INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

(REQUEST FOR ADVISORY OPINION)

RESPONSES TO JUDGES' QUESTIONS
KINGDOM OF SAUDI ARABIA

20 December 2024

I. 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?"

1.1. The two questions put to the Court in resolution 77/276 do not refer to any obligations of States under international law that might arise from fossil fuel production.

1.2. Instead, the questions refer to the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from greenhouse gas emissions. Therefore, Judge Cleveland's question has not been the subject of any or detailed argument in the course of the present proceedings. The question would go beyond the Court's jurisdiction in these proceedings.

1.3. International law does not impose any specific obligations on States with respect to fossil fuel production in their territory or jurisdiction. Moreover, the specialized treaty regime on climate change, which comprises the UNFCCC, Kyoto Protocol and Paris Agreement, primarily regulates State obligations with respect to greenhouse gas emissions and climate change adaptation, financing, capacity building, and loss and damage[1]. It does not impose specific obligations on States within whose jurisdiction fossil fuels are produced.

1.4. To the contrary, the structure of the specialized treaty regime on climate change is premised on each State addressing *emissions within its territory* (regardless of whether, and to what extent, fossil fuels are *produced in its territory*). That is reflected, for example, in the obligation of States under the Paris Agreement to prepare and regularly update a national inventory of greenhouse gas emissions and removals taking place

[1] See, for example, Oral Statement of Kuwait, CR 2024/43, p. 55, para. 8 (Sarooshi); 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 Japan, para. 11; Written Statement of the Kingdom of Saudi Arabia, para. 1.9; Written Statement of the Organization of the Petroleum Exporting Countries, para. 9; Written Statement of the United Arab Emirates, paras. 16-17.

within their national territory,[2] and to prepare and communicate nationally determined contributions ("NDCs") that specify the contributions they intend to achieve with respect to those territorial emissions. Similarly, the UNFCCC requires all Parties to report on their "national inventories of anthropogenic emissions by sources and removals by sinks"[3]. In the Kyoto Protocol, Annex I Parties[4] agreed to meet individualized greenhouse gas emissions reductions[5].

1.5. There are good reasons behind States collectively adopting an approach to emissions reductions that centers on the territory in which emissions and removals occur, rather the territory in which fossil fuels are produced. For example:

i. Greenhouse gas emissions arise across all sectors of a State's economy, including those arising from agriculture, land-use change and industrial processes, activities related to deforestation, and the combustion of fossil fuels. Mitigation and adaptation efforts require coordinated policies that balance a range of domestic considerations when implementing policies to address emissions arising from all activities within their territory. Moreover, climate change results from the accumulation of greenhouse gases that have historically been emitted in significant quantities due to long histories of industrialization. A narrow focus on 'fossil fuel production' in those States in which fossil fuels *are produced* is incapable of accounting for the dynamic economy-wide choices and trade-offs required to be made by *all States*.

ii. Sovereignty over, and access to, energy resources, is essential to energy and national security interests, both for producer as well as consumer States. Secure, reliable energy access is fundamental to the economies and societies of all States. In that context, it is unsurprising that States have not consented to obligations

2 See Written Statement of the Kingdom of Saudi Arabia, paras. 4.69-4.70.

3 UNFCCC, Articles 4(1)(a), 7(2)(d), 12(1).

4 The Annex I Parties are listed in Annex B to the Kyoto Protocol.

5 Kyoto Protocol, Article 3(1).

with respect to fossil fuel production which would risk jeopardizing or affecting access to secure energy supplies.

iii. Not all fossil fuels are the same. Coal, oil and gas each make up different shares of the energy mix in different sectors and regions of the global economy; reflecting differences in their availability, price, emissions-intensity, and physical properties and applications – among other factors. Even within each category, differences exist. A narrow focus on fossil fuel production is, in contrast to the broad focus on emissions reflected in the Paris Agreement, incapable of taking these complex interactions into account.

iv. Emissions from fossil fuels are not the only source that contribute to global greenhouse gas emissions. Emissions from agriculture, land-use change and industrial processes contribute significantly to greenhouse gas emissions, as do activities related to deforestation. Moreover, not all fossil fuels that are produced are combusted, with fossil fuels also used in a range of other applications – from chemicals, to consumer goods to industrial applications. A narrow focus on fossil fuel production, rather than a broad focus on greenhouse emissions as a whole, is therefore disconnected from the much broader sources of emissions which contribute to climate change.

v. There are various applications of fossil fuels, and consumers have influence on how these fossil fuels products can be consumed. They may serve as feedstock in petrochemical processes upon which a large portion of global consumer goods rely. They can be used for combustion without or with abatement of emissions. They can also be used with or without offsetting. Producing States cannot control how fossil fuels are used, whether they are combusted in inefficient ways, or whether the emissions are abated or offset – all is fully dependent on the consumer and outside of the producer's purview. This is why the specialized treaty regime on climate change places responsibility on territorial emissions or, in other terms, emissions under the jurisdiction's control.

