International Court of Justice

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

REQUEST FOR ADVISORY OPINION

Written Statement

of the EUROPEAN UNION

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1 INTRODUCTION

1. The European Union considers that climate change is one of the most pressing issues confronting humankind. Climate change is intensifying and its real-life costs accelerating.[1] Therefore, the European Union welcomes these advisory proceedings as an opportunity for the International Court of Justice (the "Court"), to clarify fundamental legal questions of relevance to the international community.

2. On 29 March 2023, at the sixty-fourth plenary meeting, the United Nations General Assembly ("UNGA") adopted resolution 77/276, entitled "Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change". By this resolution, the UNGA addressed the following question to the Court:

> *"Having particular regard to the 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,*
>
> *(a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations?*

1 Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Securing our future Europe's 2040 climate target and path to climate neutrality by 2050 building a sustainable, just and prosperous society, COM/2024/63 final.

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

(i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?

(ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?"

3. This request for an advisory opinion ("the Request") was transmitted to the Court on 12 April 2023 and was received by the Court on 17 April 2023.

4. By an order of 23 April 2023, the Court decided that "the United Nations and its Member States are . . . likely to be able to furnish information on the question submitted to the Court for an advisory opinion" and fixed 20 October 2023 as the time-limit within which written statements could be put to the Court in conformity with Article 66 (2) of its Statute.

5. By letter dated 20 June 2023, the Court authorised the European Union to present a written statement on the questions, and written comments on any written statements made by States or other organizations.

6. The Court, by a subsequent Order dated 4 August 2023 granted a request from the Republic of Vanuatu and 14 co-signatory States, the Commission of Small Island States on Climate Change and International Law, and the Republic of Chile to extend the time-limit set down in its Order of 23 April 2023. The Court duly fixed 22 January 2024 as the time-limit within which written statements could be put to the Court.

7. By an Order dated 15 December 2023 the President of the Court extended to 22 March 2024 the time-limit within which written statements on the questions put to the Court may be submitted in accordance with Article 66, paragraph 2, of its Statute, and to 24 June 2024 the time-limit within which States and organizations having presented written statements to the Court may submit written comments on the other written statements, in accordance with Article 66, paragraph 4, of the Statute.

8. Before considering the legal issues related to the Request, the European Union briefly wishes to recall the sequence of events which led the UNGA to adopt resolution 77/276, the more general context of that resolution and the legal significance of the Advisory Opinion.

1.1 THE ADOPTION OF GENERAL ASSEMBLY RESOLUTION 77/276

9. Draft Resolution A/77/L.58 was submitted to the UNGA by Vanuatu on behalf of a group of States, on 1 March 2023. The Resolution was adopted by consensus on 29 March 2023, at the sixty-fourth meeting in plenary of the General Assembly. In the period between the submission of the draft Resolution and its adoption, an additional 29 States joined in sponsoring the draft resolution. The Resolution was supported by all 27 Member States of the European Union.

10. From the start of informal consultations on this Resolution until its adoption, the European Union engaged constructively showing in practice its appreciation of the urgent concerns that lay behind this initiative. The European Union has all along been supportive of ambitious climate action both within its domestic legal order and on the international plane.

11. During those consultations, the European Union's principled position was that the Resolution is not the appropriate vehicle to negotiate or litigate climate law, arguing that its content should be in line with its aim and purpose, which was to request an Advisory Opinion on climate change. Thus, the European Union insisted that the preamble reflect agreed language on climate change, thereby setting out the necessary context that leads to the questions to the Court. At the same time, the Resolution's operative language should not prejudge the findings of the Court. These guiding principles were reflected in a statement delivered on behalf of the European Union and its Member States at the General Debate following the adoption and inform the European Union's understanding of the Resolution.[2]

2 See EU Statement – UN General Assembly: Resolution requesting an Advisory Opinion of the International Court of Justice on climate change

1.2 THE CONTEXT OF THE REQUEST

12. The world is facing a 'climate emergency'. There is a scientifically established and undisputable link between anthropogenic greenhouse gas emissions, and harm to the climate system and environment, including biodiversity loss.[3]

13. As scientific understanding of the causes and consequences of climate change has developed over recent decades, so too has the shared understanding of the international community that there is a fundamental need to adopt norms at international level to mitigate the adverse effects of climate change induced by anthropogenic greenhouse gas emissions and prevent the occurrence of further harm. Consequently, in recent decades, there has been an expansion of legal norms and obligations as regards the climate system including those set out in the United Nations Framework Convention on Climate Change ('the UNFCCC'), the Kyoto Protocol to that Convention and, most recently, the Paris Agreement on Climate Change.[4]

14. The fundamental purpose and function of this Request is to obtain clarification as regards the existence, scope and implications of the international legal norms that are applicable to the protection of the climate system.

15. The progress in the scientific understanding of climate change induced by anthropogenic greenhouse gas emissions evolves faster than the development of treaty-based norms, prompting questions as to whether in parallel, obligations under customary international law to prevent harm induced by anthropogenic emissions have crystalised. In that sense, the European Union underscores that the interpretation of the international law obligations relating to the protection of the climate should reflect the dynamic nature and rapidly evolving state practice in this field. Moreover, in addressing the existence and scope of obligations under international law, the European Union further emphasises that the climate should be regarded as a global common good and hence, States have collective obligations and responsibilities to ensure its protection.

3 Reports of the Intergovernmental Panel on Climate Change ("IPCC").

4 Adopted by the Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC) at its 21st session on 12 December 2015.

1.3 THE LEGAL SIGNIFICANCE OF THE ADVISORY OPINION

16. Seising the Court as the principal judicial organ of the United Nations emphasises the importance of the rule of law, and international institutions, in addressing fundamental questions relating to the impacts of climate change on peoples and States.

17. Whereas other courts have been seised of specific or sectorial issues relating to the effects of climate change[5], this is the first occasion on which this Court has been seised, and the questions referred are of overarching significance to the international legal order.

18. These advisory opinion proceedings thus have the capacity to contribute to clarifying the state of international law as regards addressing climate change induced by anthropogenic greenhouse gas emissions. This is the case even though the Opinion will not be legally binding and that it will ultimately be for the UNGA to determine what effect it should be given.

19. The European Union wishes to recall the Statement to the UNGA made on behalf of the European Union and the Member States on 29 March 2023:

> *"Although legally non-binding, the requested Advisory Opinion of the ICJ has the potential to make a significant contribution to the clarification of the current state of international law. The EU and its Member States appreciate the choice of engaging the Court through advisory proceedings whose non-contentious nature avoids disputes and encourages the continued pursuit, by the international community, of further ambitious and effective action, including through international negotiations, to tackle climate change."*[6]

20. In other words, for the first time the Court is given the opportunity to pronounce itself in a holistic manner on the current state of international law on climate change with regard to all States, to identify, and to the extent possible, elucidate the legal

5 This includes national courts, regional Human Rights Courts and the International Tribunal for the Law of the Sea (ITLOS) in its advisory jurisdiction.

6 Verbatim Record of Agenda item 70, Seventy-seventh session, UNGA.

obligations of States as well as the legal consequences for all States for the breach of these obligations.

21. Whilst the scope of the Request is comprehensive, the Advisory Opinion is not meant to prejudge, let alone determine, whether and when breaches of international legal obligations have occurred, are occurring or will occur in the future. Consistent with the purpose and function of the Advisory Opinion proceedings, and their non-contentious nature, the matter before the Court is to clarify the content and scope of obligations incumbent on all States. The name of the case ("Obligations of States in respect of Climate Change"), which does not refer to the legal consequences of breaches of obligations, indicates that possible breaches and legal remedies in respect thereof are not intended to be the main focus of these proceedings.

1.4 THE STRUCTURE OF THE EUROPEAN UNION'S WRITTEN STATEMENT

22. The European Union's Written Statement is structured as follows:

Part 2 considers the exercise of the Court's jurisdiction to address the Request.

Part 3 addresses the scope of the questions referred to the Court.

Part 4 considers the legal obligations of States in respect of climate change.

Part 5 examines the legal consequences of potential breaches of the obligations described in Part 4.

Part 6 provides an overview of measures adopted by the European Union to address climate change.

Part 7 sets out the European's Unions conclusions.

2 JURISDICTION AND DISCRETION TO RENDER AN ADVISORY OPINION

23. The European Union considers that the Court both has jurisdiction to render an Advisory Opinion on the questions that have been referred and further, should exercise its discretion to do so.

24. Article 65 (1) of the Statute of the ("the Statute") establishes the Court's jurisdiction to issue an Advisory Opinion and provides:

> *1. The Court may 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 accordance with Article 96, paragraph 1, of the Charter of the United Nations ("the Charter"):

> *The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.*

26. The Court's jurisdiction is, therefore, conditional on first the advisory opinion having been requested by an organ authorised to make such request under the Charter and, second, on the requested opinion concerning a 'legal question'.[7]

27. The European Union considers that both conditions for establishing jurisdiction are satisfied by the present Request.

28. In the first place, the Request was submitted to the Court by the UNGA, and thus an organ authorised to submit a request.[8] In the second place, the European Union is of the view that the Request plainly concerns a "legal question" within the meaning of both Article 96 of the Charter and Article 65 of the Statute.

29. As far as the Request asks the Court to identify the "obligations of States under international law in relation to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases…," this should be regarded both in substance and in form as an inherently legal question.

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7 Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal: Advisory Opinion, I.C.J. Reports 1982, pp. 333-334, para. 21. "It 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." The term "legal question" has been interpreted broadly and should be considered to have the same meaning in both provisions. In substance, the Court should inquire whether the question referred to it is "framed in terms of law" and is "susceptible to a reply based on law": see Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 153, para. 37; Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 18, para. 15. See also Advisory Opinion of 22 July 2010 - Accordance with international law of the unilateral declaration of independence in respect of Kosovo. Paragraph 25.

8 Request as transmitted to the Court by the Secretary-General of the United Nations by a letter dated 12 April 2023 following the adoption of A/RES/77/276 on 29 March 2023.

30. The same holds true insofar as the Request asks the Court to identify 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".

2.1 THE COURT SHOULD EXERCISE ITS DISCRETION TO ANSWER THE REQUEST

31. Article 65 (1) of the Statute provides that the Court '*may give an advisory opinion* ...'. This permissive language indicates that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met.[9] Indeed, the Court has a "*duty to satisfy itself, each time it is seised of a request for an opinion, as to the propriety of the exercise of its judicial function*"[10]. This duty entails an obligation to ensure that there are no "*compelling reasons*" which should prevent the Court from exercising that function.

32. Given that this is a matter which the Court may raise of its own motion[11], the European Union, whilst acknowledging that the Court enjoys a broad discretion, nevertheless invites the Court to answer this Request and, in doing so, address all constituent parts of the questions formulated by the UNGA.[12]

33. In the first place, the European Union takes the view that, as a matter pf principle, where the Court has jurisdiction to give and Advisory Opinion it should do so. Indeed, the delivery of an opinion by the Court "*represents its participation in the activities of the Organization, and, in principle, should not be refused*."[13]

34. In the second place, the function and purpose of the advisory opinion proceedings is to enable organs of the United Nations and other authorised bodies to obtain opinions

9 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 156, para. 44.

10 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 157, para. 45.

11 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Separate Opinion of Judge Owada, I.C.J. Reports 2004, p. 260-1, para. 2.

12 The European Union addresses the proper scope of those questions below.

13 Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 71; Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I), pp. 78-79, para. 29; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 156, para. 44).

from the Court which will assist them in the future exercise of their functions.[14] The UNGA has identified the basis on which it considers this Request would provide such assistance. The European Union recalls, in particular, that in addressing the UNGA on presentation of the draft Resolution, Secretary General Guterres stated that:

> *"If issued, such an opinion would assist the General Assembly, the United Nations and Member States in taking the bolder and stronger climate action that our world so desperately needs. It would also guide the actions and conduct of States in their relations with one another, as well as towards their own citizens, and that is essential."*[15]

35. Moreover, the UNGA occupies a central position as the chief deliberative, policymaking and representative organ of the United Nations. The UNGA has adopted numerous resolutions related to climate change since recognising in 1988 that climate change is a common concern of mankind.[16] Therefore, although the adoption of commitments in the area of climate change indisputably falls primarily within the scope of processes under the UNFCCC, the UNGA has every interest to obtain clarity on the applicable international legal framework in this area when deliberating and adopting decisions.

36. In the third place, in the European Union's view, there are no 'compelling reasons' which would require the Court to decline to exercise its jurisdiction in this instance.

37. First, whereas in certain advisory proceedings, the assessment of whether there was a 'compelling reason' to decline to address a question focused on whether the circumstances and substance of a given request could require the Court to adjudicate on a contentious issue, this is clearly not the case as regards the present Request. Indeed, it is clear from the terms of this questions set out in the Request that the Court is explicitly not invited to adjudicate or otherwise opine on any specific instance of State Responsibility and hence on any matter which would qualify as a "contentious issue". To the contrary, the Court is asked to clarify, by reference to the rules and principles of international law, the existence, scope and nature of obligations under

14 It should be left to the requesting organ, the General Assembly, to determine "whether it needs the opinion for the proper performance of its functions" (Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II), p. 417, para. 34 and 44.

15 A/77/PV.64 - Report of the International Court of Justice Draft resolution (A/77/L.58)

16 See Resolution 43/53.

international law incumbent on States, and, by way of extension, on international organisations.

38. The European Union observes however, that, were the Court to interpret the questions in the Request differently, and to consider that in fact it was being invited to opine on issues such as the existence of and attribution of responsibility to harm caused by climate change as regards specific States, international organisation or categories of State (e.g. developed countries), it should decline to do so. In the European Union's view, not only would these issues fall outside the intended scope of the question, but also the advisory opinion proceedings are not apposite to address them.

39. Second, and for the sake of completeness, the European Union considers that there is no issue of res judicata17 which could operate in such a way as to prevent the Court from giving an Advisory Opinion on the matters brought before it.18

3 THE SCOPE OF THE QUESTIONS BEFORE THE COURT

40. The European Union acknowledges that climate change has cross-cutting impacts on the environment and on society.[19] The range of legal issues associated with climate change is, consequently, potentially very broad. For that reason, the European Union briefly outlines the way in which it invites the Court to interpret the intended scope and meaning of the Questions referred.

41. It has been consistently recognised in the jurisprudence of this Court that when interpreting the scope and meaning of the questions on which an Advisory Opinion is sought, the Court should be guided above all by the terms of the questions as formulated in the Request. Indeed, the jurisprudence confirms that there are only limited circumstances in which the Court should depart from the language of the

17 Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019, p. 95, para 81.

18 In this respect, the European Union considers that the fact that ITLOS has been seised to deliver an Advisory Opinion on the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (UNCLOS) does not preclude the rendering of any Opinion on the matters before it. see Request for an Advisory Opinion submitted by the Co-Chairs of the Commission of Small Island States on Climate Change and International Law on 12 December 2022.

19 See Communication from the European Commission, The European Green Deal, 11.12.2019, COM(2019) 640 final.

questions, none of which arise in the present proceedings.[20] Moreover, those questions should be construed in the light of the underlying objectives pursued by the Request.

42. The stated objectives of the Request have been formulated by the UNGA in positive and negative terms, both of which are relevant for delineating the scope and subject matter of the Opinion.

43. The positively expressed objective of this Request is to assist the UNGA in addressing the identified and uncontested harm to the climate system and other parts of the environment that is caused by anthropogenic greenhouse gas emissions.

44. The negatively expressed objective of this Request, is that the clarification of the rights and obligations of States under international law in relation to the adverse effects of climate change should be achieved through a "*constructive and unconfrontational route*"[21]. For that reason, the European Union does not perceive this Request for an Advisory Opinion to be intended, in any sense, as adversarial to individual States nor indeed, to the European Union. Since the UNGA has formulated its questions precisely and deliberately to preserve the demarcation between the Court's advisory jurisdiction and its contentious jurisdiction, that should be the guiding principle in the Court's approach to them and, more specifically to any potential reflection whether a limited reformulation thereof would be warranted.[22]

45. In this regard, it is recalled that, as attested time and again during the informal consultations on the resolution as well as on the occasion of its adoption, the Request does not intend to place additional obligations or responsibilities on States, but rather to provide legal motivation for all States, including emerging and high emitting developing countries, to build greater ambition into their Nationally Determined Contributions, and take meaningful action to curb emissions and protect human rights.

20 For instance, where a question was not adequately formulated – see Advisory Opinion of 22 July 2010 - Accordance with international law of the unilateral declaration of independence in respect of Kosovo. Interpretation of the Greco- Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, 1928, P.C.I.J., Series B, No. 16. Alternatively, where the request does not reflect the "legal questions really in issue" - Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, p. 89, para. 35).

21 Introduction of draft Resolution A/77/L.58, A/77/PV.64.

22 Whilst in exceptional circumstances, the Court may reformulate the questions referred to it for an advisory opinion, it generally only does so to ensure that it gives a reply "based on law" – see Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982, p. 348, para. 4.

46. Therefore, whereas through the questions asked, the UNGA is essentially seeking clarification from the Court as to the existence of a potential basis in international law for individuals or States to assert as against other States, state responsibility for loss and damage arising from climate change caused by anthropogenic greenhouse gas emissions and associated environmental harm, the UNGA has structured its questions with a view to obtaining a doctrinal analysis. As deliberately formulated and intended, these questions do not allow for any consideration of the adequacy of climate mitigation measures taken by individual States or international organisations, but rather focus on the legal framework, against which such adequacy would fall to be assessed. Since any such assessment would necessarily occur subsequently, it falls outside the scope of these Advisory Opinion proceedings. [23]

3.1 BASIC PREMISES

47. The European Union considers that the questions asked by the UNGA are based on four premises which should be taken into account by the Court when rendering its Opinion.

48. The first premise is that climate change is recognised by the international community as a matter of global concern of existential relevance to humankind. This is reflected in numerous UNGA resolutions and international treaties, including the UNFCCC. In the same vein, the European Union invites the Court to conduct its analysis on the basis that it has been accepted by the international community that climate change has a transboundary character and that given its 'global nature'[24], it cannot be effectively regulated exclusively within national borders.

49. The second premise is that there is a scientifically demonstrated and globally accepted link between anthropogenic greenhouse gas emissions and climate change phenomena.[25] As this should be interpreted as an accepted fact, in addressing these questions, the Court is neither asked and nor required to give an Opinion on the existence of such a link. More specifically, the Court does not need to consider whether it has sufficient evidence available to render an Opinion on this issue. The European

23 For the avoidance of doubt, nor does it extend to an assessment of the adequacy of measures taken by an international organisation.

24 See preamble to the UNFCCC.

25 IPCC Sixth Assessment Report.

Union notes in this respect that the documents on the Court record include extensive documentation from the Intergovernmental Panel on Climate Change (IPCC).

50. The third premise is that the adverse effects of climate change are not distributed equally across all States. Various factors, including differences in interdependent human and ecosystem vulnerability influence the degree of exposure of individual States, communities and individuals to climate change phenomena. Therefore, in addressing the questions, the Court should proceed with its analysis on the basis that all States may theoretically contribute to climate change through emissions associated with their activities, but the consequences of such emissions for an individual State will not necessarily correlate to their specific contribution or be distributed equally. The European Union observes that in that respect, climate change raises specific issues as regards causation and attribution.

51. The fourth premise is that obligations under international law concerning the protection of the climate system can be derived (in principle) from international treaties, customary international law and general principles of law. Therefore, all three potential sources of law are relevant to the Court's analysis. [26]

3.2 THE PRECISE MEANING TO BE ACCORDED TO THE QUESTIONS

52. As set out above, the European Union considers that the Questions on which the Advisory Opinion are sought are framed and structured in terms intended to delimit the scope of that Opinion to those specific issues on which the UNGA considers the Court could assist it in its functions. Therefore, each element of the Question referred informs the intended scope of the overall Request.

3.2.1 The chapeau to the Questions

53. The European Union considers that the role of the chapeau is to identify those specific potential sources of international law obligations on which the UNGA considers an advisory opinion would best facilitate its substantive tasks. To that end the UNGA has enumerated certain international agreements and Conventions and referred to certain

26 Article 38, Statute of the International Court of Justice.

principles some of which are reflected both in international treaties and, in the view of the European Union, in customary international law.

54. As a result, whereas the term "having particular regard to…", does not formally preclude taking other potential sources of international legal obligations into consideration, where necessary, the European Union invites the Court to focus its analysis on those potential sources of international legal obligations specifically identified by the UNGA. This understanding underpins these submissions.

3.2.2 Part (a) of the Questions

55. The European Union considers that the formulation of part (a) identifies the outer limits of the Request and its focal point.

56. First, as regards the outer limits, the European Union recalls that part (a) of the Request seeks an opinion on the existence of legal rules related specifically to the protection of the climate system and other parts of the environment from "anthropogenic emissions" of greenhouse gases. It follows from the use of this terminology that the Court is not invited to broaden the scope of its inquiry to encompass all potential threats to the climate system or to other parts of the environment attributable to other causes.

57. Moreover, as set out above, the existence of a link between emissions and climate change phenomena should be treated as an accepted scientific fact. Hence, the European Union does not consider that it is necessary for the Court to discuss the existence of climate change, or to quantify the effects of climate change caused by anthropogenic greenhouse gas emissions for the purposes of this Opinion, either in absolute or in comparative terms.

58. Second, as regards the focal point, given the Question refers to the legal obligations related to climate change induced by anthropogenic greenhouse gas emissions, the international legal obligations pertaining most specifically to emissions, namely those laid down in the Paris Agreement, the UNFCCC and its Kyoto Protocol, are of central importance to the Court's analysis.

59. In this respect, the European Union further recalls that the 2015 Paris Agreement reflects a more recent expression of the Parties' understanding of their respective obligations relating to climate change induced by anthropogenic greenhouse gas emissions than the 1997 Kyoto Protocol or the 1992 UNFCCC. Therefore, the European Union invites, the Court to attach weight to the manner in which the legal obligations

have themselves evolved as regards their scope and legal form, while at the same time taking into account the overall internal consistency of the international legal framework on climate change.

60. Third, in order to address part (a), the European Union invites the Court to clarify the interaction of the Paris Agreement with applicable customary international law and the other international conventions referred to and in particular, to clarify the standard of due diligence required both under the Paris Agreement and under customary international law as regards the protection of the climate system.

3.2.3 Part (b) of the Questions

61. The formulation of part (b) also employs terms deliberately intended to integrate certain thresholds and delimit the scope of any Opinion on these matters.

62. First, part (b) requests an Opinion on the legal consequences for certain specified acts or omissions, namely those which cause "*significant harm*". The term "significant harm" implies a threshold of harm, which the Court is also invited to define.

63. Second, part (b) (i) places emphasis on legal consequences vis-a-vis States with certain attributes, namely small island developing States that are (i) "*injured or 'specially affected' due to geographical considerations*" or (ii) "*particularly vulnerable to the adverse effects of climate change*." Given the use of these terms, the European Union invites the Court to clarify what should be understood as "*particularly vulnerable*" when considering States.

64. Third, part b (ii) places emphasis on legal consequences vis-a-vis "*Peoples and individuals of the present and future generations affected by the adverse effects of climate change*". The questions therefore contain an explicit temporal element as regards the potential obligations owed to individuals, which confirms the prospective scope of this Request.

65. As to the overall scope of this part of the Questions, the European Union considers that the ambit of the term 'legal consequences' should not be understood as inviting the Court to make general statements as to the international responsibility of certain States or categories of States, vis-à-vis other, in particular vulnerable, States. The function and purpose of advisory opinion proceedings rather requires that, having clarified the parameters of the existing obligations under international law, the Court clarifies the meaning to be ascribed to 'acts and omissions' in that context, and only then considers the legal consequences that would flow from any hypothetical illegality.

