

INTERNATIONAL COURT OF JUSTICE

Obligations of States in respect of Climate Change

(Request for an Advisory Opinion)

WRITTEN STATEMENT OF THE KINGDOM OF SPAIN

March 2024

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A. INTRODUCTION

1. Spain was one of the countries which in December 2022 submitted to the United Nations General Assembly a draft resolution on the request for an advisory opinion of the International Court of Justice on "the obligations of States in respect of climate change". On 29 March 2023, the United Nations General Assembly adopted by consensus Resolution 77/276 requesting that the International Court of Justice, pursuant to Article 65 of its Statute, 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) The peoples and individuals of present and future generations affected by the adverse effects of climate change?”

2. Spain lent its support, together with all the other EU Member States, to Resolution 77/276, and today Spain, pursuant to article 66.2 of the Statute of the International Court of Justice, submits its written statement within the deadline set by the International Court of Justice in its Resolution of 20 December 2023.

Spain does so with appreciation of the importance of the advisory opinion requested from the International Court of Justice, which reflects the following:

Environmental protection is a common concern of humankind. To preserve the environment is to ensure the survival and prosperity of present and future generations making this issue more important than the individual interests of States.

Therefore, as the European Union has indicated to the International Court of Justice, a progressive interpretation of international environmental law should be adopted, to encourage States to address the challenge of climate change with determination. What is more, an integrated interpretation must be offered of the basic norms of general international law (such as the Charter of the United Nations) and certain aspects of the international legal system (for example, international protection of human rights or law of the sea) that predate the development and consolidation of international environmental law, but which also safeguard the interests of

the international community as a whole. In that regard, Resolution 76/300 of the General Assembly of the United Nations of 28 July 2022, which recognizes the right to a clean, healthy and sustainable environment as a human right, is fundamental.

Spain, as a country that is highly vulnerable to climate change, has pioneered environmental policy and legislation, both at the level of the European Union and individually.

B. THE CLIMATE CRISIS

3. Owing to the huge advances in scientific research in the last 40 years, humanity is now able to fully grasp the seriousness of the Earth's environmental degradation. The first Special Report by the Intergovernmental Panel on Climate Change (IPCC), published on 8 October 2018, estimated that human activities had caused approximately 1.0°C of global warming above pre-industrial levels, with global warming likely to reach 1.5°C between 2030 and 2052 if it were to continue at the current rate¹. The observed changes in the climate are unprecedented not only in hundreds of years, but thousands of years; some of the changes that are already taking place, such as sea level rise, will only be reversible over several centuries or millennia. (IPCC, Working Group I contribution to the Sixth Assessment Report, of 9 August 2021).

¹ IPCC, 2018: Summary for Policymakers. In: *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* [Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.)], Cambridge University Press, Cambridge, UK and New York, NY, USA, pp. 3-24, doi:10.1017/9781009157940.001.

4. Climate change is a global issue affecting all regions of the world. Spain, owing to its location and its socioeconomic characteristics, is highly vulnerable to climate change, which is accelerating the deterioration of essential resources such as water, fertile land and biodiversity, and threatening the quality of human life and health. The average temperature in Spain has increased by approximately 1.7°C since the pre-industrial era, and the mean sea level has risen, especially since 1993 in the Strait of Gibraltar and the Canary Islands and on the Atlantic coast, according to Spain's National Climate Change Adaptation Plan 2021-2030.

C. PROPOSED SYSTEMIC INTERPRETATION

5. Spain recognizes the importance of the principles mentioned in the request for an advisory opinion insofar as they serve as channels linking, on one hand, the aforementioned different intentional legal systems, and on the other, international law with domestic law.

The parties that requested the advisory opinion ask the International Court of Justice to respond to their questions on the basis of a selected set of legislative instruments. These include the treaty instruments, customary rules, principles and soft law instruments that today constitute the pillars of the legislative model and legitimacy of the United Nations. An integrated interpretation of this body of initially scattered regulations would allow the International Court of Justice to incorporate climate obligations from the Paris Agreement into said instruments, facilitating the latter's greening or ecologization. In this task, the International Court of Justice should also consider resolutions other international and national courts called to rule on the same subject matter: the European Court of Human Rights and the International Tribunal for the Law of the Sea, the

Inter-American Court of Human Rights and, among national courts, the Spanish Supreme Court.

6. The principles that Spain considers should govern interpretation of States' obligations under international law to ensure protection of the climate system and other aspects of the environment from anthropogenic greenhouse gas emissions, for the benefit of States themselves and for current and future generations are: the duty of due diligence and principle of prevention —both of which are from customary law and exist in all areas of international law indicated in the heading of Resolution 77/276— and the principles of progression and environmental rule of law, which come from international environmental law.

