INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

(REQUEST FOR ADVISORY OPINION)

Response of Sri Lanka to Judges' Questions

20th December 2024

Sri Lanka respectfully submits hereinbelow its responses to the two questions posed by Judge Cleveland and Judge Aurescu:

Question put by Judge Cleveland

> "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?"

Response

Sri Lanka welcomes this question as it has embedded in itself what appears to be an acknowledgment of this court that fossil fuel production which constitutes part of the relevant conduct, i.e. a composite act of anthropogenic emissions of greenhouse gases by major emitter States, over a long period of time going back to the industrial revolution and with full knowledge of its risks for the past half a century, has a link with the climate system and other parts of the environment. Therefore, Sri Lanka reiterates that no further submissions are necessary to establish the causal nexus between the relevant conduct and the States' obligations, but that only the need to clarify what those specific obligations are remains. In fact, that was exactly the main objective of submitting the instant request for an advisory opinion from this court. When the UNGA resolution 77/276 was adopted, it was a foregone conclusion that States do indeed have obligations, and the only contentious issue was the scope and content of those obligations. Consonant with Sri Lanka's consistent position in its Written Statement, Written Comments and Oral Submission, the specific obligations of States in this regard are to guarantee the following rights and abide by the following principles:

a) Right to life

b) Right to health

c) Right to a clean, healthy and sustainable environment

d) Right to self-determination

e) Right to subsistence

f) Rights of children

g) Rights of women

h) Rights of persons with disabilities

i) Rights of indigenous peoples

j) Rights of future generations

k) Sovereignty of States over natural resources and the responsibility not to cause transboundary environmental damage

l) Principle of preventive action

m) Principles of good neighbourliness and co-operation

n) Principles of sustainable development and intergenerational equity

o) Precautionary principle

p) Polluter pays principle

q) Principle of common but differentiated responsibility

r) Duty of due diligence

s) Duty to compensate for harm

t) Duty to protect and preserve the marine environment

u) Duty to refrain from depriving a people of their subsistence

The foregoing obligations are found in international treaties,[1] whilst some of them have also independently evolved within customary international law[2] or emerged as general principles of international law. Yet others have been recognized or reinforced by judicial decisions and writings of jurists.[3]

As evident, the above obligations are scattered across the landscape of all the different sources of international law and lie beyond the United Nations Framework Convention on Climate Change (UNFCCC) and Paris Agreement. Their importance is even more highlighted by the fact that neither of these instruments have thus far been successful in achieving the primary objective of stabilizing greenhouse gas emissions to prevent future adverse impact on the climate system. Further, these obligations are not limited to preventing future harm, but are also remedial in nature. In cases where States have already breached their obligations – as is the reality in the present circumstances of historical failures on the part of responsible States – clarifying these remedial obligations is essential. This is because, by having produced fossil fuels, knowing full well that this act causes significant harm to the climate system and other parts of the environment, the applicability of the law of State responsibility has already been triggered.

---

[1] Charter of the United Nations, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the Rights of the Child, Convention on the Rights of Persons with Disabilities, United Nations Convention on the Law of the Sea, Vienna Convention for the Protection of the Ozone Layer, Montreal Protocol on Substances that Deplete the Ozone Layer, Convention on Biological Diversity, United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, United Nations Framework Convention on Climate Change, Kyoto Protocol, and Paris Agreement.

[2] Universal Declaration of Human Rights, Declaration of the United Nations Conference on the Human Environment, Stockholm Declaration, Rio Declaration on Environment and Development, UNGA Resolution 76/300 of 28 July 2022 and the Resolution 48/13 of 8 October 2021 of the Human Rights Council on the right to a clean, healthy and sustainable environment UNGA resolution 77/165 of 14 December 2022 on the protection of the global climate for present and future generations of humankind, UNGA resolution70/1 of 25 September 2015 entitled "Transforming our world: the 2030 Agenda for Sustainable Development" and Human Rights Council resolution 50/9 of 7 July 2022 on human rights and climate change.

