REQUEST OF AN ADVISORY OPINION ON THE OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

WRITTEN STATEMENT OF ROMANIA

February 2024

Contents

I. INTRODUCTION

Question and summary

1. On 29 March 2023, the United Nations General Assembly decided to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to render an advisory opinion on the following question:

> *"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;*
>
> *(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?".*

2. Romania has been, from the beginning, a strong supporter of the effort, led by Vanuatu, to prepare the question to be addressed to the Court and contributed directly and substantially as part of a core group of States, including also Angola, Antigua and Barbuda, Bangladesh, Costa Rica, Germany, Liechtenstein, the Federated States of Micronesia, Morocco, Mozambique, New Zealand, Portugal, Samoa, Sierra Leone, Singapore, Uganda, Vanuatu and Viet Nam, to the drafting of the resolution introduced at the 64th meeting of the United Nations General Assembly's seventy-seventh session containing the said question.

3. Resolution 77/276, co-sponsored by 132 States and adopted by consensus on 29 March 2023 by the General Assembly confirms, in Romania's view, the full trust of the international community in the activity and professionalism of the Court to assist States with clarifying their individual and collective obligations in connection with climate change.

4. The resolution and the introductive part of the question present the extremely complex legal context States find themselves in their efforts to address the incredible challenges of climate change. In addition to international conventions, framework or matter specific, establishing rules applied by the States parties, and rules of international customary law, the resolution also recalls various previous resolutions adopted by the General Assembly and the Human Rights Council concerning the relationship between the protection of the global climate and human rights.

5. Romania believes that in this complicated legal context, the Court's advisory opinion to the question asked by the General Assembly is fundamental in renewing efforts aimed at protecting the climate system that has allowed for the survival and development of human civilization on Earth. The Court's opinion should guide national authorities, acting individually and collectively, in taking the essential measures for avoiding the already occurring catastrophic outcomes of the increase of greenhouses gases, as well as the national courts in ensuring compliance and implementation of these measures.

6. In this written statement, the Romanian authorities will focus on the part of the Request regarding the current international legal obligations, while narrowing further down on the obligations pertaining to climate change mitigation.

7. First, Romania's submission will assess the state of the climate change through the most recent scientific reports (mainly IPCC) and Romania's national policies and will address the issue of interaction between the overarching international legal principles and climate change treaties and their possible application in a harmonized manner. Romania intends to elaborate on the actions that it has undertaken in order to reduce its GHG emissions.

8. Romania's submission will depict, in the process, the principle of *Equity*, as the most relevant and substantial in scope for the climate change legal regime, and will address how the other applicable norms may be interpreted in a harmonized manner in order to achieve equitable results. Romania will argue that unabated reliance on the *Common but Differentiated Responsibilities*

(CBDR) approach in mitigation could defeat the achievement of climate change treaties' objectives.

9. Romania's submission will highlight the complex network of treaty, international customary law and soft law obligations of the climate change legal regime.

II. THE SCIENCE OF CLIMATE CHANGE AND THE NATIONAL RESPONSE

a. References to science in international law

10. The 195 States Parties to the Paris Agreement have committed to addressing the causes and impacts of climate change on the basis of "the best available science". International courts and tribunals[1] have also repeatedly relied on scientific evidence to interpret and apply international environmental law. Scientific evidence ought to inform the interpretation of the content and scope of the provisions of relevant treaties, of other instruments, and of the relevant rules under customary international law.

11. In the case of climate change, science is essential to building up a foundation for understanding how humanity is impacted by climate change and how international law applies to it.

12. In this regard, the global international community has greatly relied on the findings of the IPCC established in 1998 as an intergovernmental body of the United Nations. The IPCC's reports are regarded as authoritative statements of climate science, as may be seen in multiple resolutions of the General Assembly, UNFCCC COP decisions, ILC Draft Guidelines, as well as national legislation and strategies.

13. The IPCC's mandate is to assess the risk of climate change caused by human activities, its potential impacts, and possible options for prevention. The IPCC includes all 195 Member States and is governed by an elected bureau of

[1] Pulp Mills on the River Uruguay (Argentina v. Uruguay), 20 April 2010, ICJ Reports 2010, para. 237, Trail Smelter Arbitration (United States v. Canada), Awards, 16 April 1938 and 11 March 1941, RIAA, pp. 1922-1931 and 1958-1959. For example, in Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), the Tribunal held that UNCLOS article 76 (on the definition of the continental shelf) "contains elements of law and science" and therefore "its proper interpretation and application requires both legal and scientific expertise".

scientists (the IPCC Bureau) who serve for a 6-to-7-year assessment cycle, during which time the IPCC publishes a new round of reports reflecting the latest climate science.

14. Each report is summarized into a "Summary for Policymakers" document, which is approved line-by-line in a plenary session of government officials representing IPCC Member Countries.