4 LEGAL OBLIGATIONS OF STATES TO ENSURE THE PROTECTION OF THE CLIMATE SYSTEM AND OTHER PARTS OF THE ENVIRONMENT FROM ANTHROPOGENIC EMISSIONS OF GREENHOUSE GASES FOR STATES AND FOR PRESENT AND FUTURE GENERATIONS

66. In this part, the European Union sets out its position as regards the legal obligations of States to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases. [27]

67. For the reasons elaborated upon below, the European Union considers that the principal legal obligations incumbent on States as regards the protection of the climate system are obligations of conduct and due diligence set out in international treaties, most notably in the Paris Agreement and the UNFCCC.

68. The European Union first briefly addresses the types of legal obligations by which States may be bound under international law since the difference between them informs the scope of the obligations themselves. Second, the European Union examines due diligence and, in particular, its role in the context of the protection of the climate as a standard of conduct. Third, the European Union addresses the relevant treaty-based obligations, which in its view, are mainly those set down in the Paris Agreement. In that context, the European Union further sets out its position as to the role of certain guiding principles explicitly referred to in the Paris Agreement and the UNFCCC, notably equity and the principle of common but differentiated responsibilities and respective capabilities in the light of national circumstances ('CBDR-RC'). Finally, since the European Union considers that States are bound by concurrent obligations under customary international law to protect the climate system, it also addresses those obligations. This includes consideration of relevant human rights norms.

4.1 OBLIGATIONS OF CONDUCT AND OBLIGATIONS OF RESULT

69. The dichotomy between obligations of conduct and result is well-established in the case law of the Court.[28]

27 Where applicable, the term 'States' should be read as encompassing all Parties to the appliable international agreements.

28 See, for instance*, Dispute over the status and use of the waters of the Silala (Chile v. Bolivia)*, Judgment, I.C.J. Reports 2022, p. 614, para. 83; *Application of the interim accord of 13 September 1995 (the Former Yugoslav Republic of Macedonia v. Greece),* Judgment of 5 December 2011, I.C.J. Reports 2011, p. 644, para. 67; *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Judgment, I.C.J. Reports 2010, p. 14, paras. 186 and 187.

70. An obligation of result is an obligation which requires a specific outcome.[29] This includes obligations which must be met within a reasonable period of time.[30]

71. The Court has further elucidated the concept of obligation of conduct and the respects in which it differs from the concept of an obligation of result in the framework of the obligation to prevent genocide. Specifically, the Court held that:

> *"it is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide."*[31]

72. Consonant with the above findings, the Seabed Disputes Chamber of ITLOS held that the basic difference between an obligation of result and an obligation of conduct is "*whether an obligation requires a specific result to be achieved, even if over time in which case it is an obligation of result*"; by contrast, an obligation to take measures towards achieving a specific result without there being an obligation to achieve that result whatever the circumstances is an obligation of conduct.[32]

73. An obligation to provide effective review and reconsideration is an obligation of result which "*must be performed unconditionally*".[33]

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29 Request for Interpretation of the Judgment of 31 March 2004 in *the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Mexico v. United States of America),* Judgment, I.C.J. Reports 2009, p. 3, para. 27.

30 Request for Interpretation of the Judgment of 31 March 2004 in the *Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2009, p. 3, para. 27.

31 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgment, I.C.J. Reports 2007, p. 43, para. 430.

32 ITLOS, *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, para. 110.

33 *Jadhav (India v. Pakistan),* Judgment, I.C.J. Reports 2019, p. 418, para. 146.

74. By contrast, as the Court held in *Pulp Mills on the River Uruguay*, an obligation to adopt regulatory or administrative measures either individually or jointly and to enforce them is an obligation of conduct.[34] Furthermore, in *Application of the Interim Accord of 13 September 1995*, the Court noted the Parties' agreement that a bilateral treaty obligation "*not to object*" to "*the application by or member-ship of*" the former Yugoslav Republic of Macedonia in NATO "*is not an obligation of result, but rather one of conduct*".[35]

75. Other examples of obligations of conduct considered in the case law of international courts include the obligation to negotiate in good faith with regard to the delimitation of the continental shelf between States with opposite or adjacent coasts pursuant to Article 83(1) UNCLOS,[36] the obligation to make every effort to enter into provisional arrangements in this regard and not to hamper the reaching of the final agreement pursuant to Article 83(3) UNCLOS.[37]

76. Moreover, in interpretating the expression "*responsibility to ensure*" in Article 139(1) UNCLOS and Article 4(4) of Annex III to UNCLOS, the Seabed Disputes Chamber of the ITLOS held that the obligation of a state sponsoring persons and entities with respect to activities in the Area

> *"is not an obligation to achieve, in each and every case, the result that the sponsored contractor complies with the aforementioned obligations. Rather, it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result. To utilize the terminology current in international law, this obligation may be characterized as an obligation "of conduct" and not "of result" …"*[38]

34 *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, p. 14, para. 187.

35 *Application of the Interim Accord of 13 September 1995* (the former Yugoslav Republic of Macedonia v. Greece), Judgment of 5 December 2011, I.C.J. Reports 2011, p. 644, para. 67.

36 ITLOS, *Delimitation of the Maritime Boundary in the Atlantic Ocean* (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017, p. 4, para. 604.

37 ITLOS, *Delimitation of the Maritime Boundary in the Atlantic Ocean* (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017, p. 4, paras. 627 and 629.

38 ITLOS, *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, para. 110.

77. Finally, the Court's case law appears to suggest the possible existence of obligations going beyond 'mere' obligations of conduct without in themselves constituting obligations of result. Thus, in the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion, the Court held that the obligation to negotiate in good faith a nuclear disarmament in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons is an obligation to achieve a precise result (i.e. nuclear disarmament) by adopting a particular course of conduct (i.e. negotiations in good faith).[39]

4.2 THE CONNECTION BETWEEN OBLIGATIONS OF CONDUCT AND "DUE DILIGENCE"

78. As has been noted by the Seabed Disputes Chamber of the ITLOS, the notions of obligation of conduct on one hand and due diligence on the other are connected.[40] In a similar manner, the Court has held that in the area of obligations of conduct, the notion of due diligence is of "*critical importance*".[41]

79. The connection between obligations of conduct and due diligence was again highlighted by the ITLOS in Case No. 21. There, the Tribunal held in relation to the flag State's obligation to ensure that vessels flying its flag do not engage in illegal, unreported, and unregulated fishing in the exclusive economic zone of other States that "*as an obligation "of conduct" this is a "due diligence obligation", not an obligation "of result*"".[42]

80. In considering the obligation to adopt regulatory or administrative measures either individually or jointly, and to enforce them, as set out in Article 36 of the 1975 Statute of the River Uruguay, the Court first found this obligation to constitute an obligation of conduct. As a consequence, the Court held, second, that both Parties to the statute are to exercise due diligence with regard to the necessary measures to preserve the ecological balance of the river:

39 *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, I.C.J. Reports 1996, p. 226, para. 99.

40 ITLOS, *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, para. 111.

41 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43, para. 430.

42 ITLOS, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4, para. 129.

> *"… An obligation to adopt regulatory or administrative measures either individually or jointly and to enforce them is an obligation of conduct. Both Parties are therefore called upon, under Article 36, to exercise due diligence in acting through the Commission for the necessary measures to preserve the ecological balance of the river."*[43]

81. The existence of an obligation of conduct therefore triggers, as a constituent part of the primary obligation, the applicability of a particular standard of conduct for the addressees of that obligation, namely, the obligation to act with due diligence in working towards the fulfilment of the obligation.

82. Obligations of conduct can therefore be referred to as 'due diligence obligations', meaning that compliance with those obligations requires acting with due diligence. Accordingly, the Court has found that a duty to protect property from physical harm in a treaty of amity triggered an obligation of one contracting party to exercise due diligence in providing protection from physical harm to the property of nationals and companies of the other contracting party within its own territory.[44]

4.3 "DUE DILIGENCE" AS A STANDARD OF CONDUCT

83. The specific content of due diligence as a standard of conduct is contingent on the content of the primary obligation[45] (or, in the words of the Seabed Disputes Chamber of the ITLOS, on "*the description of the measures to be taken by [a] State*"[46]) and may be further determined by principles applicable to the particular area of international law against the background of which the due diligence obligation operates, for instance the principle of common but differentiated responsibilities and respective capabilities in the light of different national circumstances.

43 *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, p. 14, para. 187.

44 See also, *Certain Iranian Assets* (Islamic Republic of Iran v. United States of America), judgment of 30 March 2023, para. 190.

45 ITLOS, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4, para. 133: "*… the Convention is the key instrument which provides guidance regarding the content of the measures that need to be taken by the flag State in order to ensure compliance with the "due diligence" obligation to prevent IUU fishing by vessels flying its flag in the exclusive economic zones of the SRFC Member States*".

46 ITLOS*, Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, para. 119.

84. At the same time, "due diligence" entails a degree of flexibility. It calls for an assessment *in concreto*, taking into account various parameters.[47] It is moreover a variable concept that may change over time and in relation to the risks involved. As a standard of conduct it has to be more severe for riskier activities (on the relevance of the precautionary principle, see section 4.4 below).[48] It may furthermore entail an obligation to comply with other internationally agreed rules and international standards or to take such rules and standards into account.[49]

85. It also emerges from the case law of the ITLOS that there is a certain connection between 'due diligence' and the concept of reasonableness. Specifically, in Case No. 17, the Seabed Disputed Chamber of the ITLOS found that the ""*due diligence" obligation "to ensure" in Article 139 UNCLOS requires the sponsoring State to take measures within its legal system and that the measures must be "reasonably appropriate*"".[50]

86. Specifically, an obligation to act with due diligence "*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*". [51] The Court has furthermore held in the context of obligations to act with due diligence that:

> *"… it may now be considered 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, in particular, on a shared resource."*[52]

47 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgment, I.C.J. Reports 2007, p. 43, para. 430.

48 ITLOS*, Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, para. 117.

49 *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Judgment, I.C.J. Reports 2010, p. 14, para. 197.

50 ITLOS, *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, para. 120. See also para. 230: *"Reasonableness and non-arbitrariness must remain the hallmarks of any action taken by the sponsoring State."*

51 *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14, para. 197.

52 *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Judgment, I.C.J. Reports 2010, p. 14, para. 204; *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, I.C.J. Reports 2015, p. 665, para. 104.

87. Such assessment needs to be carried out with due diligence. [53]

88. Both the ITLOS in Case No. 21[54] and the arbitral tribunal in the South China Sea Arbitration[55] found that the States' obligation to protect and preserve the marine environment in Article 192 UNCLOS is a due diligence obligation.

89. Other examples of due diligence obligations recognised in the case law of international courts include Articles 63(1) UNCLOS on the obligation of state Parties to seek to agree upon the measures necessary to coordinate and ensure the conservation and development in relation to the same stock or stocks of associated species that occur within the exclusive economic zones of two or more coastal States, and 64(1) UNCLOS on the obligation of state Parties to cooperate with a view to ensuring conservation and promoting the objective of optimum utilization of highly migratory species.[56] Also, the obligation of the flag State to effectively exercise jurisdiction and control in administrative matters pursuant to Article 94 UNCLOS constitutes a due diligence obligation.[57]

4.4 TREATY-BASED OBLIGATIONS TO PROTECT THE CLIMATE SYSTEM

90. The European Union considers that the principal legal obligations in relation to the protection of the climate system are treaty-based. They find their most recent expression in the Paris Agreement, which builds on and contemporises the shared understanding of the Parties to the UNFCCC both as regards their individual and also as regards their collective obligations to protect the climate system.

91. The Paris Agreement is, therefore, first and foremost a source of legal obligations.

92. At the same time, by explicitly referring inter alia to States' "*respective obligations on human rights*" and to the "*importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity (…) when taking action to address*

53 *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, p. 14, para. 205.

54 ITLOS, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4, para. 219.3.

55 PCA, *The South China Sea Arbitration*, Case No 2013-19, Award of 12 July 2016, para. 959.

56 ITLOS, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4, para. 210

57 ITLOS, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4, para. 219.3.

climate change", the preamble of Paris Agreement calls on Parties to take into account the systemic interplay between that Agreement and other, relevant areas of international law. The Paris Agreement should, therefore, also be understood as informing the interpretation of, notably, international environmental, maritime and human rights law.

93. Conversely, since other international agreements whose main subject matter is not climate change may likewise establish norms that address climate change, those other international agreements may clarify how the obligations under the Paris Agreement are to be interpreted and implemented in specific contexts. A prominent example is the United Nations Convention on the Law of the Sea (UNCLOS) which, by establishing due diligence obligations to protect and preserve the marine environment and to prevent, reduce and control pollution of the marine environment by greenhouse gas emissions, sheds light on how the obligations under the Paris Agreement are to be implemented in relation to the protection and preservation of the marine environment.

94. It follows that the relationship between the Paris Agreement and the UNFCCC with, notably, UNCLOS and human rights treaties is one of 'interpretation', whereby the provisions contained in each of these instruments apply in parallel and are to be interpreted in a manner ensuring consistency between these instruments.

95. Given the central place of treaty norms, and in particular those set down in the Paris Agreement as a source of legal obligations and a guide to interpretating other sources of law identified in the questions before the Court, in this section the European Union sets out its understanding of the scope of the obligations contained therein. Since the European Union further considers that these obligations must be understood as a progression from the legal foundation first set down in the UNFCCC, the European Union identifies the core elements of the climate-treaty regime as it has evolved.

4.4.1 The UNFCCC

96. The UNFCCC, which was adopted on 9 May 1992 and entered into force 21 March 1994, is the founding treaty of the international climate change regime. It now enjoys near-universal membership with 198 Parties.[58] The Convention sets out, in Article 2, the

58 See UNTC.

'ultimate objective' to prevent 'dangerous anthropogenic interference with the climate system', as well as the agreed principles, institutions and processes to guide this effort.[59]

97. The UNFCCC was designed as a framework convention in anticipation that its Parties would agree on more specific commitments through amendments, protocols and subsequent decisions of the governing bodies of these instruments, to take account of evolving scientific evidence and understanding as well as of political ambition. This has, as explained further below, manifested, most notably in decisions adopting the Kyoto Protocol in 1997, and the Paris Agreement in 2015.

98. The European Union considers that, notwithstanding that in substantive terms, the obligations reflected in such subsequent decisions, and in the Paris Agreement have superseded many of those set down in the UNFCCC, core elements of the architecture and design of the UNFCCC are relevant to understanding the contemporary scope of obligations incumbent on States as regards the protection of the climate system.

99. In the first place, the UNFCCC establishes the institutional framework of the climate regime, with the Conference of the Parties ('COP') serving as the 'supreme body'[60]. Through annual sessions, the COP makes, within its mandate, the decisions necessary to promote the effective implementation of the UNFCCC, as required for the achievement of its objectives.

100. In the second place, Article 3 UNFCCC identifies a number of principles by which Parties shall be guided "*in their actions to achieve the objective of the Convention* […]". Article 3 refers in this respect to inter alia present and future generations, 'equity' and 'common but differentiated responsibilities and respective capabilities' ('CBDR-RC'), the 'precautionary principle', the right to promote sustainable development, and the promotion of a supportive and open international economic system.[61] As set out in further detail below, the continued relevance of these guiding principles is explicitly reflected in the text of subsequent treaties, including the Paris Agreement.

101. In the third place, the UNFCCC establishes the type of legal norm through which its Parties agreed to give expression to their intention to establish a framework for the

59 UNFCCC, Art. 2 and Art. 3.

60 UNFCCC Art. 7.

61 Ibid, Art. 3.

protection of the climate system. For instance, by their very nature, the 'guiding principles' set out in Article 3 UNFCCC are essentially designed to inform the interpretation of the obligations of the Parties rather than to constitute obligations by themselves. This remains the case under the Paris Agreement. Equally, the commitments set out in Articles 4(1), 5, 6, 11 and 12 UNFCCC which apply to all Parties, can, in general, be considered to contain obligations of conduct and due diligence rather than obligations of result. As explained further below, the Paris Agreement likewise relies primarily on obligations of conduct, to which a standard of due diligence applies.

102. In the fourth place, the UNFCCC introduced the concept that there is a distinction between a 'developed country' party and a 'developing country' Party.

103. The UNFCCC provides that developed countries "*should take the lead in modifying longer-term trends in anthropogenic emissions*"[62].

104. To facilitate this, the UNFCCC identifies in its Annex I developed country Parties and other Parties (which includes the European Union), the industrialised countries that were members of the Organization for Economic Cooperation and Development in 1992, and those countries with 'economies in transition' away from centralized economies at the end of the Cold War). The term 'developing country Party' while not defined, is understood to refer to those Parties that are not included in Annex I.

105. Within the group of developing country Parties, the UNFCCC and subsequent practice provide for the special circumstances of 'least developed countries' as identified and regularly updated by the United Nations, as well as small island and low-lying developing countries. This identification of these categories - 'least developed countries', (a status from which it is possible to graduate), small island and low-lying developing countries is of continued relevance.

106. As to the legal commitments established under the UNFCCC, under Article 4 (2) (a) and (b) of the UNFCCC, developed country Parties are required to adopt national policies and take corresponding measures that demonstrate they are taking the lead in modifying longer-term trends in their emissions consistent with the objective of the

62 Ibid, Art. 4 (2)(a).

Convention. This vaguely worded and highly conditional commitment has been interpreted to set a collective goal of returning these emissions to 1990 levels by 2000.

107. The obligation for developed countries to take a leading role is further apparent from their collective and unquantified commitment to provide financial resources[63], and "*promote, facilitate and finance*" the transfer of technology to developing countries[64]. This commitment to provide assistance applies exclusively to a subset of the Annex I Parties (those that were not considered to be 'economies in transition'), that are listed in Annex II.

108. In the sixth place, the UNFCCC introduced horizontal reporting obligations. All Parties are required to report on their efforts to implement the Convention, which includes preparing and submitting national emission inventories. Annex I Parties, however, are held to a more rigorous reporting standard, requiring more frequent and detailed reporting, including annual emission inventories. Comprehensive reporting guidelines and procedures have been subsequently developed and revised, tailored to the specific needs of Annex I and non-Annex I Parties[65].

109. In this context, the European Union emphasises that certain general commitments (binding upon developing and developed countries), mainly of a procedural nature, may be considered as possible obligations of result.

110. These include the obligation to develop, update, publish and make available national inventories of anthropogenic emissions and removals by sinks as set out in Article 4(1)(a) and 12(1)(a) UNFCCC or to formulate and publish national programmes as prescribed by Article 4(1)(b) UNFCCC, or the obligation to communicate information to the COP as required by Article 4(1)(j)UNFCCC may impose upon the Parties to ensure that these inventories, programmes and information are effectively made available or made public.

111. Likewise, certain of the specific additional commitments binding upon the developed countries, like the obligation on developed countries to communicate information on their mitigation policies and resulting projections (Articles 4(2)(a) and (b), 12(2)(a) and (b) and 12(5) to (10) UNFCCC), may also constitute possible obligations of result.

63 Ibid, Art. 4.3. and 4.4.

64 Ibid, Art. 4.5.

65 See UNFCCC Secretariat, https://unfccc.int/Transparency

112. These procedural norms should, however, not be construed as obliging the Parties to achieve a certain level of results by such programmes and policies.

4.4.2 The Kyoto Protocol

113. The Kyoto Protocol to the UNFCCC was adopted on 11 December 1997, in response to a mandate issued at COP 1 in 1995[66] (known as the 'Berlin Mandate') to adopt "*a protocol or another legal instrument*" aimed at strengthening the commitments of Annex I Parties under the UNFCCC. Its adoption serves, therefore, to confirm that the UNFCCC is conceived and applied by its Parties as a framework instrument that is intended to provide a foundation from which other commitments should develop.

114. As part of the Berlin Mandate, the Parties agreed to develop "*quantified limitation and reduction objectives*" for Annex I Parties while refraining from imposing any new commitments[67] on non-Annex I Parties.

115. This mandate is reflected in the terms of the Kyoto Protocol. Annex I Parties assumed specific emission targets for the commitment period 2008-2012, based on a 1990 baseline. These targets, along with the respective Annex I Parties, were detailed in Annex B to the Protocol. The greenhouse gases and sectors covered by these targets were outlined in Annex A to the Protocol.

116. The Kyoto Protocol also established a compliance mechanism[68] to support these commitments, consisting of both a facilitative and enforcement branch, and included provisions for developing rules regarding accounting, reporting and review[69].

117. While the Kyoto Protocol primarily focused on Annex I Parties, it also included obligations for all Parties to continue advancing the implementation of existing commitments to achieve sustainable development[70]. Additionally, it engaged non-Annex I Parties on a voluntary basis through the clean development mechanism ('CDM') which was designed to promote investment and create an international carbon

66 Decision 1/CP.1, The Berlin Mandate: Review of the adequacy of Article 4, paragraph 2 (a) and (b), of the Convention, including proposals related to a protocol and decisions on follow-up, https://unfccc.int/resource/docs/publications/cop_decisions.pdf
67 Ibid, para 2(a) and (b).
68 Kyoto Protocol Art. 18.
69 Ibid, Arts. 5, 7 and 8.
70 Ibid, Art. 10.

market for UN certified carbon offsets generated in non-Annex I Parties, that could be used by Annex I Parties to achieve their targets[71].

118. The Kyoto Protocol introduced several innovative concepts to the climate change regime, notably a more sophisticated approach to land use, land-use change, and the forestry sector (LULUCF)[72]. It also provided, in addition to the CDM, for market mechanisms as key instruments for its implementation, such as international emissions trading and project-based joint implementation among Annex I Parties[73].

119. The Kyoto Protocol entered into force on 16 February 2005 and was designed to be a long-term legal instrument with commitments intended to evolve and strengthen over time. In accordance with Article 3.9, the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol ('CMP') initiated negotiations in 2005 for the subsequent commitment period post-2012[74]. These negotiations culminated in the adoption of an amendment to the Kyoto Protocol during COP 18 in Doha in 2012[75]. The Doha Amendment entered into force on 31 December 2020.

120. This Amendment outlines emission reduction targets for Annex I Parties for the period 2013-2020, aiming for an 18% decrease in emissions from this group compared to 1990 levels[76]. Additionally, through the Amendment the list of greenhouse gas emissions was revised.

121. The Kyoto Protocol represents a significant demonstration of developed country leadership, as envisaged by the UNFCCC. However, during the period of 1997-2020, a number of developed countries either withdrew from the Protocol or chose not to join in the Doha Amendment, citing the fact that emerging economies with globally significant emissions were not expected to have emissions reduction targets.

122. With the adoption and entry into force of the Paris Agreement, which includes provisions requiring nationally determined contributions for all Parties and establishes a new set of institutions and rules for international carbon markets, no third Kyoto

71 Ibid, Art. 12.

72 Ibid, Art. 3.3 and 3.4.

73 Ibid, Arts. 6 and 17.

74 Decision 1/CMP.1, Consideration of commitments for subsequent periods for Parties included in Annex I to the Convention under Article 3, paragraph 9, of the Kyoto Protocol, https://unfccc.int/decisions?f%5B0%5D=session%3A3696

75 See the Doha amendment to the Kyoto Protocol, https://unfccc.int/files/kyoto_protocol/application/pdf/kp_doha_amendment_english.pdf

76 Ibid, Art. 3.1 bis.

Protocol commitment period beyond 2020 has been launched, and its remaining functions are largely ceremonial.

123. The European Union considers on this basis, that for those that are Parties to both the Kyoto Protocol and the Paris Agreement, to the extent that the provisions of the Paris Agreement diverge from those established under the Kyoto Protocol, the provisions of the Paris Agreement prevail.

4.4.3 The Paris Agreement

124. In 2015, the Paris Agreement became the second treaty to be adopted under the auspices of the UNFCCC.[77] At present, 195 Parties out of 198 Parties to the Convention have ratified the Paris Agreement.[78] The Paris Agreement foresees that Regional Economic Integration Organisations may become party to it, and as with the UNFCCC and the Kyoto Protocol, the European Union and each of its Member States are Parties to the Paris Agreement.

