INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

(REQUEST FOR ADVISORY OPINION)

RESPONSE OF THE REPUBLIC OF ECUADOR TO THE QUESTIONS PUT BY JUDGES CLEVELAND, TLADI, AURESCU AND CHARLESWORTH

20 DECEMBER 2024

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Introduction

1. The Republic of Ecuador ('Ecuador') hereby submits its response to the questions posed by Judges Cleveland, Tladi, Aurescu, and Charlesworth at the closing of the oral hearing of 13 December 2024[1], in accordance with the instructions provided by the letter of the Registrar of the same date and by the President of the Court on 2 December 2024[2].

2. Ecuador welcomes this opportunity to clarify certain legal aspects of the law applicable to the subject-matter of the present proceeding that may not have been fully apparent even after lengthy written and oral submissions by States and international organizations participating in this case. Each question put by the Judges is addressed below in turn, so as to assist the Court.

Judge Cleveland's Question

3. Judge Cleveland asked:

> "During these proceedings, a number of participants have referred to the production of fossil fuels in the context of climate change, including with respect to subsidies. In your view, what are the specific obligations under international law of States within whose jurisdiction fossil fuels are produced to ensure protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases, if any?"

4. States within whose jurisdiction fossil fuels are produced have a particular position in relation to the climate crisis, and consequently bear certain obligations that are specific to them, while also considering the principles of equity and common but differentiated responsibilities ('CBDR').

5. At the outset, States are obliged to adopt mitigation measures towards transitioning away from fossil fuels in energy systems in a just, orderly and equitable manner. This

[1] CR2024/54, pp. 39-40.

[2] CR2024/35, p. 95.

obligation derives from Article 4(1) and (2) of the Paris Agreement and customary international law[3], and is based on the best available science concerning mitigation pathways[4].

6. A related obligation finds expression in Article 2(1)(c) of the Paris Agreement, which refers to "[m]aking finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development". This obligation entails for States within whose jurisdiction fossil fuels are produced that they must curtail their finance flows in support of the production of fossil fuels, in particular by phasing out related subsidies. They may indeed do so gradually – especially if they are developing countries whose economies are highly dependent on income generated from fossil fuel production[5] – but within a clear timeframe that takes into consideration the evolving circumstances of the climate crisis. They may also promote the use of transitional fuels in energy systems that are critical to a country's energy security[6].

7. States within whose jurisdiction fossil fuels are produced must also increase finance flows for low-emission renewable energy as part an effort to diversify their economies and reduce their reliance on fossil fuels. They must not undermine such support by continuing at the same time to direct significant finance flows towards the production of fossil fuels, as that would be incompatible with both the letter and spirit of the climate change treaty regime.

8. Developed States within whose jurisdiction fossil fuels are produced are also under an obligation to support developing countries, including through financing for clean energy transitions.

9. Finally, States within whose jurisdiction fossil fuels are produced must cooperate in promoting scientific, technological, technical, socio-economic, and other research, as well as the transfer of technology, relating specificallty to clean energy transition technologies and related climate adaptation efforts.

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[3] Written Statement of Ecuador, para. 3.30.

[4] IPCC, *Climate Change 2023: Synthesis Report. A Report of the Intergovernmental Panel on Climate Change. Contribution of Working Groups I, II, and III to the Sixth Assessment Report of the IPCC* (2023), p. 21.

[5] See also United Nations Framework Convention on Climate Change ('UNFCCC`), Articles 4.8(h) and 4.10.

[6] UNFCCC, Decision 1/CMA.5, Outcome of the first global stocktake (FCCC/PA/CMA/2023/16/Add.1, 13 December 2023, para. 29.

Judge Tladi's Question

10. Judge Tladi formulated the following question:

> "In their written and oral pleadings, participants have generally engaged in an interpretation of the various paragraphs of Article 4 of the Paris Agreement. Many participants have, on the basis of this interpretation, come to the conclusion that, to the extent that Article 4 imposes any obligations in respect of Nationally Determined Contributions, these are procedural obligations. Participants coming to this conclusion have, in general, relied on the ordinary meaning of the words, context and sometimes some elements in Article 31 (3) of the Vienna Convention on the Law of Treaties. I would like to know from the participants whether, according to them, "the object and purpose" of the Paris Agreement, and the object and purpose of the climate change treaty framework in general has any effect on this interpretation and if so, what effect does it have?"

11. The UNFCCC and the Paris Agreement must be interpreted in accordance with the rules of treaty interpretation laid down in Articles 31-33 of the Vienna Convention on the Law of Treaties ('VCLT'), which reflect customary international law[7]. The object and purpose of the treaty is one of main elements of interpretation to be taken into account. As paragraph 1 of Article 31 makes clear: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context *and in the light of its object and purpose*"[8]. Treaty interpretation is a "single combined operation" – all elements should be considered to arrive at the meaning to given to a text, as appropriate[9].

