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Strasbourg

Vienna, 5 December 2022

N° 2022-0.866.935

Appl. N° 53600/20,
Verein KlimaseniorInnen Schweiz v. Switzerland

Dear Madam/Sir,

I have the honour to submit **observations** of the Austrian agent regarding the above-mentioned application.

Yours sincerely,

H. Tichy

(Amb. Helmut Tichy)
Government Agent

Third party intervention
by the Republic of Austria on the application
VEREIN KLIMASENIORINNEN SCHWEIZ and Others v. Switzerland
(Application No. 53600/20)

As regards the application by the Swiss VEREIN KLIMASENIORINNEN SCHWEIZ and Others versus Switzerland, the Agents of the Austrian Government submit, within open time-limit, the following

T h i r d p a r t y i n t e r v e n t i o n

I.

Preliminary remarks

1. The Applicants - the KlimaSeniorinnen Schweiz, an association of more than 1,800 senior women, as well as four older women - in essence criticise Switzerland for failing to set climate targets that are compatible with international climate law and the best available scientific knowledge and for failing to put in place all necessary measures to achieve the 2020 (as well as the 2030) emissions reduction targets to which they would have committed themselves by ratifying the 2015 Paris Agreement. They further complain that the Swiss courts have applied the standing requirements of Article 25a of the Federal Act of 20 December 1968 on Administrative Procedure (APA) arbitrarily. According to the applicants their rights to life as well as private and family life are directly and already affected by climate-induced heatwaves, and Switzerland has thus violated Articles 2, 6 para. 1, 8 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention).

2. In the following The Agents of the Austrian Government would like to make general observations as regards to selected legal issues which they consider of mutual interest for the assessment of the present application.

II.

As to the relevance of the Paris Agreement for the application

1. In 1992, the United Nations Framework Convention on Climate Change (UNFCCC) was signed in Rio de Janeiro. However, since the catalogue of measures worked out at the time, however, was not quantified and binding, mandatory quantified reduction targets for

greenhouse gas emissions to be met by industrialised countries were laid down by means of the Protocol adopted in Kyoto in 1997 (the Kyoto Protocol).

2. The Kyoto Protocol's weakest point was the fact that it obligated only industrialised countries to mitigate greenhouse gases, and that the US never ratified the Protocol. At the same time, most of the increase in greenhouse gas emissions during the last decade stems from emerging markets and developing countries. Since climate change is a global threat that cannot be addressed by reducing emissions only in industrialised countries, the international community agreed on the Paris Agreement in December 2015, which entered into force on 4 November 2016. As at 29 November 2022, it has been ratified by 194 States which committed to taking action against climate change.

3. The goals set out in the Paris Agreement include holding the increase in the global average temperature to well below 2°C above pre-industrial levels (i.e. before 1990) and pursuing efforts to limit the temperature increase to 1.5°C, reaching global peaking of greenhouse gas emissions as soon as possible, achieving a balance between greenhouse gas emissions and removals by sinks (i.e. the storing of carbon in forests, for example) in the second half of the 21st century. In pursuit of these goals, all Parties to the Paris Agreement shall communicate and maintain nationally determined contributions (NDCs) every five years (in other words: take domestic mitigation measures to achieve the climate target), with ambitions being enhanced continuously. The Agreement's goal of strengthening the ability to adapt to climate change is of equal importance.

4. Only some of the provisions of Articles 2 to 4 of the Paris Agreement are of a legally binding nature.

4.1. Pursuant to its Article 2, the Agreement, *"in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by: ... 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 ..."*.

4.2. To achieve the goal set out in Article 2, Article 3 provides that *"[a]s nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13"*. This obliges the States to take measures.

4.3. Article 4 imposes some obligations (*"shall"*) regarding the requirement of NDCs, which are addressed either to each Party to the Agreement individually (*each party*)¹ or to

¹ Article 4.2 (*"Each Party shall prepare, communicate and maintain successive nationally determined contributions..."*); 4.3, 4.9, 4.17 PA.

the Parties to the Agreement collectively (*parties, all parties*).² Pursuant to Article 4 (2), each Party shall prepare, communicate and maintain successive nationally determined contributions “that it intends to achieve” and the Parties shall pursue domestic “mitigation measures”, with the aim of achieving the objectives of such contributions. The obligation to prepare NDCs pursuant to Article 4 (2) is thus qualified by the requirement that the States must take domestic mitigation measures aimed at achieving the objectives of these contributions (cf. *Bodansky*, The Legal Character of the Paris Agreement, RECIEL 2016, 142 (149, 153 et seq.); *Lawrence/Wong*, Soft law in the Paris Climate Agreement: Strength or weakness? RECIEL 2017, 276 (279-280). See also *Crawford*, The Current Political Discourse Concerning International Law, MLR 2018, 21: “the NDCs are ‘expectations . . . not binding obligations’ and the Paris Agreement does not impose or inflict substantive obligations.”; *Voigt*, The Paris Agreement: What is the standard of conduct for parties?, QIL, Zoom-in 26 (2016), 17 (19 et seq.).