1.6. To the extent that a State takes measures to mitigate emissions within that State's territory, the specialized treaty regime on climate change expressly recognizes the need to consider developing countries' unique challenges in this regard. Indeed, of the three

treaties comprising the specialized treaty regime on climate change, only the UNFCCC makes a specific reference to fossil fuel production, use and exportation. The UNFCCC in its preamble references fossil fuel production, use and exportation but only in the context of how States may be particularly affected by response measures taken to mitigate climate change. The preamble refers to "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 developing countries' 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 ("CBDR-RC") serves as a cornerstone of the climate change treaty regime[6].

1.7. States Parties incorporated the principles of CBDR-RC in the section on commitments under the UNFCCC: Article 4.8(h) requires consideration of the circumstances of States whose economies depend heavily on fossil fuel production, processing, export, or consumption[7]. Similarly, Article 4.10 mandates that States in the implementation of commitments take into account the situation of Parties whose economies are vulnerable to the impacts of measures addressing climate change, including those reliant on fossil fuels and/or use of fossil fuels facing challenges in switching to alternatives[8]. States' obligations under the climate treaty regime do not differ based on whether States are producing or consuming fossil fuels within their jurisdiction or not producing or consuming fossil fuels within their jurisdiction. Instead, they differ based on whether States that industrialized early and are listed as Annex I or non-Annex I Parties. An Annex I Party that produces fossil fuels within its jurisdiction has the same obligations with respect to mitigating climate change and adaptation as an Annex I Party that does not produce fossil fuels within its jurisdiction. Similarly, a non-Annex I Party that produces fossil fuels within its jurisdiction has the same obligations as a non-Annex I Party that does not produce fossil fuels within its jurisdiction.

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6 Oral Statement of China, CR 2024/29, p. 34, paras. 34 (Ma).

7 Oral Statement of Timor-Leste, CR 2024/29, p. 34, paras. 27 (Sthoeger); Oral Statement of Kuwait, CR 2024/50, p. 55, paras. 6-7 (Sarooshi).

8 Oral Statement of Kuwait, CR 2024/50, p. 52, para. 17 (Sarooshi).

1.8. Neither the UNFCCC nor the Kyoto Protocol or Paris Agreement otherwise address the production of fossil fuels in the context of climate change

1.9. Nor do States have specific obligations under international law to eliminate fossil fuel subsidies. While the WTO Agreement, particularly the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), establishes rules governing subsidies, these rules do not explicitly prohibit States from providing subsidies for fossil fuels. Instead, the SCM Agreement focuses on subsidies that distort international trade, and fossil fuel subsidies are not categorically restricted under its provisions.

1.10. Obligations under the specialized treaty regime on climate change focus on mitigation of greenhouse gas emissions and adaptation, along with financing, loss and damage, and technology and capacity cooperation, and not on fossil fuel production or subsidies.

1.11. That States agreed to these obligations reflects a deliberate balance between competing interests, based on clear State consent. This may include a transition to low emissions through various solutions and is not necessarily limited to reducing fossil fuel production or consumption.

1.12. Addressing greenhouse gas emissions involves achieving a balance between emissions produced from sources and those removed by sinks, as outlined in the UNFCCC, Kyoto Protocol, and Paris Agreement[9].

1.13. The emissions transition is not about eliminating emissions entirely but rather maintaining a sustainable equilibrium. As the Kingdom explained in its Written Statement, to meet global energy demands, fossil fuel production will play a critical role in the energy transition as affordable, reliable supplies of energy are necessary in many parts of the developing world. Accelerating the energy transition will involve increased reliance on those types of renewable energy sources, along with reducing carbon intensity, minimizing flaring, and addressing methane emissions.

1.14. Technology also remains a key enabler for achieving global climate goals, as set forth in the specialized treaty regime on climate change[10]. Technologies are being developed

[9] Written Statement of the Kingdom of Saudi Arabia, paras. 4.21, 5.15.

[10] Written Statement of the Kingdom of Saudi Arabia, paras. 2.27, 4.28, 4.43, 4.71, 4.73, 4.84, 5.17-5.18.

to produce new fuels with reduced greenhouse gas emissions, including green and blue hydrogen[11]. Yet, over two-thirds of the technologies needed to reduce cumulative greenhouse gas emissions to transition towards pathways consistent with the ambitions of the Paris Agreement remain in early stages of development or not yet commercially deployable. The Court ensure its decision does not hinder progress of avoid impeding developments through such technologies.

