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Keynote Speech

Energy Transition, Climate
Change and Energy Disputes:
No Time to Wind Down

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The Pinsent Masons and Queen Mary University of London survey on the Future of Energy Arbitration, published in January 2023, suggests that one of the causes of international energy disputes is represented by climate change and environment disputes. Asked which of these types of energy disputes will most increase due to climate change, respondents to the same survey have indicated, in particular, disputes caused by increased regulation, including energy transition measures adopted by States. The Pinsent Masons and Queen Mary survey also notes that, over the past years, “regulatory changes in response to climate change have been introduced at an unprecedented rate” and that “[t]his regulatory inflation is only expected to accelerate in the short to medium term”.

Indeed, the pace of regulatory changes is certainly a manifestation of climate change emergency. States have a general obligation on climate change arising out of the 1992 United Nations Framework Convention on Climate Change, as well as from the Conference of the Parties (“COP”), the latest COP 27 taking place in Sharm-el-Sheik. States have also more specific obligations under the 2015 Paris Agreement, which require member States to take the necessary measures at national level. Even more specific obligations are established by regional organizations, as well as by national legislation and judicial decisions of local courts. Human rights treaties are more often considered for implied obligations of States related to climate change, while human rights of the 3rd generation are formally acknowledged in response to climate emergency.

As such, States, admittedly, have two main types of obligations in relation to climate change: climate change mitigation obligations which imply that States would address the cause of climate change by, for example, reducing greenhouse gas emissions, and *climate change adaptation* obligations, by which States endeavor to implement measure to manage climate change consequences, such as, for example flood prevention mechanisms.

Climate change is a global phenomenon and individual measures by States are unlikely to address the climate emergency in an effective manner. Duties of cooperation, vigilance and consistency of States are terms used more often.

All these imply not only the sense of urgency in States’ mitigation and adaptation measures, but also reveal a rapid development in areas not addressed before. The human rights aspect mentioned before is probably the most striking one in terms of its meteoric evolution. In this context, it is worth keeping in mind that human rights treaties create not only negative obligations for States, i.e. to refrain from violating human rights, but also, and more importantly within the climate change framework, they create positive obligations to fulfill and protect human rights. On this note, on 28 July 2022, the United Nations (“UN”) General Assembly has declared the right to a clean, healthy and sustainable environment as a universal human right, where its promotion requires full implementation of the environmental agreements under the

principles of environmental law. Furthermore, on 29 March 2023, the United Nations General Assembly decided to request the International Court of Justice (“ICJ”) to render an opinion on the obligations of States under international law to ensure the protection of the climate system from anthropogenic emissions of greenhouse gases, as well as on the legal consequences under obligations of States where they caused significant harm to the climate system with respect to States, and, in particular, to small States. All UN Member States have welcomed this proposal and have also highlighted other similar initiatives at regional level, including the request by Chile and Colombia that the Inter-American Court of Human Rights renders an advisory opinion clarifying several aspects of States’ obligations in relation to climate emergency. Furthermore, mention was included to the High Seas Treaty agreed on 4 March 2023, aimed at protecting biodiversity. The majority of the UN Member States have also agreed on the value of having an ICJ advisory opinion. The Secretary General of the UN, Mr Antonio Guterres stressed that “advisory opinions of the Court have tremendous importance ... provid[ing] clarification on existing international legal obligations.” As a side note, in the context of investment arbitrations, arbitral tribunals, as well as dissenting arbitrators, have relied on ICJ’s advisory opinions, as recently in *Manuel Garcia Armas v. Venezuela* where, in deciding on the dual nationality of investors, the tribunal relied on the *Reparation for Injuries Advisory Opinion*, and in *Michael Anthony Lee-Chin v. Dominican Republic*, Dissenting Opinion of Professor Marcelo Kohen, in discussing the nature of the dispute resolution clauses, the arbitrator referenced the *Interpretation of Peace Treaties (second phase) Advisory Opinion*. Also in the context of the UN request to the ICJ for an advisory opinion on climate change, some UN Member States have highlighted certain shortcomings in such a request. The United States voiced disagreement in that launching a judicial process, especially given the broad scope of the question, might not be supportive to the diplomatic efforts which are the key in addressing climate change. Norway has suggested that improved legal clarity is needed, while legal consequences of climate change must be seen in tandem with political determination. Canada has stressed that there is currently no international agreed understanding of certain concepts, such as the right to a clean, healthy and sustainable environment.