125. Being the most recent and comprehensive multilateral climate treaty, and given the significant number of Parties, the Paris Agreement must be understood as reflecting a near universal commitment on the part of the Parties to the UNFCCC to enhance and adapt the global response to climate change. In view of the nexus between the Paris Agreement and the UNFCCC, it should also be understood as articulating specific objectives and substantive commitments that build on the broad framework for collaboration and foundational principles for cooperation established in that framework Convention. Nevertheless, and importantly, the Paris Agreement reflects a contemporary understanding of how the Parties to the UNFCCC have agreed to "*strengthen the global response to the threat of climate change*", including by reframing the respective roles of all Parties in achieving the Agreement's stated goals and objectives.

126. The European Union observes that the Paris Agreement contains different types of legal norm, which accordingly serve specific functions within its overall architecture and design. The core provisions of the Paris Agreement are addressed in greater detail in

77 Decision 1/CP.21, Adoption of the Paris Agreement, https://unfccc.int/files/home/application/pdf/decision1cp21.pdf

78 Under the terms of Decision 1/CP.21, adopting the text of the Paris Agreement is distinguished from the subsequent process of signing and ratification. See https://unfccc.int/process/the-paris-agreement/status-of-ratification

the following subsections. Nevertheless, the European Union makes the following preliminary and overarching observations.

127. In the first place, it is inherent to the overall architecture of the Paris Agreement that it identifies its purpose (Article 2) as enhancing the implementation of the UNFCCC, including the Convention's objective of preventing "*dangerous anthropogenic interference with the climate system*" and sets down commitments to achieve that purpose. The Agreement's purpose, including the long-term temperature goal set out in Article 2 (1) (a), is set out in aspirational terms and is not in itself intended to give rise to an independent, legally binding commitment.

128. In the second place, the commitments designed to achieve the long-term temperature goal are, in general, obligations of conduct and due diligence. As described above, this choice of legal obligation is consistent with the approach applied under the UNFCCC. The facilitative, non-adversarial and non-punitive character of the "*implementation and compliance*" mechanism of Article 15 of the Paris Agreement is also indicative that most of the Agreement's substantive obligations should be considered to be obligations of conduct and, by extension, due diligence.

129. In the third place, and notwithstanding the prevalence of obligations of conduct, certain provisions may be properly characterised as establishing obligations of result. These are primarily obligations of a procedural nature, requiring Parties to provide specific information at designated intervals and adhere to reporting and accounting standards. These obligations include the procedural obligations to prepare, communicate and maintain successive nationally determined contributions ('NDC') (Article 4(2) and (9) Paris Agreement)[79] and to provide information on national inventories under the enhanced transparency framework of the Agreement (Article 13(7) Paris Agreement)[80] and information necessary to track progress made in implementing and achieving an NDC.[81] For developed country Parties, the Paris Agreement also includes obligations

79 Paris Agreement, Art. 4(2): "*Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions*."
80 Ibid, Art. 13(7): "*Each Party shall regularly provide the following information: (a) A national inventory report of anthropogenic emissions by sources and removals by sinks of greenhouse gases, prepared using good practice methodologies accepted by the Intergovernmental Panel on Climate Change and agreed upon by the Conference of the Parties serving as the meeting of the Parties to this Agreement; and (b) Information necessary to track progress made in implementing and achieving its nationally determined contribution under Article 4*."
81 Ibid, Art. 13(11): "[…] *[e]ach Party shall participate in a facilitative, multilateral consideration of progress with respect to efforts under Article 9, and its respective implementation and achievement of its nationally determined contribution*."

requiring the submission of specific information on support and to report on assistance (Article 9 (5) and (7) Paris Agreement).[82]

130. This being so, the resulting levels of greenhouse gas emissions reductions to be achieved by each Party's NDC (Article 4(2) to (19) Paris Agreement), the results of actions taken to conserve and enhance sinks (Article 5 Paris Agreement), the results of adaptation planning and actions (Article 7 Paris Agreement) or the resulting level of support to be provided to developing countries (Articles 9 to 11 Paris Agreement) are not among those that can be considered as obligations of result.

131. The distinctions made here between the Paris Agreement's obligations of conduct and obligations of result track the choices Parties made in the design of the Implementation and Compliance Committee ("PAICC") under Article 15 of the Agreement. This Committee, which is expert-based and facilitative in nature and functions in a manner that is transparent, non-adversarial and non-punitive, is nonetheless mandated to take up cases automatically with regard to a Party's compliance with commitments that are mandatory obligations of result. These include, for example, the commitment to communicate and maintain a nationally determined contribution under Article 4, and to submit a mandatory report or communication of information under Article 13 (9) and (7) and Article 9 (7) and (5) within an agreed deadline.[83]

132. Finally, the distinction between obligations of conduct and obligations of result should not lead to a conclusion that these and other provisions of the Paris Agreement are devoid of legally binding content. Indeed, the content of the obligations of conduct is highly relevant to understanding the standard of due diligence that must be exercised. Similarly, and as explained below, the 'guiding principles' referred to in the preamble to the Paris Agreement may likewise inform the implementation of those obligations of conduct by the Parties.

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82 Ibid, Art. 9(5): "Developed country Parties shall biennially communicate indicative quantitative and qualitative information related to paragraphs 1 and 3 of this Article, as applicable, including, as available, projected levels of public financial resources to be provided to developing country Parties."

Art. 9(7): "*Developed country Parties shall provide transparent and consistent information on support for developing country Parties provided and mobilized through public interventions biennially in accordance with the modalities, procedures and guidelines to be adopted by the Conference of the Parties serving as the meeting of the Parties to this Agreement, at its first session, as stipulated in Article 13, paragraph 13. Other Parties are encouraged to do so*."

83 Decision -/CMA.1 Modalities and procedures for the effective operation of the committee to facilitate implementation and promote compliance referred to in Article 15, paragraph 2, of the Paris Agreement.

4.4.3.1 The long-term goal of the Paris Agreement with regard to greenhouse gas emissions

133. Article 2(1)(a) of the Paris Agreement establishes the long-term temperature goal of "*holding the increase in global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels*".

134. Whilst more precise than the 'ultimate objective' defined in the UNFCCC, as identified above, this collective temperature goal is not in itself intended to establish a separate binding legal obligation on the Parties. In particular, the formulation by reference to a figure in °C, does not transform this goal, or the substantive obligations designed to achieve it, into obligations of result. It does, however, reflect the Parties' understanding of what the science indicated when the Paris Agreement was adopted, to be global average temperatures that would result from a "*dangerous anthropogenic interference with the climate system*." The long-term temperature goal reflects the Parties' collective intent in a clear and quantified manner and therefore, informs the interpretation of the obligations of conduct and by extension of due diligence, as to the level of ambition necessary to achieve that goal.

4.4.3.2 Due diligence obligations under the Paris Agreement

135. As outlined above, the Paris Agreement contains different types of legal obligation. The Parties have committed to procedural obligations requiring a specific action and which thereby establish obligations of result. Importantly, the Paris Agreement also includes provisions that do not establish obligations of result, but rather obligations of conduct, and by extension, of due diligence. The Paris Agreement sets normative parameters that inform the standard of due diligence with which Parties must comply.

136. In this section, rather than presenting the Paris Agreement exhaustively, the European Union focuses on those legal obligations which it considers to be most relevant for the determination of the questions before the Court.

137. Whilst the long-term temperature goal is set in Article 2(1)(a), the pathway for achieving that goal is outlined in Article 4(1) of the Paris Agreement. These provisions should, therefore, be read together since they inform each other. In that sense, Article 4(1) is often described as explaining Article 2(1)(a).

138. Article 4(1) provides that to achieve the long-term temperature goal, the Parties "*aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing*

that peaking will take longer for developing country parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty[84]."

139. For these purposes, the 'best available science' can be understood to refer to the peer-reviewed literature synthetised in the regular assessments by IPCC[85].

140. While Articles 2(1) and 4(1) do not establish obligations of result, they do collectively establish a commitment that informs a treaty-based expectation of Parties' behaviour.

141. It is a deliberate feature of the mitigation obligations under the Paris Agreement that they do not exhaustively prescribe what form mitigation efforts should take, leaving this to each of the Parties to determine. This does not, however, imply, that there are no normative parameters.

142. Pursuant to Article 4(2), in order to collectively meet the temperature goal, each Party is required to prepare, communicate, and maintain successive NDCs that it intends to achieve. Parties are also required to 'pursue' domestic measures, with the aim of achieving the objectives set forth in their NDCs, taking into account the normative context provided by Articles 2(1) and 4(1) of the Paris Agreement.

143. The European Union observes first that the commitment to prepare, communicate and maintain an NDC is a binding obligation of result, and that as a consequence, all Parties must take some mitigation measures.

144. Second, whilst Parties may design the content of those measures in their respective NDCs, pursuant to Article 4(4), developed country Parties are encouraged to continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances.

145. This provision indicates that NDCs integrating economy-wide absolute emission reduction targets are considered to reflect a higher level of ambition, and that all

84 Ibid, Art 4(1).

85 See the IPCC's 2022 Sixth Assessment Report: https://www.ipcc.ch/assessment-report/ar6/

Parties are expected to progress towards NDCs with these features. As is discussed below, Parties agreed at COP28 in Dubai, in the course of preparing their next round of NDCs, to encourage all Parties to come forward with ambitious, economy-wide emission reduction targets, covering all greenhouse gases, sectors and categories and aligned with limiting global warming to 1.5 °C, as informed by the latest science, in the light of different national circumstances.[86]

146. Third, the mitigation obligations under the Paris Agreement must be interpreted in the light of the obligations on each Party to update and adjust their NDC over time, including in response to the global stocktake. In this context, Article 4(3) provides that each successive NDC will represent a progression beyond the previous NDC and reflect that party's "*highest possible ambition*", reflecting "*common but differentiated responsibilities and respective capabilities*" ('CBDR-RC'), in the light of different national circumstances.[87]

147. While the term "*highest possible ambition*" is not defined within the Paris Agreement, the European Union considers that Article 4(3) implies a substantive expectation for each Party to exert its 'best efforts' or strive for optimal performance when crafting successive NDCs. The use of the term "*will*" in Article 4(3) carries more weight than a term such as 'should' but does not elevate the obligation to one of result – for instance by using the term 'shall'. Given the terminology used, this provision signifies a behavioural standard, consistent with its status as an obligation of conduct requiring an exercise of due diligence, whereby each Party is expected to take all appropriate measures at its disposal.[88]

148. Moreover, Parties are expected to align their ambition levels with their respective responsibilities and capabilities, taking into account national circumstances. This, as is discussed further below, implies a dynamic as opposed to static assessment of what this implies but does not detract from the (constant) obligation to maintain the threshold of ambition at it highest possible level.

86 1CMA5, para 39.

87 Paris Agreement, Art. 4(3): *"Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."*

88 This was recognized in the IPCC Working Group III chapter on international cooperation, which observed *that '[w]hile what represents a Party's highest possible ambition and progression is not prescribed by the Agreement or elaborated in the Paris Rulebook […], these obligations could be read to imply a due diligence standard'.*

149. Therefore, these two factors – progression and highest possible ambition – operate in conjunction with each other and are interconnected in setting substantive expectations of each Party's NDCs over time.

150. "*Highest possible ambition*" alongside "*progression*" implies that the increase in ambition should match the best efforts a party can feasibly undertake, in light of its evolving responsibilities, capabilities, and informed by the best available science. 'Progression' implies that there is a floor for the next NDC, discouraging backsliding, and further sets a clear, substantive expectation that each Party should raise ambition as much as possible when preparing, communicating and maintaining its successive NDC. It is the combination of both factors, together with the overall aim reflected in the temperature goal, that delineates the standard of due diligence when formulating NDC mitigation objectives.

151. These obligations are connected to the mandatory obligation that each Party communicate an NDC every five years in accordance with relevant decisions of the CMA and be informed by the outcomes of five-yearly global stocktake – the collective assessment of progress towards achieving the Paris Agreement's purpose, including the long-term temperature goal (Article 4(9) and Article 14(1) and (2)).

152. The first global stocktake took place at COP28/CMA5 in Dubai, and Parties' successive NDCs are expected 9-12 months prior to the COP30/CMA7 in 2025. As discussed below, CMA5 took a decision, in accordance with Article 4(9) requiring all Parties to submit to the secretariat their next NDCs at least 9-12 months in advance of CMA7, encouraging Parties to come forward in their next nationally determined contributions with ambitious, economy-wide emission reduction targets, covering all greenhouse gases, sectors and categories and aligned with limiting global warming to 1.5 °C, as informed by the latest science, in the light of different national circumstances, and encouraging all Parties to design their NDCs with an end date of 2035.

153. In view of the above, the Paris Agreement requires all Parties when formulating their NDCs, to exercise due diligence, deploy their best efforts and maximise their contributions to bolster the global endeavour to combat climate change.

154. As to the implementation of NDCs, the European Union recalls that the first sentence of Article 4(2) obliges Parties to prepare, communicate and maintain an NDC that they 'intend to achieve'. Given the emphasis on 'intentions', this clause cannot be interpreted as establishing obligations of result on each party to implement or indeed to achieve its NDC. The second sentence of that paragraph requires the Parties to

"*pursue domestic mitigation measures, with the aim of achieving the objectives of such NDCs*"[89]. This can be viewed as an obligation of conduct that tests the domestic mitigation measures 'pursued' by a Party against the stated level of ambition of that Party's NDC.

155. Underpinning the obligations to prepare, communicate, maintain and regularly update successive NDCs, as well as the requirement to pursue domestic mitigation measures, with the aim of achieving the objectives of the NDCs, are the commitments under the Paris Agreement's enhanced transparency framework to provide information necessary to track progress made in implementing and achieving NDCs. This includes the information that Parties must submit according to Article 4(8).[90] This information is subject to mandatory technical and political review.[91]

156. Equally, each Party is to "*provide information on legal, institutional, administrative and procedural arrangements for domestic implementation, monitoring, reporting, archiving of information and stakeholder engagement related to the implementation and achievement of its NDC under Article 4*"[92].

157. Moreover, each Party is to provide information on actions, policies and measures that support the implementation and achievement of its NDCs, focusing on those that have the most significant impact on greenhouse gas emissions[93]. In providing such information, Parties must select indicator(s) to track progress towards the implementation and achievement of their NDCs[94]. The information provided is subject to an independent technical expert review and the facilitative multilateral consideration of progress under Article 13(11).

89 Ibid, Art. 4(2): Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.

90 Ibid, Art. 4(8): "*In communicating their nationally determined contributions, all Parties shall provide the information necessary for clarity, transparency and understanding in accordance with decision 1/CP.21 and any relevant decisions of the Conference of the Parties serving as the meeting of the Parties to this Agreement*."

91 The Parties have a reporting obligation on the progress of implementing and achieving the NDC under the enhanced transparency framework, in accordance with Article 13(7)(b) of the Agreement.

92 UNFCCC 'Decision 18/CMA.1, Modalities, Procedures and Guidelines for the Transparency Framework for Action and Support Referred to in Article 13 of the Paris Agreement' UN Doc FCCC/PA/CMA/2018/3/Add.2 (19 March 2019) Annex, para 62.
file:///C:/Users/talabkl/Downloads/CMA2018_03a02E.pdf

93 Ibid, para 80.

94 Ibid, para 65.

158. These procedural provisions, which establish obligations of result, ensure that compliance with the obligations of conduct in Article 4(2) can be ascertained.

159. In conclusion, the Paris Agreement sets out normative parameters that inform the obligations of conduct and, by extension, of due diligence that bind the Parties: the level of ambition outlined in the NDCs, an expectation of alignment with the overall temperature goal, and progressive ambition with each successive NDC which should always reflect each Party's highest level of ambition. While these normative parameters are not designed to determine specific, quantified emission reduction targets and the exact level of ambition for a particular Party, they can allow for the assessment of whether Parties have discharged their obligations of due diligence.

4.4.3.3 Decisions of the Conferences of the Parties and of the Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement

160. The COP is the supreme decision-making body of the UNFCCC and serves as the meeting of the Parties to the Paris Agreement (CMA) as well as the meeting of the Parties to the Kyoto Protocol (CMP). Each formation of the governing body includes all Parties to each respective treaty, oversees the implementation of each treaty, and takes decisions to promote its effective implementation.

161. The decisions of the COP and of the CMA are generally considered to be non-binding[95], save in those circumstances where the UNFCCC or Paris Agreement, respectively, explicitly empowers the COP/CMA to take binding decisions[96]. The European Union considers that, as a matter of international law, decisions of the COP and CMA constitute at least 'subsequent practice' in the application of the UNFCCC and of the Paris Agreement, respectively, establishing the agreement of their respective Parties regarding its interpretation for the purposes of Article 31(3)(b) VCLT. As to the requirement in Article 31(3)(b) VCLT of the practice being observed by all Parties to

95 See Daniel Bodansky and Sandra Day O'Connor, Paris Agreement, College of Law Arizona State University, https://legal.un.org/avl/pdf/ha/pa/pa_e.pdf, page 4.

96 See for instance, Art 13.7(a) of the Paris Agreement.

the relevant treaty[97], it is to be noted that the COP and CMA take decisions by consensus[98].

162. Of particular relevance to an evolving understanding of the duty of due diligence with regard to protecting the climate system from anthropogenic greenhouse gas emissions, are recent COP decisions confirming what the best available science indicates is necessary to avoid dangerous climate change. The outcome of the first global stocktake, which, as described above, will inform the design and ambition of Parties' successive NDCs, was adopted at COP28/CMA5 in Dubai. With regard to the level of ambition legitimately expected of Parties in limiting greenhouse gas emissions, CMA5, among other things:

- emphasised the need for urgent action and support to keep the 1.5 °C goal within reach and to address the climate crisis in this critical decade;
- noted that feasible, effective and low-cost mitigation options are already available in all sectors to keep 1.5 °C within reach in this critical decade with the necessary cooperation on technologies and support;
- noted with concern the pre-2020 gaps in both mitigation ambition and implementation by developed country Parties and that the Intergovernmental Panel on Climate Change had earlier indicated that developed countries must reduce emissions by 25–40 per cent below 1990 levels by 2020, which was not achieved;
- acknowledged that historical cumulative net carbon dioxide emissions already account for about four fifths of the total carbon budget for a 50 percent probability of limiting global warming to 1.5 °C;
- recognised that that limiting global warming to 1.5 °C with no or limited overshoot requires deep, rapid and sustained reductions in global greenhouse gas emissions of 43 percent by 2030 and 60 percent by 2035 relative to the 2019 level and reaching net zero carbon dioxide emissions by 2050;

97 See Yearbook of the International Law Commission, 1966, Vol. II, page 22, paragraph (15): "By omitting the word "all" the Commission did not intend to change the rule. It considered that the phrase "the understanding of the parties" necessarily means "the parties as a whole". It omitted the word "all" merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice".

98 See: FCCC/CP/1996/2, Rule 42. As a last resort, decisions may be taken by two-third majority.

- called upon Parties to contribute to the following global efforts, in a nationally determined manner, taking into account the Paris Agreement and their different national circumstances, pathways and approaches:
    - Tripling renewable energy capacity globally and doubling the global average annual rate of energy efficiency improvements by 2030;
    - Accelerating efforts towards the phase-down of unabated coal power;
    - Accelerating efforts globally towards net zero emission energy systems, utilizing zero- and low-carbon fuels well before or by around mid-century;
    - Transitioning away from fossil fuels in energy systems, in a just, orderly and equitable manner, accelerating action in this critical decade, so as to achieve net zero by 2050 in keeping with the science;
    - Accelerating zero- and low-emission technologies, including, inter alia, renewables, nuclear, abatement and removal technologies such as carbon capture and utilization and storage, particularly in hard-to-abate sectors, and low-carbon hydrogen production;
    - Accelerating and substantially reducing non-carbon-dioxide emissions globally, including in particular methane emissions by 2030;
    - Accelerating the reduction of emissions from road transport on a range of pathways, including through development of infrastructure and rapid deployment of zero-and low-emission vehicles;
    - Phasing out inefficient fossil fuel subsidies that do not address energy poverty or just transitions, as soon as possible; and
- Emphasised the importance of conserving, protecting and restoring nature and ecosystems towards achieving the Paris Agreement temperature goal, including through enhanced efforts towards halting and reversing deforestation and forest degradation by 2030, and other terrestrial and marine ecosystems acting as sinks and reservoirs of greenhouse gases and by conserving biodiversity, while ensuring social and environmental safeguards.

163. These CMA decisions, as outcomes of the global stocktake, capture the best available science which is to inform Parties' successive NDCs; and set goals, that while non-binding and collective in their character, nonetheless help to inform a standard of due diligence to which all Parties can legitimately be expected to contribute, including in the context of preparing and communicating their successive NDCs.

4.5 THE ROLE OF GUIDING PRINCIPLES

164. Recital (3) to the Preamble of the Paris Agreement refers to the objectives of the UNFCCC and to its principles. It states that the Paris Agreement is to be "*guided by [the Convention's] principles, including the principle of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.*"

165. It is, therefore, evident that the 'principles' underlying the UNFCCC are considered by the Parties to the Paris Agreement to have continued relevance, and notably may guide its interpretation. A literal interpretation of recital (3) further confirms that whilst the Convention principles that may serve this function 'include' equity and Common but Differentiated Responsibilities' and 'Respective Capabilities' or 'CBDR-RC', this is not intended to be an exhaustive enumeration of all potentially relevant principles. The European Union recalls that other such principles include the precautionary principle.

166. The Parties to the Paris Agreement have, nevertheless, attached particular significance to 'equity' and to a principle of 'CBDR-RC' in the light of national circumstances, both of which are referred to in multiple provisions in the Agreement. In certain provisions, these principles are articulated in conjunction with one another. For instance, Article 2 (2) of the Paris Agreement provides that it will be implemented to reflect 'equity' and 'the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.' In other provisions, only the principle of 'equity' is referred to.[99]

167. The European Union observes that the 'CBRD-RC' principle as expressed in the Paris Agreement should therefore, be viewed as additional to and, accordingly, not coextensive with the principle of 'equity' as a general principle of law.[100] Indeed, whilst the 'CBDR-RC' principle has been described as best understood as an application of the general principle of equity in international law[101], it has acquired a specific and separate meaning within the framework of climate change mitigation and environmental obligations under international law.[102] Importantly, that meaning as well as the manner

99 See recital 11 to the Preamble and Article 3 of the Paris Agreement.

100 For a discussion on the principle of equity, see further below.

101 Wewerinke-Singh, State Responsibility, Climate Change and Human Rights under International law, page 45.

102 See Francioni F, Equity in International law, Max Planck Encyclopedia of International Law.

in which it is operationalised has evolved since the principle was first given expression in the 1992 Rio Convention.[103]

4.5.1 The principle of equity in the context of the protection of the climate system

168. 'Equity' as a general principle of law has been ascribed different meanings in different legal contexts. The European Union sets out its position as to the role and function of this principle in the specific context under consideration in these advisory proceedings, namely the protection of the climate system.

169. The principle of 'equity' has been referenced in several international treaties relevant to the obligations of States to protect the climate system. In addition to the UNFCCC and Paris Agreement, this notably includes UNCLOS in which there is an explicit reference to "*the equitable and efficient utilization*" of the ocean's resources' in the Preamble. The 1992 Biodiversity Convention and its Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity also refer to the "*fair and equitable*" sharing of benefits of the use of genetic sources among their objectives[104] and the 1987 Montreal Protocol likewise refers to "*equity*".[105]

170. In the framework of the Paris Agreement, the principle of 'equity' has different dimensions. Notably, it is used to reflect differences between States in terms of their national circumstances and capacity to address climate change, and as a principle relevant between generations (inter-generational equity).[106] In so far as equity may also serve as a principle which expresses a broader concept of global distributive

103 Principle 7 of the Rio Declaration adopted at the first Rio Earth Summit in 1992 states: *"In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command."* The concept of 'differentiation' in the Rio Declaration (in itself a non-binding international instrument) is however, formulated as an 'acknowledgment' as opposed to the basis for a specific or separate legal obligation.