1.15. Energy policies must balance diverse interests to avoid adverse consequences, such as supply shortages, market instability and shocks, and exacerbated energy poverty. These decisions are best left to political bodies. The Paris Agreement negotiations demonstrate States' preference for strengthening "cooperative action" over a top-down approach to climate mitigation[12]. Given its limited mandate under international law, the complexity of energy economics, and the critical role of fossil fuels, the Court should refrain from intervening in energy policy.

1.16. As the Kingdom explained in its Written Comments, this deliberate balance between competing interests also serves to explain why the Outcome of the first Global Stocktake recognized that there is no one-size-fits-all solution. The COP's Outcome of the first global stocktake "calls on" Parties to contribute to eight "global efforts", "in a nationally determined manner, taking into account the Paris Agreement and their different national circumstances, pathways and approaches".

1.17. These provisions in the Outcome of the first Global Stocktake do not purport to set obligations by States with regard to the "production" of fossil fuels, and therefore are not responsive to Judge Cleveland's question. Regardless, there is nothing in this decision which creates new or distinct obligations for States that produce fossil fuels or which otherwise affects the careful balance struck in the treaty regime between climate and other sustainability goals. As the Kingdom set out comprehensively in its Written

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[11] Blue hydrogen is produced by splitting hydrocarbons into hydrogen and carbon dioxide, with carbon capture and storage used to trap permanently carbon dioxide associated with its production. Green hydrogen, on the other hand, is produced from water using renewable energy and is low in greenhouse gas emissions, but up to 7.5 times more costly to produce than hydrogen obtained from natural gas. Production and use of green hydrogen could become more affordable as the technology advances and is scaled up, but blue hydrogen could make a significant contribution towards lower-carbon fuels sooner.

[12] Report of the Conference of the Parties on its thirteenth session (as amended) (FCCC/CP/2007/6/Add.1) 14 Mar. 2008, p. 3; see also UNFCCC, Articles 3(3), 3(5).

Comments, decisions of the COP are not legally binding obligations on States[13]. First, among other reasons, that is because the powers of the COP are prescribed by the relevant treaties (see Articles 7 of the UNFCCC and 16 of the Paris Agreement). They do not allow it to alter or supplement the substantive obligations under the treaties. Second, the language of the decision – for example, "calls on", "efforts" – is hortatory; it cannot possibly be read to suggest that States intended it to submit to legally binding obligations[14]. In any event, the fundamental principles of differentiation and balance run through the language of the decision. Action should be taken "in a nationally determined manner", taking into account "different national circumstances, pathways and approaches"[15]. These provisions referencing fossil fuels were not subsequently included in the COP29 decisions. Accordingly, there can be no suggestion that the decision imposes any expectation or responsibility, still less any obligation, on a specific State.

1.18. Some States have argued that States have a duty under international law to prevent transboundary harm that applies broadly to climate change. They rely on the *Pulp Mills* judgment to argue that to comply with prevention and due diligence obligations "a State is . . . 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"[16]. According to these States, exercising due diligence may entail ceasing the production of fossil fuels.

1.19. These arguments find no foundation in international law.

1.20. *First*, as the United States, the United Kingdom, India and others have argued,[17] the duty to prevent transboundary harm to the environment does not apply to climate

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[13] Written Comments of the Kingdom of Saudi Arabia, paras. 4.27-4.29, 4.34-4.36; *see also* Written Statement of Australia, para. 2.11; Written Statement of Kuwait, paras. 11, 52-59.

[14] Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on its fifth session (FCCC/PA/CMA/2023/16/Add.1) 15 Mar. 2024, para. 28.

[15] Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on its fifth session (FCCC/PA/CMA/2023/16/Add.1) 15 Mar. 2024, para. 28.

[16] *Pulp Mills on the River Uruguay (Argentina v Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at p. 56, para. 101.

[17] Oral Statement of the Kingdom of Saudi Arabia, CR 2024/36, p. 33, para. 12 (Bajbaa); Written Statement of Denmark, Finland, Iceland, Norway and Sweden, paras. 70-71; Written Statement of India, paras. 9-18; Written Comment of the United Kingdom, para. 34.1; Written Statement of the United States, paras. 4.15-4.28.

change because 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[18].

