

INTERNATIONAL COURT OF JUSTICE

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

**“OBLIGATIONS OF STATES IN RESPECT OF CLIMATE
CHANGE”**

**WRITTEN REPLIES OF
THE UNITED STATES OF AMERICA**

DECEMBER 20, 2024

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?”

Written reply of the United States of America

As explained in the U.S. Written Statement, since the late 1980s, when scientific consensus about anthropogenic climate change began to emerge and States became aware of the significant risk it posed, States have established a treaty-based international legal framework for addressing this global challenge, based on international cooperation.¹ That international legal framework—the UN climate change regime—has been carefully crafted to generate the broad participation and global mitigation action needed to address climate change, while allowing States to take into account myriad differences in their national circumstances.² In reflection of this, the treaty law of the UN climate change regime does not prescribe any particular measures States must adopt and implement to mitigate anthropogenic climate change.³ The same is the case with respect to other, non-climate-change-specific international law that might apply to greenhouse gas (GHG) emissions.⁴

For example, although article 4.1(b) of the 1992 UN Framework Convention on Climate Change (UNFCCC) obligates all Parties to formulate, implement, publish, and regularly update national programs containing measures to mitigate climate change, it does not prescribe any particular measures Parties must implement.⁵ Similarly, while the 2015 Paris Agreement requires each Party to prepare, maintain, and communicate successive nationally determined contributions (NDCs) toward mitigating anthropogenic climate change, it does not prescribe GHG emissions targets or mitigation policies and measures for Parties’ NDCs. Rather, it allows each Party to

¹ U.S. Written Statement, Chapter II.B.

² U.S. Written Statement, Chapters II.B and III.

³ *See generally* U.S. Written Statement, Chapter III; U.S. Written Comments, Chapter III.A.

⁴ *See generally* U.S. Written Statement, Chapters IV.A and IV.B; U.S. Written Comments, Chapters III.B and III.C.

⁵ *See* United Nations Framework Convention on Climate Change, art. 4.1, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994), <https://perma.cc/98AS-N3U4>; *see also* United Nations Framework Convention on Climate Change (consolidated text reflecting amendments to the Convention’s annexes), <https://perma.cc/88LK-37L5> [Dossier Nos. 4-10]; U.S. Written Statement, ¶ 3.10.

determine its own NDC in light of its national circumstances, while establishing an “ambition mechanism” to deliver increasingly ambitious climate action over time.⁶

Additionally, although article 4.2 of the Paris Agreement requires the good faith pursuit by Parties of domestic mitigation measures, with the aim of achieving the objectives of their NDCs, the Agreement does not obligate Parties to take specific mitigation measures toward that end. Instead, it allows Parties the flexibility to determine what measures to adopt and implement with the aim of achieving the objectives of their NDCs, in recognition that there is no single or “right” path, approach, or set of measures for achieving shared climate goals.⁷ This flexibility is also present with respect to the 1982 UN Convention on the Law of the Sea, which, while requiring States Parties to protect and preserve the marine environment, and to take measures to prevent, reduce, and control pollution of the marine environment, does not prescribe particular measures States must adopt to fulfill those obligations.⁸

The same would be true regarding any application in this context of a customary international law obligation to prevent or at least minimize significant transboundary environmental harm. The due diligence standard for States’ compliance with such an obligation provides States with a wide margin of appreciation in determining what measures to take to avoid or at least minimize such harm.⁹ As explained in the U.S. written submissions, in light of the context-specific nature of the standard, such an obligation would not be susceptible to general, *ex ante* prescriptions of what States must do to act diligently,¹⁰ including with respect to fossil fuel production.

Thus, although States have obligations under international law in respect of mitigating anthropogenic climate change, in the U.S. view, there are no international legal obligations in respect of climate change that impose *specific* obligations on States with respect to the production of fossil fuels, including subsidization of the same.¹¹

⁶ U.S. Written Comments, Chapter III.A.i.a.

⁷ U.S. Written Comments, Chapter III.A.i.b.

⁸ U.S. Written Statement, Chapter IV.B; U.S. Written Comments, Chapter III.C.

⁹ U.S. Written Statement, Chapter IV.A; U.S. Written Comments, Chapter III.B.

¹⁰ U.S. Written Comments, ¶¶ 3.38-3.41.

¹¹ This reply does not address whether non-climate-change-related international obligations, such as those of Parties to the WTO Agreement on Subsidies and Countervailing Measures, might be applicable to fossil fuel-related subsidies in certain circumstances. Additionally, the governing body of the Paris Agreement recently has addressed fossil fuels,