104 Article 1 Convention on Biological Diversity and Article 1 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity.

105 Preambular paragraph (9).

106 See Article 3(1) UNFCCC and Articles 2(2), 4 and 14(1) of the Paris Agreement.

justice,[107] it is operationalised in the Paris Agreement principally through the technical assistance and financing provisions, as well as the requirements for developed countries to take the lead in adopting ambitious NDCs and secure the collective temperature target.

171. The European Union acknowledges that the principle of equity in a broad sense is a general principle of law, within the meaning of Art 38(1) of the ICJ Statute.

172. Indeed, this Court has held that the "*the legal concept of equity is a general principle directly applicable as law*".[108] In the often-cited passage of the individual opinion in a case concerning the *Diversion of Water from the Meuse* (the Netherlands v Belgium), Judge Manley Hudson interpreted certain equity maxims as "*general principles of law recognised by civilized nations*".[109]

4.5.2 Intergenerational equity and the protection of the climate system

173. The principle of 'intergenerational equity' should be considered as a specific articulation of the general principle of equity under international law. The principle of 'intergenerational equity' under international law generally refers to the "*rights and obligations of present and future generations with respect to the use and enjoyment of nature and cultural resources*" and to the need for present generations to take into account the rights of future generations, so as to "*pass the Earth and our natural and cultural resources on in at least as good condition as we received them*"[110].

174. Further, the principle of intergenerational equity is often linked with the concept of distributive justice, fairness and is understood as an "*integral element*" of the broader

107 The Oxford Handbook of International Environmental Law, edited by Lavanya Rajamani, and Jacqueline Peel, Oxford University Press, Incorporated, 2021. Chapter 19. See also *Gabčíkovo–Nagymaros* in which the Court recognised the "right to an equitable and reasonable share of the natural resources" - ICJ, *Case Concerning the Gabčíkovo–Nagymaros Project* (Hungary v Slovakia), Judgment of 25 September 1997, para. 85, p. 53. See also ICJ, *Case Concerning Pulp Mill on the River Uruguay (Argentina v Uruguay),* Judgement of 20 April 2010, para. 266, p. 91. ICJ (1974) Reports of Judgements, Advisory Opinions and Orders, para. 72, p. 31. 055-19740725-JUD-01-00-EN.pdf (icj-cij.org).

108 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya),* Judgment, I.C.J. Reports 1982, p. 18, para. 71. See also: North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, p. 3, para. 88.

109 Individual Opinion of Judge Manley Hudson in *Diversion of Water from the Meuse (the Netherlands v Belgium)* case, p. 76. (en-diversion-of-water-from-the-meuse-individual-opinion-by-mr-hudson-monday-28th-june-1937 (jusmundi.com))

110 Weiss Brown, Edith. 'Climate Change, Intergenerational Equity, and International Law.' (2008).

principle of sustainable development[111]. Principle 3 of the Rio Declaration on Environment and Development, indeed indicates that meeting "*developmental and environmental needs of present and future generations*" is the ultimate objective of the right to development[112], while the IPCC considers that intergenerational equity "*underlies the concept of sustainability*" and is an "*intrinsic component*" of sustainable development[113].

175. This principle is of relevance in the context of the protection of the climate system, due to the inherent long-term and partially irreversible effects of climate change. For, it needs to be recognised that it would be unjust for future generations to bear the detrimental consequences of interferences with the climate system by present generations, to which they have not contributed.

176. Its relevance in the framework of the present Advisory Opinion is contemplated by the Request, which refers explicitly to the "*[p]eoples and individuals of the present and future generations affected by the adverse effects of climate change*" (question 2(b) referred to the Court).

177. The principle of intergenerational equity is referred to in a number of international treaties[114] as well as in soft-law instruments[115].

178. Within the context of the Paris Agreement and the UNFCCC, intergenerational equity is referred to as a guiding principle which Parties should follow (Article 3(1) UNFCCC) and acknowledged among the principles in the preambular paragraphs of the

111 Redgwell, Catherine, 'Principles and Emerging Norms in International Law: Intra- and Inter-generational Equity', in Kevin R. Gray, Richard Tarasofsky, and Cinnamon P. Carlarne (eds), The Oxford Handbook of International Climate Change Law (2016; online edn, Oxford Academic, 2 Nov. 2016), page 189.

112 A/CONF.151/26 (Vol. I) Report of The United Nations Conference on Environment and Development, Principle 3: *"The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."*

113 Fleurbaey M., S. Kartha, S. Bolwig, Y.L. Chee, Y. Chen, E. Corbera, F. Lecocq, W. Lutz, M.S. Muylaert, R.B. Norgaard, C. Okereke, and A.D. Sagar, 2014: Sustainable Development and Equity. In: Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Edenhofer, O., R. Pichs-Madruga, Y. Sokona, E. Farahani, S. Kadner, K. Seyboth, A. Adler, I. Baum, S. Brunner, P. Eickemeier, B. Kriemann, J. Savolainen, S. Schlömer, C. von Stechow, T. Zwickel and J.C. Minx (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, page 287.

114 UNFCCC, Article 3(1); Paris Agreement, Preambular paragraph (11); UNESCO Convention concerning the protection of the world cultural and natural heritage, Article 4; UNECE Water Convention, Article 2(5)(c); Convention of Biological Diversity, Article 2.

115 Stockholm Declaration and Action Plan for the Human Environment (A/CONF.48/14/REV.1) and Rio Declaration on Development and the Environment, A/CONF.151/26 (Vol. I).

Agreement (Paris Agreement, preambular paragraph 11)[116]. While the Paris Agreement only mentions the principle of intergenerational equity in its preambular part, it refers more generally to 'equity' in various operational provisions, which the European Union considers should be construed as referring to intergenerational equity more specifically[117].

179. Indeed, the European Union considers that since climate change has a (detrimental) impact on future generations, the consideration of the principle of intergenerational equity should inform the content of the due diligence obligations under the Paris Agreement. The European Union also supports the IPCC's proposition that "*mitigation and adaptation measures can strongly affect broader [sustainable development] and equity objectives*".[118]

180. On that basis, the European Union considers that the references to 'equity' in the operative provisions of the Paris Agreement – as a factor shaping the Parties' due diligence obligations thereunder – should be interpreted as requiring particular consideration of intergenerational equity. This notably means that Article 4 of the Paris Agreement should be interpreted to the effect that in "*aim[ing] to reach global peaking of greenhouse gas emissions as soon as possible*" Parties should factor-in the off-setting of climate change effects to future generations and strive to ensure that the irreversible effects of climate change are kept to a minimum.

181. In terms of the content of the principle, the European Union supports the doctrinal description of intergenerational equity as aiming at "*conserving the diversity of the natural resource base so that future generations can use it to satisfy their own values*"; "*ensuring the quality of the environment on balance is comparable between*

116 However it has been argued that, based on Article 3 UNFCCC*, "countries have accepted treaty commitments to act against climate change that include the commitment to share the burden of action equitably".* See: Fleurbaey M., S. Kartha, S. Bolwig, Y.L. Chee, Y. Chen, E. Corbera, F. Lecocq, W. Lutz, M.S. Muylaert, R.B. Norgaard, C. Okereke, and A.D. Sagar, 2014: Sustainable Development and Equity. In: Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, page 294.

117 Article 2(2), 4(1) and 14(1) of the Paris Agreement.

118 Fleurbaey M., S. Kartha, S. Bolwig, Y.L. Chee, Y. Chen, E. Corbera, F. Lecocq, W. Lutz, M.S. Muylaert, R.B. Norgaard, C. Okereke, and A.D. Sagar, 2014: Sustainable Development and Equity. In: Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA., page 288. The IPCC report also considers that: *"Equitable and sustainable development provides a broader overarching framework within which to examine climate strategies as one of the multiple interacting challenges confronting society. Ultimately, it is a framework within which society can consider the fundamental question of its development pathway",* page 322.

generations" and allowing "*non-discriminatory access among generations to the Earth and its resources*"[119].

182. As to the legal status of the principle under general international law, the European Union notes that the interests of future generations in the context of environmental protection have been acknowledged by this Court[120] and the possibility that intergenerational equity may be emerging as a general principle of law[121] has been explored since the end of the last century.

183. In recognition of the pivotal role of intergenerational equity in the context of climate change, the European Union also underscores that this principle is reflected in the constitutional fabric of the European Union, which mentions the "*solidarity between generations*" (Article 3(3) of the Treaty on European Union) and the "*sustainable development of the Earth*" (Article 3(5) of the Treaty on European Union) among the overarching objectives of the Union both in its internal and external action, right next to the protection and improvement of the quality of the environment. The close link between environmental protection and sustainable development is further reflected in Article 11 of the Treaty on the Functioning the European Union (TFEU)[122] and in Article 37 of the Charter of Fundamental Rights of the European Union[123]. In turn, the European Union policy on the environment explicitly includes "*combating climate change*"[124].

119 Weiss Brown, Edith, Climate Change, Intergenerational Equity, and International Law, (2008), page 616.

120 The Court stated 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".* See: Reports of Judgments, Advisory Opinions and Orders, *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion of 8 July 1996, paragraph 29, p. 19. 095-19960708-ADV-01-00-EN.pdf (icj-cij.org); *Gabcikovo-Nagymaros Project (HungarylSlovakia)*, Judgment, 1. C. J. Reports 1997, p. 7, paragraph 53.

121 See: *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Courts Judgment of 20 December 1974 in the Nuclear Tests* (New Zealand v. France) Case, Dissenting opinion by Judge Weeramantry, page 341*: "The case before the Court raises, as no case ever before the Court has done, the principle of intergenerational equity - an important and rapidly developing principle of contemporary environmental law";* and: Reports of International Arbitral Awards, Award in the Arbitration regarding the *Iron Rhine Railway between the Kingdom of Belgium and the Kingdom of the Netherland*s, decision of 24 May 2005, Volume XXVII, pp. 35-125, para. 58: *"emerging principles, whatever their current status, make reference to conservation, management, notions of prevention and of sustainable development, and protection for future generations".*

122 This Article provides that *"[e]nvironmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development".*

123 This Article provides that: *"A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development".*

124 Article 191(1) TFEU.

184. Therefore, and considering that the Treaties establishing the European Union "*represent a body of rules of international treaty law*"[125], the European Union invites the Court to find that the principle of equity, as an enforceable legal norm of customary international law, also comprises intergenerational equity. The European Union also invites the Court to clarify the content of the principle of intergenerational equity and its implications in terms of States' obligations under the Paris Agreement and under human rights law[126].

4.5.3 The principle of "common but differentiated responsibilities and respective capabilities" in the context of the protection of the climate system

185. 'CBDR-RC' is referred to explicitly in the preamble as well as in Articles 2.2 and 4.3 of the Paris Agreement. It has therefore, been accorded a normative status. Nonetheless, whilst there is a broad consensus between States that CBDR-RC is one of the guiding principles relevant to the interpretation of the international standards and rules related to the protection of the climate system, there are divergent opinions as to the scope of this principle and, notably, as to how it interacts with States' obligations to protect the climate system.

186. In the absence of a shared contemporary interpretation of the 'CBDR-RC' principle, the European Union considers that the Court could usefully examine the principle of CBDR-RC in the light of the evolving substantive obligations to which States have expressed consent to be bound, and clarify its scope and relevance when delimiting the obligations of States and international organisations to protect the climate system as well as when considering the legal consequences flowing from such obligations.

4.5.3.1 The Interpretative Approach

187. The European Union recalls that existing international law on the protection of the climate system from anthropogenic emissions is largely treaty-based. Therefore, the interpretation of the 'CBDR-RC' principle and any assessment of its relevance to the

125 Judgment of the Court of Justice of the European Union in Case C-431/22, ECLI:EU:C:2023:1021, paragraph 87.

126 An attempt to delineate the content of human rights of future generations based on the principle of intergenerational equity and States' obligations in relation thereto has been done in the 'Maastricht Principles' endorsed by a group of academics and civil society representatives. See: Maastricht Principles on the Human Rights of Future Generations July 2023, available at: https://www.rightsoffuturegenerations.org/home.

scope of obligations to protect the climate system is also properly located within the law of those treaties. In particular, the European Union does not consider that the principle of CBDR-RC has acquired either the status of customary international law, or that of a general principle of law.[127]

188. The main treaty-based rules related to States' obligations in respect of anthropogenic emissions find their most recent expression in the Paris Agreement which builds on the United Nations Framework Convention on Climate Change (UNFCCC). These international treaties provide, therefore, the basis for the contemporary interpretation of the CBDR-RC principle in the specific context of the protection of the climate system.

4.5.3.2 There is no uniform norm of 'differentiation' across all treaties

189. Norms establishing differential treatment as between different Parties to a single treaty are an existing feature of international law including international environmental treaties. However, the concept of 'differentiation' between States or between groups of States does not have the same meaning and implications in all treaties or across all normative frameworks.

190. In some treaties, certain States may be exempted from specific obligations, or, conversely, be subject to additional obligations.[128] In other treaties, the underlying obligations are identical as between all Parties, but the implementation of certain obligations is 'differentiated' to account for the specific domestic circumstances of the respective Parties.[129] This form of 'differentiation' may be given effect through procedural mechanisms, such as a longer period of time to implement the same substantive obligations. Finally, it has been suggested that there is a third model of 'differentiation', namely clauses requiring one group of Parties to provide technical and financial assistance to another group of Parties.[130]

191. Given that 'differentiation' can be articulated in multiple ways and may serve various functions, provisions establishing differential treatment must always be construed

127 See further The Oxford Handbook of International Environmental Law, edited by Lavanya Rajamani, and Jacqueline Peel, Oxford University Press, Incorporated, 2021. Chapter 19: *"The principle of CBDR may not have become a principle of customary international law in itself but the equity dimension of international environmental law constitutes an intrinsic part of this branch of international law."*

128 See for instance UNCLOS, and the WTO Agreement of which the GATT 1994 is a part.

129 See for instance, Article 2 (1) of the Covenant on Economic, Social and Cultural Rights, 16 December 1966.

130 Rajamani, Differential Treatment in International Environmental Law, p.74. For an example, see the 2001 Stockholm Convention.

within their specific legal context and in the light of the overall objectives of the treaty or body of law of which they form a part.

192. This interpretative approach is central to the assessment of the relevance of the principle of CBDR-RC when defining the scope of the obligations incumbent on States for the protection of the climate system.

193. States' understanding of the scope and relevance of the principle of 'CBDR-RC' in the context of climate change mitigation obligations has evolved.

194. As described above, States have modulated their treaty-based obligations in respect of anthropogenic emissions over time. This reflects the evolution in the shared understanding of States as to their collective and individual obligations to mitigate climate change, notably in response to progress in scientific understanding related to climate change phenomena.[131]

195. In parallel, and consistent with this development, norms of 'differentiation' in the context of obligations related to the reduction of anthropogenic emissions have also been modulated by the Parties. These changes have impacted the normative content of 'differentiation' in the relevant treaties, as well as States' views on the manner in which this principle interacts with other substantive obligations. This has two main interpretative implications.

196. First, to the extent that 'differentiation' as expressed in multilateral treaties relevant to the protection of the climate system is not articulated in a uniform manner, this should be understood as reflecting a deliberate choice by the negotiating Parties. Therefore, whereas a number of multilateral instruments refer to the principle of 'CBDR' or 'CBDR-RC'[132], the precise interaction of that principle with the substantive norms laid down in those treaties is specific to each treaty and depends on the interpretation of the relevant treaty as a whole.

197. Second, in view of the above, when considering how the principle of CBDR-RC interacts with the obligations of the Parties to the Paris Agreement to protect the climate system, the starting point must be the interpretation of that principle as laid down in that agreement and elucidated in subsequent decisions of the COPs. In other words, earlier

131 See Maljean-Dubois S and Moraga Sariego P, 'Le principe des responsabilités communes mais différenciées dans le régime international du climat' Cahiers de Droit, 55/1 (2014): 83, 104.

132 The UNFCCC refers explicitly to a principle of 'CBDR' and added the concept of 'respective capabilities' or 'RC'.

iterations of the 'CBDR' or 'CBDR-RC' principle may be relevant for retracing this evolution, but no longer reflect the contemporary understanding of the scope and relevance of the CBDR-RC principle in the specific context of protection of the climate system.

4.5.3.3 The scope and role of the principle of CBDR- RC in the Paris Agreement

198. The principle of CBDR-RC is recalled in recital (3) of the Preamble to the Paris Agreement, and it is operationalised through Articles 2(2) and 4 of the Paris Agreement.

199. The reference to CBDR-RC as a guiding principle in the preamble to the Paris Agreement does not impose a separate legal obligation on the Parties, but rather reflects its function to underpin the design of the substantive provisions and hence, its relevance for interpreting the latter.

200. Article 2 identifies the aims, objectives and principles of the Paris Agreement. Notably, Article 2(2) of the Paris Agreement provides that *"[t]his Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances*."

201. Article 4(1) of the Paris Agreement lays down the commitments of the Parties as regards mitigation. That article does not itself set mitigation targets but rather leaves them to be defined in future commitments entered into by the Parties.[133] This legal construction is fundamentally different from that established in the UNFCCC as reinforced in the Kyoto Protocol. Notably, under the Paris Agreement, there is no longer a rigid 'bifurcation' in the mitigation obligations based on economic status. Instead, Parties may autonomously differentiate their substantive mitigation contributions through their NDCs.[134]

202. Consequently, although identified as one of the 'guiding principles' originating in the UNFCCC that should inform the interpretation and implementation of the substantive

133 Paris Agreement, Article 4 (2).

134 The UNFCC divided countries into 'Annex I' and 'non-Annex I,' the former generally referring to 'developed countries' and the latter to 'developing countries'. The Kyoto Protocol codified the classifications of countries in the two annexes. Article 10 (1) of the Kyoto Protocol explicitly reaffirms the commitments in Article 4 (1) UNFCCC and refers to the 'CBDR-RC' principle.

obligations in the Paris Agreement[135], the legal significance of 'CBDR-RC' is not identical to that of expressions of 'differentiation' contained in earlier treaties, most notably in the UNFCCC and the Kyoto Protocol.[136]

203. In the first place, the European Union recalls that the Paris Agreement requires all Parties to participate in efforts to mitigate climate change through the adoption of domestic mitigation measures. It is built on a foundation of collective endeavours to address a 'common concern of humankind.'

204. Whilst derived from and therefore often associated with concepts of 'equity', 'CBDR-RC' should be understood as a mechanism which has allowed a sufficient consensus to materialise in negotiations for all Parties to agree to adopt forward-looking greenhouse gas emissions reductions goals. It is, therefore, primarily designed to express the acknowledgment by the international community that the capabilities of all Parties to meet their obligations to mitigate climate change are not equal.

205. Accordingly, emphasis is placed on the 'national circumstances' of each party. This reflects that not all obligations may be 'differentiated' and that any differentiation is intended to account for economic and technical realities.

206. The principle of CBRD-RC in the context of the Paris Agreement has, therefore, been calibrated as well as nuanced. The references to 'respective capabilities' throughout the Paris Agreement demonstrates that this calibration is substantial[137] and 'differentiation' under the Paris Agreement has been re-focused to account for national circumstances as they evolve over time.

207. In the second place, in line with the above, the 'CBDR-RC' principle should be understood to reflect, in legal terms, that individual Parties may be subject to different standards of conduct, whilst being bound to fulfil the same overarching obligations that apply to all States. Consequently, whilst the acknowledgment that not all Parties may

135 Paris Agreement, recital (3).

136 Article 3 of the UNFCCC, entitled 'Principles', states: *"The Parties 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."* 'Differentiation' under the UNFCCC, therefore, implies that some countries ('developed countries') have a greater mitigation role than others. This is also reflected in the structure of Article 4 UNFCCC which expresses certain commitments as applying to *"[a]ll parties taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances",* and other commitments as applying specifically to developed and 'Annex 1' countries.

137 See in particular Paris Agreement, recital (3), and Articles 2, 4.

have the same capacity to participate in efforts to reduce emissions, and to mitigate climate change, is inherent in the 'CBDR-RC' principle, that principle is neither capable of modifying the fundamental, substantive obligations with which all Parties are required to comply nor, establishes an 'exemption' from those obligations.[138] In this respect, the Paris Agreement is to be distinguished from other international law regimes which provide for certain privileges or alleviations of obligations to certain States, on the basis of their level of economic development.[139]

208. In particular, the European Union observes that all Parties to the Paris Agreement are equally bound to seek to achieve a reduction in emissions and to implement their respective NDCs. Moreover, the responsibility to set ambition at the highest possible level applies to all Parties irrespective of their national circumstances.

209. However, the interpretation of the notion of the 'highest possible level of ambition' implies that implementing measures may vary as between Parties according to their national circumstances. Therefore, in accordance with the principle of 'CBDR-RC', the level of ambition in terms of the rate and magnitude of implementing measures as well as the degree of assistance provided to other Parties may legitimately differ depending on the economic and technical resources at a given party's disposal.

210. Paragraph 167 of the outcome document of the first global stocktake[140] at the fifth session of the conference of the Parties serving as the meeting of the Parties to the Paris Agreement (COP28/CMA5) illustrates this point:

> *"Recalls Article 3 and Article 4, paragraph 3, of the Paris Agreement, and reaffirms that each Party's successive nationally determined contribution will represent a progression beyond the Party's current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances;"*

138 Those core substantive obligations have been described in section 4.4 above.

139 For instance, the 'special and differential treatment' provisions of the World Trade Organization (WTO) agreements).

140 See FCCC/PA/CMA/2023/L.17

211. In the third place, whilst the Paris Agreement includes provisions which give expression to 'differentiation' in terms of the degree of financial and technical assistance that some States are required to provide to others, this does not dilute the underlying obligations which remain incumbent on all States. Rather it is based on the recognition that the available technical and economic resources vary between different Parties and hence their capacity to meet their shared and common obligations also varies. For instance, Article 4 (5) of the Paris Agreement provides that *"[s]upport shall be provided to developing country Parties … recognizing that enhanced support for developing country Parties will allow for higher ambition in their actions*".

212. 'Differentiation' in the financing provisions of the Paris Agreement is therefore, intended to provide a 'means' to enable certain Parties to achieve an 'end', in which all Parties have a common interest, namely addressing climate change as a 'common concern of humankind'.

4.5.3.4 Relationship between the principle of CBDR-RC and the level of ambition

213. The European Union recalls that the Paris Agreement requires Parties to attain the highest possible level of ambition but does not prescribe a specific level of ambition for any party. Against that backdrop, the 'CBDR-RC' principle informs the understanding of the measures that a specific party is bound to undertake.

214. First, since the principle of CBDR-RC does not establish a derogation from the core obligations incumbent on all States to refrain from causing or contributing to foreseeable harm or to act to prevent foreseeable threats to the climate system, all Parties must take some measures. Consequently, whilst certain Parties may, by virtue of their comparative economic and technical circumstances, have an obligation to move first and fastest to mitigate climate change, this does not imply that other Parties may 'free ride' or fail to take measures at their own disposal and within their means. This is embodied in the concept of 'common responsibilities' which implies that there a exists a minimum acceptable threshold of ambition.

215. To avoid diluting the substantive ambition of the international climate framework, to the extent that Parties rely on CBDR-RC to justify a low level of ambition in their NDC, this should be calibrated to subsisting and genuine economic and technical limitations impeding their capability to take more ambitious action. For that reason, the appropriate degree of 'differentiation' must be regarded as a dynamic rather than a

static concept[141], and must be focused on national circumstances. Within the framework of the Paris Agreement, this is reflected in the requirement of 'progressive' ambition and the obligation on each party to review their NDCs.

