INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

(REQUEST BY THE UNITED NATIONS GENERAL ASSEMBLY FOR AN ADVISORY OPINION)

WRITTEN STATEMENT

THE REPUBLIC OF ALBANIA

22 March 2024

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I. INTRODUCTION

A. OVERVIEW

1. The Government of the Republic of Albania welcomes the request by the UN General Assembly ("**UNGA**") for an advisory opinion by the International Court of Justice ("**ICJ**" or the "**Court**") on:

   a. The obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases ("**GHGs**") for States and for present and future generations; and

   b. The legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to States which, due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change; and peoples and individuals of the present and future generations affected by the adverse effects of climate change (the "**Request**").

2. Albania recognises and is driven by the shared global responsibility to address climate change and protect the environment for both present and future generations, thereby ensuring the potential for sustainable development for *all* States. Mindful of these proceedings' potential to catalyse a more united, fair and effective global response against climate change, Albania submits this written statement to encourage and support the Court to deliver a tangible real-world impact through its advisory opinion.

3. In that regard, Albania's submission emphasises that while climate change represents a global threat multiplier, Albania, along with other developing States, is "*likely to bear the greatest burden of climate change in terms of loss of life and relative effect on investment and the economy*".[1] This is despite having contributed very little in anthropogenic GHG emissions.

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[1] P. Abeygunawardena et. al., *Poverty and climate change: reducing the vulnerability of the poor through adaptation (English)* (Washington, D.C.: World Bank Group), 2019, available at http://documents.worldbank.org/curated/en/534871468155709473/Poverty-and-climate-change-reducing-the-vulnerability-of-the-poor-through-adaptation.

4. In these circumstances, yesterday's "*good enough*" has become today's "*unacceptable*".[2] If immediate corrective action is not taken, natural disasters caused by climate change will continue to occur with increasing frequency and severity around the world, including in Albania. This is a fight that requires immediate and collective action.

5. Albania has met the challenge head-on, demonstrating regional leadership as the first Balkan country to adopt a comprehensive Climate Change Strategy and related Mitigation and Adaptation Action Plans.[3] Further, the Albanian Government is on track to meet the United Nations' global goal of reducing GHG emissions by 45% over the next decade and reaching net zero emissions by 2050, as per the Paris Agreement.[4]

6. However, developed States, too, must acknowledge their distinct responsibility in respect of climate change and deliver transformative action. Speaking at the COP28 meeting in December 2023, Prime Minister Edi Rama issued a forceful assessment of the status quo: "[w]*e all know that for decades developing countries like ours have struggled tirelessly to address development challenges, while facing the negative effects of climate change*". Highlighting that, despite the hope induced by the Paris Agreement, the reality is far from the commitments made, he drew attention to how "*the burden of climate action continues to fall disproportionately on the shoulders of developing countries, despite their minimal contribution to this crisis*".[5]

7. This resolute statement echoes and reinforces the long-repeated appeals from leaders from developing States around the world, who, for decades, have called on developed States to discharge their obligations to support them in climate change mitigation and adaptation through funding and technology-sharing. This is critical to facilitating a just transition by developing States towards "*development that meets the needs of the present without*

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2 *In re Hawai'i Electric Light Co*, No SCOT-22-0000418, Supreme Court of the State of Hawaii, 13 March 2023, p. 19, available at https://law.justia.com/cases/hawaii/supreme-court/2023/scot-22-0000418.html.

3 Albanian Council of Ministers, Decision No. 466, 3 July 2019 ("*For the Approval of the Strategic Document and National Plans for the Mitigation of Greenhouse Gases and for the Adaptation to Climate Changes*"), available at https://qbz.gov.al/share/GzkcixPlSvWPXuZoNVAqzg.

4 Permanent Mission of Albania to the UN in New York, *Remarks by Ambassador Ferit Hoxha at the Arria Formula Meeting on Climate Finance for Sustaining Peace and Security*, 9 March 2022, available at https://ambasadat.gov.al/united-nations/remarks-by-ambassador-ferit-hoxha-at-the-arria-formula-meeting-on-climate-finance-for-sustaining-peace-and-security/.

5 Kryeministria, *Prime Minister Edi Rama at the World Climate Action Summit COP 28*, 2 December 2023, available at https://www.kryeministria.al/en/newsroom/kryeministri-edi-rama-ne-samitin-boteror-te-veprimit-per-klimen-cop-28/.

compromising the ability of future generations to meet their own needs".[6] These advisory proceedings provide an important platform where every voice carries equal weight, fostering the hope of a fair and equitable articulation of States' obligations regarding climate change.

8. In that regard, Albania further recalls that the Court in its endeavour must be guided by established principles of international law, particularly those of cooperation, equity and sustainable development, as well as the principle of common but differentiated responsibilities ("**CBDR**"). A major step forward is required to translate the overwhelming scientific consensus as to the causes and negative effects of climate change – and the developing concurrence between States – into a clear and authoritative statement of the content of States' obligations in this regard. Albania recognises that, for all the ongoing work by the international community of States towards giving effect to these principles and mobilising to meet the scale and urgency of the climate crisis, clear and considered judicial guidance from the Court in response to the questions put to it in the proceedings should be a seminal moment. This is a critical next step and Albania is pleased to have the opportunity to contribute this submission for the Court's consideration.

B. GLOBAL CONTEXT

9. In March 2023, the Intergovernmental Panel on Climate Change ("**IPCC**") presented a sombre yet undefeated perspective on the magnitude of the challenge collectively faced by the international community:

> "*Climate change is a threat to human well-being and planetary health (very high confidence). There is a* ***rapidly closing window of opportunity to secure a liveable and sustainable future for all*** *(very high confidence). Climate resilient development integrates adaptation and mitigation to advance sustainable development for all, and is enabled by increased international cooperation including improved access to adequate financial resources, particularly for vulnerable regions, sectors and groups, and inclusive governance and coordinated policies (high confidence).* ***The choices and actions implemented in this decade will have impacts now and for thousands of years***".[7]

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[6] UN Sustainable Development Goals, *The Sustainable Development Agenda*, available at https://www.un.org/sustainabledevelopment/development-agenda/#:~:text=Sustainable%20development%20has%20been%20defined,to%20meet%20their%20own%20needs. See also H. Xue, *Liability for damage to the global commons* in *Transboundary Damage in International Law*, Cambridge Studies in International and Comparative Law (CUP 2003), p. 229 ("*the critical task for the final success of the global action lies in a truly meaningful cooperation in this field between developed countries and developing countries*").

[7] IPPC, "*Summary for Policymakers*", Climate *Change 2023: Synthesis Report*, 2023, Statement C.1 (emphasis added), available at https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf

10. The scientific evidence concerning anthropogenic climate change, as articulated by publications of the IPCC and other experts, is indisputable. Upholding the integrity of this well-established scientific consensus is essential for informed decision-making and collaborative efforts in addressing climate challenges.

11. Informed decision-making, as emphasised in this submission, also necessitates a comprehensive consideration of those most severely impacted. Vulnerable groups – including women, children, indigenous peoples, disabled individuals, minorities, and those in extreme poverty – bear the brunt of the effects of climate change. An intersectional lens is both imperative and illuminating, providing a fuller and more truthful understanding of the myriad factors influencing people's daily lives. Encouraging and facilitating the active participation of those most affected is equally crucial.

12. The interconnectedness of the climate change challenges we face also shows in the pervasive impact of environmental degradation on peace and security. Inevitably, given the magnitude of the climate emergency, its effects extend beyond the environmental sphere and into the social and political realm, already acting as a risk multiplier, exacerbating underlying vulnerabilities and compounding existing grievances, with this likely only to get worse on our current trajectory. Acutely alive to this reality, Albania has advocated for climate change to be a core topic on the agenda of the UN Security Council,[8] and is supporting the appointment of a *Special Representative for Climate and Security* to enhance the UN's capability to address climate-related security risks.[9]

13. In light of these considerations, this submission emphasises that climate change "*is not a mere environmental problem*",[10] and that the myriad challenges it gives rise to defy compartmentalisation within separate legal regimes. As observed by Ambassador Hoxha during Albania's presidency of the UN Security Council, climate change is "*the most*

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8 *See* Permanent Mission of Albania to the UN in New York, *Albania's priorities in the UNSC,* available at https://ambasadat.gov.al/united-nations/albanias-priorities-in-the-unsc/. *See also* Permanent Mission of Albania to the UN in New York, *Remarks by Ambassador Ferit Hoxha at the UN Security Council Open Debate on Climate Change, Peace and Security*, 13 June 2023, available at https://ambasadat.gov.al/united-nations/remarks-by-ambassador-ferit-hoxha-at-the-un-security-council-open-debate-on-climate-change-peace-and-security/.

9 *See* Delegation of the European Union to the United Nations in New York, *EU Statement – UN Security Council: Ministerial Debate on Climate Change, Peace and Security*, 13 June 2023, available at https://www.eeas.europa.eu/delegations/un-new-york/eu-statement-%E2%80%93-un-security-council-ministerial-debate-climate-change-peace-and-security_en.

10 Permanent Mission of Albania to the UN in New York, *Remarks by Ambassador Ferit Hoxha at the UN Security Council Open Debate on Climate Change, Peace and Security*, 13 June 2023, available at https://ambasadat.gov.al/united-nations/remarks-by-ambassador-ferit-hoxha-at-the-un-security-council-open-debate-on-climate-change-peace-and-security/.

existential threat to our continued existence on this planet".[11] Consequently, Albania encourages the Court to offer a holistic and harmonious interpretation of the currently fragmented legal landscape.

C. ALBANIA

14. Confronting climate change is a shared global responsibility. Each country must do its part.

15. Albania has risen to the task and will continue to lead.

16. In 1998, Albania incorporated robust environmental protection principles into its Constitution, guaranteeing citizens' access to information about the state of the environment and efforts to protect it.[12] It directs the State to channel its constitutional powers and resources, in conjunction with private initiatives, to guarantee a healthy environment for present and future generations. This includes the sustainable utilisation of forests, waters, pastures, and other natural resources in line with the principle of sustainable development.[13]

17. Further, Albania's environmental legal framework is shaped by the following objectives: (i) the rational use of natural resources; (ii) the prevention of environmental damage and, as necessary, the rehabilitation and restoration of the damaged environment; and (iii) international cooperation in the field of environmental protection. Further, environmental protection in Albania adheres to these key principles: (i) sustainable development; (ii) the precautionary principle; (iii) prevention; (iv) the 'polluter-pays' concept; (v) environmental damage repairing, recovery, and regeneration; (vi) liability; (vii) high-level protection; (viii) integration of environmental protection into sector policies; (ix) public awareness and participation in environmental decision-making; and (x) transparency.[14] The Albanian Government is currently enhancing sanctions for violations of this law, underscoring a commitment to stringent enforcement.

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[11] *See* Permanent Mission of Albania to the UN in New York, *Remarks by Ambassador Ferit Hoxha at the UN Security Council Open Debate on Climate Change, Peace and Security*, 13 June 2020, available at https://ambasadat.gov.al/united-nations/remarks-by-ambassador-ferit-hoxha-at-the-un-security-council-open-debate-on-climate-change-peace-and-security/.

[12] *See* Constitution of the Republic of Albania, Article 56, available at https://www.pp.gov.al/Legjislacioni/Kushtetuta/ (Unofficial English translation available at https://www.osce.org/albania/41888).

[13] *See* Constitution of the Republic of Albania, Article 59(1)(f), available at https://www.pp.gov.al/Legjislacioni/Kushtetuta/ (Unofficial English translation available at https://www.osce.org/albania/41888).

[14] *See* Law No. 10431 "On the Protection of the Environment", 9 June 2011, available at https://akm.gov.al/ova_doc/ligji-10431-date-9-6-2011-per-mbrojtjen-e-mjedisit/. *See also* Law No. 31/2013 amending and supplementing Law No. 10431 "On the Protection of the Environment", available at https://leap.unep.org/en/countries/al/national-legislation/law-no-732013-amending-and-

18. The Government of Albania has also recently fortified its commitment to address climate change and climate disasters by strengthening its relevant national legal framework, informed by scientific developments and the aim of eliminating inequalities and vulnerability for specific social groups within society.[15] Law No. 155/2020 "On Climate Change" is set to be instrumental in facilitating reductions of GHG emissions, enhancing adaptation to climate change, and mitigating its adverse effects. This legislation aligns with global climate initiatives, fulfils Albania's obligations to the UNFCCC and establishes a legal and inter-institutional framework for national climate action in accordance with EU legislation. While currently targeting a temperature limit of 2°C,[16] the law accommodates periodic revisions every four years to adjust GHG reduction objectives based on the country's evolving conditions.[17]

19. Albania's energy policies and strategies likewise underscore a steadfast commitment to combatting climate change. Recognising the need for a comprehensive green transition, Albania acknowledges the importance of deploying all available tools and implementing strategic policies at all national, regional, and local levels. In this framework, the National Energy and Climate Plan (NECP) 2020-2030 was approved with clear objectives for reducing greenhouse gases up to 18.7%, reducing energy consumption through efficiency measures up to 8.4% and increasing the contribution of Renewable Energy Sources up to 54.4% until 2030. Actually, NECP is in process of reviewing for the additional measures in all dimensions and the revision of projections, in order to achieve the objectives provided by the Paris Agreement (2015) and the Agenda Green for the Western Balkans (2020). For instance, aligned with the ambition to achieve carbon neutrality by 2050, Albania is actively developing a Long-Term, Low-Greenhouse Gas Emissions Strategy during the revision of

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supplementing-law-no-9441-2005; and Law No. 30/2013 amending and supplementing Law No. 8905 "On protection of the marine environment from pollution and damage", available at https://leap.unep.org/en/countries/al/national-legislation/law-no-302013-amending-and-supplementing-law-no-8905-protection.

15 *See* respectively Law No 155/2020 "On Climate Change", 17 December 2020, available at https://turizmi.gov.al/wp-content/uploads/2021/10/1.-Ligji-nr.-155-dt.-17.12.2020_PER-NDRYSHIMET-KLIMATIKE-1.pdf; and Law No. 10431 "On the Protection of the Environment", 9 June 2011, available at https://akm.gov.al/ova_doc/ligji-10431-date-9-6-2011-per-mbrojtjen-e-mjedisit/.

16 *See* Law No 155/2020 "On Climate Change", 17 December 2020, Article 7(1), available at https://turizmi.gov.al/wp-content/uploads/2021/10/1.-Ligji-nr.-155-dt.-17.12.2020_PER-NDRYSHIMET-KLIMATIKE-1.pdf.

17 *See* Law No 155/2020 "On Climate Change", 17 December 2020, Article 7(2), available at https://turizmi.gov.al/wp-content/uploads/2021/10/1.-Ligji-nr.-155-dt.-17.12.2020_PER-NDRYSHIMET-KLIMATIKE-1.pdf.; and as recognised in Article 4(11) of the Paris Agreement, 12 December 2015, UN Treaty Series No. 54113 (hereinafter the "**Paris Agreement**").

the existing National Strategy on Climate Change. This revision, grounded in the EU Climate Law, Governance Regulation, and other elements of the EU climate policy framework, is slated for adoption by 2025 without undue delay. The pivotal emphasis on these long-term strategies centres around decarbonising carbon-intensive sectors, particularly energy and transport, while establishing economy-wide targets for emission reductions across various sectors, including transport modes, buildings, agriculture, industry, and waste management. Such efforts are further supported by the establishment of the "*Green Group of the Parliament*" which seeks to increase attention and sensitivity to climate issues within the Albanian Parliament and serve as a hub for information, dialogue on environmental policies and initiatives to fulfil Albania's commitments within the Green Agenda for the Western Balkans.

20. While Albania remains steadfast in its commitment to address climate change, it would be remiss not to highlight the critical funding and technology-related challenges faced by developing States striving to fulfil their Paris Agreement commitments and transition towards sustainable energy practices. Put simply, the failure of developed States to meet their responsibilities in this regard act as a brake, frustrating the ambitions of developing State and arresting progress globally.

21. Lastly, common to all States are the challenges brought by the lag between International Investment Agreements and climate commitments, coupled with the risk (and reality) of disproportionate investor-State arbitration awards in relation to climate mitigation measures. This challenge poses a threat to the shift towards climate-friendly energy practices, as detailed in Section V.

D. STRUCTURE OF THE WRITTEN STATEMENT

22. In this written statement, Albania:

    a. Makes observations as to the Court's jurisdiction in the present proceedings to provide the advisory opinion requested (**Section II**);

    b. Makes certain preliminary observations concerning the significant harm sustained by the climate system and parts of the environment as a result of increased concentrations of anthropogenic greenhouse gases ("**GHGs**") (**Section III**);

    c. Sets out its position as to:

        i. the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic GHG emissions for States and for present and future generations (**Section IV**); and

ii. the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change; and peoples and individuals of the present and future generations affected by the adverse effects of climate change (**Section V**); and

d. Outlines key considerations for the Court to consider in respect of the critical significance of the principles of equity and sustainable development to the questions referred in the Request and the impact of climate change obligations on foreign direct investment as a tool for sustainable development (**Section VI**).

e. **Section VII** offers Albania's conclusions.

II. THE COURT HAS JURISDICTION TO GIVE THE ADVISORY OPINION REQUESTED BY UNGA AND THERE ARE NO REASONS FOR THE COURT TO DECLINE TO GIVE IT

23. This Section addresses the Court's jurisdiction to issue the advisory opinion requested by UNGA Resolution 77/276 on 29 March 2023, as well as the appropriateness of doing so. **Section II.A.** demonstrates that the Court has jurisdiction to issue the advisory opinion requested because UNGA is an organ duly authorised to seek an advisory opinion from the Court, and that the request raises legal questions. **Section II.B.** demonstrates that there are no reasons for the Court to decline to provide an advisory opinion on the questions referred by UNGA.