7. Spain argues that the climate change obligations designed by the Paris Agreement (2015), are aligned with *the due diligence obligations* recognized in international law. The Agreement, while primarily setting out procedural obligations for States Parties, also incorporates a collective mitigation goal, which simultaneously pursues a specific objective of avoiding a temperature increase exceeding 1.5°C above pre-industrial temperatures. This goal is to be achieved through nationally determined contributions (NDCs), the main mechanism through which Parties contribute to these goals (Article 4). Although proposed individually by each Party, these NDCs collectively aim to achieve the global temperature goal of no more than 2°C. The NDC structure within the Paris Agreement incorporates the principle of due diligence by requiring States to successively prepare, communicate and maintain the commitments they will seek to fulfil. This process reflects the due diligence obligation to take all appropriate measures to avoid significant climate damage.

The application of the principle of due diligence in environmental law, which requires States to prevent significant damage to the environment, is well established in international law, as seen in cases such as the *Trail Smelter* arbitration² and the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*,³ the case of the *Pulp Mills on the River Uruguay*⁴ and in the joined cases of *Certain Activities Carried Out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River*.⁵ In the *Trail Smelter* award, the arbitral tribunal held that “no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence”.⁶ In the *Pulp Mills on the River Uruguay* case, the International Court of Justice held that the principle of prevention has its “origins in the due diligence that is required of a State in its territory”.⁷

The recognition of these obligations of due diligence by the international community is widespread; however, the precise scope and content of these obligations vary due to the very nature of due diligence. Indeed, as the International Tribunal for the Law of the Sea has stated in the advisory opinion *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, the content of due diligence “may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of

² Decision of 11 March 1941, *United States v. Canada*, 1941, 3 RIAA 1938.

³ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226.

⁴ *Pulp Mills on the River Uruguay*, *Argentina v. Uruguay*, Judgment, ICJ Reports 2010, p. 14.

⁵ *Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica v. Nicaragua*), Judgment, and *Construction of a Road in Costa Rica along the San Juan River* (*Nicaragua v. Costa Rica*), Judgment, ICJ Reports 2015, p. 665.

⁶ *United States v. Canada*, 1941, 3 RIAA 1938, p. 1965.

⁷ *Pulp Mills on the River Uruguay* (*Argentina v. Uruguay*), Judgment, ICJ Reports 2010, p. 14, para. 101.

new scientific or technological knowledge".⁸ The integration of human rights alongside scientific knowledge in the framework of climate obligations exemplifies this progressive evolution.

Spain argues that the principle of due diligence, as viewed through the lens of the Paris Agreement, provides a framework to achieve equitable outcomes. Indeed, the Agreement establishes a fundamental obligation to undertake climate change mitigation and adaptation measures, based on the principle of due diligence, which requires States to act in accordance with their respective capabilities.

8. The *principle of prevention of significant harm to the environment* is a principle recognized by international case law and obliges States to exercise their sovereignty in a way that ensures that activities within their jurisdiction or control do not cause damage to the environment beyond their borders.

The obligation to prevent damage caused by climate change forms part of general customary law. This obligation, which must be pursued by States domestically, also requires international cooperation so that all States participate in its fulfilment and no one is left behind. Since the international arbitration in the aforementioned Trail Smelter case, the prevention of transboundary harm has been considered a principle of international environmental law, which has been incorporated into United Nations instruments, regional instruments and in International Court of Justice decisions which have expressly recognized it as a customary rule following its enshrinement in principle 21 of the Stockholm Declaration

⁸ *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, para. 117.

on the Human Environment (1972)⁹ and in principle 2 of the Rio Declaration on Environment and Development (1992).¹⁰

Case law of regional human rights courts has used this principle to establish the link between environmental degradation and human rights violations. To clarify the level required, reference can be made to other cases in which the matter has been assessed from the perspective of its impact on human rights. Of particular relevance for the further development of the legal framework for environmental protection is the case of *López Ostra v. Spain*, given that the European Court of Human Rights held that an interference of an environmental nature may constitute a violation of the right to respect for private and family life under Article 8 of the European Convention on Human Rights.

9. The Paris Agreement states the *progression principle* in Article 4, paragraph 3, where it provides that each Party's successive NDC "will represent a progression beyond the Party's then current NDC and reflect its highest possible ambition."¹¹ This principle calls for the improvement of environmental legislation, including by increasing the level of protection, on the basis of the latest scientific knowledge.

The principle of progression set out in Article 4.3 of the Paris Agreement, in conjunction with the 2021 Glasgow Breakthrough Agenda, obliges States to submit their new mitigation and adaptation obligations for a

⁹ Pursuant to Principle 21: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".

¹⁰ Pursuant to Principle 2: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".

¹¹ *Report of the Secretary General of the United Nations* of 30 November 2018, 73/419, para. 22.

decarbonized economy to the NDC Registry every five years. The discretionary power that governments enjoy by virtue of their sovereignty is justified by the need to take into account their national circumstances and respective capacities to meet the social costs of the transition to a decarbonized economy.