including fossil fuel subsidies, through important non-legally binding “calls” on Parties to phase down unabated coal power, transition away from fossil fuels in energy systems, and phase out inefficient fossil fuel subsidies. Conf. of the Parties serving as the meeting of the Parties to the Paris Agreement (“CMA”) Dec. 1/CMA.5, ¶ 28 U.N. Doc. FCCC/PA/CMA/2023/16/Add.1 (Dec. 13, 2023), <https://perma.cc/5CLE-M8RJ> (calling on Parties to contribute to various global efforts to keep 1.5 degrees Celsius within reach, including “[a]ccelerating efforts towards the phase-down of unabated coal power,” “[t]ransitioning away from fossil fuels in energy systems, in a just, orderly and equitable manner, accelerating action in this critical decade, so as to achieve net zero by 2050 in keeping with the science,” and “[p]hasing out inefficient fossil fuel subsidies that do not address energy poverty or just transitions, as soon as possible”); CMA Dec. 1/CMA.3, ¶ 36, U.N. Doc. FCCC/PA/CMA/2021/10/Add.1 (Nov. 13, 2021), <https://perma.cc/R3SF-KNBE> [Dossier No. 173] (calling on Parties to “accelerat[e] efforts towards the . . . phase-out of inefficient fossil fuels subsidies, while providing targeted support to the poorest and most vulnerable in line with national circumstances and recognizing the need for support towards a just transition”).

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?”

Written reply of the United States of America

The mitigation-related obligations in article 4 of the Paris Agreement, which pertain to Parties’ nationally determined contributions (NDCs), are at the heart of the UN climate change regime.¹² The key obligations in article 4 are:

- the procedural obligations of each Party under articles 4.2 and 4.9 to “prepare, communicate and maintain successive [NDCs] that it intends to achieve,” with each Party required to communicate an NDC every five years;¹³ and
- the substantive obligation of effort of Parties under article 4.2 to “pursue domestic mitigation measures, with the aim of achieving the objectives of [their NDCs].”

As explained in the U.S. written submissions, nothing in the text of article 4 or any other provision of the Paris Agreement sets forth legally binding criteria or parameters for the substance of the greenhouse gas (GHG) emissions targets or mitigation policies and measures Parties put forward in their NDCs.¹⁴ The lack of such criteria or parameters is further demonstrated by Parties’ so-far unsuccessful attempts to define “features” of NDCs.¹⁵ Furthermore, although the obligation of Parties under article 4.2 to “pursue” domestic mitigation measures “with the aim of achieving

¹² U.S. Written Statement, ¶¶ 3.16-3.18; U.S. Written Comments, Chapter III.A.i.

¹³ Additionally, under article 4.8, “[i]n communicating their [NDCs], all Parties shall provide the information necessary for clarity, transparency and understanding in accordance with decision 1/CP.21 and any relevant decisions of the [CMA],” and under article 4.13, “Parties shall account for their [NDCs],” and “[i]n accounting for anthropogenic emissions and removals corresponding to their [NDCs], Parties shall promote environmental integrity, transparency, accuracy, completeness, comparability and consistency, and ensure the avoidance of double counting, in accordance with guidance adopted by the [CMA].”

¹⁴ U.S. Written Comments, ¶¶ 3.13-3.16.

¹⁵ U.S. Written Comments, n.45.

the objectives of [their NDCs]” is an important binding obligation of effort that must be performed in good faith, it provides Parties with a wide margin of appreciation with respect to what measures to pursue domestically, and by its terms does not require Parties to have in place a set of domestic measures that the Party assesses will achieve its NDC.¹⁶ Other provisions of article 4, namely articles 4.3 and 4.11,¹⁷ complement the obligations described above by setting forth important non-binding expectations, but they do not establish legal obligations of Parties.¹⁸

Reading the terms of article 4 in light of the object and purpose of the Paris Agreement does not change these interpretations of the ordinary meaning of article 4. As an initial matter, the relevant “object and purpose” for purposes of interpreting the provisions of the Paris Agreement is that of the Agreement itself, and not of the UN climate change regime treaty framework more generally.¹⁹ Article 3 of the Paris Agreement states that “the *purpose* of [the] Agreement [is] set out in Article 2” (emphasis added). Article 2, in turn, provides:

[The] Agreement, in enhancing the implementation of the Convention, 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, including by: a. Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change²⁰

¹⁶ U.S. Written Statement, ¶ 3.17; U.S. Written Comments, ¶¶ 3.17-3.19.

¹⁷ Paris Agreement, arts. 4.3 (“Each Party’s successive nationally determined contribution will represent a progression beyond the Party’s then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.”), 4.11 (“A Party may at any time adjust its existing nationally determined contribution with a view to enhancing its level of ambition, in accordance with guidance adopted by the [CMA].”), Dec. 12, 2015, T.I.A.S. 16-1104, 3156 U.N.T.S. 79 (entered into force Nov. 4, 2016), <https://perma.cc/CSF5-4SRK> (“Paris Agreement”) [Dossier No. 16].

¹⁸ U.S. Written Statement, ¶ 3.18.

¹⁹ See Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331, <https://perma.cc/Y4MB-Q9MK> (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of *its* object and purpose.”) (emphasis added).

²⁰ As explained in the U.S. Written Statement, the Paris Agreement sets a more precise—and numerical—goal for mitigating climate change than the UNFCCC’s objective, which, as set out in article 2 of the Convention, “is to achieve . . . stabilization of greenhouse gas [GHG] concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.” U.S. Written Statement, n.166 and ¶ 2.52. The Paris Agreement also sets forth adaptation- and finance-related goals. Paris Agreement, arts. 2.1(b) (“Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production”), 2.1(c) (“Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development”).