A. THE COURT HAS JURISDICTION TO GIVE THE ADVISORY OPINION REQUESTED BY UNGA

24. The Court draws its competence in respect of advisory opinions from Article 65(1) of its Statute. Under this Article, the Court:

> *"*[M]*ay give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.*"

25. In its interpretation of this provision, the Court has explained that "[i]*t is* […] *a precondition of the Court's competence that the advisory opinion be requested by an organ duly authorized to seek it under the Charter, that it be requested on a legal question, and that*

except in the case of the General Assembly or the Security Council, that question should be one arising within the scope of the activities of the requesting organ".[18]

26. It follows that in the present case two conditions must be satisfied for the Court to exercise its advisory jurisdiction: (1) the request for an advisory opinion must be made by a duly authorised organ; and (2) the questions put to the Court must be of a legal character.

27. As explained in the following, both conditions are met in this case.

1. The Request was duly submitted by UNGA as an authorised organ pursuant to Article 65 of the Statute

28. For the Court to have jurisdiction to give an advisory opinion, it is "*necessary at the outset for the body requesting the opinion to be 'authorized by* […] *the Charter of the United Nations to make such a request*".

29. Article 96(1) of the UN Charter provides that UNGA "*may request the International Court of Justice to give an advisory opinion on any legal question*". The explicit language of this provision establishes unambiguously that UNGA is "*an organ duly authorized to seek* [an advisory opinion] *under the Charter*".[19]

30. As the Court has explained, "[a] *resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted*".[20]

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[18] *See Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports 1982, pp. 333-334, para. 21. *See also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, ICJ Reports 2004 (hereinafter "***Construction of a Wall (Advisory Opinion)***"), p. 144, para. 14; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010 (hereinafter "***Declaration of Independence in Respect of Kosovo (Advisory Opinion)***"), p. 413, para. 19; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, para. 55.

[19] *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports 1982, p. 333, para. 21. *See also Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996 (hereinafter "***Use of Nuclear Weapons (Advisory Opinion)***" or "**Nuclear Weapons**"), p. 232, para. 11; *Declaration of Independence in Respect of Kosovo (Advisory Opinion)*, p. 413, para. 21.

[20] *See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, ICJ Reports 1971, p. 22, para. 20. *See also Use of Nuclear Weapons (Advisory Opinion)*, p. 82, para. 29.

31. Resolution 77/276 of 29 March 2023 was adopted by UNGA pursuant to its own rules by consensus,[21] a procedure frequently used in the decision-making process of UNGA and clearly foreseen in Annex V of the Rules of Procedure of UNGA.[22]

32. Because the request has been made by UNGA, there is no need to establish that the questions set out in UNGA Resolution 77/276 should be ones arising within the scope of the Assembly's activities.[23]

33. Since the request for an advisory opinion was validly adopted by a duly authorised organ acting within its competence (and raises questions directly relating to its mandate), the first requirement for the exercise of the advisory jurisdiction of the Court under Article 65(1) of the Statute is fully satisfied.

2. The Request concerns a "*legal question*" under Article 65 of the Statute

34. Article 96(1) of the UN Charter and Article 65(1) of the Statute provide that the Court may only give an advisory opinion on a "*legal question*".

35. Addressing this requirement, the Court has explained that "*questions* […] *framed in terms of law and rais*[ing] *problems of international law* […] *are by their very nature susceptible of a reply based on law*" and "*therefore they appear … to be questions of legal character*".[24] Further, the Court has stated that "*a question which expressly asks whether or not a particular action is compatible with international law certainly appears to be a legal question*".[25]

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21 Requests for advisory opinions are not listed in Article 18(2) of the UN Charter as one of the "*important questions*" requesting a two-third majority and no further provisions impose specific procedures on the adoption of a resolution for the request of an advisory opinion.

22 UN, *Rules of Procedure of the General Assembly*, UN Doc. A/520/Rev.17, September 2007, Annex V, para. 104 ("*The Special Committee considers that the adoption of decisions and resolutions by consensus is desirable when it contributes to the effective and lasting settlement of differences, thus strengthening the authority of the United Nations.* […]").

23 In any event, the Court has recognised that the UNGA's competence is broad, "*relating to 'any questions or any matters' within the scope of the Charter*": *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 9 July 2004, para. 17.

24 *See Western Sahara, Advisory Opinion,* ICJ Reports 1975 (hereinafter "***Western Sahara (Advisory Opinion)***"), p. 18, para. 15. *See also Declaration of Independence in Respect of Kosovo (Advisory Opinion)*, pp. 414-415, para. 25; *Use of Nuclear Weapons (Advisory Opinion)*, pp. 233-234, para. 13.

25 *See Declaration of Independence in Respect of Kosovo (Advisory Opinion)*, pp. 414-415, para. 25 ("*It is also for the Court to satisfy itself that the question on which it is requested to give its opinion is a 'legal question' within the meaning of Article 96 of the Charter and Article 65 of the Statute. In the present case, the question put to the Court by the General Assembly asks whether the declaration of independence to which it refers is 'in accordance with international law'.* ***A question which expressly asks the Court whether or not a particular action is compatible with international law certainly***

36. In the present case, the Request is likewise focused on questions arising under international law, which are framed in terms of law, and are of a similar "*legal character*". Specifically, the questions probe the existence and scope of legal obligations of States as enshrined in international law through covenants, treaties, and agreements. In particular, the *chapeau* of the Request explicitly references:

> "[T]*he Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment*".[26]

37. Moreover, in response to the first question, the Court is asked to define States' obligations with respect to the protection of climate systems. In response to the second question, the Court is asked to specify the legal consequences for States that breach these obligations, including from the perspective of intergenerational equity and climate vulnerable States.

38. As such, the Request is clearly and unambiguously focused on the legal obligations of State Parties, including those under the aforementioned international treaties, to address the impacts of climate change. Further, provision of a response to the Request will require the Court to interpret relevant provisions of these treaties and identify other relevant rules of international law.

39. Therefore, Albania is of the view that the questions in the Request should be characterised as being "*questions … framed in terms of law and rais*[ing] *problems of international law … are by their very nature susceptible of a reply based on law*" and "*therefore they appear … to be questions of legal character*"[27] and the Request is one for "*an advisory opinion on a*

***appears to be a legal question**; as the Court has remarked on a previous occasion, **questions 'framed in terms of law and rais[ing] problems of international law... are by their very nature susceptible of a reply based on law**' (Western Sahara (Advisory Opinion), p. 18, para. 15) and therefore appear to be questions of a legal character for the purposes of Article 96 of the Charter and Article 65 of the Statute".*) *See also Use of Nuclear Weapons (Advisory Opinion*), p. 234, para. 13 ("*The question put to the Court by the General Assembly is indeed a legal one, since the Court is asked to rule on the compatibility of the threat or use of nuclear weapons with the relevant principles and rules of international law. To do this, the Court must identify the existing principles and rules, interpret them and apply them to the threat or use of nuclear weapons, thus offering a reply to the question posed based on law*").

[26] *See* Request, para. 2.

[27] *See Western Sahara (Advisory Opinion)*, p. 18, para. 15. *See also Declaration of Independence in Respect of Kosovo (Advisory Opinion)*, pp. 414-415, para. 25; *Use of Nuclear Weapons (Advisory Opinion)*, pp. 233-234, para. 13.

legal question" within the meaning of Article 96(1) of the UN Charter and Article 65(1) of the Court's Statute.

40. With both requirements satisfied, the Court has jurisdiction to give the Advisory Opinion requested by UNGA in Resolution 77/276.

B. THERE IS NO COMPELLING REASON FOR THE COURT TO EXERCISE ITS DISCRETION NOT TO RENDER AN ADVISORY OPINION IN THIS CASE

41. Article 65(1) of the Court's Statute "*leaves the Court a discretion as to whether or not it will give an Advisory Opinion that has been requested of it, once it has established its competence to do so*".[28]

42. However, it is well established that, while the Court has discretion in deciding whether to entertain a request for an advisory opinion, it cannot refuse to give an advisory opinion unless there are "*compelling reasons*" for such a refusal, especially when the statutory conditions under Article 96(1) of the UN Charter and Article 65(1) of the ICJ Statute have been met.[29] As such, notwithstanding the discretionary character of its advisory jurisdiction, "*the present Court has never, in the exercise of this discretionary power, declined to respond to a request for an advisory opinion*".[30]

43. No compelling reason exists to *refuse to give* the advisory opinion that has been requested in the present case. To the contrary, there are compelling reasons for *giving* the advisory opinion. These were adequately identified by UNGA in introducing the operative text of Resolution 77/276, notably:

> "*Recognizing that climate change is an unprecedented challenge of civilizational proportions and that the well-being of present and*

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[28] *See Use of Nuclear Weapons (Advisory Opinion)*, pp. 234-335, para. 14. *See also Construction of a Wall (Advisory Opinion)*, p. 156, para. 44: "*The Court has recalled many times in the past that Article 65, paragraph 1, of its Statute, which provides that 'The Court may give an advisory opinion...' (emphasis added), should be interpreted to mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met...*"*; Declaration of Independence in Respect of Kosovo (Advisory Opinion)*, pp. 415-416, para. 29.

[29] *See Declaration of Independence in Respect of Kosovo (Advisory Opinion)*, p. 416, para. 30; *Construction of a Wall (Advisory Opinion*), p. 156, para. 44*;* Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, *Advisory Opinion, ICJ Reports 1999* (hereinafter "***Cumaraswamy Advisory Opinion***"), p.78-9, para. 29.

[30] *See Construction of a Wall (Advisory Opinion)*, p. 156, para. 44. It is only in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* that the Court declined to give its advisory opinion, on the ground that the request for an *advisory* opinion submitted by the World Health Organization did not relate to a question arising "*within the scope of* [the] *activities*" of that organisation. *See also Use of Nuclear Weapons (Advisory Opinion)*, p. 77, para. 23. However, this limitation has no application in the present case, since Article 96(1) of the UN Charter confers on the General Assembly the competence to request an advisory opinion on *any* legal question.

> *future generations of humankind depends on our immediate and urgent response to it*
>
> […]
>
> *Noting with profound alarm that emissions of greenhouse gases continue to rise despite the fact that all countries, in particular developing countries, are vulnerable to the adverse effects of climate change and that those that are particularly vulnerable to the adverse effects of climate change and have significant capacity constraints, such as the least developed countries and small island developing States, are already experiencing an increase in such effect* […]
>
> *Emphasizing the urgency of scaling up action and support* […] *to enhance adaptive capacity and to implement collaborative approaches for effectively responding to the adverse effects of climate change, as well as for averting, minimizing and addressing loss and damage associated with those effects in developing countries that are particularly vulnerable to these effects*".[31]

44. As this language makes clear, the Request reflects broad agreement amongst States that climate change is one of the most pressing shared problems that the international community is facing and that interpretation of existing international law on this matter would strengthen the mitigation and adaptation processes of all States. The importance of these matters to UNGA and the need for the Court's guidance with respect to them, are underscored by the fact that Resolution 77/276 passed by consensus with over a hundred States co-sponsoring the resolution.

45. In conclusion, the Court has jurisdiction to give the advisory opinion requested by the General Assembly in Resolution 77/276 of 29 March 2023: UNGA is an organ duly authorised to seek an advisory opinion from the Court, and the request raises questions of a legal character. There are no "*compelling reasons*" for the Court to decline to exercise the advisory jurisdiction which the Charter and the Statute have conferred upon it, and, on this basis and in keeping with past precedent, it should exercise that jurisdiction and render the advisory opinion that UNGA has requested.

III. THE NEXUS BETWEEN ANTHROPOGENIC GHG EMISSIONS AND HARM TO THE CLIMATE SYSTEM AND OTHER PARTS OF THE ENVIRONMENT

46. In this Section, Albania presents some preliminary observations on:

    a. The irrefutable scientific evidence that anthropogenic GHG emissions (or increased concentrations thereof) cause climate change (**Section A**);

[31] Request, preambular, paras. 1, 8 and 11.

b. The devastating impacts of climate change on the climate system and parts of the environment (**Section B**); and

c. The key takeaways derived from these observations as relevant to the Request (**Section C**).

47. It is not the purpose of this Section to summarise the vast body of scientific literature on these issues, but only to put some of these issues into sharper relief before setting out Albania's legal submissions on the questions in the Request.

A. THE IRREFUTABLE SCIENTIFIC EVIDENCE

48. In the words of the UN Secretary-General, the science of climate change is a "*code red*" for the planet:

> "*The alarm bells are deafening, and the evidence is irrefutable: greenhouse gas emissions from fossil fuel burning and deforestation are choking our planet and putting billions of people at immediate risk. Global heating is affecting every region on Earth, with many of the changes becoming irreversible. The internationally agreed threshold of 1.5 degrees Celsius is perilously close*".[32]

49. The findings and publications of the IPCC comprised comprehensive assessments of the causes and impacts of climate change, prepared as a critical resource to inform the international community's response to the existential threat of our changing global environment.

50. As the UN body tasked with the development of "*international coordinated scientific assessments of the magnitude, timing and potential environmental and socioeconomic impact of climate change and realistic response strategies*",[33] the work and publications produced by the IPCC deserve special regard. The periodic reports of the IPCC have accordingly been described by the UNFCCC as "*widely recognised as the most credible sources of information on climate change*" and constitute the best available assessment of the current state of scientific knowledge.[34]

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32 UN Secretary General, *Statement on the IPCC Working Group 1 Report on the Physical Science Basis of the Sixth Assessment*, 9 August 2021, available at https://www.un.org/sg/en/content/sg/statement/2021-08-09/secretary-generals-statement-the-ipcc-working-group-1-report-the-physical-science-basis-of-the-sixth-assessment.

33 UNGA (43rd sess.: 1988-1989), *Protection of global climate for present and future generations of mankind: resolution / adopted by the General Assembly*, A/RES/43/53, UN General Assembly, 6 December 1988, para. 5.

34 *United Nations Framework Convention on Climate Change*, signed on 9 May 1992, entered into force on 21 March 1994 (hereinafter "**UNFCCC**"), Article 21.2.

51. Albania shares the view that the scientific evidence concerning anthropogenic climate change, as articulated by the IPCC and other experts,[35] is indisputable, with the IPCC having concluded that human activities are responsible for the highest atmospheric concentrations of GHGs in millions of years, driving warming of the planet at rates never before seen in human history. The IPCC has identified global average temperature rise of 1.5ºC above pre-industrial levels as a threshold that, if crossed, will result in catastrophic effects.[36] Furthermore, the IPCC has found that Earth is close to exhausting the estimated "*remaining carbon budget*" above which global average temperatures will rise 1.5°C above pre-industrial levels. The IPCC concludes that:

> "[T]*o limit global warming to 1.5°C above pre-industrial levels with either a one-in-two (50%) or two-in-three (67%) chance, the remaining carbon budgets amount to 500 and 400 billion tonnes of CO_2, respectively, from 1 January 2020 onward. Currently, human activities are emitting around 40 billion tonnes of CO_2 into the atmosphere in a single year*".[37]

52. The IPCC's calculations thus show that, without dramatic and urgent reductions in anthropogenic GHG emissions, Earth will soon exceed its estimated remaining carbon budget necessary to keep average global temperature rise within the global standard of 1.5ºC above pre-industrial levels, with devastating consequences.

B. THE DEVASTATING HARMS OF CLIMATE CHANGE ON THE ENVIRONMENT

1. Significant and interconnected harms to the environment

53. As a result of rising global temperatures, significant harm to the environment is inflicted due to GHG and other anthropogenic activities. Climate change is observed to have affected "*many weather and climate extremes in every region across the globe*", with "*substantial damages, and increasingly irreversible losses, in terrestrial, freshwater, cryospheric and coastal and open ocean ecosystems*", effecting ecosystems around the world.[38]

54. Beyond a linear cause-and-effect relationship, the harms resulting from climate change are multi-faceted and interconnected. Ensuing from rising global temperatures, harms manifest

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35 *See for e.g.*, European Environment Agency, '*European Climate Risk Assessment'*, EEA Report 01/2024, March 2024, available at https://www.eea.europa.eu/publications/european-climate-risk-assessment.

36 *See* IPCC, *Special Report on Global Warming of 1.5ºC*, 2018, Chapter 3, p. 253. *See also* Statement by IPCC Chair Hoesing Lee during the opening of UNFCCC Cop27, 6 November 2022, available at https://www.ipcc.ch/2022/11/07/statement-ipcc-chair-hoesung-lee-cop27/.

37 *See* IPCC, *Contribution of Working Group I to the Sixth Assessment Report*, 2021, Chapter 5, p. 777, available at https://www.ipcc.ch/report/ar6/wg1/.