1.21. *Second,* the duty to prevent transboundary environmental harm under customary international law is inapposite to climate change and is not explicitly or implicitly provided for within the specialized climate change treaty regime. Instead, the climate treaty regime provides for a deviation from the customary duty that may have otherwise governed the relations between Parties to the specialized climate change treaty regime. As Kuwait noted, "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"[19].

1.22. *Third,* an obligation of States to "adopt all available measures to prevent environmental harm" is not in the text of the treaties in the specialized treaty regime on climate change. Rather, due diligence required of States when taking mitigation and adaptation measures is reflected in the text of the specialized treaty regime on climate change. Respectively, the obligation in Article 4 of the Paris Agreement, to prepare, communicate and maintain successive NDCs. According to Article 3, paragraph 3 of the UNFCCC, mitigation policies should take into account adaptation. According to Article 7 of the Paris Agreement, this involves engaging in planning and implementing actions to enhance resilience and reduce vulnerability to climate impacts.

1.23. *Fourth,* any due diligence obligations of States based on positive human rights obligations could not entail a specific obligation with respect to fossil fuel production or fossil fuel subsidies, as States have not agreed to address that subject in the core human rights treaties, namely the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. As the

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[18] Oral Statement of the Nordics, CR 2024/39, p. 51, para. 6 (Jørgensen); Written Comments of Australia, para. 3.13(b); Written Comments of the United Kingdom, para. 34.1. Written Statement of the United States, paras. 4.15-4.28.

[19] Oral Statement of Kuwait, CR 2024/43, p. 56, para. 9 (Sarooshi); see also *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands), Judgment, I.C.J. Reports 1969*, p. 3, at p. 42, para. 72; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 137, para. 274.

Kingdom noted in its pleadings, the same applies with respect to anthropogenic greenhouse gas emissions[20].

1.24. *Finally,* contrary to what some States seem to suggest, the "best available science" alone cannot in and of itself determine State obligations under international law[21]. As the Kingdom observed in its Written Comments, while the specialized treaty regime on climate change mentions climate change science, the International Tribunal for the Law of the Sea rightly stated in its 2024 advisory opinion that "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"[22].

1.25. Even if specific obligations under international law of States within whose jurisdiction fossil fuels are produced existed, it would be difficult to tie these to the breach of an international obligation (*quod non*).

1.26. In the first place, the specialized treaty regime on climate change contains its own compliance mechanisms to deal with the legal consequences where significant harm is caused. As noted by Egypt, it is "noteworthy that 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 [23]".

1.27. Addressing production, rather than emissions, would also create 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

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20 Written Comments of Saudi Arabia, paras. 4.39-4.47.

21 Oral Statement of Latvia, CR 2024/8, p. 18, para. 21 (Paparinskis).

22 *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*, to be published, para. 212; Written Comments of the Kingdom of Saudi Arabia, para. 4.30; see also Daniel Bodansky *et al*., International Climate Change Law pp. 125-126 (2017), referring to the objective in Article 2 of the UNFCCC: "specifying what concentration level is safe involves value judgments, and cannot be answered by science alone. Ultimately, it requires political choices about how to balance economic, social, and environmental factors".

23 Written Comments of Egypt, para. 137.

be dispensed with, regardless of the complexity of the matter[24]. 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 . . ."[25]. 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[26].

1.28. It would be exceedingly difficult to prove a causal link between the production of fossil fuels (there is no basis to consider it as wrongful in the first place) and a certain injury caused by a specific event, such as flooding or hurricanes. There is no direct and certain causal nexus between the production of fossil fuels and emissions driving climate change. Responsibility for emissions rests with consumers and end-users, who determine how fuels are used, whether emissions are mitigated or offset, or avoided altogether – all decisions beyond the control of the producer. Additionally, as the Kingdom explained in its Written Comments, anthropogenic emissions of greenhouse gases originate from diverse sources worldwide, spanning various human activities such as power generation, transportation, agriculture, and industrial processes[27]. Emissions trace back to the early stages of the industrial revolution, which significantly benefitted many now-developed States[28]. Recognizing this complexity, States have agreed to address climate change through cooperation, putting in place mitigation and adaptation, and measures to address loss and damage associated with consequences of climate change.

1.29. All being said, as the European Union observed, "the assessment of whether these conditions exist *in concreto* is beyond the scope of the present Request for an advisory opinion"[29].

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24 Oral Statement of the United States, CR 2024/40, p. 49, paras. 42-44 (Taylor).

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

26 Ibid.

27 Written Comments of the Kingdom of Saudi Arabia, para. 1.4.

28 Ibid.

29 Oral Statement of the European Union, CR 2024/54, p. 25, para. 11 (Bruti Liberati).

II. 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?"

2.1. 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 the terms of the various paragraphs of Article 4 of the Paris Agreement.