15. Romania's submission relies for its assessment on the climate change science substantiated mainly by the IPCC. The information in this chapter is sourced from IPCC reports - Summary for Policymakers[2], the report on Climate Change 2021: The Physical Science Basis[3], UNEP Emissions Gap Report 2023[4].

b. Climate change effects

16. The speed and magnitude of the climate change we are facing today is unprecedented.

17. It is unequivocal that human influence has warmed the atmosphere, ocean and land.

    i. Land is both a source and a sink of GHGs and plays a key role in the exchange of energy, water and aerosols between the land surface and atmosphere. Climate change exacerbates land degradation, particularly in low-lying coastal areas, river deltas, drylands and in permafrost

[2] IPCC, 2019: Summary for Policymakers. In: Climate Change and Land: an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems [P.R. Shukla, J. Skea, E. Calvo Buendia, V. Masson-Delmotte, H.- O. Pörtner, D. C. Roberts, P. Zhai, R. Slade, S. Connors, R. van Diemen, M. Ferrat, E. Haughey, S. Luz, S. Neogi, M. Pathak, J. Petzold, J. Portugal Pereira, P. Vyas, E. Huntley, K. Kissick, M. Belkacemi, J. Malley, (eds.)]. In press, IPCC, 2023: Summary for Policymakers. In: Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, pp. 1-34, doi: 10.59327/IPCC/AR6-9789291691647.001

[3] Seneviratne, S.I., X. Zhang, M. Adnan, W. Badi, C. Dereczynski, A. Di Luca, S. Ghosh, I. Iskandar, J. Kossin, S. Lewis, F. Otto, I. Pinto, M. Satoh, S.M. Vicente-Serrano, M. Wehner, and B. Zhou, 2021: Weather and Climate Extreme Events in a Changing Climate. In Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Masson-Delmotte, V., P. Zhai, A. Pirani, S.L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M.I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T.K. Maycock, T. Waterfield, O. Yelekçi, R. Yu, and B. Zhou (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, pp. 1513–1766, doi:10.1017/9781009157896.013

[4] United Nations Environment Programme (2023). Emissions Gap Report 2023: Broken Record – Temperatures hit new highs, yet world fails to cut emissions (again). Nairobi. https://doi.org/10.59117/20.500.11822/43922

areas. In 2015, about 500 (380–620) million people lived within areas, which experienced desertification between the 1980s and 2000s.[5]

ii. Ice. Over the last decades, global warming has led to widespread shrinking of the cryosphere, with mass loss from ice sheets and glaciers, reductions in snow cover and Arctic sea ice extent and thickness, and increased permafrost temperature.

iii. Ocean. The ocean warming trend documented has continued and, globally, marine heat-related events have increased. Ocean warming and ocean acidification have adversely affected food production from fisheries and shellfish aquaculture in some oceanic regions. Sea level rise is unavoidable for centuries to millennia due to continuing deep ocean warming and ice sheet melt, and sea levels will remain elevated for thousands of years. Global mean sea level increased by 0.20 [0.15 to 0.25] m between 1901 and 2018.

c. Disasters and extremes

18. Heatwaves, droughts, floods, extreme storms. Humanity is already feeling the climate change disasters effects in the daily life and in a progressive manner.

i. Human-induced greenhouse gas forcing is the main driver of the observed changes in hot and cold extremes on the global scale and on most continents.

ii. Significant trends in peak streamflow have been observed in some regions over the past decades.

iii. Different drought types exist which are associated with different consequences and respond differently to increasing greenhouse gas concentrations.

iv. It is likely that the global proportion of Category 3–5 tropical cyclone instances has increased over the past four decades

v. The probability of Compound Events, Including Dry/Hot Events, Fire Weather, Compound Flooding, and Concurrent Extremes has likely increased in the past due to human-induced climate change.

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[5] IPCC, 2019: Summary for Policymakers. In: Climate Change and Land: an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems [P.R. Shukla, J. Skea, E. Calvo Buendia, V. Masson-Delmotte, H.- O. Pörtner, D. C. Roberts, P. Zhai, R. Slade, S. Connors, R. van Diemen, M. Ferrat, E. Haughey, S. Luz, S. Neogi, M. Pathak, J. Petzold, J. Portugal Pereira, P. Vyas, E. Huntley, K. Kissick, M. Belkacemi, J. Malley, (eds.)]. In press.

19. Scientists also warn that for any given future warming level, many climate-related risks are higher than assessed in previous reports, and projected long-term impacts are up to multiple times higher than currently observed.

d. The global, regional and national vulnerabilities

20. All these changes are happening at a global scale and no country is invulnerable. Human-caused 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.

21. Approximately 3.3 to 3.6 billion people live in contexts that are highly vulnerable to climate change. A high proportion of species is vulnerable to climate change. Human and ecosystem vulnerability are interdependent. Current unsustainable development patterns are increasing exposure of ecosystems and people to climate hazards.

22. Climate change has reduced food security and affected water security due to warming, changing precipitation patterns, reduction and loss of cryospheric elements and greater frequency and intensity of climatic extremes, thereby hindering efforts to meet Sustainable Development Goals.

23. Vulnerability of ecosystems and people to climate change differs substantially among and within regions, driven by patterns of intersecting socioeconomic development, unsustainable ocean and land use, inequity, marginalization, historical and ongoing patterns of inequity.
    i. In urban areas, observed climate change has caused adverse impacts on human health, livelihoods and key infrastructure. Observed impacts are concentrated amongst economically and socially marginalized urban residents.
    ii. Coastal ecosystems are affected by ocean warming, including intensified marine heatwaves, acidification, loss of oxygen, salinity intrusion and sea level rise, in combination with adverse effects from human activities on ocean and land. Impacts are already observed on habitat area and biodiversity, as well as ecosystem functioning and services.

24. Vulnerable communities who have historically contributed the least to current climate change are disproportionately affected.

25. In Romania, **the average annual temperature** for the period 1981–2010 registered an increase of 0.5°C compared to the climatic period 1961–1990.[6]

26. The evolution of the intensity of **heat** in Romania, between 1961 and 2010, showed an increasing trend, especially after 1981.[7]

27. The phenomena of **floods and landslides** have intensified, as a consequence of the way land is used, of anthropic interventions in natural processes and of the effects generated by climate change, affecting more and more communities. The intensification of torrential rainfall events has often caused major material damage and loss of human life. Such floods have occurred in all regions of the country, most often of a catastrophic nature, and it is very likely that the frequency of these severe flash flood events will increase in the coming period, especially after 2030, according to the current climate change scenarios.