38 *See* IPCC, *Climate Change 2023: Synthesis Report*, 2023, p. 46, available at https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_LongerReport.pdf/

across a variety of crises, including losses to biodiversity, sea level rise, alterations to meteorological patterns and the contamination of ecosystems. In particular, climate change is recognised to be having and to threaten further considerable impact on the occurrence and intensity of extreme weather events such as heavy precipitation, floods, hurricanes, heat waves and droughts.[39]

55. In addition to the breadth of these harms, many of these crises are recognised to be further exacerbated by one another. For example, increased global temperatures risk both (i) irreversible losses to biodiversity;[40] and, independently, (ii) severe depletion of atmospheric water vapour concentration.[41] These two outcomes subsequently feed into each other: among multiple consequences, reduced atmospheric water vapour pressure places forest ecosystems at considerably greater risk of wildfires.[42] Wildfires themselves contribute directly to global GHG emissions, and cause severe losses to biodiversity in affected ecosystems. The resultant loss of forests represents a loss to 'carbon sink' ecosystems, heightening vulnerability to global temperature increases and thereby forming a feedback loop.[43] Such a cycle is painfully familiar to Albania, which is "*exceedingly vulnerable to forest fires*" due to increased temperatures, long periods of aridity and high forest coverage.[44]

56. The significant harm caused by climate change is not limited only to the *direct* causation of environmental crises. Those crises compound, amplifying further harms across a web of interconnected effects. As such, the damage caused by climate change is far-reaching, requiring urgent rectification to address an increasingly self-perpetuating cycle of harms resulting from rising global temperatures.

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39 BVerfG, Order of the First Senate of 24 March 2021, 1 BvR 2656/18, para. 20, available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html.

40 IPCC, "*Summary for Policymakers*", *Climate Change 2023: Synthesis Report*, 2023, p. 18, available at https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf.

41 PNAS, "*Quantifying Contributions of Natural Variability and Anthropogenic Forcings on Increased Fire Weather Risk over the Western United States"*, *Proceedings of the National Academy of Sciences*, 2021, Vol. 118 No. 45, p. 7, available at https://www.pnas.org/doi/10.1073/pnas.2111875118.

42 PNAS, "*Quantifying Contributions of Natural Variability and Anthropogenic Forcings on Increased Fire Weather Risk over the Western United States"*, *Proceedings of the National Academy of Sciences*, 2021, Vol. 118 No. 45, p. 7, available at https://www.pnas.org/doi/10.1073/pnas.2111875118.

43 *See* H. Clarke et al., "*Forest fire threatens global carbon sinks and population centres under rising atmospheric water demand*", *Nature communications 13*, 2022, p. 6, ("*There is already evidence that recent increases in fire may have tipped the Amazon from a net carbon sink to a net carbon source"*), available at https://www.nature.com/articles/s41467-022-34966-3.

44 World Bank Group, *Climate Risk Country Profile: Albania*, 2021, p. 18, available at https://climateknowledgeportal.worldbank.org/sites/default/files/2021-06/15812-Albania%20Country%20Profile-WEB.pdf.

2. Specific harms to the marine environment

57. Climate change has particularly devastating effects on the marine environment, in addition to its broader environmental consequences. Such repercussions are particularly significant given that the ocean is the Earth's primary climate regulatory mechanism, responsible for the uptake and distribution of anthropogenic CO2 in the atmosphere, which drives weather patterns and influences our climate.[45] As a result, harm to the marine environment triggers substantial repercussions for climate systems and the broader environment, particularly given its role in contributing to 'positive feedback loops'. These loops amplify the impact of climate change, resulting in a cyclical pattern of environmental harm. Consequently, all States are experiencing and will continue to experience the adverse impacts of these feedback loops, as well as the ocean's diminished ability to regulate our common climate.

58. Especially pertinent to Albania as a coastal state and being heavily dependent on hydropower, the oceans' absorption of excess heat leads to several interrelated physical and chemical changes, all of which cause profound harm. These changes include ocean warming, melting of the marine cryosphere, sea-level rise, changes to ocean and air currents, and ocean stratification and deoxygenation. All of these phenomena cause acute harm, such as declines in biodiversity and abundance (especially in sensitive ecosystems such as coral reefs); losses of marine habitats; increased food insecurity; reduced availability of potable water; submergence and destruction of coastal communities; extreme weather events; and threats to cultural heritage sites.

C. CONCLUSION

59. The science is indisputable: anthropogenic GHG emissions cause climate change. The causal relationship between those emissions and the significant harms of the physical and chemical changes that result create a profoundly negative impact on the climate system and global environment. Further, the severity of the harms caused by GHG emissions increases substantially where average global temperatures rise beyond 1.5ºC above pre-industrial levels, a threshold which current IPCC reports predict are likely to be reached between 2030 and 2035.[46]

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45 NASA, *Climate Variability*, available at https://terra.nasa.gov/science/climate-variability-and-change#:~:text=Studying%20year%2Dto%2Dyear%20climate,happen%20as%20Earth%27s%20climate%20changes; IPCC, "*Technical Summary*", *Special Report on the Ocean and Cryosphere in a Changing Climate*, 2019, p. 43.

46 IPPC, "*Summary for Policymakers*", *Climate Change 2023: Synthesis Report*, 2023, p. 18, available at https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_LongerReport.pdf/.

60. The IPCC's Working Group II Co-Chair has stated: "*the cumulative scientific evidence is unequivocal: Climate change is a threat to human well-being and planetary health. Any further delay in concerted anticipatory global action on adaptation and mitigation will miss a brief and rapidly closing window of opportunity to secure a liveable and sustainable future for all*".[47]

61. Regrettably, Albania's first-hand experience of the deleterious effects of climate change has grown exponentially in recent years. Despite consistently outputting some of the lowest CO_2 and GHG emissions per capita of any country in Europe,[48] Albania remains subject to intense storms, floods, heatwaves and wildfires – with these crises becoming more frequent, unpredictable and severe as a result of climate change trends.[49] As identified by Albania's 2023 National Disaster Risk Reduction Strategy, "[p]*rojected changes in precipitation patterns during winter, fall and spring months increase the risk of river floods*" with coastal areas vulnerable to increased river floods and storm surges arising from sea level rise.[50] Further effects of climate change are highlighted in Albania's report, including: increases to the size and magnitude of floods and erosion of coastal areas; increasing salinisation of coastal aquifers; increased frequency of heat waves and droughts; greater forest fires; and the spread of water-borne and vector-borne diseases as a consequence of increased flooding.[51]

62. Alongside greater variability in precipitation, the World Bank predicts the increase in extreme weather events in Albania as "*likely to pose a serious threat to agriculture production, water availability, food security and economic growth*".[52] The adverse effects of

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47 IPCC, *Climate Change: a threat to human wellbeing and of the planet. Taking action now can secure our future*, 28 February 2022, available at https://www.ipcc.ch/2022/02/28/pr-wgii-ar6/#:~:text=%E2%80%9CThe%20scientific%20evidence%20is%20unequivocal,%E2%80%9D%20said%20Hans%2DOtto%20P%C3%B6rtner.

48 H. Ritchie, P. Rosado, M. Roser, *CO_2 and Greenhouse Gas Emissions*, available at https://ourworldindata.org/co2-and-greenhouse-gas-emissions.

49 World Bank Group, *Climate Risk Country Profile: Albania*, 2021, p. 13, available at https://climateknowledgeportal.worldbank.org/sites/default/files/2021-06/15812-Albania%20Country%20Profile-WEB.pdf.

50 Republic of Albania, *National Disaster Risk Reduction Strategy 2023-2030*, p. 38, available at https://www.undp.org/sites/g/files/zskgke326/files/2024-01/national_drr_strategy.pdf.

51 Republic of Albania, *National Disaster Risk Reduction Strategy 2023-2030*, p. 38, available at https://www.undp.org/sites/g/files/zskgke326/files/2024-01/national_drr_strategy.pdf.

52 World Bank Group, *Climate Risk Country Profile: Albania*, 2021, p. 16, available at https://climateknowledgeportal.worldbank.org/sites/default/files/2021-06/15812-Albania%20Country%20Profile-WEB.pdf.

climate change are already identifiable in Albania,[53] and are poised to intensify in the absence of committed and coordinated action from the global community. Without urgent rectification, States like Albania will continue to incur significant loss and damage from the devastating consequences of climate change, from which they have contributed very little when compared to the world's most significant polluters.

IV. 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

63. This Section addresses the Request's first question and identifies the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic GHG emissions for States and for present and future generations.

64. Albania contends that States bear obligations in this respect and which derive, *inter alia*, from:

a. their customary obligation, owed to other States, to prevent transboundary harm – this obligation takes expression, notably, in the climate change treaty regime and the law of the sea (**Section A**); and

b. their obligations to respect, protect, and fulfil the human rights of individuals within their jurisdiction (**Section B**).

A. OBLIGATION TO PREVENT TRANSBOUNDARY HARM

65. The obligation to prevent, reduce, and control the risk of environmental harm to the territory of other States or areas beyond national jurisdiction, i.e. the no-harm rule, forms the "*cornerstone of international environmental law*"[54] in general, and international climate change law in particular.[55]

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53 L. Dibra, L. Tafaj, A. Borde, *Striving to Adapt to Climate Change: Lessons from Albania*, 29 October 2019, available at https://napglobalnetwork.org/2019/10/striving-to-adapt-to-climate-change-lessons-from-albania: "*Recurring floods caused USD 218 million in damage between 1997 and 2017 and directly affected more than 550,000 inhabitants* [i.e., over one-sixth of the Albanian population]".

54 P. Sands and J. Peel, *Principles of International Environmental Law*, 3rd edn (CUP), 2012, p. 191.

55 S. Maljean-Dubois, *The No-Harm Principle as the Foundation of International Climate Law* in B. Mayer and A. Zahar (ed.), *Debating Climate Law* (Cambridge University Press 2021), p. 15.

66. As an obligation under customary international law,[56] it applies to all States, irrespective of their ratification of any climate treaty.[57]

67. First upheld in the *Trail Smelter* arbitration,[58] the customary rule of *sic utere tuo ut alienum non laedas* (use your own property so as not to injure that of another) has since been reflected in various binding and non-binding instruments, including Article 3 of the Convention on Biological Diversity, Principle 21 of the Stockholm Declaration of 1972 and Principle 2 of the Rio Declaration of 1992, which express the common conviction of the States concerned that they have "*the responsibility to ensure that activities* ***within their jurisdiction or control*** *do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction*".[59] It also takes expression in Articles 192 and 193 of the UN Convention on the Law of the Sea ("**UNCLOS**"), and is reflected in the preamble to the UNFCCC, which recalls that States "*have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction*". Further, the "*ultimate objective*" of the Convention and "*any related instruments*" is to stabilise GHG concentrations "*at a level that would prevent dangerous anthropogenic interference with the climate system*".[60]

68. In the same vein, this Court has already recognised in its *Nuclear Weapons Advisory Opinion* that "*the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the* ***general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment***".[61] The Court subsequently confirmed the same in *Gabcikovo-Nagymaros Project*, where it reiterated the "*great*

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56 I. Brownlie in: *Principles of Public International Law*, 7th ed., 2008, pp.275-285; P. Birnie et al. in: *International Law and the Environment*, 3rd ed. (Oxford), 2009, pp.143-152.

57 S. Maljean-Dubois, *The No-Harm Principle as the Foundation of International Climate Law* in B. Mayer and A. Zahar (ed.), *Debating Climate Law* (Cambridge University Press 2021), pp. 18-19.

58 *Trail Smelter Arbitration (United States v Canada)*, Awards, 16 April 1938 and 11 March 1941, RIAA, Vol. III, p. 1905.

59 It is also reflected in the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1046 UNTS 120; Convention on long-range transboundary air pollution, 13 November 1979, 1302 UNTS 217; and Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, 1513 UNTS 293.

60 UNFCCC, Article 2.

61 *Use of Nuclear Weapons (Advisory Opinion)*, para. 29.

significance that it attached to respect for the environment, not only for States but also for the whole of mankind".[62]

69. In Albania's view, there can be no doubt that anthropogenic GHG emissions (or increased concentrations thereof) may constitute transboundary harm. As set out in Section III, above, there is a clear nexus between historical and future anthropogenic GHG emissions and the alarming rise in the global mean surface temperature, which in turn causes significant harm to the climate system and parts of the environment. The scientific consensus on this is incontestable. Furthermore, scientific advancements now also enable us to pinpoint the emissions of States most responsible for climate change,[63] and scientists are increasingly capable of attributing specific extreme weather events to climate change.[64] Therefore, "*the rationale which justifies a prevention of activities that cause local transboundary damage applies a fortiori to circumstances where the stakes include the prosperity, viability or survival of other states and human civilization as a whole*".[65]

1. Due diligence

70. The obligation to prevent transboundary harm has been understood as a positive obligation, and more specifically as a duty of due diligence (an obligation of conduct and not of result).[66] The notion that a State must respond diligently to a potential breach of its positive obligations, and yet is not obliged to provide a guarantee against all potential damage, is the

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62 *Gabcikovo-Nagymaros Project*, Judgment, ICJ Reports 1997, p.41, para. 53.

63 S. Evans, *Analysis: Which countries are historically responsible for climate change? Carbon Brief*, 27 November 2023, available at https://www.carbonbrief.org/analysis-which-countries-are-historically-responsible-for-climate-change/.

64 *See, e.g.,* F. Otto et al., *The science of attributing extreme weather events and its potential contribution to assessing loss and damage associated with climate change impacts*, available at https://unfccc.int/files/adaptation/workstreams/loss_and_damage/application/pdf/attributingextremeevents.pdf ("*The emerging science of Probabilistic Event Attribution (increasingly allows a quantitative assessment of the extent to which human-induced climate change is affecting local weather events*"); *see also* J. D. Haskett, *Is that climate change? The science of extreme event attribution, Congressional Research Service*, 1 June 2023, available at https://crsreports.congress.gov/product/pdf/R/R47583; and M. Zachariah et. al., "*Attribution of the 2015 drought in Marathwada, India from a multivariate perspective*", *Weather and Climate Extremes*, 2023, available at https://www.sciencedirect.com/science/article/pii/S2212094722001256.

65 B. Mayer, "*Construing International Climate Change Law as a Compliance Regime*", *Transnational Environmental Law*, 2018, 7(1), p. 121.

66 ITLOS, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, Case No 17, Advisory Opinion of 1 February 2011, (hereinafter "***Area* Advisory Opinion**" or "**Responsibilities and Obligations of States Sponsoring Persons**", para. 110. *See also Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, p. 14 ("***Pulp Mills***"), para. 187. See also H. Xue, *The doctrine of due diligence and standard of conduct* in *Transboundary Damage in International Law*, Cambridge Studies in International and Comparative Law (CUP 2003), p. 165.

determining standard in respect of numerous international legal problems[67] – many of which concern obligations that are significant variations of a State's core due diligence obligation "*to protect within* [its own] *territory the rights of other States*".[68]

71. Albania recognises the absence of any *"single-agreed upon definition"* of due diligence in international law[69] and that its requirements are context-specific, requiring different measures in different circumstances. This inherent flexibility, however, underscores the significance of due diligence as a pivotal instrument for accountability concerning the safeguarding of the climate system and various facets of the environment, and the need for further judicial guidance from the Court. As such, "*some criteria have emerged that w*[ould] *assist* [the Court] *in determining whether a State has acted diligently in different areas of international law*".[70] As regards environmental protection, four points can be made.

72. *First*, this obligation has been construed as a broad and demanding obligation "*which entails not only the* ***adoption of appropriate rules and measures****, but also* ***a certain level of vigilance in their enforcement*** *and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators*".[71] This is especially relevant in the context of climate change, where a State's direct obligation to deploy adequate means may have an indirect impact on private actors

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67 L. Bastin, *State Responsibility for Omissions: Establishing a Breach of the Full Protection and Security Obligation by Omissions* (Oxford), 2017, pp. 53-54: due diligence as a standard has thus been treated as determining, *inter alia:* whether a State has "*take*[n] *all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide*" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro*, Judgment, 2007, ICJ Rep 17, para. 430); whether a State has "*take*[n] *all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof*" (ILC, "*Draft articles on prevention of transboundary harm from hazardous activities*", *Report of the International Law Commission on the work of its fifty-third session*, UN Doc. A/56/10 Supp. No.10, 2001, Article 3, and *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, 1 February 2011, para. 116 (hereinafter "**Responsibilities and Obligations of States Sponsoring Persons**"); and whether a State has acted sufficiently to protect within its territory the diplomatic and consular missions and staff of a foreign State (*United States Diplomatic and Consular Staff in Tehran* (*United States of America v Iran*), Judgment, 1980 ICJ Rep 3, paras. 61-63).

68 L. Bastin, *State Responsibility for Omissions: Establishing a Breach of the Full Protection and Security Obligation by Omissions* (Oxford), 2017, pp. 53-54.

69 B. Frey, *Prevention of human rights violations committed with small arms and light weapons*, UN Doc. E/CN.4/Sub.2/2003/29, 25 June 2003, para. 39. H. Duffy, *The 'War on Terror' and the Framework of International Law* (CUP), 2005 p. 57. R. Barnidge, "*The Due Diligence Principle Under International Law*", *International Community Law Review*, 2006, 8(1), p. 118.

70 T. Koivurova & K. Singh, "*Due Diligence*", *Max Planck Encyclopaedia*, August 2022, para. 5.

71 *Pulp Mills*, para. 197.

whose activities within the State's territory or jurisdiction account for a significant portion of global GHG emissions.[72]

73. The choice of specific measures in the exercise of due diligence in principle falls within the discretion of the State. That does not mean, however, that this flexibility is unlimited. As has been noted, the standard of due diligence requires "*nothing more nor less than the reasonable measures which a well-administered government could be expected to adopt under similar circumstances*".[73] Likewise, the International Law Association's Study Group on Due Diligence has noted that "'[r]*easonableness*' *is a golden thread in determining which measures States should take to act in a duly diligent manner*".[74]

74. Furthermore, in the analogous context of the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, the International Law Commission ("**ILC**") has characterised this due diligence obligation as follows:

> "*States are under an* ***obligation to take unilateral measures*** *to prevent significant transboundary harm or at any event to minimize the risk thereof arising out of activities within the scope of article 1.* ***Such measures include, first, formulating policies designed to prevent significant transboundary harm or to minimize the risk thereof*** *and,* ***secondly, implementing those policies****. Such policies are* ***expressed in legislation and administrative regulations and implemented through various enforcement mechanisms***".[75]

75. The focus on implementation and enforcement in the exercise of due diligences underscores that the sole adoption of national rules and regulations is insufficient. If proper care is not taken in implementing and monitoring these measures, it must be presumed that adequate diligence has not been exercised.