2.2. The general rule of treaty interpretation, reflected in Article 31(1) of the Vienna Convention on the Law of Treaties, provides that "[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 [the treaty's] object and purpose".

2.3. It is well-established that the object and purpose cannot be used to alter the clear meaning of a term of the treaty[30].

[30] See, for example, *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 4, at p. 8 ("The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter"); *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 6, at p. 18 para. 33 ("Interpretation must be based above all upon the text of a treaty" (quoting *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 6, p. 22 para. 41); see also 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".).

2.4. Here, the ordinary meaning of the terms of the various paragraphs of Article 4 of the Paris Agreement is clear, as the Kingdom of Saudi Arabia and others explained in the pleadings[31]. The Paris Agreement's core mitigation obligations are explicitly procedural in nature[32]. There is no indication in the text that they must be interpreted on the basis of the temperature goals in Paris Agreement Article 2, and the scientific context of the threat of climate change.

2.5. Article 4(2) provides that all Parties are to prepare, communicate and maintain successive nationally determined contributions to the global response to climate change[33]. Various subsections provide procedural guidance for Parties with respect to their NDCs, but Article 4 leaves it open to each Party to determine the content of its NDC. Article 4(3) of the Paris Agreement merely requires that each NDC "will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition", reflecting its CBDR-RC[34].

2.6. Nothing in the object and purpose of the UNFCCC or the Paris Agreement affects the fundamentally procedural nature of the obligations under Article 4 of the Paris Agreement, or somehow converts its procedural obligations into obligations of result.

2.7. The position is similar in respect of other provisions of the climate change treaties, such as Article 2 of the Paris Agreement, where the terms are equally clear.

2.8. Article 2 includes objectives on how the Paris Agreement aims to strengthen the global response to the threat of climate change, "including by … [h]olding the increase in the

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[31] See Written Comments of the Kingdom of Saudi Arabia, paras. 4.22-4.30; Written Comments of the United States, paras. 3.5-3.7; Written Statement of the Kingdom of Saudi Arabia, paras. 1.7-1.9, 4.64-4.70; Written Statement of Kuwait, paras. 42, 51, 54-55.

[32] Oral Statement of Iran, CR 2024/53, p. 65, para. 21 (Mousavi); Oral Statement of Republic of Korea, CR 2024/61, p. 67, para. 6 (Lee); Oral Statement of Kuwait, CR 2024/50, p. 54, para. 3 (Sarooshi); Oral Statement of Latvia, CR 2024/8, p. 13, para. 8 (Paparinskis) ("Thirdly, the obligation to mitigate adverse effects of climate change in Article 4, paragraph 2, of the Paris Agreement is an obligation of conduct, not result, and is subject to requirements of due diligence."); Oral Statement of Serbia, CR 2024/60, p. 67, para. 34 (Gajic) ("It appears to be evident that obligations of States in respect to climate change which are based on the international climate treaties are obligations of conduct, not of result"); Oral Statement of the United Kingdom, CR 2024/42, p. 45, paras. 17-18 (Hermer) ("parties must – must, in the words of Article 4 – "intend to achieve" their NDCs. This is an obligation of conduct that is governed by a due diligence standard") ("The second obligation is contained in the second sentence of Article 4, paragraph 2. This requires each party to pursue domestic mitigation measures with the aim of achieving its NDCs. This is also an obligation of conduct, and is also subject to a due diligence standard.").

[33] Paris Agreement, Article 4(2).

[34] Paris Agreement, Article 4(3).

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".

2.9. Article 2 provides that the 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.

2.10. Paris Agreement Article 4(1) provides that in order to achieve the temperature goal of Article 2, Parties "aim" to reach global peaking of emissions as soon as possible, and to undertake rapid greenhouse gas emissions reductions thereafter. Again, the word "aim" is clearly hortatory. There are two qualifications in Article 4(1). First, the Parties "aim" to reach global peaking of greenhouse gas emissions as soon as possible, but they recognize that "peaking will take longer for developing country Parties". This recognition is clearly based on CBDR-RC and implies that non-Annex I Parties will have a longer period of time to reach peaking. Of course, Article 4(1) is aspirational rather than obligatory.

2.11. Paris Agreement Article 4(1) then provides that Parties "aim" to undertake "rapid reductions thereafter in accordance with the best available science", so as to achieve "a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty". The use of the phrase "so as to achieve" a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century indicates that this relates to the goals of the Paris Agreement. This is again located within a hortatory provision: Parties "aim" to reach global peaking "so as to achieve" the balance. There is no hard obligation requiring that Parties actually achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century.