4.4. Other key provisions, however, are drafted as recommendations only (“*should*”, “*aim to*”).³ This mainly concerns Article 4 (1) regarding achieving the goal of Article 2 (“*In order to achieve the long-term temperature goal set out in Article 2, Parties aim to ...*”).

5. Consequently, within the framework of NDCs, each State may autonomously define its intent to the reduction of emissions as regards quantity and means, on the basis of the respective national circumstances (concept of *self-differentiation*, cf. *Binder*, Umweltvölkerrecht, in Ennöckl/Raschauer/Wessely (ed.), Handbuch Umweltrecht, 3rd ed., 2019, 55, 71). How the “contributions” autonomously specified as NDCs are to be implemented domestically is within the discretion of the individual Parties (cf. Update of the NDC of the European Union and its Member States, Submission by Germany and the European Commission on behalf of the European Union and its Member States of 17 December 2020, accessible under https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/European%20Union%20First/EU_NDC_Submission_December%202020.pdf). In this respect, the States are not bound by either quantity or quality goals; this applies all the more to the goal of 2°C pursuant to Article 2 of the Agreement (see *Meguro*, Litigating climate change through international law: Obligations strategy and rights strategy, Leiden Journal of International Law 2020, 933, 943. See also *ibidem*, p.946: “*In this regard, it must be emphasized that Article 4.2 of the Paris Agreement leaves the content of the obligation to be worked out at the domestic level under ‘nationally determined contributions’, which is, by its nature, self-determined by each party to the UNFCCC. Because every state has the discretion to define the content by taking into account priorities amongst different domestic interests, what is prescribed at the international level is only a procedural obligation to determine and register NDCs. In other words, the substance of the obligation is independently determined by each party as a part of*

² Article 4.8, 4.13 (“*Parties shall account for their nationally determined contributions. ...*”), 4.19 PA. Other provisions are drafted as obligations but are not addressed to anyone specific: See Article 4.5 PA (“*support shall be provided to developing country Parties for the implementation of this Article*”).

³ Art. 4.4, 4.14, 4.19 PA. See also Art. 5.1, 7.7, 10, 11.3 PA.

domestic policy making.”. This goal is pursued by all Parties collectively (cf. *Cohen*, Annotation to Urgenda, American Journal of International Law 2020, 729, 733).

6. However, the character of the obligations under Articles 2 to 4 of the Agreement is that of an obligation of conduct, and not that of an obligation of result (cf. *Hänni*, Menschenrechtsverletzungen infolge Klimawandels, EUGRZ 2019, 1, 4; *Böhringer*, Das neue Pariser Klimaübereinkommen, ZaöRV 2016, 753, 780; see also the Observations by the Swiss Government, para. 88). Although the Parties are obliged to take measures to achieve the aim of the Agreement, they are not obliged to actually achieve the aim with these measures (cf. *Bodansky*, The Legal Character of the Paris Agreement, quoted above, 148f, 153, 155; *Voigt*, The Paris Agreement, quoted above, 19 et seq.; *Binder*, Umweltvölkerrecht, quoted above, 82 with further references. On this, see also the judgment of the International Court of Justice of 20 April 2010, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, I.C.J. Reports 2010, p. 18, para. 187). The contents of the NDCs, and thus the emission targets promised by the individual Parties, are not binding under (international) law, regardless of their potential binding effect under EU law and/or national law (cf. *Böhringer*, Das neue Pariser Klimaübereinkommen, ZaöRV 2016, 753, 791; *Bodansky*, The Legal Character of the Paris Agreement, quoted above, furthermore refers to the history of the Paris Agreement: “... So making parties’ NDCs legally binding might have limited participation or caused countries to put forward less ambitious contributions” (153) and to para. 52 of the COP21 decision adopting the Agreement, which excludes liability (153).