76. *Second*, and critical to the context of climate change, due diligence is an inherently progressive and evolutionary standard.[76] It may therefore change with time and the

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72 S. Maljean-Dubois, *The No-Harm Principle as the Foundation of International Climate Law*, in B. Mayer and A. Zahar (ed.), *Debating Climate Law* (Cambridge University Press 2021), p. 16.

73 AV Freeman, "*Responsibility of States for Unlawful Acts of their Armed Forces*", (1955-II) 88 *Recueil des Cours de l'Academie de Droit International* 263, pp. 277-278.

74 T. Stephens & D. French, *ILA Study Group on Due Diligence in International Law: Second Report*, July 2016, available at https://www.ila-hq.org/en_GB/documents/draft-study-group-report-johannesburg-2016#:~:text=The%20ILA%20Study%20Group%20on,of%20due%20diligence%20is%20applied.

75 ILC, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries*, 2001, Commentary to Article 3, para. 10.

76 Y. Tanaka, "*Shared State Responsibility for Land-Based Marine Plastic Pollution*", 2023, *Transnational Environmental Law*, 1-26, p.7; S. Besson, *La due diligence en droit international* (Brill/Nijhoff), 2021, p. 138.

development of science and technology.[77] This point was highlighted by ITLOS's Seabed Disputes Chamber 2011 advisory opinion, in which it stated: "*due diligence' is a variable concept. It* ***may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge***".[78] It "*may also change in relation to the risks involved in the activity*. [...] ***The standard of due diligence has to be more severe for the riskier activities***".[79]

77. The ILC has further expressed that

> "***What would be considered a reasonable standard of care or due diligence may change with time****; what might be considered an appropriate and reasonable procedure, standard or rule at one point in* time *may not be considered as such at some point in the future. Hence, due diligence in ensuring safety* ***requires a State to keep abreast of technological changes and scientific developments***".[80]

78. Consequently, contemporary scientific data serves as a crucial benchmark by which the Court can assess States' compliance with their environmental due diligence obligations. In that regard, as noted above (see **Section III.A.**), the periodic reports of the IPCC have been described by the UNFCCC as "*widely recognised as the most credible sources of information on climate change*", and have concluded that to address the harms linked to climate change discussed above, States must limit global warming consistent with the tipping point standard of 1.5°C above pre-industrial levels to reduce the risks of harm associated with even greater increases in average global temperature. The IPCC's *Climate Change 2022: Mitigation of Climate Change* acknowledges that immediate and rapid action to phase out fossil fuels is essential for curbing climate change.[81] The International Energy Agency ("**IEA**") has thus noted that reducing fossil fuel production "*holds the key to averting the worst effects of*

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77 Y. Tanaka, "*Shared State Responsibility for Land-Based Marine Plastic Pollution*", 2023, *Transnational Environmental Law*, 1-26, p.7.

78 Responsibilities and Obligations of States Sponsoring Persons, p. 43, para. 117 (emphasis added).

79 Responsibilities and Obligations of States Sponsoring Persons, p. 43, para. 117 (emphasis added).

80 ILC, "*Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with Commentaries", Report of the ILC on its 53rd Session*, UN Doc. A/56/10, 2001, Vol. II(2), Commentary to Article 3, p. 154, para. 11 available at: http://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf.

81 The report of the IPCC's sixth assessment Working Group III (AR6 Climate Change 2022: Mitigation of Climate Change) concludes: "*In all scenarios [*limiting warming in 2100 to below 1.5 C°, f*ossil fuel is greatly reduced and unabated coal use is completely phased out by 2050"*. The report also notes that "[p]*rojected cumulative future CO2 emissions over the lifetime of existing and currently planned fossil fuel infrastructure without additional abatement exceed the total cumulative net CO2 emissions in pathways that limit warming to 1.5°C (>50%) with no or limited overshoot. They are approximately equal to total cumulative net CO2emissions in pathways that limit warming to 2°C (>67%). (high confidence)*".

climate change" and achieving "*net zero means a huge decline in use of fossil fuels*".[82] Within that context, Albania further notes that the general obligation to fulfil obligations in *good faith* requires that States should refrain from seeking to undermine or discredit said scientific advancements.

79. *Third*, restating its finding in the *Pulp Mills* case, the Court recognised in *Certain Activities* (2015) that, "***under customary international law***, '[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*".[83] In its 2011 Advisory Opinion, the Seabed Disputes Chamber in examining the due diligence obligation of sponsoring States under UNCLOS, qualified due diligence in that context as "*an obligation to deploy adequate means, to exercise* ***best possible efforts****, to do the utmost, to obtain this result*".[84] Similarly, the ILC's commentary to its Draft Articles on Prevention of Transboundary Harm from Hazardous Activities states that "*the degree of care expected of a State with a well-developed economy and human and material resources… is different from States which are not so well placed*".[85]

80. Thus, notwithstanding its core "*objective assessment criterion*",[86] the obligation can also be subject to a subjective qualification in that the aforementioned "*means*" must be at the "*disposal*" of States. Consequently, the assessment of what may be reasonable may be influenced by a State's capabilities and the level of development.[87] The extent of the effort a State is required to exert is determined by its practical technical and scientific capacity to undertake this effort. It follows that developed and industrialised States have a more stringent due diligence obligation in this regard. In fact, it is both fair and *equitable* that developed and industrialised States undergo a more stringent obligation in preventing transboundary harm by anthropogenic GHG emissions, considering that the standard of due diligence that

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82 IEA, *Net Zero by 2050 A Roadmap for the Global Energy Sector*, 2021, available at https://www.iea.org/reports/net-zero-by-2050.

83 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, ICJ Reports 2015, p. 665 ("***Certain Activities* (2015)**"), para. 118. *See also Pulp Mills*, para. 101.

84 Responsibilities and Obligations of States Sponsoring Persons, para. 110.

85 ILC, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries*, 2001, Commentary to Article 3, para. 17.

86 C. Voigt, "*The Paris Agreement: What is the standard of conduct for parties?*", *The Role of Law in a Bottom-up International Climate Governance Architecture: Early Reflections on the Paris Agreement*, Questions of International Law, 24 March 2016, available at http://www.qil-qdi.org/paris-agreement-standard-conduct-parties/#_ftn4.

87 T. Stephens, D. French, ILA *Study Group on Due Diligence in International Law, Second Report*, July 2016, pp. 3 and 16, https://www.ila-hq.org/en_GB/documents/draft-study-group-report-johannesburg-2016

applies to States should be "*appropriate and proportional to the degree of risk of transboundary harm*"[88] from their activities. By contrast, and as noted in Section III, above, the emissions of climate-vulnerable developed States are negligible, making only a small fraction of global GHG emissions, and as such are *de minimis*. As the International Law Association has noted, the most advanced States must therefore take the lead in addressing GHGs "*by adopting more stringent mitigation commitments*" and addressing their adverse effects.[89]

81. This differentiation is embodied in the principle of *common but differentiated responsibilities*. The relevance of this manifestation of the general principle of equity[90] is expressly recognised in the Stockholm and Rio Declarations[91] as well as in the UNFCCC,[92] Kyoto Protocol[93] and the Paris Agreement.[94] It is also articulated in UNCLOS,[95] in the

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88 ILC, "*Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with Commentaries", Report of the ILC on its 53rd Session*, UN Doc. A/56/10, 2001, Vol. II(2), Commentary to Article 3, available at: http://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf.

89 International Law Association, Resolution 2/2014, Declaration of Legal Principles Relating to Climate Change, Annex 'ILA Legal Principles Relating to Climate Change: Draft Articles', Draft Article 5(3)(a) – Common but Differentiated Responsibilities and Respective Capabilities. Emissions from the 49 least developed countries collectively accounted for just 0.54 percent of global GHG emissions in 2003. Emissions from these countries are *de minimis* because they contribute such a small portion of global GHG emissions.

90 P. Cullet, Common but differentiated responsibilities, Fitzmaurice, Malgosia, Brus, MMTA and Merkouris, Panos, (eds.), *Research Handbook on International Environmental Law*, 2nd edition. Cheltenham: Edward Elgar, pp. 209-228.

91 *Declaration of the United Nations Conference on the Human Environment*, adopted on 16 June 1972 ("**Stockholm Declaration**"); *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. I), adopted 12 August 1992 ("**Rio Declaration**"), Principle 7.

92 Article 3(1) of the UNFCCC provides that States should "*protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof*".

93 *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, adopted on 11 December 1997, entered into force on 16 February 2005 ("**Kyoto Protocol**").

94 In the Paris Agreement, the common but differentiated responsibilities principle is referred to in several instances and provides that the parties to the Agreement are guided by the principles of equity and common but differentiated responsibilities and respective capabilities in the light of different national circumstances (Preamble) and that the Paris Agreement will be implemented to reflect these two principles (Article 2(2)). It must also specifically be reflected in a State Party's nationally determined contribution (Article 4(3)) and long term low GHG emission development strategies (Article 4(19)). *See* E. Hey & S. Paulini, "*Common But Differentiated Responsibilities*", *Max Planck Encyclopaedia of Public International Law*, October 2021, para. 6.

95 United Nations Convention on the Law of the Sea, adopted on 10 December 1982, entered into force on 16 November 1994 ("**UNCLOS**").

jurisprudence of the UN Committee on the Rights of the Child[96] and in the reports and decisions adopted by the UN Treaty Bodies and Special Procedures.[97]

82. *Fourth*, due diligence is a *continuous* duty. For example, the ICJ stressed in *Pulp Mills* that throughout the lifetime of a project its effects on the environment must be continuously monitored.[98]

2. Duty to cooperate

83. It is well established that a number of obligations arise as corollaries of the general due diligence obligation, notably the obligations of information, notification, and cooperation (see below), the obligation to conduct an environmental impact assessment,[99] and the obligation of continuous monitoring.[100] In the context of climate change, the obligation to cooperate is of particular and paramount importance.

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96 *See, e.g.*, UN Committee on the Rights of the Child, *Sacchi et al vs. Argentina*, Communication No. 104/2019 (CRC/C/88/D/105/2019), 9 November 2021, para. 10.10 where the Committee found that "*in accordance with the principle of common but differentiated responsibility…the collective nature of the causation of climate change does not absolve the State party of its individual responsibility that may derive from the harm that the emissions originating within its territory may cause to children, whatever their location*".

97 *See for e.g.*, UN Human Rights Council, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/74/161 (2019), paras. 26 and 68.

98 *Pulp Mills*, para. 205.

99 As noted by this Court in *Pulp Mills*, "*in accordance with a practice, which in recent years has gained so much acceptance among states that it may now be taken as* ***a requirement under general international law*** *to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context*" (*Pulp Mills*, para. 204, emphasis added). This treats EIA as a distinct and freestanding transboundary obligation in international law – reflecting Principle 17 of Rio Convention on Environmental Impact Assessment in a Transboundary Context, and Article 7 of the ILC Draft Articles on Transboundary Harm. *See* A. Boyle, *Pulp Mills Case A Commentary,* available at https://www.biicl.org/files/5167_pulp_mills_case.pdf. It is also reflected in Articles 204-206 of UNCLOS. That a State may not be fully able to trace the chain of causation linking specific GHG emission to damage in a particular injured State does not diminish the necessity or utility of conducting an environmental impact assessment. Environmental assessments may be adapted for the specific requirements of evaluating the possible transboundary and extraterritorial harmful impact of GHG activity. Such assessments are important for enabling "*the State to determine the extent and the nature of risk involved in an activity and consequently the type of preventative measures it should take*". (ILC, "*Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with Commentaries", Report of the ILC on its 53rd Session*, UN Doc. A/56/10, 2001, Vol. II(2), Article 7, available at: http://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf). As the ICJ observed in *Pulp Mills*, "*the duty of vigilance and prevention . . . would not be considered to have been exercised, if a party planning works liable to* [significantly] *affect . . . the quality of* [the environment] *. . . did not undertake an environmental impact assessment on the potential effects of such works* (*Pulp Mills*, para. 204).

100 *Pulp Mills,* para. 205.

84. Cooperation plays a pivotal role in preventing and addressing the hazards caused by climate change. As has been emphasised by the IPCC:

> "***Climate change has the characteristics of a collective action problem at the global scale****, because most GHGs accumulate over time and mix globally, and emissions by any agent (e.g., individual, community, company, country) affect other agents.* ***Effective mitigation will not be achieved if individual agents advance their own interests independently****. Cooperative responses, including international cooperation, are therefore required to effectively mitigate GHG emissions and address other climate change issues*".[101]

85. The principle of cooperation is enshrined in soft law instruments,[102] and in a significant number of international treaties relevant to environmental protection.[103] The customary status of the obligation to cooperate is confirmed by the ILC in its Draft Guidelines on the Protection of the Atmosphere, under which States "*have the obligation to cooperate . . . for the protection of the atmosphere from atmospheric pollution and… degradation*".[104]

86. This Court has further observed that "*it is by co-operating that States can jointly manage the risks of damage to the environment that might be created by the plans initiated by one or other of them, so as to prevent the damage in question*".[105] ITLOS has also had the opportunity to discuss the duty to cooperate in protecting the marine environment both in the context of prevention of marine pollution and conservation of marine living resources,[106] and the duty to cooperate has been recognised as a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and "*the* ***overriding***

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101 IPCC, "*Summary for Policymakers*", *Climate Change 2014: Synthesis Report, Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, 2014, p. 17 (emphasis added).

102 Stockholm Declaration, Principle 24; 1992 Rio Declaration, Principles 7, 12 and 14.

103 UNCLOS, Article 194; *Convention on Biological Diversity*, signed between 5 June 1992 to 4 June 1993, entered into force on 29 December 2003; UNFCC (preamble, articles 3, 4, 5, 6, 7 and 9); Paris Agreement (preamble, articles 6, 7, 8, 10, 11, 12, and 14).

104 ILC, *Draft guidelines on the protection of the atmosphere, with Commentaries*, 2021, Guideline 8: International Cooperation.

105 *Pulp Mill*s, para. 77.

106 *The MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, para. 82; *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore)*, Provisional Measures Order dated 10 September 2003, para. 92; *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Advisory Opinion),* 2 April 2015, at para. 140.

***principle of international environmental law**, in particular when the interests of neighbouring States are at stake*".[107]

87. The principle of cooperation enjoys similar status and recognition in the environmental context of human rights law. In particular, the Inter-American Court of Human Rights ("**IACtHR**") has held that "*States have the obligation to cooperate, in good faith, to protect against environmental damage*".[108] Further, "*States must notify other potentially affected States*" and "*consult and negotiate in good faith with States potentially affected by significant transboundary harm*" and have "*the obligation to ensure the right of access to information*" concerning potential environmental impacts.

88. There are three points in particular to register in respect of States' duty to cooperate to prevent harm to the climate system and parts of the environment.

89. *First*, States must "*cooperate in good faith*", which emphasises a return to multilateralism and a duty to negotiate in good faith.[109] This extends beyond mere rhetoric, requiring States to engage in tangible actions that promote sustainability and environmental protection. This also includes the implementation of measures and policies that align with international agreements and frameworks aimed at mitigating the impact of climate change.

90. *Second*, cooperation also has a special function in helping to promote equity among States in climate governance.[110] Article 3(3) of UNGA's Declaration on the Right to Development provides that States must "*co-operate with each other in ensuring development and eliminating obstacles to development*", which include climate change.[111] Likewise, Principle 27 of the Rio Declaration calls upon States to cooperate in *good faith* to develop "*international law in the field of sustainable development*". Further, as recognised in UNGA's 2022 landmark resolution on the right to a clean, healthy and sustainable

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107 *The MOX Plant* (*Ireland v. United Kingdom*), Provisional Measures, Order of 3 December 2001, Separate Opinion Judge Wolfrum, ITLOS Reports 2001, p. 135 (emphasis added). *See also Pulp Mills*, para. 77; *Certain Activities* (2015), para. 106.

108 Inter-American Court of Human Rights, *The Environment and Human Rights—Requested by the Republic of Colombia*, Advisory Opinion, 15 November 2017, OC 23/17, para. 242 (d) (Original text: "*Los Estados tienen la obligación de cooperar, de buena fe, para la protección contra daños al medio ambiente* [...]"). *See also* E. Sobenes et al., *The Environment Through the Lens of International Courts and Tribunals* (Springer), 2022, p. 552.

109 *See for e.g.*, *Gabcikovo-Nagymaros Project*, Judgment, ICJ Reports 1997, para. 142; *Lac Lanoux*, Award (16 November 1957), 12 RIAA 281, paras. 13, 16, 20, 22, 24; B. Mayer, 'Customary Obligations', *International Law Obligations on Climate Change Mitigation* (Oxford, 2022; online edn, Oxford Academic, 17 Nov. 2022), p. 105.

110 J. Rudall, "*The Obligation to Cooperate in the Fight against Climate Change*", *International Community Law Review*, 2021, *23*(2-3), pp. 184-196.