12. The Paris Agreement contains key obligations for States in respect of climate change, not least in its Article 4, which addresses nationally determined contributions ('NDCs'). Many of those obligations may be considered "procedural", as described by some participants in these proceedings. This is notably the case of the obligation under paragraph 2 to prepare, communicate and maintain successive NDC's, which must be fulfilled in accordance with the requirements laid down in other provisions of the same article.

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[7] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 625, para. 37; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 177, para. 153.

[8] Emphasis added.

[9] ILC, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties (2018), Conclusion 2(5).

13. However, not all the obligations under Article 4 of the Paris Agreement are "procedural" in nature. Notably, paragraph 2 of Article 4 provides that "Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of [NDCs]". The ordinary meaning of this provision makes clear that States have a substantive obligation to design, adopt and implement ("pursue") mitigation measures at the domestic level to achieve the goals of their NDCs.

14. This obligation is one of due diligence in that it does not require States to achieve a particular result, but to make best efforts to obtain that result. Ecuador has already explained elsewhere the standard that should be applied when assessing whether a due diligence obligation has been properly fulfilled, including in the specific context of climate change[10]. Similar conduct is required from States under the principle of prevention and the duty to protect and preserve the marine environment under customary international law, and the obligation to adopt and implement measures to prevent, reduce and control pollution of the marine environment under UNCLOS.

15. The scope of Article 4 of the Paris Agreement is clarified by the object and purpose of the Agreement, as well as that of the UNFCCC. Article 2 of the Paris Agreement states that its aim is to "strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty" [11]. This must be done by holding the increase of global average temperature to well below 1.5º-2º C above pre-industrial levels[12]; increasing the ability to adapt to the adverse effects of climate change[13]; and providing appropriate finance flows[14]; all while reflecting the principles of equity and CBDR[15].

16. The object and purpose of the Paris Agreement is aimed at "enhancing the implementation of the [UNFCCC], including its objective"[16]. Article 2 of the UNFCCC, for its part, states that:

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[10] See, for example, Written Comments of Ecuador, para. 65, referring to the findings of the International Tribunal for the Law of the Sea on this matter in the *COSIS Advisory Opinion*.

[11] Paris Agreement, Article 2(1).

[12] Paris Agreement, Article 2(1)(a).

[13] Paris Agreement, Article 2(1)(b).

[14] Paris Agreement, Article 2(1)(c).

[15] Paris Agreement, Article 2(2).

[16] Paris Agreement, Article 2(1).

> "The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner."

17. Ecuador considers that the object and purpose of the UNFCCC and the Paris Agreement inform the ordinary meaning of the provisions of Article 4 of the Paris Agreement. The obligation to "pursue domestic mitigation measures", for example, must be carried out in such way that the greenhouse gas concentrations in the atmosphere are indeed stabilized, and the global response to the threat of climate change is effectively strengthened. All States parties to the UNFCCC and the Paris Agreement must pursue domestic mitigation measures, but the obligation of developed countries with high historical emissions is more stringent in light of the principles of equity and CBDR, expressly incorporated in the treaties to achieve an equitable result when tackling climate change.

18. The object and purpose of the UNFCCC and the Paris Agreement must also be taken into account when interpreting the obligation to prepare, communicate and maintain successive NDCs, on the basis of which domestic mitigation measures are to be pursued. Some participants argued during the proceedings that the implementation of this obligation is left to the discretion of States, who alone can determine, for example, which mitigation measures are necessary and in which time frame they may be implemented. Such a claim for unlimited discretion is clearly at odds with the object and purpose of the UNFCCC and the Paris Agreement. An NDC that does not reflect the level of ambition required by the treaty regime, in light of the agreed standards and the best available science, would be in breach of the relevant obligations. In the same vein, domestic mitigation measures pursued on the basis of NDCs that are not compatible with the Paris Agreement would be contrary to international law as well.

Judge Aurescu's Question

19. Judge Aurescu asked:

> "Some Participants have argued, during the written and/or oral stages of the proceedings, that there exists the right to a clean, healthy and sustainable environment in international law. Could you please develop what is, in your view, the legal content of this right and its relation with the other human rights which you consider relevant for this advisory opinion?"

20. Many participants in these proceedings indeed maintained that the right to a clean, healthy and sustainable environment forms part of the corpus of general international law, be it as a rule of customary international law or a general principle of law. The UN General Assembly recently confirmed this, recognizing the right to a clean, healthy and sustainable environment as a human right[17]. It did so while, *inter alia*, noting that "a vast majority of States have recognized some form of the right to a clean, healthy and sustainable environment through international agreements, their national constitutions, legislation laws or policies"[18], and that said right is "related to other rights and existing international law"[19].