Also related to the rapid developments in the context of human rights and climate change emergency, the European Court of Human Rights (“ECtHR”) is currently considering several cases dealing with States’ positive obligations to mitigate the effects of climate change, as well as their obligations under international law, in particular under the Paris Agreement: *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, *Careme v. France*, and *Duarte Agostinho v. Portugal* are currently before the Grand Chamber of the ECtHR awaiting a judgment. To these, one adds the litigations before the national courts, which are increasing in number and frequency. In the *Urgenda* case before the Supreme Court of the Netherlands, in 2019, States’ obligations to fulfill and protect the right to private family life implied an obligation to reduce the greenhouse gas emissions. In *Bundes Klimaschutzgesetz* case before the German Federal Constitutional Court, in 2021, States not only have an obligation to reduce annual greenhouse emissions, but they have to do it in a timely manner.

No doubt that climate change requires immediate action, and this is reflected on States' responsibility towards their own populations, as well as towards other States, as stressed by the UN Resolution on the ICJ advisor opinion on climate change. Climate emergency also translates into State regulation and into the discretion in the specific implementation of international obligations under the UN Framework Convention, the Paris Agreement, the Kyoto Protocol etc. The imminence of the negative consequences of climate change requires rapid responses at international, regional and national levels, as well as quick adaptation in light of the evolving circumstances. For example, under the EU Regulation of 2021 establishing the framework for achieving climate neutrality it is expected that the European Commission reviews relevant European Union legislation in order to enable achievement of the 2030-2050 targets.

However, one cannot talk about climate emergency and climate change mitigation and adaptation without the increased need of investments. At COP 27, mentioned before, the Sharm-el-Sheik Implementation Plan expressly referred to USD 4 trillion/year needs to be invested in renewable energy by 2030 to be able to reach net zero emissions, and USD 4-6 trillion / year needs for a global transformation to a low carbon economy. Often, we think about energy transition in terms of the shutting down of fossil fuel energy investments, but these appear to be the most manageable costs. A recently released report by the World Bank and the Energy Charter Secretariat on the "Enabling Foreign Direct Investment in the Renewable Energy Sector – Reducing Regulatory Risks and Preventing Investor-State Conflicts" highlights that under the renewables in total electricity generation is expected to increase globally from 28% in 2021, to 61% in 2030, and 88% in 2050. As the role of the public sector in these investments is limited, private investments will be increasingly required in these renewable energy projects, generally characterized by high upfront costs.

Summing up, climate emergency requiring rapid action, triggers unprecedented actions by States, regional and international organizations. We will likely see in the near future, as advanced by the Pinsent Masons and Queen Mary survey, an increased number of energy disputes related to climate change. Likely that most of these disputes will be related to the regulatory changes by States in the implementation of climate change mitigation and adaptation measures. We will likely see an increasing number of disputes related to renewable investments, but, possibly, also litigations related to the negative impact of renewable energy on the environment and population. However, capital commitment in order to ensure energy transition and climate change action requires regulatory guarantees and stability, as well as consistency in States' action and investor protection. Such consistency must also be approached regionally and globally, as investors commit substantial capital to renewable energy technologies and projects. Last week, when Finland connected the most powerful nuclear reactor in Europe, producing 30% of the needed Finnish electricity, Germany was shutting down three nuclear power plants as Belin has enacted its plan for fully renewable electricity generation by 2035. At the same time the UN General Assembly

was discussing the need of an ICJ advisory opinion, the US administration was approving the Willow oil drilling plan in Alaska, expected to produce around 277 million metric tons of carbon dioxide during its lifetime. To these, one should add the uncertainty about the expected modernization of the Energy Charter Treaty which, in its updated form is set to phase out fossil fuel energy investments and to continue to protect renewable energy investments.

As explained by the World Bank and the Energy Charter Secretariat in their Report, “[s]ustaining the high levels of FDI in renewable energy needed to achieve development goals will require sound strategies to minimize or eliminate risks.”