28. **Agriculture and rural development** are highly vulnerable to the impacts of climate change and the associated risks are not equally distributed. The most affected category is and will be that of farmers practicing subsistence and semi-subsistence agriculture.

29. **Cities are also highly vulnerable** to cope with the impacts of climate change, amplified by city heat islands and urban soil waterproofing.
    i. Urban flooding will increase as the intensity precipitation increases, and the isolation of the soil with asphalt and constructions causes an increase in water runoff on the surface and a reduction of water infiltrated into the soil.
    ii. The impacts of heat waves (which increase in intensity, duration and frequency under conditions of global warming) are much stronger in the urban environment in general and for certain groups of the urban population in particular.
    iii. Vulnerable categories to urban heat waves are generally people with diseases of the circulatory system, of whom the elderly and women suffer the greatest impact.

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[6] Romania's Sixth National Communication on Climate Change and First Biennial Report at http://unfccc.int/files/national_reports/annex_i_natcom/submitted_natcom/application/pdf/6th_nccc_and_1st_br_of_romania%5b1%5d.pdf , last visited 3 December 2023.

[7] Ibidem

e. Status of Global GHG emissions

30. Global greenhouse gas emissions have continued to increase, with unequal historical and ongoing contributions arising from unsustainable energy use, land use and land-use change, lifestyles and patterns of consumption and production across regions, between and within countries, and among individuals.

31. Global GHG emissions increased by 1.2 per cent from 2021 to 2022 to reach a new record of 57.4 gigatons of CO2 equivalent (GtCO2e).

32. All sectors apart from transport have fully rebounded from the drop in emissions induced by the COVID-19 pandemic and now exceed 2019 levels. CO2 emissions from fossil fuel combustion and industrial processes were the main contributors to the overall increase, accounting for about two thirds of current GHG emissions.

33. Based on early projections, global net land use, land-use change and forestry (LULUCF) CO2 emissions remained steady in 2022. LULUCF CO2 emissions and removals continue to have the largest uncertainties of all gases considered, both in terms of their absolute amounts and trends.

34. Current and historical emissions are highly unequally distributed within and among countries, reflecting global patterns of inequality.
    i. Per capita territorial GHG emissions vary significantly across countries. The G20 as a group averaged 7.9 tCO2e, whereas least developed countries averaged 2.2 tCO2e and small-island developing States averaged 4.2 tCO2e.
    ii. Inequality in consumption-based emissions is also found among and within countries. Globally, the 10 per cent of the population with the highest income accounted for nearly half (48 per cent) of emissions with two thirds of this group living in developed countries. The bottom 50 per cent of the world population contributed only 12 per cent of total emissions.

35. Generally, global emissions have shifted from high-income to low- and middle-income countries in the past two decades.

36. The failure to stringently reduce emissions in high-income countries and to prevent further emissions growth in low- and middle-income countries implies that all countries must urgently accelerate economy-wide, low-carbon transformations to achieve the long-term temperature goal of the Paris Agreement.

f. Role of mitigation

37. Some future changes are unavoidable and/or irreversible but can be limited by deep, rapid, and sustained global greenhouse gas emissions reduction. However, deep, rapid, and sustained GHG emissions reductions would limit further sea level rise acceleration and projected long-term sea level rise commitment.

38. Accelerated and equitable action in mitigating and adapting to climate change impacts is critical to sustainable development. Mitigation and adaptation actions have more synergies than trade-offs with Sustainable Development Goals. Synergies and trade-offs depend on context and scale of implementation.

39. There is a rapidly closing window of opportunity to secure a livable and sustainable future for all. The choices and actions implemented in this decade will have impacts now and for thousands of years. International cooperation is a critical enabler for achieving ambitious climate change mitigation, adaptation and climate resilient development.

40. Unfortunately, a substantial 'emissions gap' exists between global GHG emissions in 2030 associated with the implementation of NDCs announced prior to UNFCCC COP26 and those associated with modelled mitigation pathways that limit warming to 1.5°C (>50%) with no or limited overshoot or limit warming to 2°C (>67%) assuming immediate action.

g. European Union and national response

41. **By the end of 2019, the EU and its Member States have already reduced their emissions by around 26% on 1990 levels** while GDP has grown by more than 64% over the same period. As a result, average per capita emissions

across the EU and its Member States have fallen from 12 tones CO2-eq in 1990 to 8.3 tones CO2-eq.

42. The EU's agreed objective is achieving a **climate-neutral EU by 2050.**[8] The EU therefore considers the enhanced NDC to be a fair contribution towards the global temperature goal of the Paris Agreement. The EU's enhanced NDC represents a significant progression beyond both its current undertaking of a 20% emissions reduction commitment by 2020 compared to 1990, and its NDC submitted at the time of ratifying the Paris Agreement. Both the initial NDC and this update require significantly higher emissions reductions than were projected as business as usual at the time of their adoption.

43. As an EU Member State, Romania has assumed the targets and actions adopted at EU level. In this regard, the EU submission to ICJ in these proceedings is further substantiating the progress made and adopted policies for the 2030 and 2050 targets, which is a collective EU target.

44. According to the **National Inventory of Greenhouse Gas Emissions 2022 submission**, the total GHG emissions and removals (net emissions, including the LULUCF sector) were 77.48 Mt CO2-eq in 2020, which represents **a reduction of 73%** compared to emission level in 1989. If the removals from the LULUCF sector are not accounted for, then the total GHG emissions in 2019 were 110.37 Mt CO2-eq (**64% less compared to 1989**). Romania's emissions accounted for 0.36 percent of the world's GES in 2020.