216. Second, the 'CBDR-RC' principle must not be applied to constrain the use of domestic regulation by Parties to address climate change in line with their respectively defined level of ambition.

217. In particular, Parties may establish norms and rules that require products to be placed on their own markets to comply with requirements aimed at securing the achievement of their self-defined environmental and climate change mitigation goals. In other words, a principle of 'CBDR-RC' does not require or even allow Parties to the Paris Agreement to lower domestic environmental standards to account for the domestic circumstances of each and all third countries. Parties may, without acting inconsistently with the CBDR-RC principle, establish norms, including those which regulate access to their market, that seek to promote greater global ambition as regards climate change mitigation, precisely because the Paris Agreement establishes a minimum standard of conduct.[142]

218. Finally, the European Union recalls more generally that the performance and interpretation of treaties are subject to the overriding obligation of good faith. Whilst there are multiple facets to this principle, one aspect is that: "... *it would be a breach of this obligation for a party to make use of an ambiguity in order to put forward an interpretation which it was known to the negotiators of the treaty not to be the intention of the Parties.*"[143] It has also been recognised that the text of a treaty cannot "*... be enlarged by reading into it stipulations which are said to result from the proclaimed intentions of the authors of the Treaty, but for which no provision is made in the text itself*."[144]

219. When interpreting the scope and application of the 'CBDR-RC principle' as defined in the Paris Agreement, the Court should, therefore, have regard to the common intentions of the negotiators of the Paris Agreement and neither broaden the scope of

141 See for instance, Voigt C, Ferreira F. 'Dynamic Differentiation': The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement. Transnational Environmental Law. 2016;5(2):285-303. doi:10.1017/S2047102516000212

142 See Article 4 (3) of the Paris Agreement.

143 McNair The Law of Treaties (1961), p465.

144 *Polish War Vessels in Danzig*. PCIJ Reports. Series A/B. No. 43, p. 142.

this principle beyond that which was agreed, nor accord it a meaning which would undermine the founding premise of the Paris Agreement which is that States will act collectively and are free to define their own level of ambition as high as they consider feasible.

220. Equally, given the principle of CBDR-RC has been accorded a specific meaning under international environmental law and in the context of climate change mitigation, 'CBDR-RC' as applicable in the framework of the Paris Agreement cannot be simply extrapolated to other normative frameworks.

4.6 LEGAL OBLIGATIONS TO PROTECT THE CLIMATE SYSTEM ARISING UNDER CUSTOMARY INTERNATIONAL LAW

221. The European Union submits that, concurrent with the treaty-based obligations described above, States are bound by norms of customary international law to protect the climate system. In this section, the European Union sets out in greater detail its position as to the scope and content of such norms.

222. The chapeau of the questions referred to the Court mentions human rights instruments among the instruments to which the Court should have regard when replying to the questions. These are the Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR). In addition, the Request refers to the United Nations Charter, the provision of which refer to human rights.

223. The provisions of these instruments are generally accepted as reflecting customary international law[145]. This stems notably from their *"near-universal"* ratification – an element that the International Law Commission (ILC) has clearly considered "*particularly indicative"* to identify a treaty rule as custom[146]. Further, this Court has found in the *Barcelona Traction* case that "*the principles and rules concerning the basic*

145 See for instance: Gudrun Monika Zagel (2018) International Organisations and Human Rights: The Role of the UN Covenants in Overcoming the Accountability Gap, Nordic Journal of Human Rights, 36:1, 74-90, DOI: 10.1080/18918131.2018.1453586, page 83.

146 Report of the International Law Commission, Seventieth session, A/73/10, page 144, para 3 and case law cited therein.

rights of the human person" are obligations *erga omnes*, in the protection of which "*all States can be held to have a legal interest*"[147].

224. The chapeau of the questions referred to the Court also refers to the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment, which are likewise considered to be customary international law principles[148].

225. The European Union's submission considers these sources of obligations in turn.

4.6.1 The relationship of systemic integration between the international climate change regime, on one hand, and customary international law related to human rights, the duty to protect and preserve the marine environment, and the principle of prevention, on the other hand

226. Since the human rights instruments, as well as the duty to protect and preserve the marine environment and the principle of prevention of significant harm mentioned in the chapeau of the questions referred to the Court are considered to codify or reflect norms of customary international law, it follows that, as a matter of general international law, the relationship between the international climate change, on one hand, and the international human rights regime, the duty to protect and preserve the marine environment and the principle of prevention of significant harm, on the other hand, is one between a treaty regime and the customary law regime.

227. The European Union submits that there is no conflict between the treaty-based international climate change regime, on one hand, and customary international law relating to human rights, the duty to protect and preserve the marine environment and the principle of prevention of significant harm, on the other hand. Rather, the relationship between these bodies of law is one of "*interpretation*", whereby "*one norm assists in the interpretation of another*"[149].

147 *Barcelona Traction, Light and Power Company, Limited* (Belg. v. Spain), Second Phase, Judgment, 1970 I.C.J. 3, paras 33-34: "*In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law*".

148 See sections 4.6.3. and 4.6.4 below.

149 Report of the International Law Commission on the work of its fifty-eight session, Chapter XII, page 178, paragraph (2).

228. The Vienna Convention on the Law of the Treaties (VCLT) and the 'principle of harmonization' are means through which the relationship of interpretation may be applied. According to the ILC, Article 31(3)(c) VCLT reflects the objective of "*systemic integration*"[150], in providing that treaties should be interpreted taking into account, inter alia, "*any relevant rules of international law applicable in the relations between the Parties*". The principle of harmonization applies where different norms bear on a single issue and it is possible to interpret them so as to give rise to "*a single set of compatible obligations*"[151]. The European Union considers that this is the case as regards the Paris Agreement, on one hand, and customary international human rights norms, the duty to protect and preserve the marine environment, and the principle of prevention of significant harm, on the other hand, since all these sets of rules bear on the issue of climate change.

229. The European Union therefore submits that both Article 31(3)(c) VCLT and the 'principle of harmonization' apply to the relationship between the Paris Agreement and the above-mentioned international customary law norms, such that the two legal regimes mutually inform and assist in the interpretation of the other, giving rise to a single set of harmonious, compatible obligations.

230. According to the ILC, customary international law rules are "*of particular relevance for the interpretation of a treaty under Article 31(3)(c) VCLT*" where "*a treaty rule is unclear or open-textured*"[152]. This is the case for the substantive provisions of the Paris Agreement, which by establishing due diligence obligations, leaves a certain margin of discretion to States.

4.6.2 Human Rights norms

231. While the list of human rights which may be affected by climate change cannot be described in exhaustive terms, and different climate phenomena may variably affect specific rights, the following rights – which constitute customary international law norms – appear to be particularly affected by climate change. The European Union will

150 Report of the International Law Commission on the work of its fifty-eight session, page 180, paragraph 17.

151 Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, 2006, paragraph (4).

152 Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, 2006, para (20)

hence focus its analysis on the relationship between States' international obligations regarding climate change and their customary human rights obligations regarding only those human rights.

232. **The right to life.** The right to life is a fundamental human right recognised by international treaty and customary law. It is codified in Article 3 of the UDHR, Article 6 of the ICCPR as well as in a number of regional human rights instruments such as the European Convention on Human Rights (ECHR)[153].

233. In its General Comment on the right to life, the Human Rights Committee (HRC) highlighted that "*[e]nvironmental 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*"[154].

234. **The right to health.** The right to health is codified in Article 25 of the UDHR and in Article 12 of the ICESCR, which recognizes "*the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*". The right to health includes a series of socio-economic conditions allowing the enjoyment of a healthy life, such as adequate sanitation, access to safe and potable water, and a healthy environment[155].

235. **The right to self-determination.** The right to self-determination is codified in Article 1 of the United Nations Charter, and in common Article 1 of the ICCPR and ICSECR. Its nature as a customary international norm applicable *erga omnes* was explicitly recognised by the ICJ for the first time in its *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia*[156].

236. According to common Article 1 of the UN Covenants, this right is three-fold: it entails the right of all peoples to "*freely determine their political status and freely pursue their economic, social and cultural development", to "freely dispose of their natural wealth and resources*" and to not "*be deprived of its own means of subsistence*"[157].

153 See: ECHR, Article 2; African Charter on Human and Peoples' Rights (ACHPR), Article 4; Inter-American Convention on Human Rights (IACHR), Article 4.

154 Human Rights Committee, General Comment No. 36 Article 6: right to life, paragraph 62.

155 CESCR General comment No. 14, E/C.12/2005/4, paragraph 36.

156 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, I.C.J. Reports 1971, p. 16, paragraph 52.

157 Common Article 1 of the UN Covenants.

237. As noted by the ILC, "*self-determination [is] closely linked to sovereignty over natural resources and the territorial integrity of States*" and that it "*implied that States should not lose their right to territorial integrity as a result of sea-level rise*"[158].

238. In this regard, the IPCC reports indicate that climate change affects the ability of certain people to dispose of their natural resources, which sometimes constitute the very means of subsistence of a people, which is one specific aspect of the right to self-determination[159].

239. **The right to privacy and family life.** The right to privacy and family life is codified in Article 17 of the ICCPR, according to which every person is to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honour and reputation.

240. At regional level, the right to privacy and family life is for instance codified in Article 8 of the ECHR. That right has consistently been held by the European Court of Human Rights (ECtHR) as being affected by environmental threats, thus entailing obligations for States in relation to environmental protection[160].

4.6.2.1 Increasing recognition of the relationship between human rights and climate change

241. This link between the international climate change and the human rights regimes is reflected in preambular paragraph (11) of the Paris Agreement, which States 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, empowerment of women and intergenerational equity"*. While non-binding, this preambular paragraph acknowledges the relevance of human rights in the context

158 ILC, Report on the work of the seventy-fourth session (2023), A/78/10, Chapter VIII - Sea-level rise in relation to international law, paragraph 170.

159 See notably, IPCC, 2022: Summary for Policymakers. In: Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change. Cambridge University Press, Cambridge, UK and New York, NY, USA, pp. 3–33, doi:10.1017/9781009325844.001., section B.1.6. and B.2.1

160 See for instance: ECtHR, *Pavlov and Others v Russia, (Application n. 31612/09),* paragraph 92; ECtHR*, Kotov and Others v Russia, (Applications nos. 6142/18 and others),* paragraph 123; ECtHR*, Hatton and Others v. The United Kingdom, (Application no. 36022/97),* paragraph 98. See also infra, section 4.6.2.1.

of climate change and invites States to take them into account in their climate action, including when establishing their level of climate ambition, in accordance with their respective human rights obligations.

242. In this sense, preambular paragraph (11) of the Paris Agreement reflects the principle of systemic integration, indicating that *"taking actions in response to climate change does not exempt [a State] from complying with its human rights obligations"*[161].

243. The consistent recognition of the relationship between human rights and climate change in numerous contexts and fora supports not only the possibility but also the desirability of interpreting the climate change and human rights regimes in such a way as to achieve utmost consistency between the two regimes.

244. Both the bodies entrusted with monitoring the implementation of the ICCPR and the ICECR (the HRC and the Committee on Economic, Social and Cultural Rights (CESCR), respectively) and various UN bodies have increasingly recognised the impact of climate change on the human rights guaranteed by the Covenants and the relationship of mutual influence between international climate change and human rights norms.

245. Notably, the HRC went as far as suggesting a relationship of mutual influence between the climate change and human rights regimes, whereby the *"obligations of States Parties under international environmental law should thus inform the content of article 6 of the Covenant, and the obligation of States Parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law"*[162].

246. Further, the framework principles on human rights and the environment laid down by the UN Special Rapporteur on Human Rights and the Environment, underscore that: *"Human rights and environmental protection are interdependent. A safe, clean, healthy and sustainable environment is necessary for the full enjoyment of human rights,*

161 See in this regard: United Nations Special Rapporteur on human rights and the environment, Framework Principle on Human Rights and the Environment, 2018, A/HRC/37/59, commentary to principle No. 16, paragraph 54. The specific rights mentioned in the preambular paragraph, in so far as they follow the general reference to "obligations on human rights", are considered to integrate an illustrative and not exhaustive list.

162 HRC, General comment No. 36 Article 6:Right to life, CCPR/C/GC/36, paragraph 62; as regard the CESCR, see: CESCR, General comment No. 26 (2022) on land and economic, social and cultural rights; and Statement on human rights and climate change Joint statement by the Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, 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 and the Committee on the Rights of Persons with Disabilities, HRI, 2019/1.

including the rights to life, to the highest attainable standard of physical and mental health, to an adequate standard of living, to adequate food, to safe drinking water and sanitation, to housing, to participation in cultural life and to development, as well as the right to a healthy environment itself, which is recognized in regional agreements and most national constitutions. At the same time, the exercise of human rights, including rights to freedom of expression and association, to education and information, and to participation and effective remedies, is vital to the protection of the environment"[163].

247. A topical moment in this progressive recognition was the UNGA Resolution on a human right to a healthy and clean environment, which acknowledged that the right to a clean, healthy and sustainable environment is *"related to other rights and existing international law"* and called on *"States, international organizations, business enterprises and other relevant stakeholders to adopt policies, to enhance international cooperation, strengthen capacity-building and continue to share good practices in order to scale up efforts to ensure a clean, healthy and sustainable environment for all"*[164].

248. The interactions between the international climate change and environmental law regime with international human rights norms have also been increasingly[165] acknowledged by different courts[166].

249. Already in 1996, in its Advisory Opinion on the *Threats of Use of Nuclear Weapons*, the Court found 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"*[167].

163 United Nations Special Rapporteur on human rights and the environment, Framework Principle on Human Rights and the Environment, 2018, paragraph 4.

164 See: Resolution adopted by the General Assembly on 28 July 2022, The human right to a clean, healthy and sustainable environment, A/RES/76/300.

165 Human rights-based climate litigation has increasingly grown worldwide, both at the regional and domestic level. The database of the Sabin Centre for Climate Change Law currently lists 140 climate litigation cases against government concerning human rights. See: Human Rights Archives - Climate Change Litigation (climatecasechart.com) – this number covers cases before judicial bodies and, in some exemplary instances, matters brought before administrative or investigatory bodies.

166 There is also a growing stream of domestic litigation interpreting States' climate change and environmental obligations in light of their human rights obligations. In Europe, more than a hundred cases were brought at the national or sub-national level in Belgium, Czech Republic, Finland, Germany, Ireland, Luxembourg, Spain, Austria, Estonia, France, Italy, Netherlands, Poland, Romania and Sweden.

167 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 226, paragraph 29.

250. The ECtHR has already rendered more than 300 decisions and judgements in environmental cases[168], consistently recognising that environmental harm can result in a violation of the rights codified Articles 2 and 8 of the ECHR and that States' obligations to protect the rights enshrined in the ECHR also encompass environmental protection obligations[169].

251. Currently, three cases concerning specifically climate change are pending before the ECtHR: the *Duarte Agostinho et al v Portugal and 32 other States* case[170], brought against the 27 European Union Member States as well as Norway, Russia, Switzerland, the United Kingdom, Turkey and Ukraine by six Portuguese youth alleging that the respondent States failed to comply with their obligations to protect the right to life, right to privacy, and right to not experience discrimination under Articles 2, 8 and 14 ECHR, read in the light of the commitments made within the context of the Paris Agreement; the *Verein KlimaSeniorinnen Schweiz* case[171], brought by an association of senior women against Switzerland based on alleged violations by Switzerland's climate policy, inter alia, of their right to life and health under Articles 2 and 8 ECHR; and the *Carême v. France* case[172], concerning an alleged breach by the French authorities of their obligation to protect the right to private and family life and to guarantee the right to life under Articles 2 and 8 ECHR by failing to take sufficient climate action[173].

252. The Inter-American Court of Human Rights (IACtHR) even recognized the right to a healthy environment, as expressively codified in the Inter-American human rights system[174] as an autonomous right, entailing individual and collective connotations and

168 See: Speech by the Tim Eicke, "Human Rights and Climate Change: What Role for the European Court of Human Rights", 2 March 2021, paragraph 16, available at: rm.coe.int/human-rights-and-climate-change-judge-eicke-speech/1680a195d4.

169 In this regard see also section 5.2 below.

170 *Duarte Agostinho and Others v. Portugal and Others* (application no. 39371/20).

171 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (application no. 53600/20).

172 *Carême v. France* (application no. 7189/21).

173 For the protection offered by the ECtHR vis-à-vis breaches of human rights see also infra, Section 5.2.

174 Article 11 of the Protocol of San Salvador.

as a *"fundamental right for the existence of humankind"* due to the *"irreparable harm"* that environmental degradation may cause to human beings[175].

253. The relationship between climate change and the enjoyment of human rights is also underscored by the reports of the IPCC, which reflect the global consensus of the scientific community on climate change and are endorsed by IPCC member governments[176].

254. The IPCC reports notably indicate that *"climate change poses significant risks to the enjoyment of the human rights protected in (…) the International Covenant on Economic, Social and Cultural Rights"* and that *"[t]he adverse impacts identified in the [IPCC] report threaten, among others, the rights to life, to adequate food, to adequate housing, to health and to water, and cultural rights"*[177].

255. As concerns the right to life, the IPCC found with *"very high confidence"* that climate change has life-threatening effects, in so far as *"[i]n all regions extreme heat events have resulted in human mortality and morbidity"*[178], with *"high confidence"* that *"[c]limate change and related extreme events will significantly increase ill health and premature deaths from the near- to long-term"*[179] and, with *"very high confidence"*, that *"[g]lobally, population exposure to heatwaves will continue to increase with additional warming, with strong geographical differences in heat-related mortality without additional adaptation"*[180].

175 IACtHR, Advisory Opinion Oc-23/17 of November 15, 2017, Requested by the Republic of Colombia, *The Environment And Human Rights (State Obligations In Relation To The Environment In The Context Of The Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) And 5(1) In Relation to Articles 1(1) And 2 of the American Convention on Human Rights),* paragraph 59. A new request for Advisory Opinion of the IACtHR has been lodged on January 2023 by Chile and Colombia concerning the Climate Emergency and Human Rights.

176 The Panel is made up of 195 member governments.

177 Statement on human rights and climate change, Joint statement by the Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, 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 and the Committee on the Rights of Persons with Disabilities, HRI/2019/1, 2020, paragraph 3.

178 IPCC, 2022: Summary for Policymakers. In: Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change. Cambridge University Press, Cambridge, UK and New York, NY, USA, pp. 3–33, doi:10.1017/9781009325844.001., section B.1.4

179 Ibidem, section B.4.4.

180 Ibidem.

256. In relation to the right to health, the IPCC concluded with *"very high confidence"* inter alia that *"[c]limate change has adversely affected physical health of people globally"* and *"mental health of people in the assessed regions"*[181].

257. In relation to the right of self-determination, the IPCC found with *"high confidence"* that *"individual livelihoods have been affected through changes in agricultural productivity, impacts on human health and food security, destruction of homes and infrastructure, and loss of property and income, with adverse effects on gender and social equity"*[182] and that *"[l]oss of ecosystems and their services has cascading and long-term impacts on people globally, especially for Indigenous Peoples and local communities who are directly dependent on ecosystems, to meet basic needs"*[183]. As described above, climate change particularly affects the right to self-determination of small island developing States, whose very cultural identity and statehood is threatened by climate-related sea-level-rise[184].

4.6.2.2 The emergence of the human right to a healthy and clean environment as a norm of customary international law

258. Considering the widespread recognition of climate change-human rights relationship in numerous fora and forms, the European Union submits that the human right to a clean and healthy environment is emerging as a matter of customary international law, requiring States to inter alia take appropriate measures to protect and fulfil human rights vis-à-vis the deleterious effects of climate change.

259. The constituent element of a norm of customary international law is *"general practice that is accepted as law (opinio juris)"*[185], which requires that a sufficiently widespread,

181 Ibidem, section B.1.4. See also B.1.3 where the IPCC stated that: *"[i]ncreasing weather and climate extreme events have exposed millions of people to acute food insecurity and reduced water security",* which in turn *"have increased malnutrition in many communities (high confidence)".*

182 IPCC, 2022: Summary for Policymakers. In: Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change. Cambridge University Press, Cambridge, UK and New York, NY, USA, pp. 3–33, doi:10.1017/9781009325844.001, section B.1.6.

183 Ibidem, B.2.1.

184 ILC, Report on the work of the seventy-fourth session (2023), A/78/10, Chapter VIII - Sea-level rise in relation to international law, paragraph 170.

185 ILC, Draft conclusions on identification of customary international law 2018, conclusion 2.

representative and consistent practice by States or, in certain cases, international organizations exists[186] and is *"undertaken with a sense of legal right or obligation"*[187].

260. According to the ILC, 'State practice' may consist inter alia in diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; decisions of national courts[188]. *'Opinio iuris'* may consist in decisions of national courts, treaty provisions and conduct in connection with resolutions adopted by international organizations[189].

261. Section 4.6.2.1. above has outlined a certain degree of States' practice, and of acceptance of that practice as law – notably reflected in States' conduct in relation to the adoption of UNGA resolutions and in judgments of regional courts – of recognising a human right to a healthy environment. Additionally, the right to a healthy environment has acquired constitutional recognition and protection in more than 100 States[190].

262. However, given the lack of codification of the right to a healthy environment in any global (rather than regional) international treaty and the lack of recognition of such right by international courts, it is not possible to conclude that a sufficient *opinio iuris* has emerged as regards the existence of a human right to a healthy environment as of yet.

263. The European Union thus encourages the Court to clarify the contours and the consequences – in terms of States' obligations – of the systemic integration between the international climate change and customary human rights regimes, and to confirm whether – on that basis – a right to a clean and healthy environment has emerged as a customary international norm.

186 ILC, Draft conclusions on identification of customary international law 2018, conclusions 4 and 8.

187 ILC, Draft conclusions on identification of customary international law 2018, conclusion 9.

188 ILC, Draft conclusions on identification of customary international law 2018, conclusion 6, paragraph 2.

189 ILC, Draft conclusions on identification of customary international law 2018, conclusion 10, paragraph 2.

190According to UNEP (https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what-0): "About two thirds of the constitutional rights refer to a healthy environment; alternative formulations include rights to a clean, safe, favourable, wholesome or ecologically balanced environment."

4.6.2.3 Obligations of States flowing from Human Rights

264. Article 1(3) of the UN Charter identifies among the purposes of the United Nations that of *"promoting and encouraging respect for human rights and for fundamental freedoms"*; the ICCPR requires States to *"respect"* and *"ensure"* the rights guaranteed by the ICCPR, notably by adopting legislative or other measures necessary to give effect to the rights and by ensuring the right to effective remedy for the violation of those rights; the ICESCR instead mandates States to *"progressively achiev[ing] the full realization"* of the rights guaranteed by that Covenant. Albeit worded in a different way, both the ICCPR and the ICESCR impose positive as well as negative obligations on States. In particular, these instruments provide for an obligation to *"respect"*, i.e. to *"refrain from interfering directly or indirectly with"* the relevant rights; to *"protect"*, i.e. to *"take measures to make sure that others, such as businesses, political groups or other people do not interfere"* with the right; and to *"fulfil"*, i.e. to *"take steps to realize rights"* the relevant rights[191].

265. Although States' obligations to respect, protect and fulfil human rights vis-à-vis the effects of climate change may vary depending on the specific right considered, some common traits are identifiable, notably in light of: (1) the best available science on climate change; (2) relevant case law; (3) recommendations of the UN bodies. The European Union invites the Court to set out what these common traits are, and thereby clarify the effect of human rights on States' climate obligations in the context of the UNFCCC framework.

266. As illustrated above, the best available science unequivocally demonstrates the detrimental effects of climate change on the enjoyment of the right to life, of key components of the right to self-determination, such as the possibility for certain communities to exploit their natural resources and to keep enjoying their statehood and cultural identity, of the right to health, notably with respect to water scarcity, malnutrition, spread of diseases and sanitation, and of the right to the key components of the right to privacy and family life of certain communities.

