the treaty; it is intrinsic to its text. It follows that, under Article 31 of the Vienna Convention, a treaty's object and purpose is to be used only to clarify the text, not to provide independent sources of meaning that contradict the clear text").

[9] The significance of the term 'ultimate objective' *[l'objectif ultime'*] in Article 2 of the UNFCCC is uncertain.

further provides that this is to be done "in accordance with the relevant provisions of the Convention" and achieved "within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner". Article 2 of the Paris Agreement states that the Paris Agreement, "in enhancing the implementation of the [UNFCCC], including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty".

2.4. Neither the object and purpose of the Paris Agreement, nor 'the object and purpose of the climate change treaty framework in general', affects the ordinary meaning of the terms used in Article 4 of the Paris Agreement.

2.5. Article 2 of the Paris Agreement includes objectives on how the Paris Agreement aims to strengthen the global response to the threat of climate change, "including by … Holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change". Article 2 also provides that the Paris Agreement "aims" to strengthen the global response to the threat of climate change, "including" by holding the increase in the global average temperature to the specified targets. The use of the word "aims" indicates that this is a hortatory objective. The clearly hortatory nature of the temperature goal is even more apparent for the 1.5 °C target, which states that the Paris Agreement will "pursue efforts" to limit the temperature increase to 1.5 °C above pre-industrial levels.

2.6. Article 4 of the Paris Agreement lastly provides a set of different criteria for its obligations to fulfill, and the ordinary meaning of the Article's terms must be ascertained. Article 4.2 of the Paris Agreement contains a binding obligation on the States when it requires that each Party shall prepare, communicate and maintain its nationally determined contribution "NDC". It also requires each Party to pursue domestic mitigation measures with the aim of achieving the objective of its NDC. These binding obligations in Article 4.2 are though limited in scope. They are obligations of conduct rather than of result. They do not require anything in terms of the content of each State's NDC. That is left to each State to determine.[10] Further, Article 4.3 of the Paris Agreement contains an obligation on States to put forward a successive NDC every five years. This again is an obligation of conduct. States are enjoined to seek the "*highest possible ambition*" when formulating their successive NDCs, and in doing so they should take into account what Article 4.3 refers to as common but differentiated responsibilities and capabilities "CBDR", in the light of national circumstances. Indeed, these limitations of CBDR and national circumstance apply across the entire climate treaty regime.[11]

[10] See para 3 of Part IV of the oral submission dated 6 December 2024 of the State of Kuwait.
[11] See para 4 of Part IV of the oral submission dated 6 December 2024 of the State of Kuwait.

3. Question put by Judge Aurescu

"Some Participants have argued, during the written and/or oral stages of the proceedings, that there exists the right to a clean, healthy and sustainable environment in international law. Could you please develop what is, in your view, the legal content of this right and its relation with the other human rights which you consider relevant for this advisory opinion?"

The Response of the State of Kuwait

3.1.1. Insofar as the right to a clean, healthy and sustainable environment has been stated in recent resolutions of the United Nations General Assembly[12] and the Human Rights Council[13], such resolutions cannot impose legally binding obligations on States related to the climate system or otherwise[14]. Member States at the adoption of General Assembly resolution 76/300 also were clear they did not intend to create legally binding obligations[15].

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[12] See UN General Assembly resolution 76/300 of 28 July 2022, The human right to a clean, healthy and sustainable environment.

[13] See UN Human Rights Council resolution 48/13 of 8 Oct. 2021, The human right to a clean, healthy and sustainable environment.

[14] See Conclusion 12 of the ILC's 2018 Conclusions on the identification of customary international law YBILC v2018, vol II (2), p. 107109. Conclusion 12.1 reads: "A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law."

[15] Written Statement of the United States, para. 4.57 (*citing* U.N. GAOR, 76th Sess., 97th plen. mtg. at 6-7, U.N. Doc. A/76/PV.97 (July 28, 2022), https://perma.cc/U6C7-CQFW:
(representative from the Russian Federation explaining that "neither universal environmental agreements nor international human rights treaties address such concepts as a clean environment, a healthy environment and sustainable environment, or a concept similar to them" and that the Russian Federation is "convinced that the new right can be recognized only within the framework of international treaties that have been carefully prepared by competent experts and subsequently adopted by States"); id. at 7-8 (representative from Pakistan explaining that "the right to a clean, healthy and sustainable environment and the corresponding State obligations have not been legally established by the existing international human rights instruments" and, therefore, Pakistan "believe[s] that the draft resolution is a political resolution and not a legal affirmation"); id. at 11-12 (representative from the UK stating that "[t]here is no international consensus on the legal basis of the human right to a clean, healthy and sustainable environment," that the UK "do[es] not believe [such a right] has yet emerged as a customary right," and that the UK's basis for voting in favor of the resolution was because the issue is "of deep concern"); id. at 12 (representative of Canada stating that "there is currently no common or internationally agreed understanding of the content and scope of the right to a clean, healthy and sustainable environment"); id. at 13 (representative from Japan stating that "the right to a safe green, healthy and sustainable environment . . . has yet to be clearly defined" and that Japan voted for the resolution in view of, inter alia, "the aspiration . . . of sending a political message"); id. (representative from Belarus stating that "the identification and recognition of a separate category of human right can be achieved only by drawing up a universally legally binding instrument"); id. at 14 (representative from New Zealand stating that "the right to a clean, healthy and sustainable environment does not have a legally binding character," that such a right "has not been agreed in a treaty," that "this resolution does not state a role of customary international law or provide evidence of a new norm of customary international law," and that New Zealand "consider[s] that this resolution has the character of a political declaration"); id. at 15 (representative from India stating "there is no clear understanding and agreed definition of the terms 'clean,' 'healthy' and 'sustainable'" and that India voted in favor of the resolution in view of its "read[iness] to support any effort for a better environment and to further international cooperation for environmental protection"); U.S. Mission to the UN, Explanation of Position on the Right to a Clean, Healthy, and Sustainable Environment Resolution (July 28, 2022) (stating that "a right to a clean, healthy, and sustainable