45. To further increase its action, Romania has recently adopted the **Neutral Romania** scenario in 2050, targeting 99% net emission reduction in 2050 compared to 1990, through the Government Decision no. 1215/2023 for the approval of the long term Strategy of Romania for GHG emissions reduction – Neutral Romania in 2050. Additionally, Romania has adopted a set of compatible and synergetic policy documents and legislation:
    i. Romania's National Recovery and Resilience Plan approved by the EU Council (October 28, 2021)
    ii. National Energy and Climate Plan for 2021-2030,
    iii. 2014-2020 National Programme for Rural Development,
    iv. Strategic Plan of Common Agricultural Policy 2023-2027 (2023-2027 CAP SP)

[8] See press release https://www.consilium.europa.eu/en/press/press-releases/2023/10/16/paris-agreement-council-submits-updated-ndc-on-behalf-of-eu-and-member-states/ last visited 3 December 2023

v. National Long-Term Renovation Strategy to support the renovation of the national stock of residential and non-residential buildings, both public and private, and to gradually transform it into a highly energy efficient and decarbonized building stock by 2050,
vi. National Integrated Urban Development Strategy for resilient, green, inclusive and competitive cities 2022-2035,
vii. Sustainable Urban Mobility law proposal,
viii. 2021-2025 Restructuring Plan of the Oltenia Energy Complex (CEO) with a 2030 perspective.

III. A CASE FOR EQUITY IN CLIMATE CHANGE MITIGATION

a. Introduction

46. "The climate crisis is a case study in moral and economic injustice."[9] The IPCC reports emphasize how the most poor and vulnerable countries will suffer the most under climate change consequences (see previous chapter).

47. This chapter aims to look into *Equity* as a source of international norms and focus on the CBDR approach and whether it has a role or not in correcting climate change injustice and in distributing justice through the applicable treaty provisions. We first look into the *Equity principle* and its intricacies and then into the origins and growth of the CBDR approach.

48. *Equity* is part of international law, as endorsed repeatedly by international case law.[10] It is both a source of norms and a procedural step in applying the international norms.

49. Equity itself is a manifestation of the idea of Justice.[11]

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[9] Secretary General A. Guterres UN General Assembly, Sept.2022 chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://wid.world/wp-content/uploads/2023/01/CBV2023-ClimateInequalityReport-2.pdf, last visisted on 3 December 2023

[10] See, for example, the North Sea Continental Shelf I.C.J. Reports 1969, p. 3, The Indo-Pakistan Western Boundary (Rann of Kutch) between India and Pakistan (India, Pakistan), 7 I.L.M. 633 (1968), the English Channel Continental Shelf Arbitration, Court of Arbitration, The United Kingdom of Great Britain and Northern Ireland and the French Republic, Decision of 30 June 1977, the Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, p. 3.

[11] Case Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), Judgment, I.C.J. Reports (1982), para 71

50. In the *Continental Shelf* dispute between Tunisia and Libya, the International Court of Justice (henceforth *the Court*) laid down the basis for the surge of *Equity* in international law from the idea of justice:

> *"Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it. In the course of the history of legal systems the term "equity" has been used to define various legal concepts. It was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the development of international law; the legal concept of equity is a general principle directly applicable as law".*[12]

51. Equity and law are built-in each other and not separable. In the North Sea Continental Shelf cases, the Court further states that "[i]*t is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles*".[13]

52. The relation between *Equity* and the law has been further developed in the case law of the international tribunals, the work of the International Law Commission (ILC) and the doctrine.

53. As V. Lowe stated, *"the close relationship between law and equity is undeniable, and the pervasive influence of equity on legal rules and principles is at least as strong in international law as in other legal systems. [...]. The two are so thoroughly commingled as to be inseparable, and it is not clear that an attempt to separate them would be either informative or interesting".*[14]

54. The distinction between the principle of *Equity* and the application of the *ex aequo et bono* principle established in Article 38(2) of the Statute of the Court is also carefully made in both case law and doctrine.

55. According to the commentaries to the ILC 'Draft articles on succession of States in respect of State property, archives and debts', "*equity, in addition to being a supplementary element throughout the draft, is also used therein as part of the material content of specific provisions, and not as the equivalent of the notion of equity as used in an ex aequo et bono proceeding, to which a*

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[12] Ibidem, para. 71

[13] North Sea Continental Shelf Judgment, I.C.J. Reports 1969, p. 3, para. 85

[14] Bluebook 21st ed. Vaughan Lowe, The Role of Equity in International Law, 12 Aust. YBIL 54 (1988-1989) at p 54

tribunal can have recourse only upon express agreement between the parties concerned".[15]

b. Scope

56. Romania's submission underlines the open-endedness nature of this principle, as developed in the international public law. Equity, as part of international law, was used to develop "*a set of principles designed to critique the law and ensure fairness among nations, particularly in situations of moderate scarcity".*[16]

57. This set of principles may cover a wide variety of concepts: "the principle of good faith, the principle of equitable and under certain circumstances preferential treatment, the principle of objective reasonableness, and the like"[17], "the concepts of acquiescence and estoppel"[18], of "*pacta sunt servanda*, of *jus cogens*, of unjust enrichment, of *rebus sic stantibus* and of abuse of rights".[19]

58. To further elaborate its scope and elasticity in application, the Court held that the criteria to be used to assess the equitableness of a norm are not set *a priori*, but must be established to each specific circumstance, after a careful balance:

> "The *equitableness [...] can only be assessed in relation to the circumstances of each case, and for one and the same criterion it is quite possible to arrive at different, or even opposite, conclusions in different cases. The essential fact to bear in mind is, as the Chamber has stressed, that the criteria in question are not themselves rules of law and therefore mandatory in the different situations, but "equitable", or even "reasonable", criteria, and that what international law requires is that recourse be had in each case to the criterion, or the balance of different criteria, appearing to be most appropriate to the concrete situation".*[20]

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[15] Draft articles on succession of States in respect of State property, archives and debts, para. 85, p. 20
[16] T. Franck, Fairness in International Law and Institutions, Oxford: Clarendon Press, 1995, p. 47
[17] P. Van Dijk, 'Nature and Function of Equity in International Economic Law', 7 Grotiana (1986), p. 17
[18] Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984, p. 246, para. 130
[19] Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993 Separate Opinion of Judge Weeramantry, para 17
[20] See Note 18 Gulf of Maine case, para. 158

59. Thus, the references to the general principle of *Equity* have kept gaining traction in the international law field, in spite of its critics.[21] The positive test of "equitableness" would be "the application of equitable criteria and the use of practical methods capable of ensuring an equitable result".[22]

60. To conclude on the general principle of *Equity*, Romania submits that this principle has contributed significantly to the development of international law, its scope remaining flexible, in order to ensure equitable results in specific circumstances.

c. Equity, CBDR and climate change mitigation

61. The concept of CBDR has risen together with the concept of sustainable development and are strongly interconnected under the general principle of *Equity*. Their surge in international law was largely in the same time, starting mainly with the 1992 treaties and soft law documents: the Rio Declaration on Environment and Development, Agenda 21, the Convention on Biological Diversity, the United Nations Framework Convention on Climate Change and the Statement of Forest Principles.

62. In the international sustainable development arena, the term usually employed in expressing the *distributive Equity* is *Inter-generational Equity*. Intra-generational equity (for present generations) is contained in the Inter-generational Equity[23], as first developed by the *Report of the World Commission on Environment and Development: Our Common Future*[24] (herewithin the Brundtland Report) and also in the general principle of *Equity*.
63. In what regards CBDR and sustainable development, Romania's submission will focus on the *Intra-generational Equity* due to its application in the present times and climate change disastrous consequences already manifesting in the present. As a result, Romania considers that, while still relevant, it is not

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21 See Dissenting Opinion of Vice-President Koretsky, the North Sea Continental Shelf cases, I.C.J. Reports 1969, p. 166: *"I feel that to introduce so vague a notion into the jurisprudence of the International Court may open the door to making subjective and therefore at times arbitrary evaluations, instead of following the guidance of established general principles and rules of international law in the settlement of disputes submitted to the Court"*

22 See Note 18 Gulf of Maine case, para 113

23 Rio Declaration on Environment and Development of 13 June 1992 - Principle 3: *The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.*

24 Brundtland Report, page 41: "Even the narrow notion of physical sustainability implies a concern for social equity between generations, a concern that must logically be extended to equity within each generation", at https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf

necessary for the developing of our legal argument to go into the future (i.e. the larger concept of *Inter-generational Equity*).

64. *Intra-generational Equity* can be applied through the setting of obligations in the paradigm of the developing-developed States or obligations *erga omnes*[25], as a common concern. Romania's submission is that intra-generational equity should be assessed *erga omnes*. This approach also allows for different roles in the developing-developed States paradigm.

65. The CBDR approach enshrined in Principle 7[26] of the Rio Declaration is based on the acknowledged responsibility of developed States *for the pressures on the global environment*.

66. While it starts with acknowledging the different contributions to the global environment degradation by all States, the focus on the developed countries from the second part would give source to new binding obligations on the latter, in successive UNFCCC COP decisions and agreements, as Romania further submits.

67. In the same time, Principle 7 of the Rio Declaration must be read in conjunction with the other principles which refer to all States' sustainable development obligations, in particular Principles 3[27] and 8[28].

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[25] In the Gabcikovo-Naygmaros Project Case, Judge Christopher Weeramantry stated in his Separate Opinion that "*there is persuasive evidence suggesting that the general protection of the environment beyond national jurisdiction has been received as obligations erga omnes*", ICJ, GabcikovoNaygmaros Project (Hungary v. Slovakia), Judgment of 25 September 1997, Separate Opinion of Vice-President Weeramantry, ICJ Reports 1997, 88, 118. In the same time, In the Myanmar genocide case, the Court held that: "*All the States parties to the Genocide Convention thus have a common interest to ensure the prevention, suppression and punishment of genocide, by committing themselves to* fulfilling the obligations contained in the Convention. As the Court has affirmed, such a common interest implies that the obligations in question are owed by any State party to all the other States parties to the relevant convention; they are obligations erga omnes partes, in the sense that each State party has an interest in compliance with them in any given case (...)".Judgment of 22 July 2022) [107] available at: https://www.icj-cij.org/sites/default/files/case-related/178/178-20220722-JUD-01-00-EN.pdf . See also *The Articles on Responsibility of States for Internationally Wrongful Acts*, Article 48 provides that: "1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if (…) (b) the obligation breached is owed to the international community as a whole" (General Assembly Resolution 56/83 of 12 December 2001).

[26] *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 to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources, they command.*

[27] *The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.*

[28] *To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies.*

68. The CBDR approach in climate change is regulated in UNFCCC, Article 3, para 1, as a procedural step to assess and provide responsibilities of States in international law, *on the basis of Equity*:

> *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.*

69. What is critical concerning the UNFCCC treaty language is the adding of the *respective capabilities* concept, which has become an integral part of the CBDR approach. Indeed, without it, the whole focus of the CBDR approach would be to establish the States' legal obligations as a consequence of their past behavior.