[3] *Trail Smelter Case*, United States of America v. Canada (1938 and 1941); *Corfu Channel Case*, United Kingdom v. Albania (1949); *Affaire du Lac Lanoux*, Espagne v. France, (1957); *Nuclear Test Cases*, Australia v. France and New Zealand v. France, (1974); *Fisheries Jurisdiction Cases*, United Kingdom of Great Britain and Northern Ireland v. Iceland and Federal Republic of Germany v. Iceland (1974); *Case Concerning the Gabcikovo-Nagymaros Project*, Hungary/Slovakia (1997); *Stichting Greenpeace Council v. Commission of European Communities* (1998), *Pulp Mills on the River Uruguay*, Argentina v. Uruguay (2010); *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (1984); *Maritime Delimitation in the Black Sea*, Romania v. Ukraine (2009); *Territorial and Maritime Dispute*, Nicaragua v. Columbia (2012); *Request for an advisory opinion submitted by the Commission of Small Island States on Climate Change and International Law*, ITLOS Case 31, Advisory opinion (2024).

In terms of Article 30 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), a State responsible for an internationally wrongful act is under an obligation to cease that act, if it is continuing. Unregulated production of fossil fuel being the internationally wrongful act, States should immediately desist from such production and/or take active measures to stop the same. The specific obligations arising in this connection may, therefore, be in negative or positive form and require policy and legislative reforms to achieve the following: discontinuation of fossil fuel production, suspension of fossil fuel subsidies, prohibition of the further expansion of fossil fuel production, regulation of fossil fuel production under the jurisdiction of the responsible State, including by corporate actors within the control of the State, and multilateral cooperation to phase out fossil fuels, especially by expediting the process of concluding the Fossil-Fuel Non-Proliferation Treaty. However, Sri Lanka reiterates its submissions during the oral hearing that geoengineering technology is not an acceptable mitigatory obligation as it is highly speculative and counterproductive.

The overwhelming evidence before this court is that, despite the fact that major emitter States knew, at least from the second half of the 20th century, that the production of fossil fuels have the internationally wrongful consequence of damaging the climate system and/or other parts of the environment and thereby causing transboundary harm, they failed to discontinue these practices. By such historical failures, the said States have breached all of the obligations listed from (a) to (u) above.

Question put by Judge Aurescu

> "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?"

Response

Although the right to a clean, healthy and sustainable environment may, at first glance, seem to be derived from the treaty-based right to health, it is in fact a right that has evolved later within customary international law. Its emergence may be traced back to the 1948 Universal Declaration

of Human Rights which recognized the right to a standard of living adequate for the health and well-being of himself and of his family.[4] Consequently, the 1972 Stockholm Declaration recognized that "Man has the fundamental right to freedom, equality and adequate conditions of life, including an environment of a quality that permits a life of dignity and well-being".[5] Half a century later, the right to a clean, healthy and sustainable environment was recognized by the UNHRC[6] and, thereafter, by the UNGA.[7] Therefore, whilst it is an autonomous right of and in itself, it is also intrinsically related to the right to health, the right not be deprived of subsistence and the overarching right to life. The legal content of the right entails States' obligations to ensure a safe climate in which living beings can enjoy clean air, healthy food and nutrients, safe water, adequate sanitation and a non-toxic environment which includes healthy ecosystems and biodiversity. As such, this right has particular relevance for indigenous communities which have an even closer connection with the natural environment, thus attracting ancillary rights in respect of culture and self-determination. It is also a right which extends to present and future generations, has extraterritorial reach due to the transboundary impact of environmental harms and is universal in nature.

Significantly, the text of UNGA Resolution 77/276 draws a nexus between this right and climate change not only by recalling States' obligations and commitments under multilateral environmental instruments and agreements, but also by recognizing that the impact of climate change interferes with the enjoyment of a safe, clean, healthy and sustainable environment. In this context, Sri Lanka reiterates that the relevant conduct is illustrative of the breach of the obligations to guarantee this right, especially given the scientific evidence before this court. Therefore, it is urged that the full scope of this right be recognized in relation to the protection of the climate system and that it is applied to clarify that responsible States have both preventative and remedial obligations thereunder. States' obligations corresponding to this right should be engaged to achieve cessation and reduction of future emissions of greenhouse gases, as well as to ensure that historical and ongoing breaches which have caused and are continuing to cause significant harm to the climate system and other parts of the environment, are effectively and meaningfully addressed.

---

[4] Article 25.
[5] Principle 1.
[6] UNHRC Resolution 48/13 of 8 October 2021.
[7] UNGA Resolution 76/300 of 28 July 2022.