21. Determining the specific content of the right to a clean, healthy and sustainable environment would require an assessment pursuant to the methodology for the identification of rules of customary international law or general principles of law, as applicable. The content of the right as a rule of customary international would necessitate showing the existence of sufficient State practice accompanied by *opinio juris*. As regards general principles of law, one would need to ascertain the existence of a principle common to the various legal systems of the world and its transposition to the international legal system.

[17] UN General Assembly resolution 76/300, 28 July 2022, para. 1.

[18] *Ibid*., last preambular paragraph.

[19] *Ibid*., para. 2.

Judge Charlesworth's Question

22. Judge Charlesworth asked:

> In your understanding, what is the significance of the declarations made by some States on becoming parties to the UNFCCC and the Paris Agreement to the effect that no provision in these agreements may be interpreted as derogating from principles of general international law or any claims or rights concerning compensation or liability due to the adverse effects of climate change?"

23. Upon joining the UNFCCC and the Paris Agreement, eleven States made declarations, which have not encountered opposition by other States[20]. For the UNFCCC, Tuvalu's declaration is representative:

> "The Government of Tuvalu declares its understanding that signature of the Convention shall in no way constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change, and that no provisions in the Convention can be interpreted as derogating from the principles of general international law".

24. For the Paris Agreement, the declaration of the Cook Islands is representative:

> "The Government of the Cook Islands declares its understanding that acceptance of the Paris Agreement and its application shall in no way constitute a renunciation of any rights under international law concerning State responsibility for the adverse effects of climate change and that no provision in the Paris Agreement can be interpreted as derogating from principles of general international law or any claims or rights concerning compensation due to the impacts of climate change.
>
> The Government of the Cook Islands further declares that, in light of the best available scientific information and assessment on climate change and its impacts, it considers the emissions reduction obligations in the aforesaid Paris Agreement to be inadequate to prevent a global temperature stabilisation level at or above 1.5 degrees Celsius relative to pre-industrial levels and as a consequence, such emissions will have severe implications for our national interests".

[20] A total of thirteen declarations were made by eleven States, with some States making declarations for both treaties. As regards the UNFCCC, declarations were made by Fiji, Kiribati, Nauru, Papua New Guinea, and Tuvalu. For the Paris Agreement, declarations were made by the Cook Islands, the Marshall Islands, Micronesia (Federated States of), Nauru, Niue, Solomon Islands, Tuvalu, and Vanuatu. Nauru and Tuvalu made declarations for both treaties.

25. The declarations, made at the time of the conclusion[21] of the treaties and consistently formulated to preserve existing rights and obligations under international law, qualify as permissible interpretive declarations governed by the law of treaties.

26. They do not, like reservations[22], seek to "exclude or modify the legal effect" of treaty provisions[23], but rather to "specify or clarify the meaning or scope" of the UNFCCC and the Paris Agreement, specifically as regards their relationship with other rules of international law[24]. When "interpreted in good faith in accordance with the ordinary meaning to be given to its terms, with a view to identifying therefrom the intention of its author, in light of the treaty to which it refers", their purpose is clear[25]. Moreover, as the International Law Commission ('ILC') clarified, when a treaty prohibits reservations, as both the UNFCCC and the Paris Agreement do[26], unilateral statements should be presumed not to constitute reservations[27].

27. The declarations confirm the conclusion of the vast majority of participants in these proceedings that the UNFCCC and the Paris Agreement do not constitute *lex specialis* and do not displace other rules of international law that may be applicable in the context of climate change. As Ecuador explained in its submissions, while these treaties contain specific provisions addressing climate change mitigation, adaptation, cooperation, and loss and damage, they do not displace or supersede the applicability of other relevant rules, including those derived from customary international law, general principles of law, and other treaty regimes, such as UNCLOS and human rights treaties, as well as the law of state responsibility. The relationship between the climate change treaty regime and other rules of international law must be assessed on a case-by-case basis, taking into account the specific content and scope of the rule in question, including its object and purpose[28].

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[21] While the term 'conclusion' of a treaty is not clearly defined in the VCLT, for interpretative declarations the most appropriate meaning is a contextual and pragmatic one. The term should be understood broadly as encompassing the entire process of joining a treaty, including signature, ratification, and accession. See R. Gardiner, *Treaty Interpretation*, 2nd ed. (OUP, 2017), pp. 234-235.

[22] ILC, Guide to Practice on Reservations to Treaties (2011), Guideline 1.3.3.

[23] *Ibid.*, Guideline 1.1

[24] *Ibid.*, Guideline 1.2.

[25] *Ibid*., Guideline 1.3.1.

[26] The UNFCCC and the Paris Agreement prohibit reservations in Article 24 and Article 27 respectively.