2.12. Determining the object and purpose of the climate change treaties is not straightforward; it requires an overall assessment of these treaties. The specialized treaty regime on climate change balances competing objectives of addressing climate change and advancing socioeconomic goals by establishing procedural obligations through NDCs whose substantive content is left to individual States to determine based on their unique needs and circumstances. This Court in *Whaling in the Antarctic*[35] recognized that in interpreting environmental treaties, it is imperative to conduct an overall assessment of the treaty, in order to determine its object and purpose. Interpreting the Convention for the Regulation of Whaling, the Court noted that "the Convention pursues the purpose of ensuring the conservation of all species of whales while allowing for their sustainable exploitation"[36]. In interpreting the treaty, Australia stressed the objective of conservation[37], while Japan emphasized exploitation[38]. In the end, "[t]aking into account the Preamble and other relevant provisions of the Convention. . . , the Court observe[d] that neither a restrictive nor an expansive interpretation . . . is justified"[39].

2.13. Here, in conducting overall assessment of the treaties, it must be noted that the preamble to the UNFCCC and the preamble to the Paris Agreement each set forth a range of considerations that may inform the object and purpose of each treaty. The preamble to the UNFCCC repeatedly recognizes that responses of States to climate change must be individualized and tailored to their individual needs and circumstances:

- Cooperation by States must be "in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions";
- States have "the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies";
- "[T]he principle of sovereignty of States in international cooperation to address climate change" is recognized;

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35 *Whaling in the Antarctic (Australia v Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226.

36 Ibid., para. 56.

37 Ibid., para. 53.

38 Ibid., para. 52.

39 Ibid., para. 58.

- Environmental "standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries";
- Responses to climate change "should be coordinated with social and economic development in an integrated manner with a view to avoiding adverse impacts on the latter, taking into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty"; and
- "[A]ll countries, especially developing countries, need access to resources required to achieve sustainable social and economic development and that, in order for developing countries to progress towards that goal, their energy consumption will need to grow taking into account the possibilities for achieving greater energy efficiency and for controlling greenhouse gas emissions in general".

2.14. The objective is similar in respect of other provisions of the climate change treaties, such as the Paris Agreement. The preamble to the Paris Agreement reaffirms the guiding "principle of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances".

2.15. At the same time, Article 2 of the UNFCCC sets out the 'ultimate objective'[40] of the UNFCCC and any related legal instruments "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 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".

2.16. Article 2 of the Paris Agreement similarly specifies that obligations set forth in Article 4 of the Paris Agreement are to be pursued "in the context of sustainable development and efforts to eradicate poverty" and in accordance with "the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances".

2.17. The objective set out in Article 4(1) of the Paris Agreement is to be achieved "on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty". This clause is similar to the term used in the UNFCCC. UNFCCC Article

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

3(1) provides in part that "[t]he Parties should protect the climate system. . . on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities". The reference to "context" means that this provision should be interpreted in light of CBDR-RC and poverty eradication efforts. These clear treaty terms are not altered by the object and purpose of the treaty, regardless of how that is defined under the Paris Agreement.

2.18. In light of the dual objects and purposes, the climate treaties cannot be read to ignore either their climate system protection goals or their socioeconomic goals. Their textual solution – protection of the climate system, pursued by individual States through their NDCs, in fulfilment of their procedural obligations – balances *both* sets of goals. The ordinary meaning of the language on NDCs in Article 4 of the Paris Agreement, read neither restrictively nor expansively, is clear. 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. As the Kingdom of Saudi Arabia and others explained in their pleadings[41], NDCs are procedural obligations. Their substantive content is left to each State according to its needs and priorities, with developed country parties "taking the lead"[42], while developing countries are "encouraged" to set targets over time "in the light of different national circumstances"[43].

III. 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?"

3.1. The Kingdom recalls its position that a right to a clean, healthy and sustainable environment has not entered the corpus of international law, and the implications

[41] Written Comments of the Kingdom of Saudi Arabia, paras. 4.22-4.30; Written Statement of the Kingdom of Saudi Arabia, paras. 4.20-4.22.

[42] Paris Agreement, Article 4.

[43] Ibid.

flowing from any such right have not been spelled out and agreed by States[44]. Since no such right currently forms part of international law, there is no content to elucidate, nor capacity for any such right to relate to established human rights. The Kingdom also recalls its general position that international human rights law does not assist the Court in answering the questions posed[45]; arguments which suggest that international human rights law requires States to take measures to reduce greenhouse gas emissions or adapt to climate change are misconceived as a matter of law[46].