191 See: OHCHR, International Bill of Human Rights, available at: https://www.ohchr.org/en/what-are-human-rights/international-bill-human-rights.

267. Further, the HRC and the CESCR have interpreted the UN Covenants as requiring States to take environmental and climate change measures to protect the right to life[192], the right to privacy and family life[193] and the right to health[194].

268. The European Union therefore supports the view that the duty to respect, protect and fulfil human rights also requires States to take appropriate measures to address *"the general conditions in society that may give rise to direct threats"* [195] to the enjoyment of such right, among which climate change. In accordance with the principle of systemic integration reflected in Article 31(3)(c) VCLT, the European Union takes the view that the measures States must take to respect, protect and fulfil the human rights affected by climate change include measures to tackle the latter.

269. The European Union submits that human rights obligations in relation to climate change are obligations of conduct and due diligence, entailing a duty to prevent human rights

192 See: HRC General Comment 36 on the right to life, paragraph 62, where the HRC found that the *"[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"* and that *"States parties should therefore ensure sustainable use of natural resources, develop and implement substantive environmental standards, conduct environmental impact assessments and consult with relevant States about activities likely to have a significant impact on the environment, provide notification to other States concerned about natural disasters and emergencies and cooperate with them, provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach".*

193 See: Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019, *Torres Strait*, CCPR/C/135/D/3624/2019, paragraph 8.12, where the HRC found that Australia violated the complainants' right to privacy and family life as codified in Article 17 *ICCPR "by failing to discharge its positive obligation to implement adequate [climate] adaptation measures to protect the authors' home, private life and family, the State party violated the authors' rights under article 17 of the Covenant",* considering *that "when climate change impacts (…) have direct repercussions on the right to one's home, and the adverse consequences of those impacts are serious because of their intensity or duration and the physical or mental harm that they cause, the degradation of the environment may then adversely affect the well-being of individuals and constitute foreseeable and serious violations of private and family life and the home".*

194 See: CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C.12/2000/4, General comment No. 14: The right to the highest attainable (refworld.org), paragraph 11, where the CESCR interpreted the right to health *"as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health".*

195 HRC General Comment 36, right to life, paragraph 26.

violations, and a duty of care, with regard to the conduct of private operators, entailing both positive and negative obligations[196].

270. Positive obligations[197] are in particular at stake where: *"(i) the State knew or should have known that (ii) there was a real, serious and foreseeable risk" and (iii) the State failed to exercise due diligence in the adoption of necessary and appropriate measures reasonably available to it to prevent or protect from the risk"*[198]. These obligations are in essence, obligations of conduct, which are *"flexible enough to adjust to require States to do what is 'necessary,' as well as feasible or 'reasonable,' to avert foreseeable risk and this changes as science evolves, and as the capacity of States varies"*[199].

271. Since the IPCC shows the detrimental impact of climate change on the enjoyment of human rights will significantly increase in scenarios of global temperature rises beyond

196 See: for instance, the HRC General Comment 36 on the right to life. The ECtHR found that States' human rights obligations have both a negative and a positive dimension, whereby States must not only refrain from interfering with the enjoyment of such rights, but also take positive measures to secure their enjoyment. While the ECtHR recognised a certain discretion to States as regards the *"choice of means"* in this respect, it consistently found that positive obligation to entail a requirement to adopt, maintain and operate an appropriate regulatory regime. On this basis, the ECtHR has repeatedly found violations of article 8 ECHR based on States' failure to comply with their domestic legal or regulatory regime. However, it has also clarified that such legislative compliance is not necessarily enough to find compliance with certain human rights obligations – but merely one of the many elements to be considered in that regard. The ECtHR also makes it clear that States's human rights obligations also entail a duty to prevent human rights violations, and a duty of care in relation to the conduct of private operators under their jurisdiction. The same goes for the obligation to progressively achieve the full realisation of the human rights guaranteed by the ICSECR, entailing an obligation to *"ensure the enjoyment of minimum essential levels of each right"* and to *"take steps towards the full realization of ESCRs for all", as well as a prohibition of retrogression and discrimination in such protection. To this regard, States have a duty to "use their maximum available resources"* (see: Economic, social and cultural rights | OHCHR).

197 In its, General Comment No. 31, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, the HRC clarified that the positive obligations of States require them *to "adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations"* (paragraph 7) under the Covenant and entail an obligation of *"due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities"* paragraph 8). The HRC also clarified that a failure by States to comply with the obligation to give effect to the Covenant rights in their domestic order *"cannot be justified by reference to political, social, cultural or economic considerations within the State"* (paragraph 14).

198 Helen Duffy, Climate Change and the Extra-Territorial Scope of Human Rights Obligations; Global Threats and Fragmented Responses in Furthering the Frontiers of International Law: Sovereignty, Human Rights, Sustainable Development, Blokker, Dam and v. Prisland (eds), Brill (2021), available at: *SSRN-id4326910.pdf (cec.eu.int), page 7. As regard the requirement of 'foreseeable' risk, in its General Comment 36 on the right to life, the HRC has interpreted Article 6 ICCPR to the effect that the *"obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life. States parties may be in violation of article 6 even if such threats and situations do not result in loss of life"* (paragraph 7). In relation to the positive obligation to ensure the right to life, the HRC clarified that this duty encompasses an obligation to *"exercise due diligence to protect the lives of individuals against deprivations caused by persons or entities whose conduct is not attributable to the State"* (paragraph 7).

199 Ibidem.

1.5ºC or 2ºC – i.e., absent proper mitigation and adaptation measures[200], the European Union in particular submits that measures to be taken by States to ensure the full realization of human rights necessarily also encompass those aimed at tackling climate change and maintaining the temperature rise within the 1.5/2 ºC limit.

272. Therefore, the European Union is of the view that in order to comply with their human rights obligations associated with climate change, the measures States must take to tackle climate change must assuredly be appropriate to achieve the Paris Agreement temperature goal and must thus include both mitigation and adaptation measures. A State that has not complied with the procedural obligations established in the Paris Agreement, or whose NDCs would be manifestly inadequate to achieve the long-term temperature goal laid down in Article 2, would be susceptible to be found to be in breach of its human rights obligations under customary international law.

273. At the same time, because the substantive obligations under the Paris Agreement are due diligence obligations which leave a certain margin of discretion to States as to how to reach the overall temperature goal, merely complying with the procedural requirements under the Paris Agreement is not necessarily sufficient to actually achieve that goal and thus to 'respect, protect and fulfil' fundamental human rights to the required standard. Whether that standard is reached would depend on the level of ambition – the level of due diligence – applied by Parties to the Paris Agreement.

274. To conclude, the European Union is of the view that States have obligations to take mitigation and adaptation measures also as a matter of international human rights law[201]. Since the best available science suggests that breaches of human rights are among the foreseeable effects of global warming especially above 1.5ºC/2ºC, such

200 According to the Summary for Policymakers of the IPCC Sixth Assessment Report, (see infra, footnote 161 above), section B.4.: *"the magnitude and rate of climate change and associated risks depend strongly on near-term mitigation and adaptation actions"*. Because according to IPCC (ibidem, paragraph B.3), *"[n]ear-term actions that limit global warming to close to 1.5°C would substantially reduce projected losses and damages related to climate change in human systems and ecosystems, compared to higher warming levels, but cannot eliminate them all (very high confidence)",* States' measures must be appropriate to keep the temperature raise within the 1.5°C or at least 2°C limit.

201 In this regard see: Committee on Economic, Social and Cultural Rights General Comment No. 26 (2022) on land and economic, social and cultural rights: *"States shall cooperate at the international level and comply with their duty to mitigate emissions and their respective commitments made in the context of the implementation* of the Paris Agreement. States have these duties also under human rights law, as the Committee has highlighted previously" (paragraph 56). States must *"take specific measures to prevent their domestic and international policies and actions, such as trade, investment, energy, agricultural, development and climate change-mitigation policies, from interfering, directly or indirectly, with the enjoyment of human rights"* (paragraph 41).

measures must be appropriate to reach the overall temperature goal laid down in Article 2 of the Paris Agreement.

275. In the European Union's view, States' human rights obligations as regards the detrimental effects of climate change may apply extraterritorially, within the limits of States' jurisdiction/effective control.

276. This conclusion is particularly relevant in the context of the detrimental effects of climate change since climate phenomena and the effects thereof are of a transboundary nature, and are linked to the duty of prevention of significant harm (see Section 4.6.4. below).

277. In addition, certain human rights norms constitute obligations *erga omnes*, which States have *"towards the international community as a whole"* and which *"are the concern of all States"*[202].

278. Regional human rights courts and specialised human rights bodies consistently held that States' human rights obligations are not necessarily constrained within their own national borders but extend to the scope of their 'jurisdiction'[203]. In particular, there is a certain convergence in the case-law of the HRC[204], the CESCR[205], the ECtHR[206] and

202 *Barcelona Traction, Light and Power Company,* Limited, Judgment, I.C.J. Reports 1970, p. 3, paras. 33-34.

203 Article 2(1) of the ICCPR explicitly provides that States must "respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant". In relation to the right to life, the HRC has interpreted this provision to the effect *that "a State party has an obligation to respect and ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control".* The ICESCR lacks any jurisdictional clause and is thus interpreted by the CESCR in the sense that the Covenants lays down exterritorial obligations for States (see: Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, paragraphs 26-27). As concerns the UN Charter, the duty of Members of the United *Nations "to take joint and separate action in cooperation with the Organization"* to achieve the purposes set forth in article 55 of the Charter, including *"universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion"* is expressed without any territorial limitation, *and "should be taken into account when addressing the scope of States' obligations under human rights treaties"*(see: Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, paragraph 27).

204 Human Rights Committee, General Comment No. 31 [80].pdf, CCPR/C/21/Rev.1/Add. 13, paragraph 10.

205 See CESCR, para 10: *"The Covenant establishes specific obligations of States parties at three levels — to respect, to protect and to fulfil. These obligations apply both with respect to situations on the State's national territory, and outside the national territory in situations over which States parties may exercise control".*

206 ECtHR, *Al Skeini v. United Kingdom and Jaloud v. Netherlands,* (Application no. 55721/07), paragraphs 133-140 and case-law cited therein.

the IACtHR[207] on the fact that human rights obligations extend to cases where the State has exercised sufficient *"effective control"* – either over a certain territory, over certain people by agents of the State, but also over activities which have effects on human rights abroad.

279. For instance in relation to the right to life enshrined in Article 6 ICCPR, the HRC clarified that States *"must also take appropriate legislative and other measures to ensure that all activities taking place in whole or in part within their territory and in other places subject to their jurisdiction, but having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory, including activities undertaken by corporate entities based in their territory or subject to their jurisdiction, are consistent with article 6, taking due account of related international standards of corporate responsibility and of the right of victims to obtain an effective remedy"*[208].

280. Similarly, according to the CESCR, *"[e]xtraterritorial obligations arise when a State party may influence situations located outside its territory, consistent with the limits imposed by international law, by controlling the activities of corporations domiciled in its territory and/or under its jurisdiction, and thus may contribute to the effective enjoyment of economic, social and cultural rights outside its national territory"*[209].

281. Under the ECHR, the concept of 'jurisdiction' enshrined in its Article 1 has been interpreted by the ECtHR as *"primarily territorial"*, so that *"acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in exceptional cases"*[210].

282. However, the ECtHR has been increasingly progressive in the interpretation of *"jurisdiction"* for the purposes of the ECHR obligations, holding notably that *"as an exception to the principle of territoriality, a Contracting State's jurisdiction under Article 1 may extend to acts of its authorities which produce effects outside its own*

207 IACtHR, Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia the Environment and Human Rights *(State Obligations In Relation To The Environment In The Context Of The Protection And Guarantee Of The Rights To Life And To Personal Integrity: Interpretation And Scope Of Articles 4(1) And 5(1) In Relation To Articles 1(1) And 2 Of The American Convention On Human Rights),* Paragraph 81.

208 Human Rights Committee, General Comment No. 36: right to life, paragraph 22.

209 Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, para 28.

210 ECtHR, Case of *Al-Skeini and Others v. the United Kingdom*, Application no. 55721/07, paragraph 131 (emphasis added).

territory"[211]. In particular, the ECtHR held that a State' jurisdiction outside its own borders can primarily be established based on the basis of: the power (or control) actually exercised over the person of the applicant[212] or of control actually exercised over the foreign territory in question[213].

283. Further, in *Kovačić and Others v. Slovenia*, the ECtHR found that *"the responsibility of the High Contracting Parties may be engaged by acts of their authorities that produce effects outside their own territory"* and that *"the acts of the Slovenian authorities continue[d] to produce effects, albeit outside Slovenian territory, such that Slovenia's responsibility under the Convention could be engaged"*[214]. At the same time, the Court also clarified that *"[t]he mere fact that decisions taken at national level had an impact on the situation of persons resident abroad is also not such as to establish the jurisdiction of the State concerned over those persons outside its territory"* and that *"[i]n order to determine whether the Convention applies […], the Court must examine whether exceptional circumstances existed which could lead to a conclusion that [the State] was exercising extraterritorial jurisdiction in respect of the applicants"*[215].

284. Essentially, according to the ECtHR, *"Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory"*[216].

285. On this basis, the European Union invites the Court to clarify the concepts and extent of States' 'jurisdiction' and 'control' in this context, and in particular whether, and if so, to what extent, States' human rights obligations with respect to climate change extend to the human rights of individuals against the effects of activities over which they exercise effective control, regardless of where such effects unfold.

211 ECtHR, *Al-Skeini and Others v. the United Kingdom*, Application No. 55721/07 [GC], 2011, § 133, and the references therein.

212 Ibidem, paragraph 137.

213 Ibidem, paragraph 138.

214 ECtHR *Kovačić and Others v. Slovenia*, Decision on admissibility, Application No. 44574/98 [2003] 5(c).

215 *ECtHR, M.N. and Others v. Belgium* (dec.) [GC], 2020, Application No. 3599/18, paragraph 112.

216 See ECtHR, *Issa and Others v. Turkey*, Judgment, Application No. 31821/96 [2004] paragraph 71.

4.6.3 The duty to protect and preserve the marine environment

286. The customary duty to protect and preserve the marine environment has crystallised[217] in Part XII of UNCLOS. In particular, the obligation to 'protect and preserve the marine environment'[218] constitutes the primary and general obligation of Part XII of UNCLOS, which the subsequent provisions of Part XII of UNCLOS further develop and detail.

287. The customary international law nature of these provisions of UNCLOS is evidenced, inter alia, by the reference to *"the relevant provisions of customary international law reflected in Part XII of the United Nations Law of the Sea Convention and, in particular"* in the Preamble of the OSPAR Convention[219], and in Agenda 21 on Sustainable Development and by widespread State practice addressing sources of pollution covered by Part XII of UNCLOS[220].

288. The European Union submits that the duty to protect and preserve the marine environment is an obligation of conduct and of due diligence, rather than of result. This means that it does not provide for an obligation of State Parties to necessarily achieve the protection and preservation of the marine environment, but merely to take all necessary measures towards that end.

289. This interpretation reflects the settled case law of the International Tribunal on the Law of the Sea (ITLOS)[221] and of relevant arbitral tribunals.

290. In terms of content, the European Union takes the view that the duty to protect and preserve the marine environment:

217 See in this regard: *Continental Shelf (Libyan Arab Jarnahiriya/Malta),* Judgment, I. C.J. Reports 1985, p. 13, paragraph 26: "the 1982 Convention was regarded by the Parties as irrelevant : the Parties are again in accord in considering that some of its provisions constitute, to a certain extent, the expression of customary international law in the matter". See also: Professor Suzanne Lalonde, , Protection of the Marine Environment: The International Legal Context, A Symposium on Environment in the Courtroom: Protection of the Marine Environment October 13, & 14, 2016, Dalhousie University, available at: https://cirl.ca/sites/default/files/teams/1/Oct%202016%20Symposium/ENG_Protection%20of%20the%20Marine%20Environment%20-%20The%20International%20Legal%20Context_Lalonde.pdf, page 2: "Most legal authors and governments, including non-parties such as the United States, recognize that since their entry into force on 16 November 1994, the environmental provisions established by the Convention have gained nearly universal acceptance and thus reflect customary law".

218 Article 192 of UNCLOS.

219 Convention for the protection of the marine environment of the North-East Atlantic, preambular paragraph (7).

220 See in this regard Philippe Sands and Jacqueline Peel, Principles of international Environmental Law, page 462.

221 See notably: ITLOS, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC),* Case Nº 21, Advisory Opinion of 2 April 2015, paragraph 219. See also: Permanent Court of Arbitration (PCA*), The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China),* Case Nº 2013-19, Award of 12 July 2016, paragraph 959 (hereinafter 'the South China Sea Arbitration')

- features a dual nature, as it *"extends both to the "protection" of the marine environment from future damage and "preservation" in the sense of maintaining or improving its present condition"* and hence encompasses both *"the positive obligation to take active measures to protect and preserve the marine environment"* and *"the negative obligation not to degrade the marine environment"*[222];
- as to its precise content, varies depending on the circumstances of the specific situation and notably the level of risk related to the activity at stake[223];
- requires *"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 the public and private operators"*[224].
- covers the preservation and protection of the marine environment *per se*, beyond the issue of pollution and encompasses the *"the conservation of the living resources of the sea"*[225].

291. The European Union also recalls that the due diligence obligation to protect and preserve the marine environment *"is informed by the other provisions of Part XII and other applicable rules of international law"*[226]. These rules include international law principles, such as the customary principle of prevention of environmental harm and

222 PCA*, South China Sea Arbitration,* Case Nº 2013-19, Award of 12 July 2016, paragraph 941. Thereby the Arbitral Tribunal clarified that Article 192 of UNCLOS also covers the protection of the marine environment from future damage. In this regard the European Union considers that this should not be construed as a duty to anticipate any hypothetical risk, but rather as a *"duty to prevent, or at least mitigate significant harm to the environment"* in accordance with a standard of due diligence.

223 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, paragraph 117.

224 Ibidem, paragraph 115, citing ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Judgment of 20 April 2010, I.C.J. Reports 2010, p. 18, paragraph 197.

225 ITLOS, *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan),* List of cases: Nos. 3 and 4, Order of 27 August 1999 (Provisional Measures), ITLOS Reports 1999, p. 280, at page 295, para. 70.

226 PCA, *South China Sea Arbitration,* paragraph 941. Since the customary international law duty to protect and preserve the marine environment has been crystalised in Article 192 of UNCLOS, its content is also detailed by the other provisions of Part XII of UNCLOS which further develop and specify the general obligation to protect and preserve the marine environment. Notably, Section 5 of Part XII establishes obligations specific to the different sources of marine pollution; Section 4 of Part XII establishes procedural obligations, inter alia the requirement to carry out an environmental impact assessment; the general obligation in Article 192 is informed by the horizontal obligations to act in good faith and to cooperate internationally for the protection and preservation of the marine environment.

the precautionary principle, as reflected notably in the Rio Declaration on Environment and Development[227].

292. Further, the European Union submits that the duty to protect and preserve the marine environment also extends to threats posed by the effects of climate change[228].

293. Indeed, first, there is solid scientific evidence of the detrimental effects of climate change on the marine environment[229]. Second, Article 192 of UNCLOS, which reflects the customary duty to protect and preserve the marine environment does not qualify the type of harm against which the protection and preservation of the marine environment must be ensured. Therefore, States are required to take measures to protect and preserve the marine environment against any kind of harm, including harm caused by climate change, such as ocean warming, sea level rise and ocean acidification, which are caused by green-house gases emissions into the atmosphere.

294. It follows that the due diligence obligation to protect and preserve the marine environment should also be informed by the commitments set out in the UNFCCC and in the Paris Agreement, as the primary international law instruments governing climate change, and in the subsequent relevant decisions taken by the governing bodies of these treaties.

295. The European Union has detailed its position as regards the relationship between the protection and preservation of the marine environment and the Paris Agreement in its

227 UN, Rio Declaration on Environment and Development, The United Nations Conference on Environment and Development, Rio de Janeiro, 1992, A/CONF.151/26 (Vol. I), Principle 15: *"In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation".* Further, in the context of the 2012 review of the Agenda 21 of the 1992 Rio Conference (see UN, UNGA Res 66/288, 2012, Annex, paragraph 158), States committed *"to protect, and restore, the health, productivity and resilience of oceans and marine ecosystems, to maintain their biodiversity, enabling their conservation and sustainable use for present and future generations, and to effectively apply an ecosystem approach and the precautionary approach in the management, in accordance with international law, of activities having an impact on the marine environment, to deliver on all three dimensions of sustainable development".*

228 The close relationship between international climate change law of the law of the sea was inter alia underscored by the UN Secretary-General in his report on 'Oceans and the law of the sea', in which he noted that: *"Increased near-term action, reflected in nationally determined contributions, will be essential to reach the Paris Agreement targets, which include many possibilities for ocean-related action".* See: UN General Assembly (UNGA), Report of the Secretary-General, Oceans and the law of the sea, A/76/311, 30 August 2021, paragraph 48.

229 See to this regard: IPCC, 2019: Summary for Policymakers. In: IPCC Special Report on the Ocean and Cryosphere in a Changing Climate, Cambridge University Press, Cambridge, UK and New York, NY, USA, pp. 3–35. https://doi.org/10.1017/9781009157964.001.

submission in ITLOS Case No. 31 and in this regard refers to its written statement (**Annex 1**) and oral submission (**Annex 2**) in that case[230].

296. In light of this clear relationship, and well as the fact that the Paris Agreement explicitly mentions *"importance of ensuring the integrity of all ecosystems, including oceans"* in its Preamble, the European Union thus further takes the view that the due diligence obligations under the Paris Agreement should be informed also by the duty to protect and preserve the marine environment.

4.6.4 The principle of prevention of significant harm

297. The obligation to prevent significant transboundary harm (duty of prevention) is widely recognised as part of customary international law and constitutes a primary obligation of customary international environmental law.

298. The origins of the duty of prevention lie in the due diligence required of States in their territory[231]. Accordingly, every State has an obligation *"not to allow knowingly its territory to be used for acts contrary to the rights of other States"*[232].

299. The Court has confirmed the existence of an obligation of general international law to prevent (significant) transboundary environmental harm on a number of occasions.

300. In the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court held that *"[t]he 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."*[233]

301. In *Gabčikovo-Nagymaros Project*, the Court reiterated this finding and further specified that, in 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.[234]

230 Case No. 31, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal).*

231 *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Judgment, I.C.J. Reports 2010, p. 14, para. 101.

232 The *Corfu Channel Case, Judgment (Merits),* I.C.J. Reports 1949, p. 22.

233 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, para. 29.

234 Case concerning the *Gabčikovo-Nagymaros Project (Hungary v. Slovakia),* Judgment I.C.J. Reports 1997, paras. 53 and 140.

302. In *Pulp Mills*, the Court held that States are obliged to use all the means at their disposal in order to avoid activities which take place in their territory, or in any area under their jurisdiction, causing significant damage to the environment of another State.[235]

303. The Court reiterated this statement in *Certain Activities* and confirmed the States' obligation *"to exercise due diligence in preventing significant transboundary harm"*.[236]

304. The existence of a general international law obligation to prevent significant transboundary harm is furthermore confirmed by a number of arbitral awards in inter-state arbitration.

305. Thus, the arbitral tribunal in *Iron Rhine*[237] held that the duty to prevent, or at least mitigate, significant harm to the environment has now become a principle of general international law[238].

306. In *The South China Sea Arbitration*[239], the arbitral tribunal quoted from the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*[240], before concluding that States have a positive duty to prevent, or at least mitigate, significant harm to the environment when pursuing large-scale construction activities.