[27] ILC, Guide to Practice on Reservations to Treaties (2011), Guideline 1.3.3.

[28] Written Comments of Ecuador, para. 18.

28. For the avoidance of any doubt, Ecuador reiterates that the above conclusion obtains irrespective of the interpretative declarations, based on the general rules of interpretation and conflict of norms. Absent these declarations, there would still be no basis in the UNFCCC and the Paris Agreement themselves or elsewhere for concluding that they displace other norms of international law altogether. The relationship between the various rules of international law relating to climate change remain informed by complementarity and mutual supportiveness[29].

29. While interpretive declarations cannot alter treaty obligations or override the parties' common intent, they can nevertheless inform and influence the subsequent interpretation process.

30. In this connection, the ILC has emphasised the importance of considering the reaction of States to such declarations in assessing their weight. It clarified that, contrary to reservations, approval of or opposition to an interpretative declaration "shall not be presumed"[30] and that "[a]n approval of an interpretative declaration shall not be inferred from the mere silence of a State or an international organization"[31]. However, approval or opposition may be "inferred in exceptional cases from the conduct of States"[32].

31. The declarations referred to by Judge Charlesworth may represent such an exceptional case. They address a central and critically important issue: the relationship between the UNFCCC framework and established rules of general international law.

32. The declarations made upon joining the UNFCCC and reiterated when concluding the Paris Agreement reaffirm that the climate regime does not constitute *lex specialis* and does not displace other rules of international law that may be applicable in the context of climate change. The consistent repetition of the declarations by States that are particularly vulnerable to the adverse effects of climate change, the complete absence of contemporary or subsequent objections to the declarations, and the clear significance of the issue at stake, are evidence of

[29] Written Comments of Ecuador, para. 17.

[30] ILC, Guide to Practice on Reservations to Treaties (2011), Guideline 2.9.8(1).

[31] *Ibid*., Guideline 2.9.9.

[32] *Ibid.*, Guideline 2.9.8(2).

acquiescence[33]. Had States disagreed with the declarations' premise, they would have raised objections – indeed they had ample opportunity to do so.

33. It bears noting that the threshold for assessing acquiescence to interpretative declarations must be distinguished from the higher threshold that applies when a State seeks to establish specific bilateral obligations through silence, as was the case in *Obligation to Negotiate Access to the Pacific Ocean*. In that case, the question was whether an obligation could be established, *inter alia*, on the basis of acquiescence to statements claiming the existence of the obligation[34]. While an exacting standard may apply where it is alleged that declarations would have required a response to prevent an obligation from arising, the same need not apply where declarations are merely confirmatory of the continued operation of general international law alongside treaty commitments.

34. This understanding is also supported by the arguments advanced by a majority of States before the Court, which align with the declarations, despite these States having neither endorsed nor opposed the declarations at the time they were made.

35. Irrespective of whether individual States explicitly or implicitly approved them, the ILC confirmed that declarations may be considered as elements of treaty interpretation[35]. They do not automatically qualify as context under Article 31(2)(b) or as subsequent agreements or practice under Article 31(3) of the VCLT unless other parties demonstrably acquiesce, either explicitly or implicitly, to their relevance for the interpretation of the treaty. However, they may be relied upon as supplementary means of interpretation under Article 32.

36. The weight and persuasive force accorded to declarations under Article 32 of the VCLT depend on their ability to shed light on a common understanding shared by the parties to the

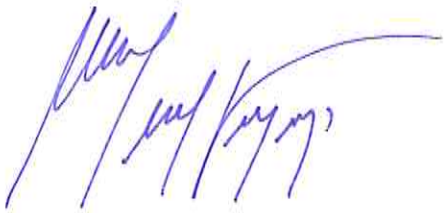
[33] Decision regarding delimitation of the border between Eritrea and Ethiopia, 13 April 2002, RIAA Vol. XXV, p. 111, para. 3.9 ("In each case the ingredients are the same: an act, course of conduct or omission by or under the authority of one party indicative of its view of the content of the applicable legal rule—whether of treaty or customary origin; the knowledge, actual or reasonably to be inferred, of the other party, of such conduct or omission; and a failure by the latter party within a reasonable time to reject, or dissociate itself from, the position taken by the first"), referring to *Case concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6.

[34] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Judgment, I.C.J. Reports 2018.*, pp. 52-54, paras. 149-152.

[35] ILC, Guide to Practice on Reservations to Treaties (2011), Guideline 4.7.1.

treaty[36]. In this specific case, the consistency of the declarations, the lack of opposition to them, and the arguments made by a majority of States before the Court are evidence of a shared understanding that the UNFCCC and the Paris Agreement do not displace other rules of international law.

[36] *The Iron Rhine (Ijzeren Rijn)*, Award, 24 May 2005, RIAA, vol. XXVII, p. 63, para. 48.



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