3.2. As many States have noted, no right to a clean, healthy and sustainable environment is contained in the core human rights treaties, namely the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Likewise, it is the position of the Kingdom and many other States that no such right exists as a matter of customary international law[47]. Two elements must be established to evidence the existence of a rule of customary international law: a "*settled practice*" of States, meaning a practice that is "*extensive and virtually uniform*", accompanied by the requisite *opinio juris*, i.e., the belief that such practice is required

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44 Oral Statement of the Kingdom of Saudi Arabia, CR 2024/36, p. 33, para. 13 (Bajbaa); Written Comment of the Kingdom of Saudi Arabia, para 4.46; Written Statement of the United States, para. 4.39; see also UN Press, With 161 Votes in Favour, 8 Abstentions, General Assembly Adopts Landmark Resolution Recognizing Clean, Healthy, Sustainable Environment as Human Right, 28 July 2022 (*e.g.* UK: "General Assembly resolutions are not legally binding, recognition of the right in the text does not legally bind States to its terms"; New Zealand: "The text has the character of a political declaration and does not create international human rights law with legally binding obligations on States"; India: "General Assembly resolutions do not create binding obligations and that it is only through conventions and treaties that State parties undertake obligations for such right"; Russian Federation: "neither universal environmental agreements nor international human rights treaties address the concepts of a clean, healthy or sustainable environment or similar notions. Only until such a right is recognized exclusively within international treaties as approved by States can they talk about a legally recognized right"); Written Statement of Canada, para. 24; Written Statement of Indonesia, para. 43; Written Statement of the Netherlands, para. 3.34; Written Statement of New Zealand, para. 114.

45 Written Statement of the Kingdom of Saudi Arabia, para. 4.97.

46 Written Comments of the Kingdom of Saudi Arabia, para. 4.98-4.100.

47 See Oral Statement of the United States, CR 2024/40, p. 47, para. 32 (Taylor); Written Statement of Germany, para. 104 ("An individual right to a healthy environment is currently not part of international customary law"); Written Statement of New Zealand, para. 114 ("New Zealand does not consider that the content of [the right to a clean and healthy environment] is sufficiently well defined to have achieved the status of customary international law").

as a matter of law[48]. Neither element is present in relation to any claimed right to a clean, healthy and sustainable environment.

3.3. Insofar as the right to a clean, healthy and sustainable environment has been stated in recent resolutions of the United Nations General Assembly[49] and the Human Rights Council[50], such resolutions cannot, by themselves, create or impose legally binding obligations on States related to the climate system or otherwise[51]. At the adoption of General Assembly resolution 76/300, Member States were clear that they did not consider it to create a new right nor to evidence a pre-existing right of customary international law[52]. Moreover, several States noted the absence of any internationally

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48 *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports, 1969*, p. 13, at pp. 43-44, paras. 74, 77.

49 See UN General Assembly resolution 76/300 of 28 July 2022, The human right to a clean, healthy and sustainable environment, 1 Aug. 2022.

50 See UN Human Rights Council resolution 48/13 of 8 Oct. 2021, The human right to a clean, healthy and sustainable environment (A/HRC/RES/48/13) 18 Oct. 2021.

51 See Conclusion 12 of the ILC's 2018 Conclusions on the identification of customary international law, YBILC 2018, vol. II (2), pp. 107-109. 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".

52 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 (28 July 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"); ibid. (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 (28 July 2022) (stating that "a right to a clean, healthy, and sustainable environment has not yet been established as a matter of

agreed understanding of the definition, content and scope of such a right[53]. Such uncertainty serves as a critical obstacle to the emergence of any new right under international law and explains the absence of any "settled practice" of States. The Kingdom notes that the limited number of States which have argued that a right to a "healthy" environment (or some variant of this) exists under international law have not described its formulation, content or scope in a consistent way[54]. This underscores the absence of any "extensive and virtually uniform" practice of States capable of evidencing a customary human right binding on all States.

3.4. General Assembly resolution 76/300 does not impose and does not purport to 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.

3.5. Finally, it should be recalled that reports and decisions of UN treaty bodies and Special Rapporteurs are policy statements by the individuals concerned, and are not legally

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")").

[53] U.N. GAOR, 76th Sess., 97th plen. mtg., U.N. Doc. A/76/PV.97, 28 July 2022, at 8 (representative from the Islamic Republic of Iran stating that "this draft resolution . . . references a human right that lacks a clear definition and understanding among States"); ibid., at 18 (representative from China stating that "voting on today's resolution, once again shows that there is no agreement on the right to the environment, in particular with regard to the definition and the scope of the right to the environment and its relationship with other human rights").