307. A duty of prevention has furthermore been recognized in the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities. The Draft Articles apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences (Article 1 of the Draft Articles). Article 3 provides for a duty to prevent significant transboundary harm on the State of origin. The latter is defined as the State in the territory or otherwise under the jurisdiction or control of which these activities are planned or carried out (Article 2(d) of the Draft Articles).

235 *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Judgment, I.C.J. Reports 2010, p. 14, para. 101.

236 *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, I.C.J. Reports 2015, p. 665, paras. 104 and 153.

237 PCA, *Iron Rhine Arbitration,* Award of 25 May 2005, paras. 59 and 222, with the latter referring to the Nuclear Weapons Advisory Opinion.

238 See also PCA, *Indus Waters Kishenganga Arbitration,* Partial Award of 18 February 2013, para. 451.

239 PCA, *The South China Sea Arbitration,* Award of 12 July 2016, para. 941.

240 *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, 1. C.J. Reports 1996, p. 226, para. 29.

308. While the obligation to prevent significant transboundary harm traditionally has been understood as applying in an inter-state context and typically obliges one State (the State of origin) to prevent significant damage to another State[241], it is widely recognized that general international law is evolving to enlarge the scope of the obligation to include also significant harm to the global commons as well as in areas beyond national jurisdiction.

309. This is evidenced by the case law of the Court, which in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* held that the States´ obligation of prevention under general international law not only applies with regard to the environment of other States but also with regard to *"areas beyond national control"*[242]. Quoting and contextualizing this statement in *Gabčikovo-Nagymaros Project*, the Court referred to the *"great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind"*[243].

310. In addition, referring to the judgment of the Court in *Pulp Mills*, the ITLOS held that *"[t]he Court's reasoning in a transboundary context may also apply to activities with an impact on the environment in an area beyond the limits of national jurisdiction; and the Court's references to "shared resources" may also apply to resources that are the common heritage of mankind."*[244]

311. A similarly broad understanding of the obligation to prevent significant harm is furthermore evidenced by Treaty practice in relation to climate change. For instance, the 8th preambular paragraph to the UNFCCC 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."* (emphasis added).

312. Accordingly, Guideline 3 of the ILC Draft Guidelines on the Protection of the Atmosphere (2021) states that *"States have the obligation to protect the atmosphere*

241 See the Trail Smelter case, Reports of International Arbitral Awards, Vol. III, p. 1965, where the arbitral tribunal held that *"no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein"* (emphasis added).

242 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. C.J. Reports 1996, p. 226, para. 29

243 Case concerning the *Gabčikovo-Nagymaros Project (Hungary v. Slovakia),* Judgment I.C.J. Reports 1997, para. 53 (emphasis added).

244 ITLOS, Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, para. 148.

by exercising due diligence in taking appropriate measures … to prevent, reduce or control atmospheric pollution and atmospheric degradation"[245].

313. On the other hand, Article 3 of the ILC Draft Articles on the Prevention of Transboundary Harm provides that *"[t]he State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof"*. Article 2(e) of the Draft Articles defines *"State likely to be affected"* as *"the State or States in the territory of which there is the risk of significant transboundary harm or which have jurisdiction or control over any other place where there is such a risk"*.

314. While the Draft Articles on the Prevention of Transboundary Harm therefore do not consider significant harm in areas beyond the limits of national jurisdiction or to the global commons, they do not rule out the applicability of the duty of prevention, as a matter of general international law, to those areas. In any event, it is clear from Article 2(e) of the Draft Articles that more than one State may be considered likely to be affected by a risk of significant transboundary harm.[246] In addition, the ILC also notes that it cannot forecast all the possible future forms of *"transboundary harm"*.[247]

315. The qualifier 'significant' in relation to harm introduces a de minimis rule threshold and yet also contains a temporal element, given that the qualification of harm as significant will depend on the scientific knowledge at a particular moment in time.[248]

316. As far as scientific knowledge in relation to climate change is concerned, the reports of the IPCC have consistently concluded with *"high confidence"* that human-caused climate change produces significant harm at a worldwide scale. In its 2023 Synthesis Report on Climate Change[249], the IPCC observes, for instance:

> "*Widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred. Human-caused*

245 At the same time, point (8) of the ILC's commentary to Guideline 3 states: *"In the context of transboundary atmospheric pollution, the obligation of States to prevent significant adverse effects is firmly established as customary international law, as confirmed, for example, in the Commission's articles on prevention of transboundary harm from hazardous activities and by the jurisprudence of international courts and tribunals. However, the existence of this obligation in customary international law is still somewhat unsettled for global atmospheric degradation."*

246 See also point 11 of the ILC's commentary on Article 2.

247 Point 9 of the ILC's commentary on Article 2.

248 See point 7 of the ILC's commentary on Article 2 and point 7 of the ILC's commentary on Article 10.

249 https://www.ipcc.ch/report/sixth-assessment-report-cycle/

climate change is already affecting many weather and climate extremes in every region across the globe. This has led to widespread adverse impacts and related losses and damages to nature and people (high confidence)".[250]

"*Climate change has caused substantial damages, and increasingly irreversible losses, in terrestrial, freshwater, cryospheric, and coastal and open ocean ecosystems (high confidence)*".[251]

"*Risks and projected adverse impacts and related losses and damages from climate change escalate with every increment of global warming (very high confidence)*".[252]

317. It follows from the above that the duty under general international law to prevent significant transboundary harm is applicable with regard to the protection of the international climate system. As an obligation of conduct and due diligence[253] (see Section 4.3 above) it requires States to take appropriate measures to prevent significant harm or in any event to minimize the risk thereof. This involves positive obligations on States to adopt and implement suitable national legislation incorporating accepted international standards.[254]

318. In assessing whether a State has complied with its due diligence obligation arising from the duty of prevention, the starting point is therefore the adoption of measures in domestic legislation as well as the implementation of those measures. Where a State has taken no, or only insufficient, measures of prevention, it breaches the duty of prevention.

319. However, ascertaining compliance with the duty of prevention also requires assessing the measures adopted in domestic legislation against the yardstick of accepted

250 Point A.2 (summary for policy makers).

251 Point A.2.3 (summary for policy makers).

252 Point B.2 (summary for policy makers).

253 *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Judgment, I.C.J. Reports 2010, p. 14, para. 187. ITLOS, Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, para. 117.

254 *Pulp Mills on the River Uruguay (Argentina v. Uruguay*), Judgment, I.C.J. Reports 2010, p. 14, para. 197;See also point 4 of the ILC's commentary on Article 2.

international standards. In this regard, the European Union submits that the main source of accepted international standards regarding climate change is the Paris Agreement.

320. Without prejudice to additional or more stringent measures adopted by States, national measures on the reduction of greenhouse gas emissions must therefore meet the requirements of the Paris Agreement.

321. At the same time, the general international law duty of prevention informs the interpretation of the obligations of States under the Paris Agreement[255] and may accentuate those obligations, by requiring States to take sufficient action to ensure that they meet their NDCs and that mitigation targets are sufficiently stringent.

5 THE LEGAL CONSEQUENCES UNDER THE OBLIGATIONS IDENTIFIED FOR STATES HAVING CAUSED SIGNIFICANT HARM

322. As submitted above, the present procedure is one of a non-adversarial and advisory nature. Thus, there is no scope for the Court to find any specific breaches of the obligations set out before, or even for any statement as to the probable existence of breaches by certain categories of specifically responsible States to the detriment of other categories of specifically vulnerable States and people.

323. Therefore, the reply to the second question should be understood as being of an essentially hypothetical nature, and it should be confined to a brief explanation, in general terms, of the secondary rules and mechanisms which are in place under applicable treaty rules and under codified customary international law. Both limbs of the second question are therefore addressed in conjunction.

324. Possible findings of breaches will therefore remain primarily for domestic courts, or for regional or international dispute settlement bodies, whereby typically an adversarial procedure is to be followed.

325. First the relevant provisions of the UNFCCC and the Paris Agreement will be presented (with a special attention to particularly vulnerable States and affected peoples), then

255 See, by analogy, PCA, *The South China Sea Arbitration*, Award of 12 July 2016, para. 941.

the role for regional human rights courts, and finally the subsidiary role of codified customary law rules.

5.1 THE LEGAL CONSEQUENCES OF THE CAUSATION OF SIGNIFICANT HARM UNDER THE UNFCCC AND THE PARIS AGREEMENT

326. From the outset it is to be underlined that the UNFCCC and the Paris Agreement do not include rules, procedures or institutions that provide for detailed remedies for consequences of significant harm to particularly vulnerable States and people caused by breach. This does not mean that the UNFCCC and Paris Agreement have not established a comprehensive regime which also addresses compliance and harm to particularly vulnerable States and affected peoples, but the choice was to do so in a non-adversarial way.

327. First, the UNFCCC (Article 14) and by incorporation, the Paris Agreement (Article 24) provide for a standard set of dispute settlement mechanisms to resolve disputes between Parties *"concerning the interpretation or application"* of the treaties, including by recourse to this Court, or by arbitration or conciliation. None of these dispute settlement procedures have been triggered thus far, in part because the jurisdiction of the Court must be agreed in advance between parties to a dispute, and because additional arbitration and conciliation procedures have yet to be negotiated or agreed by the Parties. Furthermore, as was discussed above, the often collective and largely procedural nature of the obligations of conduct and of result under the UNFCCC and the Paris Agreement, do not provide, in the absence of detailed remedies, for adversarial dispute resolution.

328. The UNFCCC and the Paris Agreement instead seek to address the concerns and needs of particularly vulnerable States facing the impacts of climate change through financial and technical support, on the basis of global solidarity and development cooperation, rather than as 'legal consequences' for harm resulting from a breach. For example, the UNFCCC provides in Article 4(4) that developed country Parties included in Annex II shall assist the developing countries that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects. These commitments are implemented through bilateral and multilateral financial assistance, including through the operating entities of the UNFCCC and the Paris Agreement's financial mechanisms, and have focused on support for plans that help reduced vulnerability and increase resilience to climate impacts.

329. Under the UNFCCC and the Paris Agreement, Parties have also sought to address the concerns and needs of vulnerable countries experiencing the closely related challenge of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change. The need to enhance international action and support to address this challenge was provided for in treaty law for the first time in Article 8 of the Paris Agreement. When adopting the Paris Agreement, the COP explicitly agreed that Article 9 *"does not involve or provide a basis for any liability or compensation"*[256].

330. Prior to the Paris Agreement the UNFCCC had already started to address the issue of loss and damage, by establishing, in 2013[257], the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts, a body of experts which aim to enhance knowledge of risk management approaches, strengthen international dialogue and cooperation, and to enhance action and support to vulnerable countries and communities. In order to more specifically address the financial and capacity needs of developing countries, the Parties in 2019 established the *Santiago Network for Loss and Damage*, to link potential providers of assistance with each other and with developing countries[258].

331. More recently, at COP27 in 2022, the Parties to the Paris Agreement established a fund for responding to loss and damage with a focus on *"addressing loss and damage to assist developing countries that are particularly vulnerable to the adverse effects of climate change in responding to economic and non-economic loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events"* [259]. The CMA Decision did not simply establish a fund but also recognized the existence of a *"mosaic"* of approaches to support activities related to loss and damage.

332. Finally, at COP28 in 2023[260], the funding arrangements for this Loss and Damage Fund were operationalized through the adoption of the Fund's Governing Instrument and urged *"developed country Parties to continue to provide support and encourage[ing] other Parties to provide, or continue to provide support, on a voluntary basis, for*

256 Decision 1/CP.21, Adoption of the Paris Agreement, para 51.

257 Decision 2/CMA.2, para 43

258 Decision 2/CMA.1, paras 43-45.

259 Decisions 2/CP.27, paragraphs 1 and 3, and 2/CMA.4, paragraphs 1 and 3.

260 Decisions 1/CP.28 and 1/CMA.5

activities to address loss and damage". The decision operationalising the Loss and Damage Fund clearly confirms that the Fund and the funding arrangements are based on cooperation and facilitation and do not involve liability or compensation based on breach. Instead the Fund aims to *"assist developing countries that are particularly vulnerable to the adverse effects of climate change in responding to economic and non-economic loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events"*[261] and, in effect, call on all Parties, developed as well as developing, to support it financially. The Fund is meant to operate in *"complementarity with new and existing funding arrangements for responding to loss and damage associated with the adverse effects of climate change across the international financial, climate, humanitarian, disaster risk reduction and development architectures"*[262].

333. Furthermore, as explained in section 4.4.3, the Parties to the Paris Agreement have also provided in Article 15(2) that the consequences of a Party's non-compliance with the obligations under the Paris Agreement are to be addressed under the PAICC. The procedures and modalities of the PAICC are focused on a certain number of core obligations of conduct, are expert-based and facilitative in nature, and they function in a manner that is transparent, non-adversarial and non-punitive, leading to recommendations and to facilitating assistance.

334. The UNFCCC and the Paris Agreement thereby clearly reflect the preference of the international community to enter into obligations of a largely procedural nature, mainly with obligations of conduct and due diligence (rather than obligations of result), whereby issues of compliance and implementation are addressed through non-adversarial processes with limited jurisdiction aiming at facilitating the implementation of and at promoting compliance rather than at finding breaches, and whereby the concerns of countries affected by climate change are addressed through financial and technical assistance based on principles of global solidarity and support, rather than on liability and compensation.

261 Ibidem, para 2.

262 Ibidem, paragraph 4. Notably, according to paragraph 6: *"The funding arrangements are to work in a manner coherent with and complementary to the fund established by paragraph 3 of decisions 2/CP.27 and 2/CMA.4 (hereinafter referred to as the Fund), which will be made possible through the best use of existing mechanisms, such as the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts (WIM) and the Santiago network for averting, minimizing and addressing loss and damage associated with the adverse effects of climate change".*

5.1.1 The notion of "particularly vulnerable States"

335. By its second question, the UNGA asks about the legal consequences for States where they have caused significant harm with respect to States, including, in particular, small island developing States, which, due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change.

336. In order to address to this question, the Court will have to consider which States can be considered particularly vulnerable to the adverse effects of climate change.

337. Both the Paris Agreement and the UNFCCC refer to Parties that are *"particularly vulnerable"* to the adverse effects of climate change, when signalling that Parties should accord priority to these Parties when assisting them to meet the costs of adaptation, through finance and capacity building.

338. While neither agreement lists which Parties fall within this category, the UNFCCC identifies the specific needs and concerns of certain developing country Parties arising from the adverse effects of climate change, notably on small island countries, countries with low-lying coastal areas, countries with arid and semi-arid areas, forested areas and areas liable to forest decay, countries with areas prone to natural disasters, countries with areas liable to drought and desertification, countries with areas of high urban atmospheric pollution, countries with areas with fragile ecosystems, including mountainous ecosystems, and landlocked and transit countries, that could, due to their geographical and economic exposure to the impacts of climate change be considered to be particularly vulnerable.

339. Article 9 of the Paris Agreement refers to the specific needs of *"developing country Parties, especially 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"* and Article 11 of the Paris Agreement mentions both *"countries that are particularly vulnerable to the adverse effects of climate change, such as small island developing States"* and the least developed countries as the countries with the least capacity.

340. Against this background, the reference to countries particularly vulnerable to the effects of climate change should be understood as referring to a subset of the developing countries which, by reason of objective criteria, have been identified as bearing a high risk of suffering adverse effects and as having a low capacity to mitigate or to otherwise address that risk. Most clearly within this subset of the developing

countries particularly vulnerable to the effects of climate change are the least developed countries and small island and low-lying developing countries.

341. As explained above, it is through a set of solidarity-based funding arrangements, including support for adaptation and loss and damage, that assistance is ensured to these particularly vulnerable countries, rather than through a compensation mechanism based on breach.

5.2 MECHANISMS UNDER REGIONAL HUMAN RIGHTS PROTECTION SYSTEMS

342. As mentioned in Section 4.6.2.1 above, regional human rights courts have increasingly entertained the issue of environmental harm in relation to the enjoyment of human rights, thus offering substantial protection to human rights in the context of climate change. Such protection is afforded by laying down not only primary obligations but also monitoring and remedial mechanisms for the breach of those obligations.

343. Indeed, the Parties to the ECHR, which is a prominent example of such a regional human rights protection system, are by virtue of Article 46 of the ECHR, legally bound to execute the ECtHR's judgements finding violations, which implies the obligation to terminate the human rights violation.

344. The Committee of Ministers, aided by the Department for the Execution of Judgments, oversees the execution of judgments by State Parties, and report back to the Court in case of non-compliance[263].

345. In addition, Article 41 of the ECHR provides for a just satisfaction mechanism to the benefit of the injured party, in cases where a breach of fundamental rights is found but the internal law of the Parties concerned only allows for partial reparation to be made[264].

263 Article 46(2) and (4) of the ECHR Pursuant to Article 46(5): *"If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case."*

264 In *Nagmetov v Russia*, Merits and just satisfaction, 30 March 2017, App 35589/08, para. 82, the ECtHR indicated that: *"As a further element to be taken into consideration for making a just-satisfaction award in the absence of a properly made "claim", the Court needs to ascertain whether there are reasonable prospects of obtaining adequate "reparation", in terms of Article 41 of the Convention, at the national level after the Court's judgment."*

346. That just satisfaction mechanism mostly serves a compensatory or remedial purpose, as the principle underlying that provision is that *"the applicant should as far as possible be put in the position he would have enjoyed had the proceedings complied with the Convention's requirements"*[265]. On the other hand, the ECtHR has repeatedly refused to award punitive damages[266]. The ECtHR may also offer the State a choice between restorative measures and monetary compensation[267].

347. The just satisfaction mechanism applies to both pecuniary and non-pecuniary damages, provided that a *"direct causal link"*[268] is established between the damage claimed and the violation alleged. With regards to pecuniary damage, just compensation aims at providing *restitutio in integrum*, whereby the applicant should be placed, as far as possible, in the position in which he or she would have been had the violation found not taken place[269]. Just satisfaction awards in respect of non-pecuniary damage aim to provide financial compensation for 'non-material harm', such as mental or physical[270].

5.3 THE LEGAL CONSEQUENCES UNDER CODIFIED CUSTOMARY INTERNATIONAL LAW RULES OF THE ARTICLES ON THE RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

348. The Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), as adopted by the ILC in 2001, and submitted to the UNGA, which welcomed, took note and recommended them in its Resolution 56/83[271], are generally considered to constitute, for a part, a codification of customary international law[272] (for certain parts of the ARSIWA, the customary character is contested).

265 *Kingsley v United Kingdom*, Merits and just satisfaction, 28 May 2002, App 35605/97, paragraph 40.

266 See: *Varnava v Turkey*, 2009, para 223; *Akdivar and Others v Turkey*, 1998, para 38; *Orhan v Turkey*, 2002, para 448.

267 See to this regard for instance: ECtHR, *Brumărescu and Mirescu (intervening) v Romania*, Judgment of 23 January 2001, Merits, App No 28342/95, ECHR 1999-VII, [1999], paragraphs 22-23.

268ECtHR, Practice Directions - Rules of Court, Just satisfaction claims, available at: https://www.echr.coe.int/documents/d/echr/PD_satisfaction_claims_ENG; page 67, paragraph 9.

269 See: https://www.coe.int/en/web/execution/article-41.

270 Ibidem.

271 See for ARSIWA with commentaries at: Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries - 2001 (un.org)

272 In point 1 of its general commentary the ILC stated this: *"These articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts."*

349. The Articles on the Responsibility of International Organizations, adopted by the ILC in 2011 (ARIO), and recommended by the UNGA in its Resolution 66/10[273], are, unlike the ARSIWA, generally not considered to constitute a codification of customary international law[274].

350. The ARSIWA rules are not applicable *"where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law"* (Article 55). Article 55 ARSIWA requires that the matter is governed by special rules of international law and that there are discrepancies or inconsistencies, for the ARSIWA rules to be set aside[275]. In addition, other existing rules of international law continue to *"govern questions concerning the responsibility of a State for an internationally wrongful act"*, to the extent that they are not regulated by the ARSIWA (Article 56).

351. As it has been explained above, for climate change a comprehensive set of rules have been put in place, which include solidarity based financial assistance mechanisms to address the harm caused, notably to particularly vulnerable countries and affected peoples, by the effects of climate change or by the remedial measures, and whereby it was the conscious choice of the international community in the context of the UNFCCC and the Paris Agreement not to rely on a compensation mechanism based on breach.

352. As regards fundamental rights, remedial mechanisms under regional human rights regimes, such as the just satisfaction mechanism provided for under Article 41 ECHR, as well as the obligation of implement judgements finding violations by way of

273See for ARIO with commentaries at: : Draft articles on the responsibility of international organizations, with commentaries, 2011 (un.org)

274In point 5 of its general commentary, the ILC stated in this sense: *"The fact that several of the present draft articles are based on limited practice moves the border between codifcation and progressive development in the direction of the latter. It may occur that a provision in the articles on State responsibility could be regarded as representing codifcation, while the corresponding provision on the responsibility of international organizations is more in the nature of progressive development. In other words, the provisions of the present draft articles do not necessarily yet have the same authority as the corresponding provisions on State responsibility. As was also the case with the articles on State responsibility, their authority will depend upon their reception by those to whom they are addressed."* The ARSIWA are explicitly *"without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization"* (Article 57).

275 See point 5 of the commentary to Article 55: *"For the lex specialis principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other."*

cessation under Article 46 ECHR, can be considered to provide for an effective set of remedies to address human rights violations in connection to climate change.

353. As these two sets of specific rules effectively address the harm caused by climate change to countries and to people, and do so in a way which differs from the breach-based mechanism of the ARSIWA, there are clear discrepancies and inconsistencies. Hence these sets of specific rules remove the need to consider, in addition, the breach-based mechanisms of ARSIWA with cessation and reparation (through restitution, compensation or satisfaction).

354. Therefore, by virtue of, or in the general logic of Article 55 ARSIWA, the climate change regime of the UNFCCC and the Paris Agreement, as well as the regional human rights protection systems such as the ECHR, can be seen as a set of specific rules addressing, in a different way the harm caused by climate change, which render the inconsistent mechanisms of ARSIWA without object and inapplicable.

355. In conclusion, the effects of significant harm caused by anthropogenic greenhouse gas emissions are to be addressed by the specific global mechanisms of the Paris Agreement, such as the Loss and Damages Fund, whereby vulnerability is taken into account, or by specific regional mechanisms such as the ECHR providing for just compensation to injured persons. Thereby, the general customary rules of the ARSIWA would not be applicable.

6 EUROPEAN UNION'S CLIMATE CHANGE MITIGATION AND ADAPTATION MEASURES

356. In order to offer the Court a more complete overview of the measures which have been taken to address climate change by mitigating the emissions or by adaptation to the effects, in the following the European Union presents the measures it has taken, through its ambitious climate legislation as a leader in international cooperation in this field.

357. With its European Green Deal, the European Union has set in motion the transformation into a resource-efficient and climate-neutral economy which addresses climate and environmental risks. Over the past years, the European Union has put forward a comprehensive set of policy initiatives that support the decarbonisation efforts and it has become a global standard setter, inspiring global partners to also embark on this path.

358. First and foremost, the European Union has actively engaged in the negotiations of the Paris Agreement and promptly ratified it along with all its Member States.

359. Furthermore, ahead of COP21 (which adopted the Paris Agreement), the European Union and its Member States were the first major economy to communicate their intended NDC. In October 2014, the European Council endorsed a binding target of at least 40% domestic reduction in economy-wide greenhouse gas emissions by 2030 compared to the 1990 level of emissions. On 6 March 2015, the Council adopted this contribution of the Union and its Member States as their intended NDC, which contribution was submitted to the Secretariat of the UNFCCC[276]. To complement these mitigation measures, the European Union and its Member States communicated on 2 June 2015 their undertakings in the area of adaptation planning[277]. The intended NDC became the European Union's first NDC when the European Union ratified the Paris Agreement in October 2016 (para 22 of the Paris Decision 1/CP.21)[278].