111 UNGA Resolution, *Declaration on the Right to Development*, UN Doc. A/RES/41/128, adopted on 4 December 1986.

environment, "*international cooperation has an essential role in* ***assisting developing countries****, including highly indebted poor countries, least developed countries, landlocked developing countries, small island developing States, as well as* ***the specific challenges faced by middle-income countries****, in* ***strengthening their human, institutional and technological capacity***".[112]

91. This is required, both as a matter of equity, and to enable and facilitate effective implementation of treaty obligations. For instance, Part XII of UNCLOS requires States Parties to cooperate, both *inter se* and through international organisations, to protect and preserve the marine environment, including with respect to pollution by GHG emissions. This general obligation of cooperation comprises a more specific obligation for States Parties to assist developing States in their efforts to protect and preserve the marine environment through scientific, technical, and financial assistance. The Paris Agreement further enshrines this by recognising that "[a]*ll State Parties should cooperate to enhance the capacity of developing country Parties to implement this Agreement*"[113] and by articulating express obligations on developed country to facilitate capacity-building and provide financial support and transfer technology to developing countries with respect to both mitigation and adaptation, recognising this to form part of existing obligations under the UNFCCC.[114]

92. *Third*, the Commentary to the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities notes that "*cooperation between States is essential in designing and implementing effective policies to prevent significant transboundary harm or at any event to minimize the risk thereof*".[115] Likewise, Principle 24 of the Stockholm Declaration and Principle 7 of the Rio Declaration recognise cooperation as an essential element in any effective planning for the protection of the environment. More specific forms of cooperation are stipulated in subsequent articles. They envisage the participation of the State likely to be affected in any preventive action, which is indispensable to enhance the effectiveness of any such action.[116] In Albania's view, participation in these actions should transcend diplomatic formalities and be viewed as a strategic imperative to amplify the overall efficacy of such

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112 UNGA Resolution, *The human right to a clean, healthy and sustainable environment*, UN Doc. A/RES/76/300, adopted on 28 July 2022, Preamble (emphasis added). *See also* UNGA Resolution, *Co-operation between States in the field of the environment*, UN Doc. A/RES/2995(XXVII), 15 December 1972 and UNEP, *Shared Natural Resources*, Environmental aw guidelines and principles, 1978, p. 2.

113 Paris Agreement, Article 11(3).

114 Paris Agreement, Article 9(1).

115 ILC, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries*, 2001, Commentary to Article 4, para. 1.

116 ILC, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries*, 2001, Commentary to Article 4, para. 1.

endeavours. Considering the disproportionate impact of climate change on developing States, those most vulnerable to its adverse effects should not only be attentively listened to but should also occupy a significant position at the negotiation table. Their insights, rooted in the first-hand experiences of climate vulnerability, play a crucial role in shaping global climate policies that are both effective and equitable.

93. In conclusion, the customary obligation to prevent transboundary harm is key to informing States' obligations in respect of anthropogenic GHG emissions, as reflected in key treaties relevant to the protection of the environment (in particular those stemming from the UNFCCC, UNCLOS and the Paris Agreement). These two sets of obligations do not conflict but rather complement each other.[117]

B. STATES' OBLIGATIONS TO PROTECT HUMAN RIGHTS IN THE CONTEXT OF CLIMATE CHANGE

94. This section highlights the nexus between environmental harm and human rights and identifies key obligations of States triggered in respect of their anthropogenic GHG emissions (**1**). In view of this close connection, Albania recognises that States have obligations (i) to prevent significant harms to the climate systems and parts of the environment which would foreseeably violate human rights; (ii) to ensure that measures taken in response to climate change impacts do not result in human rights violations; and (iii) to provide redress for human rights violations that result from significant harms to the climate system and parts of the environment (**2**).

1. Nexus between environmental harm and human rights

95. Climate change represents the greatest threat to human rights in the twenty-first century.[118] The connection between climate change and human rights is well established and apparent in the preamble to the Paris Agreement, wherein State parties incorporated language pertaining to human rights: States ought to "*respect, promote, and consider their respective obligations on human rights*" when undertaking measures to tackle climate change. International human rights bodies are also in agreement that the climate crisis has a substantial impact on States' obligations and the enjoyment of human rights.[119] This

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117 S. Maljean-Dubois, *The No-Harm Principle as the Foundation of International Climate Law*, in B. Mayer and A. Zahar (ed.), *Debating Climate Law* (Cambridge University Press 2021), p. 28.

118 UN Human Rights Council, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc. A/HRC/31/52, 1 February 2016, para. 23.

119 For the individual communications see, UN Human Rights Committee ("**UNHRC**"), *Teitiota v. New Zealand*, Communication No. 2728/2016, UN Doc. CCPR/C/127/D/2728/2016, 23 September 2020

connection is confirmed by a stream of resolutions adopted over a period of 15 years by the Human Rights Council[120] and outlined in the *Joint Statement on Human Rights and Climate Change*, released by five UN human rights treaty bodies in September 2019.[121]

96. Those rights most patently affected by climate change include the following:

a. **The right to life**, recognised as "*the supreme right from which no derogation is permitted, even in situations of armed conflict and other public emergencies that threaten the life of the nation*".[122] The right to life is a well-established obligation under both treaty law and customary international law, and all States must therefore respect, protect, promote, and fulfil it. This entails, at the very least, that States should take effective measures against foreseeable and preventable loss of life.[123] The right

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(views adopted on 24 October 2019); UNHRC, *Billy et al. v. Australia*, Communication No. 3624/2019, UN Doc. CCPR/C/135/D/3624/2019, 18 September 2023 (views adopted on 21 July 2022); UNCRC, *CRC v. Argentina*, Communication No. 104/2019, UN Doc. CRC/C/88/D/104/2019, 11 November 2021 (decision adopted on 22 September 2021); UNCRC, *CRC v. Brazil*, Communication No. 105/2019, UN Doc. CRC/C/88/D/105/2019, 9 November 2021 (decision adopted on 22 September 2021; UNCRC, *CRC v. France*, Communication No. 106/2019, UN Doc. CRC/C/88/D/106/2019, 10 November 2021 (decision adopted on 22 September 2021); UNCRC, *CRC v. Germany*, Communication No. 107/2019, UN Doc. CRC/C/88/D/107/2019, 11 November 2021 (decision adopted on 22 September 2021); UNCRC, *CRC v. Switzerland*, Communication No. 95/2019, UN Doc. CRC/C/88/D/95/2019, 3 November 2021 (decision adopted on 22 September 2021); and UNCRC, *CRC v. Turkey*, Communication No. 108/2019, UN Doc. CRC/C/88/D/108/2019, 9 November 2021 (decision adopted 22 September 2021). For the general comments or recommendations, *see* especially, UNHRC, *General Comment 36 on the right to life*, 2018; CEDAW, *General Recommendation No. 37 (2018) on the gender-related dimensions of disaster risk reduction in the context of climate change*, UN Doc. CEDAW/C/GC/37, 13 March 2018; CRC, *General Comment No. 26 (2023) on children's rights and the environment, with a special focus on climate change*, UN Doc. CRC/C/GC/26, 22 August 2023. For statements, *see* UNCESCR, *CESCR Committee Statement on "Climate Change and the CESCR"*, UN Doc. E/C.12/2018/1, 31 October 2018; Joint statement by the CEDAW, CESCR, CMW, CRC, and the CRPD, *Statement on human rights and climate change*, UN Doc. HRI/2019/1, 14 May 2020.

120 *See, e.g.*, UN Human Rights Council, *Human rights and climate change*, UN Doc A/HRC/RES/7/23, March 2008; UN Human Rights Council, *Human rights and climate change*, UN Doc A/HRC/RES/50/9, 14 July 2022. *See also* OHCHR, *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, UN Doc A/HRC/10/61, 15 January 2009; OHCHR, *Panel discussion on climate change's negative impact on the full and effective enjoyment of human rights by people in vulnerable situations*, UN Doc A/HRC/52/48, 27 Dec 2022.

121 The joint statement from the Committee on the Elimination of Discrimination Against Women ("**CEDAW**"), the Committee on Economic, Social and Cultural Rights ("**CESCR**"), the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, the Committee on the Rights of the Child ("**CRC**"), and the Committee on the Rights of Persons with Disabilities. Acknowledging the findings of the 2018 Report by the IPCC concerning global warming of 1.5°C, it highlights that climate change presents substantial threats to the realisation of human rights as safeguarded by the different international human rights treaties that establish these Committees.

122 UNHRC, *General Comment No. 36 "The right to life"*, UN Doc. CCPR/C/GC/36, 3 September 2019, para. 2.

123 UNHRC, *General Comment No. 36 "The right to life"*, UN Doc. CCPR/C/GC/36, 3 September 2019, para. 7.

to life also includes the right of individuals to enjoy a life with dignity and to be free from acts or omissions that would cause their unnatural or premature death.[124] The UN Human Rights Committee ("**UNHRC**") has observed that "*environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life*"[125] and "*that without robust national and international efforts, the effects of climate change may expose individuals to a violation of their* [rights to life]".[126] It found that "*severe environmental degradation can adversely affect an individual's well-being and lead to a violation of the right to life*".[127] The Committee on the Rights of the Child has also recognised that "[t]*he right to life is threatened by climate change*" and that States have duties to take positive measures to protect children "*from environmental conditions that may lead to direct threats to the right to life*".[128]

b. **The right to self-determination** has been recognised by this Court as (i) "[o]*ne of the essential principles of contemporary international law*" and (ii) carrying obligations *erga omnes*.[129] It is further recognised by various international legal sources as constituting a peremptory norm of international law (*jus cogens*).[130] The right to self-determination includes the right of a people not to be deprived of its own means of subsistence.[131] It also requires States to promote the realisation of self-determination

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124 UNHRC, *General Comment No. 36 "The right to life"*, UN Doc. CCPR/C/GC/36, 3 September 2019, para. 3. *See also* UNHRC, *Billy et al. v Australia,* UN Doc. CCPR/C/135/3624/2019, 21 July 2022, para. 8.3.

125 UNHRC, *General Comment No. 36 "The right to life"*, UN Doc. CCPR/C/GC/36, 3 September 2019, para. 62.

126 UNHRC, *Teitiota v. New Zealand*, UN Doc. CCPR/C/127/D/2728/2016, 24 October 2019, para 9.11; *Billy et al. v Australia*, para. 8.3.

127 UNHRC, *Billy et al. v Australia,* UN Doc. CCPR/C/135/3624/2019, 21 July 2022, para 8.5.

128 CRC, *General Comment No. 26 (2023) on children's rights and the environment, with a special focus on climate change*, UN Doc. CRC/C/GC/26, 22 August 2023, paras. 20-21.

129 *Case Concerning East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1996, para. 29.

130 *See for e.g.*, D. Tladi, *Fourth Report of the Special Rapporteur on Peremptory Norms of General International Law (Jus Cogens)*, 31 January 2019, UN Doc A/CN.4/727, p. 48–52, paras. 108–115; Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the ILC (2001), Volume II, Part II, Report of the Commission to the General Assembly on the Work of its Fifty-Third Session*, document A/CN.4/SER.A/2001/Add.1 (Part 2), p. 85, para. 5 of commentary to Article 26 (Compliance with peremptory norms): "*Those peremptory norms that are clearly accepted and recognized include ... the right to self-determination*".

131 UNHRC, *General Comment No. 12: The right to self-determination of peoples*, 13 March 1984, para. 5.

including for those outside their own territories.[132] As the Office of the UN High Commissioner for Human Rights ("**OHCHR**") has observed: "*Climate change not only poses a threat to the lives of individuals but also to their ways of life and livelihoods, and to the survival of entire peoples*".[133]

c. **Economic, social and cultural rights**, encompassing among others the right to health,[134] water,[135] food,[136] and to a clean, healthy and sustainable environment (right to a "**healthy environment**").[137] As regards the latter, the substantive elements of the right include "*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*".[138]

97. Those impacts are felt with the greatest intensity by vulnerable groups, such as women, children, indigenous peoples, disabled people, minorities, and people living in extreme poverty.[139]

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132 UNHRC, *General Comment No. 12: The right to self-determination of peoples*, 13 March 1984, para. 6.

133 Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change, 27 November 2015, p. 14, available at https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/COP21.pdf.

134 Universal Declaration of Human Rights (1948), Art. 25. UN. Committee on Economic, Social, and Cultural Rights, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) (2000), paras 4 and 11.

135 UNGA, *The human right to water and sanitation*, UNGA Res 64/292, 3 August 2010.

136 *See, inter alia*, UN Human Rights Council, *Report of the United Nations High Commissioner for Human Rights: Measures for minimizing the adverse impact of climate change on the full realization of the right to food*, UN Doc. A/HRC/55/37, 1 February 2024 (especially recommendations in paras. 40-47).

137 UN Human Rights Council, *The human right to a clean, healthy and sustainable environment*, Res A/HRC/Res/48/13, 18 October 2021; UNGA, *The human right to a clean, healthy and sustainable environment*, UNGA Res A/Res/76/300, 1 August 2022.

138 UN Human Rights Council, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 'Right to a healthy environment: good practices', UN Doc. A/HRC/43/53, 30 December 2019, para. 2.

139 UN Human Rights Council, *Report of the Secretary-General: the impacts of climate change on the human rights of people in vulnerable situations*, UN Doc. A/HRC/50/57, 6 May 2022. Likewise, IPCC AR6 and other scientific authorities have found that climate change has disproportionate effects on certain individuals and groups, including children, women, the elderly, poor people, disabled people, indigenous peoples, subsistence farmers and fishermen, people living in informal settlements, and people who are already face social marginalisation or vulnerability due to pre-existing inequalities and discrimination (IPCC AR6 WGII at 1692, 1765).

2. Interpretation of human rights obligations through the lens of climate change

98. As set out in **Section III** and **Section IV.B.1.**, above, it is undeniable that the harm resulting from anthropogenic GHG emissions on the climate system and parts of the environment directly affects the fundamental rights of individuals.[140] Moreover, the current trajectory indicates an exponential escalation of these impacts (see Section III). It is further incontrovertible that the climate harms impacting individuals' rights are reasonably foreseeable.[141]

99. In Albania's view, the close connection between environmental harm to the climate system and parts of the environment and human rights thus requires a "*harmonious interpretation*"[142] of States' obligations arising both from customs and treaty (environment and human rights) regimes. In that respect, while States' obligations to respect, protect, and fulfil human rights arises in various contexts related to climate change, these may appropriately be divided into the following three categories:[143]

100. *First*, States have prevention obligations in respect of significant harms to the climate system and parts of the environment which would foreseeably violate human rights.

101. The positive obligations to prevent human rights violations fall within the scope of the obligations to ensure respect for these rights. Most, if not all, substantive human rights give

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140 *See also* the intervenor submission of GLAN in the advisory proceedings on climate change before the IACtHR. For decades, the consequences of anthropogenic greenhouse gas emissions, and in particular the correlation between the combustion of fossil fuels by industry and the onset of a global warming crisis, have been widely recognised and understood, at the very latest, since the adoption of the UNFCCC in 1992. As regards, specifically, the threat of global warming beyond 1.5°C, at the very least since the Copenhagen Accord was reached in 2009. That knowledge is underlined by the periodic reports of the IPCC that have been produced since 1990 and are accepted by government members, and the ratification of the Paris Agreement by 193 States and the European Union in 2015. Moreover, since 2008, the UN Human Rights Council has passed a series of resolutions highlighting the current and predictable impacts of climate change on the effective enjoyment of human rights throughout the world.

141 UN Human Rights Council, "*Human rights and climate change*", *Resolution adopted by the Human Rights Council on 22 June 2017*, Res A/HRC/RES/35/20, 7 July 2017; UN Human Rights Council, "*Human rights and climate change*", *Resolution adopted by the Human Rights Council on 1 July 2016*, Res A/HRC/RES/32/33, 18 July 2016; UN Human Rights Council, "*Human rights and climate change*", *Resolution adopted by the Human Rights Council on 2 July 2015*, Res A/HRC/RES/29/15, 22 July 2015; UN Human Rights Council, "*Human rights and climate change*", *Resolution adopted by the Human Rights Council*, Res A/HRC/RES/18/22, 17 October 2011; UN Human Rights Council, "*Human rights and climate change*", *Resolution adopted by the Human Rights Council*, Res A/HRC/RES/7/23, 28 March 2008; UN Human Rights Council, "*Human rights and climate change*", *Resolution adopted by the Human Rights Council*, Res A/HRC/RES/10/4, 25 March 2009.

142 *The Environment and Human Rights*, Advisory Opinion OC-23/17, IACtHR, 15 November 2017, para. 44.

143 *See also Written Opinion of the Republic of Vanuatu*, *Advisory Opinion on the Climate Emergency and Human Rights*, IACtHR, 18 December 2023.

rise to a duty to prevent that is derived from the effective interpretation of a substantive right in conjunction with the respective human rights treaty's general protection clause, and requires that States parties to those treaties adopt legislative, judicial, administrative, educative, and other appropriate measures in order to fulfil their legal obligations.[144]

102. Consequently, UN human rights treaty bodies have engaged with the risks that climate change imposes on human rights, clarifying various obligations incumbent upon States.[145] For instance, with regard to the right to life, the Human Rights Committee has clarified that, "[i]*mplementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors*".[146] Likewise, a number of domestic jurisdictions have already found that States have an obligation to control and reduce GHG emissions from sources under their jurisdiction to prevent harm to individuals under their jurisdiction.[147]

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144 *See also* B. Baade, "*Due Diligence and the Duty to Protect Human Rights*", in H. Krieger et al. (eds), *Due Diligence in the International Legal Order* (Oxford), 2020 in respect of the duty to protect.

145 For the engagement of UN human rights treaty bodies with climate change, *see, inter alia*, Center for International Environmental Law, *States' Human Rights Obligations in the Context of Climate Change: Guidance Provided by the UN Human Rights Treaty Bodies* (reports for 2020, 2021, 2022, and 2023), available at https://www.ciel.org/reports/human-rights-treaty-bodies-2023/.