70. Romania submits that CBDR cannot influence the existence of such legal obligations with regards to climate change, but only the means of their achievement, the key concept being the *respective capabilities*.

71. The CBDR approach is, thus, apt for various interpretations. Based on this, the UNFCCC normative system divides the Parties essentially in two categories, on one side Annex I and Annex II, and the rest of the Parties, on the other. In this system, only Annex I and Annex II States undertake specific commitments, while the others have general obligations.

72. This approach culminated with the 1997 Kyoto Protocol under UNFCCC, which took the CBDR approach described above even further. Its objective was to strengthen the commitments of Annex I parties from UNFCCC. Accordingly, only Annex I parties assumed the specific legally binding mitigation commitments provided for in this treaty.

73. The first important change of this mindset comes with the 2009 Copenhagen Accord adopted as a UNFCCC COP 15 decision[29]: developed States have undertaken to make additional reductions in GHG emissions, and developing States for the first time accepted a commitment to reduce their own emissions by taking "*nationally appropriate mitigation actions*". These obligations, which are not binding, are all set under the following common target:

[29] Para 5, page 6 of the COP decision at https://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf last visited on 3 December 2023

"*reducing global greenhouse gas emissions so as to hold the increase in global average temperature below 2 degrees Celsius above preindustrial levels*".[30]

74. The Paris Agreement adopted in December 2015 by 175 parties (174 States and the European Union) reflected a fundamental shift in the CBDR approach: though it includes references to developed and developing countries, stating that the former should take the lead in the process, it does not provide for Annex I or non-Annex I parties and establishes an overall objective of "holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels ".[31]

75. Right from the Preamble, the treaty states that *in pursuit of the objective of the Convention, and being guided by its principles, including the principle of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances*. Nevertheless, it further regulates common commitments and allows flexibility to accommodate respective capabilities in the light of different national capacities and circumstances. It also establishes the duty of Parties to periodically revisit their actions and assess whether their levels of ambition correspond to their best possible effort[32], which is an expression of due diligence.

76. As a result, the Paris Agreement represents a reset of the CBDR approach in the context of climate change international mitigation obligations. All Parties, whether developed or developing, must act "*in the light of different national circumstances*" with the same common aim, established in Article 2.

d. The socio-economics aspects of climate change

77. Another angle important in examining Equity within the climate change mitigation obligations of States is the socio-economic dynamic and the particularities of climate change. To this purpose, it is necessary to understand the way that inequity and inequality are manifesting within climate change.

78. One important factor is that States are generally both perpetrators and victims of climate change.

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[30] Ibidem, paras 1 and 2.
[31] Article 2 (1) a) of the Paris Agreement.
[32] Article 3 of the Paris Agreement: "[…]*The efforts of all Parties will represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of this Agreement.*"

> *"In comparison to traditional air pollution, the effects of climate change are more diffuse and difficult to track back to any one state's failure to avoid activities that cause significant damage to the environment of another state or in areas beyond national jurisdiction. Any harm may be perceived as the result of the accumulation of complex and synergetic effects of diverse contributory factors involving different pollutants and polluters".*[33]

Although the degree of each of these roles can be debated and argued, in essence, States' obligations must be assessed *erga omnes*, with regard to climate change mitigation and through the lentils of international cooperation obligations.

79. The world countries' economies are based on a system that relies on burning fossil fuel as well as farming agriculture and deforestation, the leading causes to climate change.[34] Climate change can slow down only with systemic changes, and these transformational policies are "inherently complex and politically difficult".[35]

80. The climate change paradigm, thus, is more complex than the individual environment activities paradigm that international tribunals have dealt with until now. With regard to the latter, in the Gabčíkovo-Nagymaros Project case, the Court referred to the "need to reconcile environmental protection and economic development".[36] In the climate change paradigm, nevertheless, climate change mitigation cannot be envisaged outside the sphere of sustainable economic development.

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[33] Christina Voigt, State Responsibility for Climate Change Damages, Nordic Journal of International Law, Vol. 77 Nos. 1-2, 2008, p.10

[34] IPCC, Climate Cgange 2021. Summary for all, page 6 - *However, human activities since the 19th century have emitted more and more greenhouse gases into the atmosphere, mostly from burning fossil fuels (coal, oil and gas), but also from agriculture and cutting down forests. These actions have added to the greenhouse effect, causing global warming.*
chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.ipcc.ch/report/ar6/wg1/downloads/outreach/IPCC_AR6_WGI_SummaryForAll.pdf

[35] See Note *24, p 268: As is evident from this report, the transition to sustainable development will require a range of public policy choices that are inherently complex and politically difficult.* See also Samuel Fankhaeser, Friedel Sehlleier, and Nicholas Stern, *'Climate Change, Innovation and Jobs', 8(4) Climate Policy 421–29 (2008). Turning away from fossil fuels, meat-eating, or flying, would have short-term economic impacts, as well as depriving those alive now of pleasures and freedoms they are accustomed to. The situation above arises because mitigation brings immediate material and lifestyle costs, while its benefits for the climate come only later".*

[36] GabCikovo-Nagymaros Project (HungarylSlovakia), Judgment, 1. C. J. Reports 1997, p. 7, para. 140

81. Romania recalls that the last IPCC report also points out the paradox of measuring development costs against climate costs, considering that they influence each other: "*Climate change is a threat to human well-being and planetary health (very high confidence). There is a rapidly closing window of opportunity to secure a livable and sustainable future for all.*" [37]

82. Another particularity of climate change and the application of the *Equity* principle is that mitigation is not easily measurable in overall economic terms. The analysis is complicated if the consumption of green-house gas (GHG) emissions are added in the mixture. "*Free trade and the globalisation of production and transport have exacerbated the difficulty of regulating GHG emissions*".[38] And in this sense, another layer of difficulty is added in fixing different sets of mitigation obligations for developed and developing States, considering also that GHG emissions can move to a degree from a group of States to the other, if no other obstacles are added.[39]

e. Conclusions

83. Equity has emerged as a key principle applicable to climate change and it is critical to asses also other principles and approaches to test their applicability in the case of climate change.