[54] See, for example, the Written Statement of Tonga, para. 244 ("The normative character and the precise content of the right to a clean, healthy and sustainable environment is not settled"). Further, by way of examples only: the Written Statement of Kenya at para. 5.73 asserts that the "right to a clean, healthy and sustainable environment" is codified in Article 24 of the African Charter on Human and Peoples' Rights, yet the latter articulates this constitutional right in very different terms, as ". . . the right [of all peoples] to a general satisfactory environment favourable to their development". Mauritius, in its Written Statement at para. 184, states that the right finds expression in the 1989 Convention on the Rights of the Child, "which requires Parties to take appropriate measures to combat disease and malnutrition 'taking into consideration the dangers of risks of environmental pollution'". Notably, it makes no reference to the African Charter. The Written Statement of Albania at para. 96 states that such a right requires "a safe climate, clean air, clean water and adequate sanitation, healthy and sustainably produced food, non-toxic environments in which to live, work, study and play, and healthy biodiversity and ecosystems". The wide variations in formulation across these examples show a clear lack of consensus as to the content and scope of any such right. New Zealand in its Written Statement at para. 115 notes that regional human rights courts have interpreted rights alike the right to a clean, healthy and safe environment in the context of environmental harms and not climate change. The cases in question "typically involve specific situations where localised environmental harm creates serious risks for individuals living near, for example, the spraying of toxic agrochemicals or the release of toxic industrial emissions".

binding[55]. This Court has recently reaffirmed that it is not bound to follow UN treaty bodies' interpretation of treaties[56].

IV. 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?"

4.1. 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 reflect the views of only those declaring States; they do not alter the interpretation of the treaties.

4.2. The declarations do not purport to be reservations, which in any event the UNFCCC and the Paris Agreement expressly prohibit[57]; rather they are "interpretative declarations", defined as a "unilateral statement" by which an individual State purports to specify or clarify the meaning of a treaty[58].

4.3. No other Party is recorded as expressing "approval" of these purported interpretations[59]. The ILC previously noted that approval cannot be presumed[60], nor can it be inferred

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55 Oral Statement of the Kingdom of Saudi Arabia, CR 2024/36, p. 33, para. 14 (Bajbaa); Written Comments of the United States, para. 4.53; Written Statement of Denmark, Finland, Iceland, Norway and Sweden, para. 38; Written Statement of the United States, para. 4.42 fn. 353; 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, and Conclusion 13, Commentary, para. 9 ("A pronouncement of an expert treaty body cannot as such constitute a subsequent agreement or subsequent practice under article 31 . . .").

56 See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Qatar* v. *United Arab Emirates*), *Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 71, at pp. 104-105, paras. 100-103.

57 UNFCCC, Article 24 ("No reservations may be made to the Convention".); Paris Agreement, Article 27 ("No reservations may be made to this Agreement".).

58 ILC, *Guide to Practice on Reservations to Treaties*, YBILC 2011, vol. II (3), p. 35, Guideline 1.2 defines interpretative declarations (at p. 51): "'Interpretative declaration' means a unilateral statement, however phrased or named, made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions".

59 Ibid., p. 189, Guideline 2.9.1.

60 Ibid., p. 196, Guideline 2.9.8.

from silence by other States[61]. Each declaration here represents only the meaning which "its author attributes" to the treaty[62]. It "does not modify treaty obligations"[63]. While interpretative declarations may be taken into account under normal rules of treaty interpretation[64], declarations by a mere handful of States do not amount to "subsequent agreement[s]" relevant to the interpretation of broadly ratified multilateral treaties[65]. The unilateral declarations here thus have no effect on the interpretation of the climate treaties[66].

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61 Ibid., p. 198, Guideline 2.9.9.

62 Ibid., p. 319, Guideline 4.7.1.

63 Ibid.

64 Ibid.

65 VCLT, Article 31(3)(a).

66 See *Maritime Delimitation in the Black Sea (Romania v Ukraine), Judgment, I.C.J. Reports 2009*, p. 61, at p. 78, para. 42 ("Finally, regarding Romania's declaration . . . the Court observes that under Article 310 of UNCLOS, a State is not precluded from making declarations and statements when signing, ratifying or acceding to the Convention, provided these do not purport to exclude or modify the legal effect of the provisions of UNCLOS in their application to the State which has made a declaration or statement. The Court will therefore apply the relevant provisions of UNCLOS as interpreted in its jurisprudence, in accordance with Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969. Romania's declaration as such has no bearing on the Court's interpretation").