146 UNHRC, General Comment 36 on the right to life, para. 62; *Billy et al. v. Australia*, Communication No. 3624/2019, UN Doc. CCPR/C/135/D/3624/2019, 18 September 2023 (views adopted on 21 July 2022), paras. 8.3 and 8.5. *See also*, *Individual opinion by Committee Member Gentian Zyberi (concurring)*, where he pointed out that States have an individual responsibility to act with due diligence in taking mitigation and adaptation measures, based on the best available science, relative to the risk at stake and their capacity to address it, despite States' shared responsibility to address climate change. Given the greater burden that their emissions place on the global climate system, States with significant total emissions or very high per capita emissions (whether past or current emissions), such as Australia, must adhere to a higher standard of due diligence, as do States with greater capacities to take high-ambitious mitigation action. Zyberi opined that the obligation to reduce GHG emissions is inextricably linked to the right of islanders to enjoy their minority culture, because if effective mitigation measures are not implemented in a timely manner, adaptation will become impossible.

147 For example, in **The Netherlands**, the Supreme Court found that future sea level rise "*could render part of the Netherlands uninhabitable*" and that this constituted a violation of human rights even though "*this risk will only be able to materialise a few decades from now and that it will not impact specific persons or a specific group of persons but large parts of the population*". It ordered the Dutch government to limit GHG emissions to 25% below 1990 levels by 2020, consistent with UNFCCC and European Union (EU) targets, in order to protect rights to life and privacy (*Urgenda Foundation v. The State of The Netherlands* [2019] ECLI:NL:HR:2019:2006.). In **Germany**, the Bundesverfassungsgericht (Federal Constitutional Court), ordered the German government to enact policies aimed at achieving, at minimum, a 65% reduction in GHGs from 1990 levels by 2030, consistent with UNFCCC and EU targets, to protect rights to life, health, property, freedom, and intergenerational equity (*Neubauer, et al. v. Germany*, Bundesverfassungsgericht [BVerfG]). In **Belgium**, *VZW Klimaatzaak v. Belgium*, (finding that the Belgium Government had breached its duty to protect rights to life and privacy due to inadequate ambition in GHG mitigation (Brussels Court of First Instance, *VZW Klimaatzaak v. Kingdom of Belgium & Others*, 17 November 2021).

103. *Second*, States have an obligation to ensure that measures taken in response to climate change impacts do not result in human rights violations.

104. In its 2019 resolution on human rights and climate change, the Human Rights Council recalled the Paris Agreement's acknowledgment that "*climate change is a common concern of humankind and that* ***parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights****, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations, and the right to development, as well as gender equality, the empowerment of women and intergenerational equity*".[148] The UN Human Rights Council's inclusion of these rights raises the importance of intersectionality when addressing the climate crisis in a human rights context. Thus, as noted by the UN Special Rapporteur on the promotion and protection of human rights in the context of climate change, "***the intersection*** *of gender with race, class, ethnicity, sexuality, indigenous identity, age, disability, income, migrant status and geographical location* ***often compound vulnerability to climate change impacts, exacerbate inequity and create further injustice***".[149]

105. It follows that "[p]***articular care should be taken to comply with relevant human rights*** *obligations related to participation of persons, groups and peoples in vulnerable situations in decision-making processes* ***and to ensure that adaptation and mitigation efforts do not have adverse effects on those that they should be protecting***".[150] Likewise, the IACtHR has recognised that when responding to climate change through mitigation and adaptation policies, States should adopt an intersectional approach that is comprehensive and integrated in recognition of the duties that States have to guarantee and protect the rights of individuals or groups who are in situations of vulnerability or who are particularly vulnerable.[151]

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148 UN Human Rights Council, *Human rights and climate change: resolution / adopted by the Human Rights Council on 12 July 2019*, Res A/HRC/RES/41/21, 23 July 2019 (emphasis added).

149 UN Human Rights Council, *Resolution on Human Rights and Climate Change*, adopted on 12 July 2019, UN Doc A/HRC/RES/41/21 available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/223/65/PDF/G1922365.pdf?OpenElement

150 OHCHR, *Key Messages: Human Rights and Climate Change* (briefing note prepared in the context of COP21), available at https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/materials/KMClimateChange.pdf (emphasis added).

151 UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change, 26 July 2022, UN Doc A/77/226, para. 8, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/438/51/PDF/N2243851.pdf?OpenElement; UN Human Rights Council, *Resolution on Human Rights and Climate Change*, adopted on 12 July 2019, UN Doc A/HRC/RES/41/21 available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/223/65/PDF/G1922365.pdf?OpenElement, para. 5; IACtHR,

106. In that regard, Albania notes with utmost concern that "*women, girls, men and boys are affected differently by climate change and disasters, with many women and girls experiencing greater risks, burdens and impacts*".[152] This is confirmed by scientific evidence showing that women and girls are more likely to die in heatwaves, tropical cyclones, and other extreme events in certain countries, and are more likely to suffer poor mental health, partner violence, and food insecurity following extreme weather and other environmental shocks.[153] Furthermore, situations of crisis exacerbate pre-existing gender inequalities and compound the intersecting forms of discrimination against women.[154] In many contexts, gender inequalities limit the control that women and girls have over decisions governing their lives, as well as their access to resources such as food, water, agricultural input, land, credit, energy, technology, education, health services, adequate housing, social protection and employment. As a result of those inequalities, women and girls are more likely to be exposed to disaster-induced risks and losses relating to their livelihoods, and they are less able to adapt to changes in climatic conditions.[155]

107. Therefore, CEDAW has observed that "*well-designed disaster risk reduction and climate change initiatives that* ***provide for the full and effective participation of women*** *can advance substantive gender equality and the empowerment of women, while ensuring that sustainable development, disaster risk reduction and climate change objectives are achieved*".[156] At the UN Security Council, Ambassador Hoxha has also underlined that "***climate and environmental action and disaster risk reduction need to be gender-***

"Climate Emergency: Scope of Inter-American Human Rights Obligations", Resolution 3/2021 adopted by the IACtHR on 31 December 2021, available at: https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion_3-21_ENG.pdf.

152 CEDAW, *General Recommendation No. 37 (2018) on the gender-related dimensions of disaster risk reduction in the context of climate change,* UN Doc. CEDAW/C/GC/37, 13 March 2018. *See also* Commission on the Status of Women, *Resolutions 56/2 and 58/2 on gender equality and the empowerment of women in natural disasters*, adopted by consensus in March 2012 and March 2014.

153 Carbon Brief, *How Climate Change Disproportionately Affects Women's Health,* 29 October 2020, available at https://www.carbonbrief.org/mapped-how-climate-change-disproportionately-affects-womens-health/.

154 CEDAW, *General recommendation No. 37 (2018) on the gender-related dimensions of disaster risk reduction in the context of climate change*, UN Doc. CEDAW/C/GC/37, 13 March 2018. These include, *inter alia*, "*women living in poverty, indigenous women, women belonging to ethnic, racial, religious and sexual minority groups, women with disabilities, refugee and asylum-seeking women, internally displaced, stateless and migrant women, rural women, unmarried women, adolescents and older women, who are often disproportionately affected compared with men or other women*".

155 CEDAW, *General recommendation No. 37 (2018) on the gender-related dimensions of disaster risk reduction in the context of climate change*, UN Doc. CEDAW/C/GC/37, 13 March 2018 (emphasis added).

156 CEDAW, *General recommendation No. 37 (2018) on the gender-related dimensions of disaster risk reduction in the context of climate change*, UN Doc. CEDAW/C/GC/37, 13 March 2018 (emphasis added).

responsive, value and promote women and girls *as well as the youth* ***as agents of change*** *and directly address the specific risks they face*".[157]

108. In the same vein, the adverse impacts of climate change exacerbate existing armed conflicts and threaten to ignite new wars over scarce natural resources, both within and between States. Albania reminds the Court and all States about the conclusions of the World Bank Climate Change Group & Global Facility for Disaster Reduction and Recovery, which found that, by 2030, climate change has the potential to force an additional 130 million people into poverty, worsening existing vulnerabilities such as food and water insecurity, as well as socio-economic fragility and political grievances.[158] In regions already blighted by fragility, these impacts may heighten security challenges and exacerbate instability.[159] In that regard, the IPCC's Sixth Assessment Report acknowledges that climate solutions can open up new pathways for peace-building in regions susceptible to both conflict and climate change.[160]

109. *Third*, States have an obligation to provide redress for human rights violations that result from significant harms to the climate systems and parts of the environment. The right to an effective remedy for breaches of human rights is a general principle of international human rights law expressly set out in most international human rights treaties.[161] Beyond constituting an essential right on its own, access to remedy as a human right is a fundamental element for the realisation of other rights, particularly when these have been infringed as a

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157 Permanent Mission of Albania to the UN in New York, *Remarks by Ambassador Ferit Hoxha at the UN Security Council Open Debate on Climate Change, Peace and Security*, 13 June 2020, available at https://ambasadat.gov.al/united-nations/remarks-by-ambassador-ferit-hoxha-at-the-un-security-council-open-debate-on-climate-change-peace-and-security/ (emphasis added).

158 *See, inter alia,* the UNDP, *What is climate security and why is it important?*, 1 September 2023, available at https://ambasadat.gov.al/united-nations/remarks-by-ambassador-ferit-hoxha-at-the-un-security-council-open-debate-on-climate-change-peace-and-security/.

159 *See, inter alia,* the UNDP, *What is climate security and why is it important?*, 1 September 2023, available at https://ambasadat.gov.al/united-nations/remarks-by-ambassador-ferit-hoxha-at-the-un-security-council-open-debate-on-climate-change-peace-and-security/.

160 *See* IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability*, Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, 2022, available at https://www.ipcc.ch/report/ar6/wg2/.

161 *Universal Declaration of Human Rights*, adopted on 10 December 1948, Article 8; *International Covenant on Civil and Political Rights*, adopted on 16 December 1966, entered into force on 23 March 1976, Articles 2(3) and 9(5); *Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment*, adopted on 10 December 1984, entered into force on 26 June 1987, Articles 13 and 14; *International Convention on the Elimination of All Forms of Racial Discrimination*, adopted on 21 December 1965, entered into force on 4 January 1969, Article 6; *European Convention on Human Rights*, adopted on 4 November 1950, entered into force on 3 September 1953, Article 13; *African Charter on Human and Peoples' Rights*, adopted on 1 June 1981, entered into force on 21 October 1986, Article 7; *American Convention on Human Rights*, adopted on 22 November 1969, entered into force on 18 July 1978, Article 25; and *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women*, adopted on 9 June 1995, entered into force on 3 February 1995, Article 4(g).

result of State actions or omissions. International human rights law provides not just that an accessible and effective legal avenue must be guaranteed by the State, but also the possibility of obtaining redress.[162] The main human rights bodies and related mechanisms have recognised an obligation on States to provide remedies for human rights violations arising from climate change.[163]

110. In conclusion, States must take account of the nexus between climate change and human rights, and of their human rights obligations, together with and informing their climate change obligations in respect of anthropogenic GHG emissions – in essence, international environmental law and international human rights law cannot operate in silos.[164] In that sense, States should be encouraged to take proper account (*inter alia*) of the relevance of their human rights obligations to the interpretation of their obligations under environmental law and the climate change treaty regime and *vice versa.*

111. Throughout its almost eight-decade existence, this Court has played a significant role in interpreting and advancing rules and principles within international human rights law,[165] including by articulating noteworthy *obiter dicta* underscoring the imperative for State adherence to their international legal obligations, including those outlined in human rights

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162 Dinah Shelton, *Remedies in International Human Rights Law*, 3rd edn. (OUP), 2015. *See also* UNGA, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, adopted 16 December 2005.

163 *See, inter alia*, UNHRC, *Teitiota v. New Zealand*, Communication No. 2728/2016, UN Doc. CCPR/C/127/D/2728/2016, 23 September 2020 (views adopted on 24 October 2019) and UNHRC, *Billy et al. v. Australia*, Communication No. 3624/2019, UN Doc. CCPR/C/135/D/3624/2019, 18 September 2023 (views adopted on 21 July 2022); the CRC in five cases, respectively: *Sacchi et al v. Brazil, Argentina, Tűrkiye, France, and Germany.* Several cases are pending before the European Court of Human Rights. An advisory opinion is pending before the IACtHR.

164 UNHRC, *Billy et al. v. Australia*, Communication No. 3624/2019, UN Doc. CCPR/C/135/D/3624/2019, 18 September 2023 (views adopted on 21 July 2022), para. 7.5. *See also* para. 5.6: "[i]*nternational environmental legal obligations of States are indeed relevant to interpreting the scope of their duties under the Covenant. Treaties should be interpreted in the context of their normative environment*".

165 G. Zyberi, *The Humanitarian Face of the International Court of Justice: Its Contribution to Interpreting and Developing International Human Rights and Humanitarian Law Rules and Principles*, 2008. *See also* G. Zyberi, "*The Interpretation and Development of International Human Rights Law by the International Court of Justice*", in Martin Scheinin (ed.), *Human Rights Norms in 'Other' International Courts* (CUP), 2019, pp. 28-61; R. Wilde, "*Human Rights beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties*", *Chinese Journal of International Law*, 2013, 12, pp. 639-77; B. Simma, "*Human Rights before the International Court of Justice: Community Interest Coming to Life?*", in C. Tams and J. Sloan (eds), *The Development of International Law by the International Court of Justice* (OUP), 2013, pp. 301-25; R. Higgins, "*Human Rights in the International Court of Justice*", *Leiden Journal of International Law*, 2007, 20, pp. 745-51.

law.[166] Given that States remain central to the international legal system and are primarily responsible for upholding human rights within their respective jurisdictions, an acknowledgment from the Court, to the effect expressed in paragraph 109 above, would be aligned with the customary principle of systemic integration articulated in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, and would further strengthen the State obligation to ensure the right to an effective remedy and reparations in the context of climate change.

V. INTERGENERATIONAL EQUITY AND SUSTAINABLE DEVELOPMENT

A. THE NECESSITY FOR AN INTEGRATED AND HOLISTIC INTERPRETATION OF STATES' OBLIGATIONS IN RESPECT OF CLIMATE CHANGE

112. As identified in Section IV, States grapple with a fragmented legal framework when addressing climate change. International environmental law, comprising both treaty and customary obligations, delineates obligations dictating how States should respond to the climate emergency. The law of the sea echoes with many of these obligations, emphasising their interconnectedness. Moreover, the climate emergency is inherently a human rights issue.

113. The IACtHR acknowledged this interdependence of these legal frameworks in its 2017 Advisory Opinion, in which it noted the "*extensive recognition of the **interdependent relationship** between protection of the environment, sustainable development, and human rights in international law*".[167]

114. In the face of these interconnected and interdependent legal regimes, Albania urges the Court to identify and interpret States' obligations in an integrated and holistic fashion, informed, among other sources, by general principles of international law. Amongst these, of paramount importance is the principle of intergenerational equity, itself intrinsically connected with the principle of sustainable development, with the former providing the basis for the latter.[168] In its landmark report *Our Common Future* of 1987 (the "**Bruntland**

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166 *See, e.g., Armed Activities on the Territory of the Congo (New Application: 2002)* (*Democratic Republic of the Congo v. Rwanda*), Jurisdiction and Admissibility, Judgment, ICJ Reports 2006, p. 53, para. 127.

167 *The Environment and Human Rights*, Advisory Opinion OC-23/17, IACtHR, 15 November 2017, para. 52 (emphasis added).

168 E. Brown Weiss, "*Intergenerational Equity*", *Max Planck Encyclopaedia*, April 2021. *See also Our Common Future*, Annex 1: Summary of Proposed Legal Principles for Environmental Protection and Sustainable Development Adopted by the WCED Experts Group on Environmental Law. Inter-Generational Equity: "*2. States shall conserve and use the environment and natural resources for the benefit of present and future generations*".

Report"), the World Commission on Environment and Development understood "*sustainable development as development that meets the needs of the present without compromising the ability of future generations to meet their own needs*" and a "*process of change in which the exploitation of resources, **the direction of investments**, **the orientation of technological development**, **and institutional change are made consistent with future as well as present needs***".[169]

115. This holds significant importance within the context of the imperative to secure widespread access to clean technologies—an objective emphasised by both the IPCC and the Paris Agreement as critical for limiting global temperature increases to 1.5 degrees Celsius. At present, developed countries continue to invent the vast majority of low-carbon technologies, with Japan, the United States, Germany, South Korea, and France accounting for 75% of low-carbon inventions patented between 2005 and 2015.[170] Although developing countries such as Albania aim to become major innovators in low-carbon technologies, in the short term and in view of the urgency of fighting climate change, considerable international technology transfer is required.