84. In what regards the CBDR approach and its applicability on climate change mitigation, Romania concludes that its application did not contribute to the objective of achieving equitable results in inter-state relations, from the various perspectives described above.

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[37] IPCC, 2023: Summary for Policymakers. In: Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, pp. 1-34, doi: 10.59327/IPCC/AR6-9789291691647.001, C1. The Brundhalt report, p 55, also makes this point: "Economic and ecological concerns are not necessarily in opposition. For example, policies that conserve the quality of agricultural land and protect forests improve the long-term prospects for agricultural development. An increase in the efficiency of energy and material use serves ecological purposes, but can also reduce costs. But the compatibility of environmental and economic objectives is often lost in the pursuit of individual or group gains, with little regard for the impacts on others, with a blind faith in science's ability to find solutions, and in ignorance of the distant consequences of today's decisions. Institutional rigidities add to this myopia."

[38] Bluebook 21st ed. Alan Boyle, Climate Change and International Law - A Post-Kyoto Perspective, ENVTL. POL'y & L. 333 (2012) p 340

[39] See, for example, the EU Carbon Border Adjustment Mechanism (CBAM), which came into force on 1 October 2023 (EU Regulation no 2023/956), which will ensure that carbon-intensive imports are subject to a carbon price equivalent to that of products from within the European Union.

85. The CBDR scope has clearly evolved from 1992 to 2015 in terms of its interpretation and the setting of specific commitment for all States: from establishing different sets of obligations for different sets of States (UNFCCC/Kyoto regime) to creating the same legal obligations for all, while allowing flexibility in other respects (Paris regime).

86. To this extent, in the context of the Paris Agreement, CBDR means a commitment for all to different levels of reduction and at different speeds, according to respective capabilities.

IV. INTERNATIONAL NORMS APLICABLE TO CLIMATE CHANGE

a. Paris Agreement mitigation obligations

87. Romania underlines that the Paris Agreement adopted by 176 Parties in 2015 is the specialized applicable climate change treaty in this area.

88. The Paris Agreement is a climate change agreement with *de minimis* procedural obligations. It imposes mitigation obligations on *all* Parties and allows flexibility to the Parties in meeting these targets, while providing for specific roles for developed, developing countries, least developed countries (LDC) and Small Island Developing States (SIDS) in the fulfilling of the aim of the Agreement.

89. The Paris Agreement imposes clear obligations *to all* State Parties to adopt "ambitious" and "progressive"[40] mitigation measures for the fulfillment of its primary objectives, which are, among others, to hold the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels.[41] As the target is *collective* and continuous in nature, the obligations and the responsibility are also collective.

90. The temperature goal provided for by this treaty becomes an integral part of the due diligence obligations established for all Parties (i.e. in adopting the national determined contributions). The target is also a best effort target, i.e. to hold the increase of the global average under a certain limit (*de minimis*),

[40] Article 3 of the Paris Agreement
[41] Article 2.1. (a) of the Paris Agreement

which makes it implicit that an even lower limit than the one established would be the best effort for the Parties.

91. In the same time, the Paris Agreement aims at "*making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development*".[42] This would mean that finance flows (among all developed or developing countries) should be climate proofed.

92. The "ambition" of the mitigation obligations for the State Parties provides for the substance of the due diligence obligations established by the Paris Agreement. The main obligation is to prepare, communicate and maintain nationally determined contributions (NDCs)[43], which must:
    i. be successive (every 5 years) and progressive[44];
    ii. be clear and transparent[45];
    iii. provide for peaking of greenhouse gas emissions "as soon as possible"[46];
    iv. reflect the "highest possible ambition"[47].

93. The content itself of the NDCs are not part of the Paris Agreement but the Parties are obliged to "pursue domestic mitigation measures, with the aim of achieving the objectives" of the NDCs.[48]

94. These are obligations for all Parties, but different roles are assigned, in the light of different national circumstances[49] and reflecting special circumstances[50]:
    i. support for developing country Parties shall be granted to allow for higher ambition in their actions;[51]
    ii. leading role for developed country Parties is established in undertaking economy-wide absolute emission reduction targets;[52]
    iii. LDCs and SIDS are exempted from preparing NDCs, but they may prepare and communicate strategies for low greenhouse gas emissions development.[53]

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[42] Article 2.1. (c) of the Paris Agreement
[43] Article 4.2 of the Paris Agreement
[44] Articles 4.2 and 4.3 of the Paris Agreement
[45] Article 4.3 of the Paris Agreement
[46] Article 4.1 of the Paris Agreement
[47] Article 4.2 of the Paris Agreement
[48] Article 4.2 of the Paris Agreement
[49] Articles 2.2, 4.3, 4.4. of the Paris Agreement
[50] Article 4.6 of the Paris Agreement
[51] Article 4.5 of the Paris Agreement
[52] Article 4.4 of the Paris Agreement
[53] Article 4.6 of the Paris Agreement

The Agreement allows all States Parties to determine their best effort, which must fulfill certain conditions explained above, while placing certain sets of expectations on developed and developing countries, LDCs and SIDS.