3.1.2. Even if such right were to apply under the laws other than the Climate Change Treaties, this right would more commonly apply to localized environmental circumstances, creating risks for individuals within the State. But such cases "do not support a general human rights obligation on States to mitigate climate change through emissions reductions and removals"[16]. As a human right, as asserted, it would be owed by a State that had agreed to the right only to persons within its territory or jurisdiction.

3.1.3. The plain text of General Assembly resolution 76/300 does not impose specific qualitative obligations on States to protect the climate system, or otherwise mitigate or adapt to climate change. Nor do the Human Rights Council's resolutions. Instead, "[t]he UN Human Rights Council's resolutions on climate change and human rights expressly acknowledge the centrality of the UNFCCC and the [Paris Agreement] in framing the obligations of States to mitigate climate change and thereby to protect rights, including through decisions taken by the COP and CMA"[17].

3.1.4. Although there are non-legally binding international resolutions suggesting a right to a clean, healthy and safe environment, it is not part of a universal treaty, nor is there a general practice of States or *opinio juris* such as would be needed for it to have become part of customary international law.

4. Question put by Judge Charlesworth

> "In your understanding, what is the significance of the declarations made by some States on becoming parties to the UNFCCC and the Paris Agreement to the effect that no provision in these agreements may be interpreted as derogating from principles of general international law or any claims or rights concerning compensation or liability due to the adverse effects of climate change?

The response of the State of Kuwait

4.1. Neither the UNFCCC nor the Paris Agreement allow for any reservations to their text.[18] The outcome of these Treaties allowed universal adoption and utmost cooperation to address the global issue of climate change.

A very limited number of States, from a single region, have made interpretative declarations concerning the UNFCCC and the Paris Agreement (five and nine States respectively). These declarations have no significance for the interpretation of the treaties.

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environment has not yet been established as a matter of customary international law; treaty law does not yet provide for such a right; and there is no legal relationship between such a right and existing international law" and that the United States "support[ed] this resolution as it sets forth . . . moral and political aspirations").

[16] New Zealand ¶ 115.

[17] Written Statement of New Zealand ¶ 122.

[18] Articles 24 of the UNFCCC and 27 of the Paris Agreement.

These Declarations do not inform the interpretation of the UNFCCC and Paris Agreement in accordance with the treaty interpretation rules in Article 31 of the Vienna Convention on the Law of Treaties 1969. Any State Party to these Treaties has the sovereignty to issue such declaration, however, they do not shape a treaty or imply the consent of other State Parties to them.

4.2. Therefore, giving weight to Declarations made by a few States appears to bypass the reservations process on treaties, as in the Vienna Convention on the Law of Treaties1969, transforming these Declarations into de facto reservations where they were not intended to be used as such.[19]

4.3. Had all State Parties wished to support this position that was communicated by a few State Parties, they would have included it in the adopted text of the UNFCCC or Paris Agreement - which they did not.

4.4. There is also no acceptance by State Parties to the UNFCCC and Paris Agreement of these Declarations as instruments of any interpretive weight for the Climate Change Treaties. Further, these Declarations do not align with the consensus adopted in these Treaties. Therefore, construing these Declarations as interpretive guidance or giving them interpretive weight in the Climate Change Treaties would undermine the treaty-making process in international law. This approach of extending the views of some States on all State Parties would undermine state consent as the cornerstone of adopting the text of Treaties, in contravention with Article 9 of the Vienna Convention on the Law of Treaties.

4.5. It is also noted that these Declarations have no effect on the interpretation of the treaties, as explained in the International Law Commission's Guide to Practice and the commentary thereto.[20]

[19] See Articles 1(d), Section 2 "Reservations", in particular 19(a) of the Vienna Convention on the Law of Treaties, on the exclusion of the right to submit a reservation where the treaty prohibits this.

[20] Guideline 4.7.1 of the Guide to Practice reads:

"An interpretative declaration does not modify treaty obligations. It may only specify or clarify the meaning or scope which its author attributes to a treaty or to certain provisions thereof and may, as appropriate, constitute an element to be taken into account in interpreting the treaty in accordance with the general rule of interpretation of treaties."

This is to be read with paragraph (31) of the commentary, which reads:

"It is therefore clear from practice and doctrinal analyses that interpretative declarations come into play only as an auxiliary or complementary means of interpretation, corroborating a meaning revealed by the terms of the treaty considered in the light of its object and purpose. As such, they do not produce an autonomous effect: when they have an effect at all, interpretative declarations are associated with another instrument of interpretation, which they usually uphold."