116. This transfer can be expedited through mechanisms such as the sharing of intellectual property rights and financing initiatives, alongside foreign direct investments ("**FDI**"). However, current features of the relevant protection frameworks (including intellectual property regimes ("**IPR**") or investment laws) can pose significant barriers to effective collaboration in technology transfer endeavours. In that regard, the impasse that negotiations surrounding the sharing of intellectual property rights have reached, with the UNFCCC Technology Executive Committee failing to provide policy recommendations for the establishment of a climate friendly IPR regime, underscore an ongoing lack of consensus.[171]

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169 S. Imperatives, *Report of the World Commission on Environment and Development: Our Common Future*, 1987, para. 30 (emphasis added). *See also* D. Tladi, *The principles of sustainable development in the case concerning Pulp Mills on the River Uruguay* in *Sustainable Development Principles in the Decisions of International Courts and Tribunals: 1992-2012*, Cordonier Segger, M.-C., & Weeramantry, J.C.G. (Eds.). (2017) (1st ed.), p.253; and L. Caldeira Brant, Direito ao Desenvolvimento como Direito Humano (The right to development as a human right), Revista brasileira de estudos políticos, 1995-07, Vol. 81 ("*O termo desenvolvimento sustentável é utilizado pioneiramente no Relatório da Comissão Mundial sobre Meio Ambiente e Desenvolvimento, intitulado Our Common Future, apresentado em 20 de março de 1987 por Gro Harlem Brundtland, cuja essência do conceito consiste no "processo de mudança em que a exploração de recursos, a direção dos investimentos, a orientação do desenvolvimento tecnológico; e as mudanças institucionais estão todas em harmonia e aumentam o potencial atual e futuro para atender às necessidades e aspirações humanas*").

170 Dussaux, D. & Dechezleprêtre, A. & Glachant, M. (2017) Intellectual property rights protection and the international transfer of low-carbon technologies. i3 Working Papers Series, 17-CER-05.

171 See for e.g., H. de Coninck, A. Sagar, Part II Analysis of the Provisions of the Agreement, 15 Technology Development and Transfer (Article 10) in *The Paris Agreement on Climate Change: Analysis and Commentary*, Oxford Scholarly Authorities on International Law, p. 262: "*Probably the*

Similarly, reforms are imperative to fully harness the potential of FDI as a catalyst for sustainable development, a topic explored in further detail in **Section V.B.**, below.

B. THE IMPACT OF CLIMATE CHANGE OBLIGATIONS ON FOREIGN DIRECT INVESTMENT AS A TOOL FOR SUSTAINABLE DEVELOPMENT

117. As has been noted by the OECD, FDI is an integral part of an open and effective international economic system and a major catalyst for sustainable development.[172] If directed properly, FDI can play a major role in helping States meet their climate change obligations (especially in developing States like Albania). To do so, States must be able to undertake certain measures aimed at ensuring that FDI facilitates the transition from high-emission investment to low-emission investment, as stipulated by Article 2(1)(c) of the Paris Agreement. However, as explained in more detail below, they should be able to adopt those measures without the fear of having to face substantial international claims by foreign investors impacted by those measures.

118. The international investment architecture that governs FDI comprises thousands of international investment agreements ("**IIAs**"). Those agreements assist in promoting and protecting FDI. They encourage foreign investments by obliging States to treat those investments in accordance with certain international law standards, and by providing access to investor-State arbitration proceedings to resolve disputes. Although those IIAs cover foreign 'investments' generally – including high-emission investments – they are lagging significantly behind climate commitments and are generally regarded as lacking the necessary provisions to support climate action. There is, thus, a tension between FDI commitments assumed by States in IIAs), on the one hand, and climate change commitments assumed by States in the Paris Agreement as well as other climate agreements, on the other hand. That asymmetry is highly problematic for States, not least because it has led to a number of arbitral awards that have found States liable for breaching various IIAs based on the adoption of environment measures. In light of these circumstances, it is critical to strike a right balance between the necessity for States to adapt their legislations in response to the

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most feverishly debated issue is intellectual property rights (IPR). Developed countries, which generally tend to have well-structured, effective intellectual property (IP) regimes that are a stimulus and not an impediment for innovation in the private sector, regard the absence of IP regimes in developing countries as a barrier to technology transfer. Developing countries consider the IP regime in a different light; they see it as a manifestation of the technological hegemony of the developed world, and the unwillingness to discuss IPR issues as evidence that developed countries are not genuinely interested in sharing technology".

172 *See, e.g.*, OECD, *Foreign Direct Investment for Development*, 2002, p. 3, available at https://www.oecd.org/investment/investmentfordevelopment/1959815.pdf.

climate crisis, and the stability and predictability of the State's regulatory framework to promote FDI.

1. The need to balance evolving climate change obligations and State commitments to promote FDI

119. As mentioned, IIAs are a prominent part of the public policy framework governing finance flows and FDI in general. The existing regime of IIAs consists of approximately 3,300 treaties, with nearly 85% of those signed between 1959 and 2009 and around 2,300 of them still in force.[173] The IIAs that were signed before 2010 – commonly referred to as 'old generation' IIAs – form the basis of virtually all investor-State arbitrations to date. Those IIAs contain broad standards of protection (e.g., fair and equitable treatment, non-discrimination, and protection against unlawful expropriation) but pay scant to no attention to ensuring States have regulatory flexibility to pass measures in favour of climate action. On top of this, recent efforts at modernising IIAs have not yet produced meaningful effect. Rather, both old and new IIAs have been widely criticised, including by UNCTAD,[174] for "*lacking pro-active provisions aimed at effectively supporting climate action*".[175] That lack of effective environmental protection provisions in IIAs has led to a number of disproportionate arbitral awards (referenced in Section V.B.2., below) in cases involving environmental measures which the relevant States argued fell within their right to regulate. As explained below, those awards run the risk of discouraging States from pursuing climate-friendly policies, or may, at least, make them more expensive, thereby frustrating the effectiveness and efficiency of efforts to tackle climate change.

120. The asymmetry between climate change commitments and the commitments to promote and protect FDI set out in IIAs – especially old generation agreements – requires a balancing exercise to align the competing obligations of States under both frameworks. As acknowledged in a recent UN study on the right to development in investment law, striking the right balance is a complicated task but providing regulatory flexibility to States is critical

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173 UNCTAD, *The International Investment Treaty Regime and Climate Action*, IIA Issues Note, September 2022, p. 3, available at https://unctad.org/system/files/official-document/diaepcbinf2022d6_en.pdf.

174 UNCTAD, *The International Investment Treaty Regime and Climate Action*, IIA Issues Note, September 2022, p. 3, available at https://unctad.org/system/files/official-document/diaepcbinf2022d6_en.pdf.

175 A notable example of this is the Energy Charter Treaty, which, despite the efforts to modernise it, has been abandoned by numerous States – including recently the United Kingdom – for being incompatible with the climate goals. *See* UK Government, Press release 'UK Departs Energy Charter Treaty', 22 February 2024, available at https://www.gov.uk/government/news/uk-departs-energy-charter-treaty#:~:text=The%20UK%20government%20confirms%20its,to%20agree%20vital%20modernisation%20fail.&text=The%20UK%20will%20leave%20the,today%20(Thursday%2022%20February.

as climate change regulations are highly dynamic, requiring adaptation in a non-linear and unpredictable way to respond to ongoing risks and the emergence of scientific developments.[176] Normative reform of IIAs is critical to that balancing exercise, and States should engage in a coordinate effort to achieve that. For instance, including specific climate-friendly provisions across IIAs (e.g., by carving-out climate and human rights measures from treaty protection standards[177]) would afford greater flexibility for States to adopt climate mitigations measures and direct FDI towards climate-resilient projects. It would also provide more certainty and predictability to foreign investors, which would, in turn, likely attract greater low-emission FDI.

121. However, mindful that normative reform of IIAs is challenging and time consuming (as it would involve aligning thousands of treaties with emerging climate obligations[178]), arbitrators must recalibrate how they approach the tension between climate and investment protection obligations when exercising their interpretative discretion in investor-State cases. In that sense, arbitrators should be encouraged to take proper account (*inter alia*) of the provisions of the Paris Agreement and the express reference to the right to development in its preamble, as well as other relevant provisions and legal instruments, including UN resolutions on climate change. They should also be encouraged to allow greater community participation and consultation, for example, through *amicus curiae* briefs when appropriate.[179] An acknowledgement from the Court to that effect would be welcome as it would draw arbitrator attention to this important but largely overlooked issue. Certainly, when the Court has made pronouncements that have significance for the delineation of obligations relevant to FDI, arbitrators have paid close and repeated heed thereto.

122. Albania, much like other developing States, wishes to be able to combat climate change while, at the same time, attracting FDI and pursuing economic development strategies. That is particularly so because, as noted in previous Sections, climate change is threatening

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176 UN Human Rights Council, *Study by the Expert Mechanism on the Right to Development – Right to development in international investment law*, UN Doc. A/HRC/EMRTD/7/CRP.2, 9 March 2023, para. 46.

177 For more examples of proposed amendments for climate-responsive IIAs, *see:* UNCTAD, *The International Investment Treaty Regime and Climate Action*, IIA Issues Note, September 2022, p. 16, available at https://unctad.org/system/files/official-document/diaepcbinf2022d6_en.pdf.

178 Another obvious challenge is that that most IIAs contain sunset clauses that can range from 5 to 20 years.

179 *Amici* often struggle to present effective arguments in investor-State cases as they have been afforded very limited participation and most tribunals interpret the 'significant interest' test to participate narrowly. *See, e.g., Odyssey Marine Exploration, Inc. (USA) v. United Mexican States*, ICSID Case No. UNCT/20/1, Procedural Order No. 6, Professor Sands' Dissenting Opinion, para. 2.

Albania's economic growth and population. Indeed, as noted by the IMF in relation to the impact of climate change in Albania:

> "*The increasing risk of river floods and droughts is associated with higher risk of pressure on water supply infrastructure and given the high reliance of the country on hydropower, putting at risk electricity generation* […] *Sea level rise is also expected to affect coastal population and tourism adversely. Increased temperatures and precipitation variability are expected to have a negative impact on the agricultural sector, which represents about 20 percent of the economy*".[180]

123. Because of the risk of floods and droughts that have put electricity generation at great risk, there will be concrete opportunities for FDI to build infrastructure for renewable energy sources for electricity generation in Albania. It is, therefore important that Albania – and other developing States facing similar issues – have the necessary flexibility to implement measures that enable and incentivise that FDI without the risk of having to face the sorts of disproportionate arbitral awards referred to in the following paragraphs.

2. Recent arbitral awards illustrate the imbalance between climate change obligations and commitments to promote FDI

124. As noted, the lack of pro-active provisions addressing environmental issues in IIAs has led to a number of arbitral awards against States in investor-State cases involving environmental issues.[181] In some recent cases, arbitral tribunals acknowledged the tension between climate change and FDI commitments, but nonetheless found in favour of the investors.[182] Those cases illustrate the consequences of the asymmetry between climate change obligations and FDI commitments and underscore the importance of striking a right balance between those two.

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180 International Monetary Fund, *Albania – Selected Issues*, 14 November 2022), p. 3, available at https://www.elibrary.imf.org/view/journals/002/2022/363/article-A001-en.xml.

181 It is notable that, according to UNCTAD, roughly 15% of all 1,190 known investor-State arbitration cases are related to environmental protection, and the numbers could be higher as many cases are kept confidential. *See* UNCTAD, *Treaty-Based Investor–State Dispute Settlement Cases And Climate Action*, IIA Issues Note, September 2022, p. 2, available at https://unctad.org/system/files/official-document/diaepcbinf2022d7_en.pdf.

182 *See*, e.g., *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14, Final Award, 23 August 2022, para. 10.

125. Three recent high-profile cases relevant to the effort by States to protect the environment are *RWE v. Netherlands*,[183] *Eco Oro v. Colombia*[184] and *Rockhopper v. Italy*.[185]

a. ***RWE v. Netherlands***. This is the first ICSID case that the Netherlands has faced and arose out of the Dutch Government's decision to ban the burning of coal for electricity generation by 2030 in accordance with the country's Paris Agreement commitments.[186] Although the case is pending, it is indicative of the litigation risk that States face when implementing regulations for phasing out fossil fuels.

b. ***Eco Oro v. Colombia***. In this case, *Eco Oro* held mining exploration and exploitation rights in an area that overlapped with the *páramo* ecosystem. Colombia enacted a mining ban and later withdrew *Eco Oro*'s permits. In the arbitration, Colombia relied on the environmental carve-out set out in Article 2201(3) of the Canada-Colombia FTA,[187] but the tribunal concluded that the measures breached the FTA and deferred compensation to a later (still pending) stage. This case has two relevant repercussions. First, it indicates that investor-State tribunals are willing to find that measures taken to protect the environment can constitute a breach of an IIA. Second, the environmental protection carve out contained in the Colombia-Canada FTA, calls into question the effectiveness of certain safeguards aimed at protecting the State's right to regulate in favour of the environment.

c. ***Rockhopper v. Italy***. This case concerned a dispute arising from Italy's denial of *Rockhopper Italia*'s application for a production concession to exploit the "*Ombrina Mare*" oil field. The denial of that application resulted from the passage of a law that confirmed the banning of exploitation of offshore liquid and gas hydrocarbons in

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183 *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/4 (pending).

184 *Eco Oro v Colombia*, ICSID Case No ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021.

185 *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14, Final Award, 23 August 2022.

186 UNCTAD, *Treaty-Based Investor–State Dispute Settlement Cases And Climate Action*, IIA Issues Note, September 2022, p. 2, available at https://unctad.org/system/files/official-document/diaepcbinf2022d7_en.pdf.

187 *See Canada-Colombia FTA*, Article 2203, available at https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/22.aspx?lang=eng ("*For the purposes of Chapter Eight (Investment), subject to the requirement that such measures are not applied in a manner that constitute arbitrary or unjustifiable discrimination between investment or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary: a. To protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life and health* […]").

waters within a 12-mile limit of the Italian coast. The majority of the tribunal found Italy liable for unlawful expropriation and awarded *Rockhopper* EUR 184 million in compensation. While the tribunal expressly acknowledged the importance of environmental concerns in that case,[188] it ultimately sidestepped the environmental and social considerations that were said to be central to the Italian Government's decision to pass the relevant legislation.

126. A more general example that shows the magnitude of the risk that States face when implementing measures to incentivise FDI in climate-friendly industries (e.g., renewable energy) concerns the recent investor-State cases challenging legislative measures to incentivise the development of the renewable energy in Europe. During the late 1990s, a number of European States introduced legislative measures under a special financial regime of feed-in-tariffs in order to attract foreign investors for renewable energy projects. However, the impact of the 2008 global financial crisis rendered those measures unsustainable and, therefore, a series of amendments were adopted to that special regime in the 2010s.[189] The result of those measures was an unprecedented amount of investor-State claims against Spain as well as other European countries with similar regimes. Some of those claims culminated in enormous monetary awards,[190] and Spain alone is already facing over one billion Euros in adverse Awards rendered in renewables claims.[191] What is more concerning is that a recent study published in *Science* estimates that "[g]*lobal action on climate change could generate upward of $340 billion in legal claims from oil and gas investors"*, which is *"more than the total level of public climate finance globally in 2020 ($321 billion)*".[192]

127. These cases provide a good indication of the serious risks confronting States that seek to adopt measures aimed at protecting the environment. They are also an indication that

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188 *See, e.g.*, Rockhopper *Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14, Final Award, 23 August 2022, para. 10.

189 *See, e.g., RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum, 30 December 2019, paras. 177-189.

190 *See, e.g., Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, para. 486 (which culminated in an award of **EUR 128 million**); *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Award, 31 May 2019, para. 37 (which culminated in an award of **EUR 290 million**); *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018, para. 748 (which culminated in an award of **EUR 112 million**).

191 G. Keeley, "*Spain faces €8 billion in renewable legal claims over past solar boom*", *EuroNews*, 27 December 2022, available at https://www.euronews.com/my-europe/2022/12/27/spain-faces-8-billion-in-renewable-legal-claims-over-past-solar-boom.

192 Science, *Investor-state disputes threaten the global green energy transition*, Vol. 376, Issue 6594, May 2022, available at https://www.science.org/doi/epdf/10.1126/science.abo4637.

investor-State tribunals have so far interpreted the State's right to regulate in an inappropriately restrictive manner that does not afford the necessary flexibility for States to meet their climate obligations. This problem is exacerbated by the fact those tribunals regularly apply valuation methodologies based on projected future income (e.g., the Discounted Cash Flow methodology) rather than costs-based methodologies. This has resulted in highly inflated arbitral awards – most prominently in the extractives sectors – running into the hundreds and even billions of US dollars.[193] The risk of disproportionately high compensation under those types of awards risks constraining States from meeting their climate obligations and make ambitious climate actions very expensive to the point where they could deter them altogether.

128. In sum, the lag between IIAs and climate commitments, coupled with the risk of facing disproportionate awards as a result of the implementation of climate mitigation measures, puts the transition from high-emission FDI to low-emission FEI at risk. For this reason, a pronouncement from the Court as the one identified in paragraph 120 above would be useful and would have real world effects.

VI. LEGAL CONSEQUENCES FOR STATES THAT HAVE CAUSED SIGNIFICANT HARM TO THE CLIMATE SYSTEM AND OTHER PARTS OF THE ENVIRONMENT

129. This Section addresses the legal consequences for States arising from breaches of their due diligence obligation to prevent transboundary harm by anthropogenic GHG emissions described in Section IV above. As noted in that Section, that obligation arises from the "*no-harm*" rule, which is a well-established principle of customary international law first set out in the *Trail Smelter* arbitration.[194] Since the treaty regime on climate change provides no specific rules regarding the legal consequences for breaching that obligation,[195] the general

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193 *See, e.g., ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian* Republic *of Venezuela*, ICSID Case No. ARB/07/30, Award, 8 March 2019 (**USD 8.7 billion**); *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019 (**USD 5.9 billion**).

194 *See* para. 66 above.