360. On 17 December 2020, the European Union and its Member States submitted their updated NDC[279] in which they committed to *"a binding target of a net domestic reduction of at least 55% in greenhouse gas emissions by 2030 compared to 1990"*, following endorsement of this target by the European Council on 11 December 2020[280].

361. The Paris Agreement aims at responding to climate change in the light of the best available scientific knowledge. Similarly, European Union climate policy is informed by the best available science, including the regular assessments of the IPCC, which have been duly taken into account in preparing the European Union's updated NDC.

362. In communicating this NDC update, the European Union provided further information to facilitate clarity, transparency and understanding, following the multilateral guidance adopted at the UN Climate Change Conference in Katowice (COP24, 2018). As part of this information[281], the European Union justified the fairness and ambition of the updated NDC towards the global temperature goal of the Paris Agreement in the light of national circumstances by the facts that it represents a significant progression

276 https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/European%20Union%20First/LV-03-06-EU%20INDC(Archived).pdf

277 EU undertakings on adaptation (unfccc.int)

278 https://unfccc.int/sites/default/files/resource/docs/2015/cop21/eng/10a01.pdf

279 https://unfccc.int/sites/default/files/NDC/2022-06/EU_NDC_Submission_December%202020.pdf

280 https://www.consilium.europa.eu/media/47296/1011-12-20-euco-conclusions-en.pdf

281 Annex to the EU_NDC_submission of December 2020.

beyond previous undertakings, that it will ensure that the European Union continues to be the most greenhouse gas efficient major economy, and that it is in line with the objective of achieving a climate-neutral European Union by 2050.

363. In order to achieve the objectives indicated in the NDCs of the European Union and its Member States, the European Union sets Union-wide binding targets for climate and energy that all Member States have to comply with and achieve through national implementation. At the same time, nothing precludes Member States from adopting even more ambitious greenhouse gas emissions reduction targets at national level.

364. To help the European Union reach its 2030 climate and energy targets, the Regulation on the Governance of the Energy Union[282] ("the Governance Regulation") sets common rules for planning, reporting and monitoring as described below. It also ensures that European Union planning and reporting are synchronised with the ambition cycles under the Paris Agreement.

365. Pursuant to the Governance Regulation, European Union Member States develop integrated national energy and climate plans ("NECPs") covering the five dimensions of the Energy Union, i.e., decarbonisation (greenhouse gas reduction and renewables), energy security, energy efficiency, internal energy market and research, innovation and competitiveness.

366. Member States had to submit their 2021-2030 final NECPs by the end of 2019. The Commission has assessed these both at European Union and Member State level. Member States needed to update their national energy and climate plans by 30 June 2023 in draft form and will need to update them by 30 June 2024 in a final form in order to reflect an increased ambition.

367. Until then, Member States can adapt national policies and measures at any time, provided such changes are included in the biennial integrated national energy and climate progress reports to the Commission.

368. Member States are also required to develop national long-term strategies and ensure consistency between these strategies and their national energy and climate plans.

282 Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, OJ L 328, 21.12.2018, p. 1.

369. The Governance Regulation includes the necessary elements to track progress in the implementation of European Union climate legislation. It also lays down a monitoring mechanism for greenhouse gas emissions and other climate information so that the European Union will be able to comply with its reporting obligations under the UNFCCC and the Paris Agreement.

6.1 THE EUROPEAN UNION HAS TAKEN DECISIVE ACTION TO COMBAT CLIMATE CHANGE

370. Regulation (EU) 2021/1119[283] ("European Climate Law") establishes a legally binding framework for the reduction of greenhouse gas emissions and for reaching climate neutrality by 2050 in the Union. The Regulation is an internal act of the Union. The European Union is leading the efforts to achieve the objectives of the Paris Agreement by setting itself even more ambitious greenhouse gas emission reduction targets and by going beyond the minimum necessary to comply with its obligations under that Agreement. This approach could be followed by other Parties to the Paris Agreement.

371. The European Union is at the forefront of the fight against climate change. Its policies and actions make the European Union a global standard-setter and drive climate ambition worldwide. The Paris Agreement as well as strong international leadership, diplomacy and cooperation are part of the European Union's toolbox to achieve higher climate ambition globally.

372. The UNFCCC Conference of the Parties issued an invitation at COP21 to the IPCC to *"provide a Special Report in 2018 on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways."* ("IPCC Special Report")

373. The IPCC's Special Report on Global Warming of 1.5°C found that human activities are estimated to have caused approximately 1.0°C of global warming above pre-industrial levels, and that estimated human-induced warming is currently increasing at 0.2°C per decade. Furthermore, the Report estimated that in order to be on a pathway to limit temperature increase to 1.5°C, net-zero CO2 emissions at global level needs to be

283 Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999, OJ L 243, 9.7.2021, p. 1.

achieved around 2050 and neutrality for all other greenhouse gases somewhat later in the century.

374. The European Union undertook further climate action in response to the findings of the IPCC Special Report. In December 2018, the Commission adopted the Communication 'Clean Planet for All - A European strategic long-term vision for a prosperous, modem, competitive and climate-neutral economy'[284], setting a vision of the pathways to reach climate neutrality by 2050 and hence be the first climate neutral continent.

375. In December 2019, the Commission adopted the European Green Deal Communication[285], defining a new growth strategy for the European Union, to transform the European Union into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use. The Communication encompasses everything from mobility, built environment, energy production and consumption, agriculture, international trade and taxonomy to fight climate change.

376. On 4 March 2020, as announced in the European Green Deal Communication, the Commission adopted the proposal for a European Climate Law. The European Climate Law, as adopted in 2021, put the objective of achieving climate neutrality within the European Union by 2050 - as endorsed by the European Council[286] - into legally binding legislation.

377. In its September 2020 Communication 'Stepping up Europe's 2030 climate ambition - Investing in a climate-neutral future for the benefit of our people'[287] ('2030 Climate Target Plan'), the Commission proposed to increase the European Union climate ambition to *"at least 55%"* net greenhouse gas emissions reduction by 2030 compared to 1990, in order to achieve a more balanced path to climate neutrality by 2050. This objective has also been endorsed by the European Council[288] and is part of the final text of the Climate Law as agreed by the European Parliament and Council.

284 COM(2018) 773 final

285 COM(2019) 640 final

286 European Council conclusions of 12 December 2019.

287 COM(2020) 562 final

288 European Council conclusions of 11 December 2020.

378. The Communication also encourages international partners to increase their ambition to limit the rise in global temperature to 1.5 °C and avoid the most severe consequences of climate change.

379. Moreover, on 14 July 2021, the European Commission proposed the 'Fit for 55' legislative package[289] to meet the increased level of ambition of the new 2030 GHG emission reduction target agreed in the Climate Law. The package of interconnected legislative proposals aligns the European Union's climate, energy, land use, transport and taxation policies with the target of reducing net GHG emissions by at least 55% by 2030, compared to 1990 levels.

380. To implement the Paris Agreement, and in particular the requirement to prepare, communicate and maintain successive nationally determined contributions in accordance with Article 4 thereof, the European Union has indeed adopted an ambitious legislative package to reduce, minimize and control greenhouse gas emissions and thereby limit climate change and its impacts. This notably includes:

- the European Climate Law (**Annex 3**)[290];
- the revised ETS Directive[291];
- the Effort Sharing Regulation[292];
- the Regulation on Land Use, Land Use Change and Forestry[293];
- the Renewable Energy Directive [294];

289 COM(2021) 550 final

290 Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), OJ L243, 9.7.2021, p. 1.

291 Directive (EU) 2023/959 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system, OJ L 130, 16.5.2023, p. 134.

292 Regulation (EU) 2023/857 of the European Parliament and of the Council of 19 April 2023 amending Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement, and Regulation (EU) 2018/1999, OJ L 111, 26.4.2023, p. 1.

293 Regulation (EU) 2023/839 of the European Parliament and of the Council of 19 April 2023 amending Regulation (EU) 2018/841 as regards the scope, simplifying the reporting and compliance rules, and setting out the targets of the Member States for 2030, and Regulation (EU) 2018/1999 as regards improvement in monitoring, reporting, tracking of progress and review, OJ L 107, 21.4.2023, p. 1.

294 Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652, OJ L, 2023/2413, 31.10.2023. .

- the Energy Efficiency Directive [295];
- the Regulation on CO_2 emissions standards for cars and vans[296].
- the Alternative Fuels Infrastructure Regulation[297];
- the Fuel EU Maritime Regulation[298];
- the ReFuelEU Aviation Regulation[299];
- the Regulation on deforestation-free products [300];
- the F-gas Regulation[301];
- the Regulation establishing a carbon border adjustment mechanism [302].

381. In May 2022, the European Union presented its plans on how to accelerate the clean energy transition and reduce our dependency on Russian gas as rapidly as possible. The measures in the REPowerEU Plan303 sets out measures to save energy, diversify energy supplies, and accelerate the roll-out of renewable energy to replace fossil fuels in homes, industry and power generation.

295 Directive (EU) 2023/1791 of the European Parliament and of the Council of 13 September 2023 on energy efficiency and amending Regulation (EU) 2023/955, OJ L 231, 20.9.2023, p. 1..

296 Regulation (EU) 2023/851 of the European Parliament and of the Council of 19 April 2023 amending Regulation (EU) 2019/631 as regards strengthening the CO2 emission performance standards for new passenger cars and new light commercial vehicles in line with the Union's increased climate ambition, OJ L 110, 25.4.2023, p. 5.

297 Regulation (EU) 2023/1804 of the European Parliament and of the Council of 13 September 2023 on the deployment of alternative fuels infrastructure, and repealing Directive 2014/94/EU, OJ L 234, 22.9.2023, p. 1..

298 Regulation (EU) 2023/1805 of the European Parliament and of the Council of 13 September 2023 on the use of renewable and low-carbon fuels in maritime transport, and amending Directive 2009/16/EC, OJ L 234, 22.9.2023, p. 48.

299 Regulation (EU) 2023/2405 of the European Parliament and of the Council of 18 October 2023 on ensuring a level playing field for sustainable air transport, OJ L, 2023/2405, 31.10.2023.

300 Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, OJ L 150, 9.6.2023, p. 206.

301 Regulation (EU) 2024/573 of the European Parliament and of the Council of 7 February 2024 on fluorinated greenhouse gases, amending Directive (EU) 2019/1937 and repealing Regulation (EU) No 517/2014, OJ L, 2024/573, 20.2.2024.

302 Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism, OJ L 130, 16.5.2023, p. 52.

303 COM(2022) 230 final

- The Recovery and Resilience Facility is at the heart of the REPowerEU Plan, supporting coordinated planning and financing of cross-border and national infrastructure as well as energy projects and reforms.
- A massive scaling-up and speeding-up of renewable energy in power generation, industry, buildings and transport has been supported through a number of measures:
- The Solar Strategy – and later the Wind Power Package – will accelerate the deployment of renewables.
- The revised Renewable Energy Directive simplifies and speeds up permitting procedures for renewables. And ambitious targets on renewable hydrogen domestic production and imports will help replace fossil fuels.
- A Biomethane Action Plan sets out tools including a new biomethane industrial partnership and financial incentives to increase production by 2030.

382. Following a Commission proposal to increase targets, co-legislators agreed on an 11.7% target for reducing energy consumption by 2030. They also agreed on a renewable energy target of 42.5% by 2030, increasing the original ambition as a result of REPowerEU.

383. The adoption of these key proposals of the European Green Deal has already led to impressive results. To mention a few examples:

- The Fit for 55 package will accelerate decarbonisation efforts and set us on a path to reach climate neutrality by 2050 at the latest.
- With REPowerEU, the European Union doubled down on clean, affordable and home-grown renewable energy. In May 2023, for the first time in history, the European Union produced more electricity from wind and solar than from fossil fuels.

384. Meanwhile, the European Union budget is on track to deliver its climate mainstreaming objectives, dedicating EUR 578 billion, or 32.6%[304], to climate mainstreaming. This is unprecedented in terms of scale and shows the European Union's collective dedication to implement its green goals.

304 Climate Action Progress Report 2023 60a04592-cf1f-4e31-865b-2b5b51b9d09f_en (europa.eu)

385. The European Union has achieved steady decreases in its greenhouse gas emissions since 1990, reaching – 32.5% in 2022[305].

386. A stronger Emissions Trading System will help to drive investment into decarbonisation and reduce emissions further and faster. The revised European Union ETS Directive increases the level of ambition (62% emissions reduction by 2030, compared to 2005) and a separate carbon pricing system will apply to and fuel combustion in road transport, buildings and small-emitting sectors, reaching 75% coverage of European Union emissions by 2027.

387. Since its launch in 2005, the European Union ETS has helped drive down emissions from electricity, heat generation and industrial production by 37.3%, while generating more than EUR 150 billion in auction revenues. Member States can use these to support climate action, with projects in renewable energy, energy efficiency and low-emission transport.

388. In addition, the Innovation Fund provides financial support to companies to invest in cutting-edge low-carbon technologies and accelerate Europe's transition to climate neutrality.

389. Furthermore, on 30 November 2022, the European Commission adopted a legislative proposal[306] for a regulation establishing a Union certification framework for carbon removals. The European Parliament and Council reached a provisional agreement on 20 February 2024. Once entered into force, the regulation will be the first step towards introducing a comprehensive carbon removal and soil emission reduction framework in European Union legislation and contribute to the European Union’s ambitious goal of reaching climate neutrality by 2050, as set out in the European Climate Law.

390. Moreover, on 14 February 2023, the European Commission adopted a legislative proposal to revise Regulation (EU) 2019/1242 setting CO2 emission standards for new heavy-duty vehicles (HDV) in the EU[307]. The aim is to further reduce CO2 emissions in the road transport sector and to introduce new targets for 2030, 2035 and 2040. The European Parliament and Council reached a provisional political agreement on 18

305 Idem

306 COM(2022) 672 final

307 COM(2023) 88 final

January 2024. The new rules will contribute to fulfilling the European Union's 2030 climate ambitions and reaching climate neutrality by 2050.

391. In addition, the European Climate Law provides the foundation for increased ambition and policy coherence on adaptation. It sets both the framework for achieving climate neutrality and the ambition on adaptation by 2050 by integrating the internationally-shared vision for action into European Union law, i.e. the global goal on adaptation in Article 7 of the Paris Agreement and Sustainable Development Goal 13. The Climate Law commits the European Union and its Member States to make continuous progress to boost adaptive capacity, strengthen resilience and reduce vulnerability to climate change.

392. The European Union's most recent adaptation strategy[308] is showing the way and providing the solutions to help make this progress a reality. Given the systemic nature of adaptation policy, adaptation action will be implemented in an integrated manner with other European Green Deal initiatives such as the Biodiversity Strategy, Renovation Wave, Farm to Fork Strategy, the Circular Economy and Zero Pollution Action Plans, Forest Strategy, Soil Strategy, Smart and Sustainable Mobility Strategy, and Renewed Sustainable Finance Strategy.

393. The European Union has already taken action to boost its resilience over the past years under the 2013 Adaptation Strategy[309]. All Member States now have a national adaptation strategy or plan; adaptation has been mainstreamed into the European Union's policies and long-term budget; and the Climate-ADAPT platform[310] has become a key reference for knowledge on adaptation. The Global Commission on Adaptation recognised the European Union as a pioneer in integrating considerations of climate risk into decision-making[311]. On 12 February 2024, the European Commission adopted a Communication on Managing Climate Risks: protecting people and prosperity[312], responding to the first-ever European Climate Risk Assessment published by the

308 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Forging a Climate-Resilient Europe - the new EU Strategy on Adaptation to Climate Change, COM/2021/82 final.
309 Evaluation of the EU Strategy on adaptation to climate change, SWD/2018/461 final
310 https://climate-adapt.eea.europa.eu/
311 https://gca.org/reports/adapt-now-a-global-call-for-leadership-on-climate-resilience/
312 COM(2024) 91 final

European Environment Agency[313] on increasing climate risks to Europe, and sets out next steps to address them.

6.2 THE EUROPEAN UNION HAS MOBILISED CLIMATE FINANCING FOR CLIMATE ACTION

394. A considerable part (30%) of the European Union Multiannual Financial Framework 2021- 2027 and the NextGenerationEU instrument will contribute to climate action and support related investments in research and innovation (via Horizon Europe); fair transition (via the Just Transition Fund), and preparedness, recovery and resilience (via the Recovery and Resilience Facility). This latter financing instrument has a climate target of 37% at the level of individual national recovery and resilience plans. The European Union expenditure will be compatible with the Paris Agreement and the 'do no significant harm' principle.

395. In order to channel investment towards sustainable activities and thereby meet climate objectives, the European Union has developed a robust, science-based transparency tool, the European Union Taxonomy tool, as part of its overall efforts to reach the objectives of the European Green Deal and to make Europe climate-neutral by 2050. The Taxonomy Delegated Act[314] introduces clear performance criteria for determining – within each sector covered – which economic activities make a substantial contribution to the Green Deal objectives. The criteria cover the economic activities of roughly 40% of European Union-domiciled listed companies, in sectors that are responsible for almost 80% of direct greenhouse gas emissions in the European Union.

396. Moreover, the European Union, its Member States and financial institutions, collectively known as 'Team Europe', are the leading contributor of development assistance and the world's biggest climate finance contributor, accounting for about a third of the global public climate finance. In 2021, the European Union and its Member States committed over EUR 23 billion in climate finance from public funds to support developing countries in reducing their greenhouse gas emissions and in adapting to the impacts of climate change. Over 54% of overall Team Europe finance was allocated

313 European Climate Risk Assessment — European Environment Agency (europa.eu)

314 https://eur-lex.europa, eu/legal-content/EN/ALL/?uri=CELEX%3A32020R0852

to either climate adaptation or to actions involving both mitigation and adaptation. Almost half of the total funding was committed in the form of grants[315].

397. On 4 October 2022, the Economic and Financial Affairs Council adopted conclusions on climate finance ahead of UNFCCC COP27, in which it reiterated the strong commitment of the European Union and its Member States to lead by example in ambitiously contributing to the implementation of all of the goals of the Paris Agreement and implementing the Glasgow Climate Pact[316]. On 28 October 2022, again in the context of COP27, the Council conclusions highlighted the contribution of EUR 23.04 billion in international public climate finance committed by the European Union and its Member States in the year 2021[317].

398. In addition, the European Union and the African Union announced a new 'Team Europe' *Initiative on Climate Change Adaptation and Resilience in Africa* as part of the European Union-Africa Global Gateway Investment Package. This Team Europe Initiative will bring together existing and new climate change adaptation programmes of over €1 billion and leverage its impact by improved coordination and a reinforced policy dialogue on adaptation between the European Union and the African Union. This includes €60 million for loss and damage from the overall European Union contribution[318].

399. The European Union, its Member States and the European Investment Bank are together the biggest contributor of public climate finance to developing economies (In 2022, they mobilised EUR 28.5 billion).

400. Furthermore, COP28 also pushed forward the reform of the international financial architecture. The European Union led the way in establishing a new fund responding to loss and damage, and the European Union and its Member States have contributed more than EUR 400 million, over two thirds of the initial funding pledges.

315 Climate Action Progress Report 2023 60a04592-cf1f-4e31-865b-2b5b51b9d09f_en (europa.eu)

316 https://data.consilium.europa.eu/doc/document/ST-12935-2022-INIT/en/pdf

317 https://data.consilium.europa.eu/doc/document/ST-12935-2022-ADD-1/en/pdf

318 https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6888

401. In February 2024, the European Commission presented its assessment for a 2040 climate target for the European Union[319] (**Annex 4**). The Commission recommended reducing the European Union's net greenhouse gas emissions by 90% by 2040 relative to 1990. This reaffirms the European Union's determination to tackle climate change and will shape its path after 2030, to ensure the European Union reaches climate neutrality by 2050.

402. Moreover, the Climate Action Progress report 2023[320] includes for the first time an assessment of progress under the Climate Law. It demonstrates that the European Union's domestic greenhouse gas emissions are falling steadily. In 2022, the European Union's net greenhouse gas emissions decreased by around 3% in 2022 continuing the 30-year downward trend.

403. As Member States prepare their updated NECPs, the European Commission will look closely at the implementation of the adopted "Fit for 55" legislation and ensure that the necessary policies and investment incentives are in place to deliver on the European Union's climate targets.

404. The European Union has taken urgent and comprehensive actions to combat climate change ensuring that its legal and policy framework is appropriate to achieve climate neutrality by 2050, which is now a legally binding obligation set out in the European Climate Law.

405. Furthermore, with the 2030 Climate Target Plan, the Commission proposed to raise the European Union's ambition, based on a science-based Impact Assessment, on reducing greenhouse gas emissions to at least 55% below 1990 levels by 2030. This level of ambition, endorsed by the European Council, was communicated to the UNFCCC as the updated NDC of the European Union and its Member States in December 2020.

406. That NDC, the European Green Deal, the 2030 Climate Target Plan, the European Climate Law and the European Union's sectoral legislation, in particular the 'Fit for 55'

319 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Securing our future Europe's 2040 climate target and path to climate neutrality by 2050 building a sustainable, just and prosperous society (COM(2024) 63 final)

320 https://climate.ec.europa.eu/news-your-voice/news/climate-action-progress-report-2023-2023-10-24_en

package, will all contribute to achieve climate neutrality by 2050 in the European Union and to reach the intermediary climate targets.

407. These efforts represent a significant progression beyond previous undertakings. They are informed by the findings of the scientific community as summarised in the IPCC Special Report on Global Wanning of 1.5°C. They will ensure that the European Union is the most advanced region in the world to fight climate change and continues to be the most greenhouse gas efficient major economy. All the different measures that have been adopted ensure that the trajectory towards the objective of achieving a climate-neutral European Union by 2050 can be met. As such, they represent a fair and extremely ambitious contribution to the global temperature goal of the Paris Agreement.

7 CONCLUSIONS

Based on the above considerations, the European Union respectfully submits:

1. **The Court has jurisdiction and there are no reasons for the Court to exercise its discretion to decline to render an advisory opinion.**
2. **On question (a):**
    a. **Based on treaty obligations, and primarily on those arising under the Paris Agreement and the United Nations Framework Convention on Climate Change, complemented by customary international law obligations on (i) the protection of human rights, such as in particular the right to life, the right to privacy and family life, the right to health and the right to self-determination (ii) the prohibition to cause transboundary harm, and (iii) the duty to protect and preserve the marine environment, all States, as well as competent International Organisations such as the European Union, have the obligations of conduct and due diligence to take, relying on the best scientific evidence available, all the necessary mitigation measures they can to reduce greenhouse gas emissions at levels holding the temperature increase at 1,5 °C or at least well below 2 °C.**
    b. **These measures have to represent a progression over time, reflecting the highest possible ambition, taking into account the principle of**

common but differentiated responsibilities and respective capabilities in light of different national circumstances.

c. **These obligations of conduct and, by extension, of due diligence also entail an obligation to effectively enforce the measures, but as a minimum standard of conduct, do not prevent States from adopting measures that encourage a higher global level of ambition as regards climate change mitigation.**

d. **In addition, all States and competent International Organisations such as the European Union have obligations of result to adopt and communicate Nationally Determined Contributions, and to report in a transparent manner on their greenhouse gas emissions and provide the information necessary to track progress made in implementing and achieving their Nationally Determined Contributions.**

3. **On question (b):**

For cases where anthropogenic emissions of greenhouse gases have caused significant harm to (i) small island developing States, which due to their geographical circumstances and level of development are injured or specially affected, or particularly vulnerable, or (ii) peoples and individuals of the present and future generations affected by the adverse effects of climate change, the United Nations Framework Convention on Climate Change and the Paris Agreement provide no legal framework establishing the Parties' liability or obligation to pay compensation.

Instead, States have accepted to act in global solidarity to provide support to those States and peoples, including through financial and technical support for adaptation and for averting, minimising and addressing loss and damage associated with the adverse effects of climate change.

The European Commission, on behalf of the European Union

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