7. The Agreement does not regulate the period of validity of an NDC. The relevant provisions of the Agreement – Article 1 (1) and Article 4 (19) – are drafted merely as an expectation and recommendation, respectively (arg.: “*Parties aim to reach global peaking of greenhouse gas emissions as soon as possible ...*”; “*All Parties should strive to formulate and communicate long-term low greenhouse gas emissions development strategies; ...*”). All the NDCs submitted so far specify periods of validity, which, in principle, makes it possible to establish whether the goals were complied with. Due to the reporting duty provided for by Article 13 of the Agreement, this should be possible – to some extent – also independently of the global stocktake pursuant to Article 14 which shall be undertaken by the Conference of the Parties in 2023 for the first time and every five years thereafter. Therefore, prior to 2023, the only possible *violation* of the Agreement can only consist in a Party’s failure to submit an NDC.

8. Whereas the Kyoto Protocol provided for a regulation concerning dispute resolution between States, the Paris Agreement provides for a “*mechanism to facilitate implementation of and promote compliance with the provisions of this Agreement*” (Article 15). However, this mechanism is neither aimed at formal dispute resolution proceedings nor is it of an expressly penal nature (cf. *Hänni*, Menschenrechtsverletzungen infolge Klimawandels, quoted above, 4 et seq.). The Agreement thus does not provide legal sanctions for non-achievement of the reduction goals nor for non-compliance with the NDCs (cf. *Böhringer*, quoted above, 791).

9. According to the ECtHR's constant case-law, the Convention does protect a number of environmental aspects but it is not specifically designed to provide general protection of the environment as such. To that effect, other international instruments and domestic legislation are more pertinent (cf. ECtHR of 22 May 2003, *Kyrtatos v. Greece*, Appl. 41666/98, para. 52; 9 June 2005, *Fadeyeva v. Russia*, Appl. 55723/00, para. 68; 12 May 2009, *Greenpeace e.V. and Others v. Germany*, Appl. 18212/06; 2 December 2010, *Ivan Atanasov v. Bulgaria*, Appl. 12853/03, para. 66; 10 February 2011, *Dubetska and Others v. Ukraine*, Appl. 30499/03, para. 105; 24 January 2019, *Cordella and Others v. Italy*, Appl. 54414/13 and 54264/15, para. 100). The same seems to apply even more so to the protection against climate change sought by the applicants. A European standard guaranteeing a general right to a healthy environment or a general right to protection against climate change does not seem to exist.

10. The present application is thus an attempt to make the Paris Agreement justiciable and, *de facto*, to introduce the possibility for an application in relation to the *Paris Agreement*. However, as laid out above, the Parties to the Agreement have deliberately refrained from providing such an application, while at the same time setting out comparatively strict procedural obligations (see also the Observations by the Swiss Government, para. 93). If the applicants' request were to be granted, the Convention would assume the function of a substitute for monitoring mechanisms and individual application mechanisms lacking in an international convention. However, the protection mechanism provided for in the Convention has not been designed to serve this kind of purpose, neither from an organisational nor from a procedural perspective. The Convention is not intended as an instrument for the supervision of the Contracting States' obligations arising under other international treaties. It can and must take into account elements of other sources of international law only in defining the meaning of terms and notions in the text of the Convention (cf. ECtHR of 12 November 2008, *Demir and Baykara v. Turkey*, Appl. 34507/97, para. 85).

11. At the same time, the ECtHR's accepting of a monitoring function vis-à-vis a part of the currently 195 signatories of the Paris Agreement would fundamentally change the Agreement itself and, among other things, question the function of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement as supreme body of the latter. The objective pursued by the applicants does not take into consideration that the Paris Agreement in fact constitutes the very expression of the prevailing opinion that global warming is a challenge that must be met by joint and *political* measures taken by the international community.

12. Thus, the present application seems to be inadmissible *ratione materiae*.

III.

As to the merits of the application**1. As to a right to a healthy environment arising from the positive obligations stemming from Articles 2 and 8 of the Convention**