95. Thus, although the Paris Agreement establishes mainly ***procedural*** obligations for States Parties, the mitigation obligations have a collective end-result (temperature target) as an integral part of their substance. The NDCs, while individually proposed by Parties, must lead collectively to the fulfillment of the temperature goal at least and here within lays the main vulnerability of the Paris Agreement.

96. This vulnerability of the NDCs should be balanced out by the monitoring and the non-adversarial compliance mechanism established by the Agreement (i.e. the Global Stocktake and the expert-based Committee), but this has not happened as of now and the GHG emissions budget gap keeps shrinking.[54] This is the exact opposite to what the Parties agreed in Paris.

b. International customary law and climate change

97. The Paris Agreement and the other climate treaties do not come in a vacuum. International customary law has long been developed regarding the environment or other common interests for humanity. Climate treaty norms should also be interpreted "*in accordance with any relevant rules of international law applicable in the relations between the parties*."[55]

98. Romania, thus, submits that the customary rules applicable to environmental law are also applicable to climate change. Due diligence, prevention, no harm and precautionary principles, international cooperation, the rules regarding environmental impact assessment are also applicable.

99. In the case of climate change, due diligence is intrinsically connected to the principles of prevention, no harm and precaution. International cooperation is also intrinsically linked to the fulfillment of the due diligence obligations in climate change mitigation.

100. This Court stated in the Pulp Mills case, that it is "*by co-operating that the States concerned can jointly manage the risks of damage to the*

[54] See Note 4 UNEP gap report, page 20.
[55] Article 31. 3. (c) Vienna Convention on the law of the treaties.

environment that might be created by the plans initiated by one or other of them, so as to prevent the damage in question".[56]

101. The regular IPCC reports adopted at UN level function as global strategic environment impact assessments of the application of all States' national development strategies and their effect on climate.

102. General climate change mitigation obligations are obligations of due diligence that require States to take the appropriate and necessary measures in order to mitigate climate change. This proposition can be based on international customary law on environment[57], as well as the Paris Agreement and the other climate treaties. The existence of these obligations is generally accepted by the international community[58], but it is the content of these obligations which is disputed, and for which the UN General Assembly asked this Court for further guidance.

103. In its previous case law, this Court, while assessing the content of due diligence, has stated that the obligation to act with due diligence *is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party.* [59]

104. ITLOS also describes due diligence as "*an obligation to deploy adequate means, to exercise best efforts, to do the utmost, to obtain the result*".[60]

105. "Best efforts" cannot be defined objectively, because the concept may entail different measures depending on the respective capabilities and national circumstances of each individual State.

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[56] Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, p. 14, para 77

[57] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I. C. J. Reports 1996, pp. 241 -242, para. 29: "The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment."

[58] See also various States' and international organizations' written submissions in the proceedings for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to ITLOS, case no 31)

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

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

106. When comparing this concept of due diligence with the one depicted by the Paris Agreement, as explained above, there is no overarching difference. The Paris Agreement, in addition, establishes concrete measures, which, if taken, should lead to the collective objectives. The level of vigilance, as a procedural step, is also indicated in the Paris Agreement for the collective group of States. The objective criteria on which to measure – for each individual State Party – the "highest possible ambition", especially if placed against the right of individual States to develop, is the one missing.

107. The exercise to establish such factors for an "equitable balance of interests" has already been undertaken by ILC[61] in the 2001 Draft Articles on Transboundary Harm from Hazardous Activities[62], adopted by UN General Assembly resolution 62/68.

108. Moreover, in the case of climate change, when one applies the balance of interests, the result is already acknowledged as a baseline for the climate treaty regime and reinforced regularly by the IPCC reports and that is: States have the collective and individual obligation to take all necessary measures and means to reduce GHG emissions.

V. Conclusions

109. Romania has argued in this statement that all relevant norms to climate change must abide by the *Equity principle* and they must be applied so as to lead to equitable results. In particular, Romania has submitted that the CBDR approach as applied before the entry into force of the Paris Agreement has not lead to such equitable results.

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[61] Art 10 Prevention of transboundary harm from hazardous activities: *Factors involved in an equitable balance of interests In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 9, the States concerned shall take into account all relevant factors and circumstances, including: (a) The degree of risk of significant transboundary harm and of the availability of means of preventing such harm, or minimizing the risk thereof or repairing the harm; (b) The importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the State likely to be affected; (c) The risk of significant harm to the environment and the availability of means of preventing such harm, or minimizing the risk thereof or restoring the environment; (d) The degree to which the State of origin and, as appropriate, the State likely to be affected are prepared to contribute to the costs of prevention; (e) The economic viability of the activity in relation to the costs of prevention and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity; (f) The standards of prevention which the State likely to be affected applies to the same or comparable activities and the standards applied in comparable regional or international practice.*

[62] Yearbook of the International Law Commission, 2001, vol. II, Part Two.

110. Romania has also submitted that the climate change obligations instituted by the Paris Agreement correspond to due diligence obligations, under international customary law, and are intrinsically connected to the other general principles applicable, *i.e* international cooperation, prevention, no harm and precaution.

111. In conclusion, to the question *(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,* Romania submits that States have the obligation to reduce their GHG emissions at the maximum of ambition and according to their respective capabilities.

112. In addition, States must act and determine their due diligence activities under the guidance of the regular IPCC reports, which constitute strategic environment impact assessments on climate change.

Lucian Fătu,

Ambassador Extraordinary and Plenipotentiary of Romania

to the Court of His Majesty the King of the Netherlands