Thus, a central purpose of the Paris Agreement, when it comes to climate change mitigation, is “to strengthen the global response to the threat of climate change” by seeking to achieve the global temperature goal in article 2.1(a).²¹

Vital to any understanding of the Paris Agreement’s object and purpose is the Agreement’s “aim[] to strengthen the *global* response” to climate change.²² As explained in detail in the U.S. written submissions, a key objective of the process leading to adoption of the Paris Agreement in 2015 was to attract *global* participation in the instrument while still delivering the necessary climate ambition, thereby addressing the bulk of global anthropogenic GHG emissions.²³ The history of the UN climate change regime is therefore critical context for understanding the object and purpose of the Paris Agreement.²⁴ The Paris Agreement affords Parties substantial national flexibility in order to garner the participation of the key States necessary to address such emissions. In service of this objective, a critical feature of the Paris Agreement is the nationally determined nature of NDCs, reflected in the terms of article 4. This feature recognizes that a Party’s mitigation contribution will be effective only if it grows out of the Party’s domestic policy process and reflects the Party’s national circumstances and capacities. The interpretations described above of the ordinary meaning of the terms of Parties’ mitigation-related obligations under article 4 are therefore the right ones in light of the Paris Agreement’s object and purpose; indeed, they reflect and promote the Paris Agreement’s object and purpose.

In any case, whatever a treaty’s object and purpose might be, it cannot override the treaty’s terms. Such an outcome would be inconsistent with article 31(1) of the Vienna Convention on the Law of Treaties.²⁵ Thus, for example, the Paris Agreement’s object and purpose could not operate to convert the Agreement’s global temperature goal into a legally binding obligation or to impose

²¹ See Paris Agreement, art. 2.1.

²² Paris Agreement, art. 2.1 (emphasis added).

²³ U.S. Written Statement, ¶¶ 2.29, 2.39-2.42, 2.46-2.60, and Chapter III.B; U.S. Written Comments, ¶¶ 3.16, 6.6.

²⁴ See U.S. Written Statement, Chapters II.B, III.B, and III.E.

²⁵ See, e.g., RICHARD K. GARDINER, TREATY INTERPRETATION 219 (2d. ed. 2015) (“the object and purpose of a treaty cannot be used to alter the clear meaning of a term of treaty”) (U.S. Annex 1). Accordingly, for example, when considering an arbitration agreement whose object and purpose was to resolve a boundary dispute, but whose specific jurisdictional terms were more limited, the Court did not apply the agreement’s object and purpose to override those specific terms in order to resolve the entire dispute. *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, 1991 I.C.J. 53, 72, ¶ 56 (Nov. 12), <https://perma.cc/4L2P-7J4P>.

legally binding parameters against which to judge the sufficiency of Parties' NDCs.²⁶ Nor could the Agreement's object and purpose operate to convert the article 4.2 obligation of Parties to "pursue domestic mitigation measures, with the aim of achieving the objectives of [their NDCs]" into one of "due diligence" requiring Parties to implement "all necessary measures" to achieve the objectives of their NDCs (much less the targets set out in the NDCs themselves), contrary to the ordinary meaning of the provision's terms.

²⁶ There is no legal basis, for example, for finding that the Paris Agreement's object and purpose "provides important guardrails for the setting of States' NDCs," such as by "requir[ing] States to set their NDCs at a level that makes it at least reasonably possible to achieve [the Agreement's global temperature goal]," with "improperly low NDCs [being] a violation of [a Party's] obligations under the Paris Agreement." *Contra* Bahamas Written Comments, ¶ 46; *contra also* Kenya Written Comments, ¶ 4.47. Moreover, the fact that recent decisions of the Paris Agreement's governing body have created non-legally binding links between Parties' NDCs and temperature goals—first to the Agreement's global temperature goal, and later to the more ambitious goal of limiting global warming to 1.5 degrees Celsius—further demonstrates that there is no requirement in the Agreement, and not even a non-binding call, for Parties to align their NDCs with the temperature goal set out in article 2.1(a). *See* U.S. Written Statement, ¶ 3.43 (setting out the history of the evolution of non-legally binding expectations regarding Parties' NDCs, including their relationship to temperature goals).

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?”

Written reply of the United States of America

As detailed in the U.S. submissions in this advisory proceeding, international human rights law does not currently provide for a human right to a healthy environment.²⁷ No treaty of global application provides for a right to a healthy environment, nor is such a right supported by the extensive and virtually uniform State practice and *opinio juris* necessary to establish a rule of customary international law. While select regional treaties, domestic laws, and non-binding sources reflect a growing appreciation by the international community of the importance of a healthy environment to the enjoyment of human rights, these sources are not sufficient evidence of the crystallization of a new rule of customary international law.

Efforts to develop or define a new human right to a healthy environment must comport with the established rules for the creation of international law. The United States remains open to participating in a transparent process in which States have an opportunity to provide input on the scope and content of such a right and to indicate their consent to be bound.

²⁷ U.S. Written Comments, Chapter IV.D.ii; U.S. Written Statement, Chapter IV.C.iii.