1.1. The history of the origins of the Convention shows that guaranteeing a general right to a clean and quiet environment was not intended (*Grabenwarter/Pabel*, Europäische Menschenrechtskonvention, 7th edition, 2021, § 20 margin number 23). Alleging the existence of “*simply the general deterioration of the environment*” is not sufficient to substantiate a violation of the Convention (cf. ECtHR of 22 May 2003, *Kyrtatos v. Greece*, Appl. 41666/98, para. 52; also ECtHR of 9 June 2005, *Fadeyeva v. Russia*, Appl. 55723/00, para. 105; 12 May 2009, *Greenpeace e.V. and Others v. Germany*, Appl. 1821[5]/06; 2 December 2010, *Ivan Atanasov v. Bulgaria*, Appl. 12853/03, para. 77; 10 February 2011, *Dubetska and Others v. Ukraine*, Appl. 30499/03, para. 105). In addition, the ECtHR has emphasised its subsidiary role with regard to environmental protection which results in a limitation of its power of review. The Contracting States have a wide margin of appreciation in the sphere of environmental protection (cf. ECtHR of 9 June 2005, *Fadeyeva v. Russia*, Appl. 55723/00, para. 103 et seqq.; 12 May 2009, *Greenpeace e.V. and Others v. Germany*, Appl. 18215/06; cf. also *Meyer-Ladewig/Nettesheim* in Meyer-Ladewig/Nettesheim/von Raumer (ed.), Europäische Menschenrechtskonvention, 4th edition 2017, Art. 8 margin number 81).

1.2. When interpreting Convention provisions, the ECtHR also takes into account other international agreements, whether or not the respondent States have ratified the respective agreements (in lieu of many ECtHR of 12 November 2008, *Demir and Baykara v. Turkey*, Appl. 34503/97, para. 76 et seqq.).

In the opinion of the Austrian Agents, this, however, must not result in such interpretation introducing a standard of protection which is neither provided for in the Convention nor in the respective international agreements. Contrary to the submission of the applicants in the present case a *right* to a healthy environment cannot be deduced from the Paris Agreement either, because that Agreement does not grant such an individual right.

1.3. But even in case the ECtHR arrived at the conclusion that the Convention provides a right to a healthy environment, the Paris Agreement could not serve to determine the standard of protection in detail. For such purpose, the Agreement is too indeterminate and non-binding as regards the nature of its requirements (see Point I. above).

1.4. Finally, it should also be pointed out in this context that it is currently not possible to assess with sufficient certainty whether the goals of the Paris Agreement cannot be achieved by the signatories in the future after all. In addition, it cannot be excluded that individual regions will experience more warming than others even if the global target for reducing the increase in temperature is attained.

2. As to the precautionary principle

2.1. According to the application, the obligations under Articles 2 and 8 of the Convention should be interpreted taking into account the precautionary principle.

2.2. The precautionary principle finds its way into the Paris Agreement via a reference in its preamble (paragraph 3) to the UN Framework Convention on Climate Change and to the principles set out in Article 3 therein. However, no specific obligations can be derived from the precautionary principle (cf. *Birnie/Boyle/Redgwell*, *International Law & the Environment*, 3rd edition, p. 161 et seq.). There is no consensus shared by the international community on the specific contents and the legal definition of the precautionary principle (cf. *Sands*, *Principles of International Environmental Law*, 2nd edition, p. 266-279). Hence, it is not a universal principle under customary international law (cf. *Binder*, *Umweltvölkerrecht*, in *Ennöckl/Raschauer/Wessely* (ed.), *Handbuch Umweltrecht*, 3rd edition, 2019, 55, 68 et seq.).

2.3. In its previous case law, the ECtHR did not even let itself be guided by the precautionary principle in cases where it was explicitly requested to do so (cf. *Pedersen*, *The European Convention of Human Rights and Climate Change – Finally!*, EJIL Talk 22 September 2020, with reference to the case of *Hardy and Maile v. the United Kingdom*). The judgment handed down in the case of *Tătar v. Romania* also does not allow for drawing any other conclusions (ECtHR of 27 January 2009, *Tătar v. Romania*, Appl. 67021/01, para. 120: “*En ce sens, la Cour rappelle l’importance du principe de précaution (consacré pour la première fois par la Déclaration de Rio), qui a vocation à s’appliquer en vue d’assurer un niveau de protection élevée de la santé, de la sécurité des consommateurs et de l’environnement, dans l’ensemble des activités de la Communauté.*”; see also the Observations by the Swiss Government, para. 112).

2.4. To the extent that the precautionary principle is mentioned or defined in a specific international agreement, it is meant to be applied when interpreting the *respective* agreement. The precautionary principle, however, does not allow for determining *which* measures should be taken. In particular, applying the precautionary principle would not allow for determining whether the measures Switzerland has taken to tackle climate change go against Switzerland’s obligations under the Paris Agreement, or whether these measures are at all suitable to counteract climate change.

IV.

In conclusion, the Agents of the Austrian Government respectfully request the ECtHR to give due consideration to their arguments when examining the present application.