195 Indeed, no new *lex specialis* that could set aside the law of State responsibility was created by the climate change treaty regime. In fact, in respect of the UNFCCC, to avoid any risk of misunderstanding, a number of States made declarations specifying, for instance, that their ratification: "*shall, in no way, constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change, and that no provisions in the Convention can be interpreted as derogating from the principles of general international law*". As regards the Paris Agreement, although paragraph 51 of the Decision 1/CP.21 states the following: "*Agrees that Article 8 of the Agreement does not involve or provide a basis for any liability and compensation*"; COP decisions cannot change the substance of (legally binding) provisions.

rules of State responsibility apply. As explained in more detail below, affected States can seek full reparation – including by way of monetary compensation – against States that have breached, and are breaching, their obligation to prevent transboundary harm.

130. Before addressing those rules, Albania notes four overarching points:

a. The Court is aware of the general rules on State responsibility. Thus, Albania refrains from outlining every detail of those rules and refers the Court only to the most relevant aspects for the purposes of these advisory proceedings.

b. This Section focuses exclusively on the main legal consequences for States that breach the due diligence obligation to prevent transboundary harm by anthropogenic GHG emissions (described in Section IV above). However, that should not be regarded as an indication that there might not be additional consequences arising from breaches of other climate-related obligations (e.g., obligations arising from human rights violations and procedural obligations) that might be subject to special liability regimes or mechanisms for redress.

c. This submission does not address the issue of causation in detail as it goes beyond the scope of the questions put to the Court and will have to be assessed carefully on the facts of each case. Albania simply observes that establishing a causal link in cases involving climate change will be extremely complicated given that climate change is a large-scale and multi-causal event. For that reason, Albania respectfully submits that the causation test in the context of cases involving the breach of the obligation to prevent harm to the climate should not be the "*but-for*" test, but the lower "*sufficiently direct and certain*" test used by the Court in the *Armed Activities* case, where it made clear that "*the causal nexus required may vary depending on the primary rule violated and the nature and extent of the injury*".[196] It will thus be enough to establish a sufficient connection between a State's actions – or failure to act – and the harm to the environment. Otherwise, it would be virtually impossible to establish a breach, let alone value the loss.

d. As noted, climate change is a large-scale event caused in a cumulative manner by the action of a plurality of States, and the effects of which are felt by <u>all</u> States (some much more significantly more than others). An individual State breaches its obligation to prevent harm to the climate the moment when the level harm reaches a threshold

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Consequently, nothing precludes a State from seeking remedies under the general rules of international law for loss and damage.

196 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Reparations, Judgment, ICJ Reports 2022, p. 13, para. 93.

that causes "*significant damage*"[197] to the environment (see Section IV). Upon hitting that threshold, the conduct, in the aggregate, becomes wrongful as a "*composite act*" under Article 15 of the ARSIWA, with the breach extending over the "*entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation*".[198] It is thus possible that certain States may have engaged in attributable conduct extending back in time decades, or even more. In addition to that, a State will be responsible for its own breaches even if there are other States that are also responsible for the wrongful act.[199] In such case, an injured State "*can hold each responsible State to account for the wrongful conduct as a whole*",[200] and "*each State is separately responsible for conduct attributable to it".*[201] This shared responsibility takes expression in the climate change regime through, most notably, the principle of common but differentiated responsibilities reflected in Articles 3(1) and 4(1) UNFCC.

131. The following sub-Section A addresses the legal consequences for States arising from wrongful conduct (i.e., from breaches of their obligation to prevent transboundary harm). Sub-Section B then explains that States can also be liable, under certain specific circumstances, for acts that are lawful but cause transboundary harm.

A. LEGAL CONSEQUENCES ARISING FROM INTERNATIONAL WRONGFUL ACTS

132. To the extent that States breach their obligation to prevent harm set out in Section IV, they commit a wrongful act that entails international responsibility.[202] States that are internationally responsible for breaches of that obligation can be held accountable under the general principles of State responsibility. In particular, the international responsibility of States entails the following obligations taken in turn below: (i) the "*obligation to cease the*

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197 *Pulp Mills*, para. 101.

198 ILC, "*Articles on Responsibility of States for Internationally Wrongful Acts*", *with commentaries*, Yearbook of the International Law Commission, 2001, Vol. II, Part Two, Article 15(2).

199 *See, e.g.*, ILC, "*Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*", *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, Article 47(1).

200 ILC, "*Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*", *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, Article 47, comment (2).

201 ILC, "*Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*", *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, Article 47, comment (3).

202 *See, e.g.*, ILC, "*Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*", *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, Article 28(2); *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, ICJ Reports 2012, p. 99, para. 137.

[unlawful] *act*" and "*offer appropriate assurances and guarantees on non-repetition*" (Article 30 of ARSIWA); and (ii) the "*obligation to make full reparation for the injury caused by the internationally wrongful act*" (Article 31 of ARSIWA).

1. Responsible States must cease their wrongful conduct and offer guarantees of non-repetition

133. As noted, States that commit an international wrongful act are under an obligation to perform the obligation breached and cease the wrongful act.[203] Cessation is particularly relevant in this context because climate change is a continuous event that will aggravate unless high emissions of GHG do not cease. In short, cessation entails stopping all wrongful conduct. In the context of this case, that translates into taking concrete steps to ensure immediate and significant reductions of GHG consistent with the projections of the IPCC reports,[204] and the pathways identified in the Production Gap[205] and Emission Gap Reports of the UNEP. [206] This may involve taking a wide range of actions depending on the State involved and its particular circumstances. For instance, it may require industrialised States to adopt legislative measures to require emissions reductions across a wide range of industries or may require more extreme measures such as refusing to approve or not supporting any new fossil fuel projects.

134. An additional consequence contemplated in Article 30(b) of ARSIWA along with the obligation of cessation, is the provision of assurances and guarantees of non-repetition by the responsible State. This can also involve a wide number of measures by responsible States. For example, it may require certain developed States to announce ambitious and verifiable targets for reducing its GHG including by revising nationally determined contributions (NDCs) under the Paris Agreement or committing to the implementation of specific measures to transition to renewable energy sources.

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203 ILC, "*Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*", *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, Article 30.

204 *See, e.g.*, IPCC, "*Summary for Policymakers*", *Synthesis Report of the IPCC Sixth Assessment Report* (AR6), March 2023.

205 *See, e.g.*, UNEP, *Production Gap Report 2023*: *Phasing down or phasing up? Top fossil fuel producers plan even* more *extraction despite climate promises*, November 2023.

206 UNEP, *Emissions Gap Report 2023: Broken Record. Temperatures reach new highs, yet world fails to cut emissions,* November 2023.

2. Responsible States are bound to provide full reparation.

135. In addition to the obligations of cessation and providing guarantees of non-repetition, States are also under further obligations to provide full reparation for the injury they have caused.[207] Under international law, reparation can take the form of restitution, compensation or satisfaction.[208]

136. *Restitution* is generally regarded as the first of the forms of reparation available to a State injured by an internationally wrongful act.[209] However, as stated in Article 34 of ARSIWA, restitution applies to the extent it "*is not materially impossible*" and "*does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation*". In the context of this case, environmental harm and its impact on climate change is irreversible and hence restitution, at least insofar as it concerns the restoration of the climate system to its previous state, is impossible.[210] However, that is not to say that restitution might not be possible under certain circumstances. For example, it could be used to recognise the sovereignty, territory and maritime entitlements of States, peoples and vulnerable individuals perpetually. It could also be relevant in relation to certain breaches of discrete parallel obligations arising, for example, from human rights law (e.g., restoring the rights of indigenous peoples to their lands, territories and resources affected by climate change).

137. Whenever restitution is not possible, responsible States are under an obligation to "*compensate*" the affected State(s) for any financially assessable loss caused by the

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207 *See Case Concerning the Factory at Chorzów (Claim for Indemnity) (Merits)*, Judgment of 13 September 1928, PCIJ, Series A-No. 17, p. 47, Annex 288 (stating that that States are required to "*wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed*").

208 *See*, e.g., *Pulp Mills*, para. 273 ("[C]*ustomary international law provides for restitution as one form of reparation for injury, restitution being the re-establishment of the situation which existed before occurrence of the wrongful act. The Court further recalls that, where restitution is materially impossible or involves a burden out of all proportion to the benefit deriving from it, reparation takes the form of compensation or satisfaction, or even both*").

209 ILC, "*Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*", *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, Commentary to Article 36, para. 1 ("*In accordance with article 34, restitution is the first of the forms of reparation available to a State injured by an internationally wrongful act*").

210 As to the "*irreversible*" nature of environmental damage: *see Gabčíkovo-Nagymaros*, para. 140 ("[I]*n the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage*").

internationally wrongful.[211] In terms of damage to the environment, it is uncontroversial that such damage is compensable. Indeed, as noted by the Court in *Certain Activities* (2018):

> "[D]*amage to the environment, and the consequent impairment or loss of the ability of the environment to provide goods and services, is compensable under international law. Such compensation may include indemnification for the impairment or loss of environmental goods and services in the period prior to recovery and payment for the restoration of the damaged environment*".[212]

138. Compensation is therefore due in case of damages that arise from breaches of the obligation to prevent transboundary harm. As stated in Article 36 of ARSIWA, such compensation should include all types of damages – pecuniary and non-pecuniary – as long as they are "*financially assessable*".[213] Those damages can arise from a very wide range of circumstances caused by climate change, including rises to sea levels, coral bleaching and loss of biodiversity, loss of territory and resources, changes to climatological conditions, and impairment to human health and life.

139. In terms of valuation of damages, Albania refers the Court to its previous findings that "*international law does not prescribe any specific method of valuation for the purposes of compensation for environmental damage*", and that it is thus "*necessary* […] *to take into account the specific circumstances and characteristics of each case*".[214] Valuing the exact damage arising from harm caused by climate change is extremely complicated – if not actually impossible – in many cases. However, such complexity cannot excuse responsible States from their international wrongful conduct. It is Albania's respectful submission that, in circumstances of extreme difficulty, compensation should be calculated, first, by agreement between the States involved, or, failing that, by approximation. This approach would be consistent with the Court's finding that:

> "*The absence of certainty as to the extent of damage does not necessarily preclude it from awarding an amount that it considers approximately to reflect the value of the impairment or loss of environmental goods and services*".[215]

140. Finally, if restitution or compensation cannot provide full reparation, then a third form of reparation would be *satisfaction*. According to Article 37 of ARSIWA, that can take the form

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211 ILC, "*Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*", *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, Article 36.

212 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation Judgment, ICJ Reports 2018, p. 15 ("***Certain Activities* (2018)**"), para. 42.

213 ILC, "*Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*", *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, Article 36.

214 *Certain Activities* (2018), para. 52.

215 *Certain Activities* (2018), para. 86.

of "*an acknowledgment of breach, an expression of regret, a formal apology or another appropriate modality*".[216] Those forms of satisfaction can play an important role in terms of accountability and addressing the moral dimensions of climate change. For instance, when a State acknowledges its responsibility and expresses its regret for contributing to climate change, it not only addresses the specific harm caused but also sets the stage for collective responsibility and global cooperation in mitigating climate-related impacts. That type of acknowledgment would help foster a sense of shared responsibility among nations. Satisfaction can also be particularly relevant to provide certain assurances to future generations and restore dignity of certain groups of individuals – especially vulnerable groups of individuals – and contribute to the cultural and social validation of States and peoples that have suffered losses to their cultural heritage.

B. LEGAL CONSEQUENCES ARISING FROM LAWFUL ACTS THAT INVOLVE A RISK OF CAUSING SIGNIFICANT TRANSBOUNDARY HARM THROUGH THEIR PHYSICAL CONSEQUENCES

141. In addition to legal consequences for wrongful acts set out above, States can also be held liable for failing to prevent harm in the context of activities that pose a significant risk of transboundary harm – e.g., certain industrial, mining, energy production and nuclear activities. As explained below, in those cases, the liability regime is more lenient and structurally different from the general rules of State responsibility outlined above, even though they might come into play under certain circumstances.

142. As indicated in the previous Section, the framework of State responsibility for unlawful acts comprises a set of secondary obligations that govern the legal consequences of those acts (i.e., the obligations to cease, restore and repair). In contrast, the framework for State liability arising from transboundary harm caused by lawful activities is made up of a set of primary rules that impose only an obligation of prevention and mitigation.[217] That obligation, which stems from the "*no-harm*" rule, is set in motion by the potential occurrence of harm and is of due diligence in nature.[218] It requires the liable State to take appropriate measures to prevent harm and, when harm occurs, to eliminate it, if possible, and, if not, to mitigate it. These obligations are reflected in Article 3 of the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities as follows: "[t]*he State of origin shall take*

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216 ILC, "*Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*", *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, Article 36.

217 *See, e.g.*, A. Tanzi, "*Liability for Lawful Acts"*, *Max Planck Encyclopaedias of International Law*, January 2021, para. 2.

218 *See, e.g.*, A. Tanzi, "*Liability for Lawful Acts"*, *Max Planck Encyclopaedias of International Law*, 2021, para. 2.

all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof".[219] That obligation of prevention arising from lawful hazardous activities is also an objective emphasised by Principle 2 of the Rio Declaration,[220] has been included in numerous international conventions,[221] and has been confirmed by the Court in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* as forming part of the "*corpus of international law relating to the environment*".[222]

143. Thus, unlike under the general rules of State responsibility (which trigger restoration and reparation obligations), liability for transboundary harm caused by lawful activities – in principle – requires liable States only to take preventive and mitigation measures. Those measures can be taken individually by the State of origin or in "*consultation*" with other affected States (*see* Article 9 of the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities).[223] Within that context of consultation, compensation is to be negotiated by the States involved and, as such, will normally fall short of providing full reparation. However, if the due diligence standards under the primary obligation of harm prevention and mitigation are breached, then the rules of State responsibility for wrongful acts outlined above will come into play.[224] Of course, the difficulty in such cases will be to determine whether the State of origin has adopted sufficient measures to meet the requisite threshold of due diligence, which should be measured against conduct that is "*generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance*".[225]

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219 *See* ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, Article 3.

220 Rio Declaration, Principle 9.

221 *See, e.g.*, *Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal*, adopted on 10 December 1999, Articles 2 and 3; *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, signed on 17 March 1992, entered into force on 6 October 1996, Articles 3 and 6; *Convention on the Transboundary Effects of Industrial Accidents*, signed on 14 March 1992, entered into force on 19 April 2000, Article 17.

222 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226, para. 29.

223 *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, Article 9. *See also* ILC, *Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, with commentaries*, 2006, Principle 5.

224 *See* A. Tanzi, "*Liability for Lawful Acts*", *Max Planck Encyclopedias of International Law*, January 2021, para. 15.

225 ILC, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries*, 2001, Commentary to Article 3, para. 11.

144. In sum, States that breach their international obligation to prevent transboundary harm must be held accountable in accordance with the rules of State responsibility and liability outlined above. As noted in Section III above, the science is unequivocal that the high emission of anthropogenic GHG causes harm to the environment and has contributed significantly towards climate change. The science is also clear that that "*the largest share of historical and current global emissions of greenhouse gases has originated in developed countries*",[226] despite the fact that developing counties – particularly small island States – are disproportionately affected to the point where some are facing an "*existential threat*".[227] Those developed and industrialised States must bear the consequences of their actions. They must cease their unlawful conduct by substantially reducing GHG emissions and provide full reparation to affected States. In determining that reparation, States, as well as relevant courts and tribunals hearing climate-related claims, should contemplate various forms of redress ranging from (*inter alia*) restitution, where it is possible, to reparation in the form of monetary compensation and financial and technological assistance to affected States. Accountability is the only way to compensate affected States and protect the rights of peoples and individuals of the present and future generations affected by the adverse effects of climate change.

VII. SUBMISSIONS

145. For the reasons set out in this Written Statement, Albania submits as follows:

a. The Court has jurisdiction to give the Advisory Opinion requested, and there are no grounds for declining to exercise such jurisdiction.

b. States have an obligation to prevent, reduce and control anthropogenic GHG emissions that cause significant harm to the climate system and parts of the environment. This obligation is informed by the standard of due diligence and imposes, at a minimum, and taking account of the best available science, to:

i. regulate GHG emissions with a view to limiting global warming to 1.5°C above pre-industrial levels;

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226 *See, e.g.*, UNFCCC, Preamble.

227 *See, e.g.*, IPCC, "*Summary for Policymakers*", *Synthesis Report of the IPCC Sixth Assessment Report (AR6)*, Statement A.2, available at https://www.ipcc.ch/report/sixth-assessment-report-cycle/; *Written Statement of the Commission of Small Island States on Climate Change and International Law (Vol 1) Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, ITLOS Case No. 31, 16 June 2023, para. 95 (a), available at https://climatecasechart.com/wp-content/uploads/non-us-casedocuments/2023/20230616_Case-No.-312022_opinion-3.pdf'

ii. cooperate in addressing the impacts of anthropogenic GHG emissions on the climate system and parts of the environment; and

iii. continuously assess, monitor, and improve their climate policy, considering scientific and technological progress.

c. As regards the consequences, international law requires that States that breach their international obligation to prevent transboundary harm must be held accountable in accordance with the general rules of State responsibility and liability. Developed and industrialised States must therefore cease their unlawful conduct immediately by taking concrete measures to reduce GHG emissions substantially and provide full reparation to affected States. This may include, where it is possible, reparation in the form of monetary compensation and financial and technological assistance to affected States.

146. In the exercise of its judicial function, Albania invites the Court to give an Advisory Opinion that offers full support to the interpretation and application of States' climate change obligations under relevant customary and treaty law, informed by general principles of international law, in a manner that has real world effect and helps prevent climate change, contributes to the mitigation of its consequences, and does so giving effect to the fundamental principle of equity.

147. In addition, the Court is invited to offer an Opinion on such other relief or measures as may be required by the totality of the circumstances.

His Excellency Mr Artur Kuko

Ambassador of the Republic of Albania to the Kingdom of The Netherlands