10. Recent developments in international environmental law provide two innovations which reflect the principle of environmental rule of law and environmental democracy:

1. The linking of environmental protection to human rights, by granting certain environmental rights to civil society (as individuals or groups); and
2. The requirement of public participation in environmental matters as an expression of environmental democracy. It is essential that citizens have access to information, that they can participate in decision-making on issues that affect them, and that they are able to go to court to defend their rights.

D. THE PARIS AGREEMENT AND SPANISH LAW

11. The Paris Agreement is a treaty which gives rise to international obligations relating to climate change. In addition to the long-term objectives set out in articles 2 and 4.1, the Agreement establishes the obligation of each State Party to specify the measures it will undertake to reduce national emissions and adapt to the effects of climate change. This obligation is accompanied by a duty of the Parties to take stock, every five years, of the NDCs, data and commitments presented by States to the NDC Registry.

The principle of progression is therefore a core element of the Paris Agreement. The principle is expressed in two ways. Firstly, as a requirement for each Party to submit successive NDCs (article 4.3) and secondly, as a result, as the outcome of the efforts of all Parties (article 3).

As a Member State of the European Union and during its Presidency of the Council of the European Union, Spain, together with the European Commission, submitted on 16 October 2023, the updated NDC for the European Union and its Member States, in accordance with the principle of progression.

12. Domestically, Spain meets this principle of progression through its Act 7/2021, of 20 May 2021, on Climate Change and Energy Transition Act (Official State Gazette [BOE] no. 121, of 21 May 2021) and its 2021–2030 National Integrated Energy and Climate Plan (Official State Gazette [BOE] no. 77, of 31 March 2021). The Act establishes that the Council of Ministers may amend the objectives of the Plan for the following purposes: (a) to comply with the Paris Agreement, in accordance with the decisions of the Parties to the Paris Agreement; (b) to comply with European Union legislation; (c) to adapt the objectives to technological changes and advances in scientific knowledge; (d) when such revisions are advisable for environmental, social or economic reasons based on objective and quantifiable criteria. It is specifically provided that such revisions may only raise the prevailing targets for reducing greenhouse gas emissions and increasing absorption by carbon sinks. The Spanish Supreme Court, in its ruling of 24 July 2023, upheld this.

The United Nations Environment Programme's 2023 second Global Report on Environmental Rule of Law presents Spain's Climate Change and Energy Transition Act (Act 7/2021 of 20 May 2021) as a model to follow insofar as it shows how contributions to the Paris Agreement can be converted into national obligations.¹² Article 39 of said Act ensures that the plans, programmes, strategies, instruments and general provisions adopted in the energy transition towards a low-carbon economy and in combating climate change are carried out using open formulas and accessible channels that guarantee the participation of social and economic stakeholders and the general public, through communication and information channels, pursuant to Act 27/2006, of 18 July 2006, regulating the rights of access to information, public participation and access to environmental justice.

13. Therefore, it can be affirmed that Spain has inserted elements of environmental democracy into its domestic law. An example is the adoption of Act 27/2006 of 18 July 2006, regulating the rights of access to information, public participation and access to justice in environmental matters (Official State Gazette [BOE] no. 171, of 19 July 2006).

This Act transposes Directives 2003/4/EC and 2003/35/EC into domestic law and responds to the commitments assumed by Spain with the ratification of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998), which entered into force in 2005.

¹² See UNEP, *Environmental Rule of Law: Tracking Progress and Charting Future Directions*, 2023, p. 30, available at <https://wedocs.unep.org/handle/20.500.11822/43943;jsessionid=39E64F558EE2163F23448120D9429EAF>

This Act also grants environmental non-profit organizations the right to sue in the common interest, provided that they were legally established at least two years prior to bringing the action and that they carry out their activity in the territorial area affected by the alleged act or omission. Standing to protect a diffuse interest such as the protection of the environment is thus established in favour of those organizations whose charitable purposes relate to the protection of natural resources. It can be considered that, in Spain, groups that are particularly vulnerable to climate change and environmental damage are protected at State level under Act 27/2006.

E. THE HUMAN RIGHT TO A CLEAN, HEALTHY AND SUSTAINABLE ENVIRONMENT

14. The aforementioned United Nations General Assembly Resolution 76/300 (28 July 2022) reflects the interdependence of human rights and environmental law an issue which is at the heart of this written statement.

In 2009 the Office of the United Nations High Commissioner for Human Rights issued the first report on the relationship between climate change and human rights, which explained that climate change directly and indirectly threatens the enjoyment of a wide range of human rights (10/61 of 15 January 2009), in particular, the rights to life, to adequate food, to water, to health, to adequate housing and to self-determination. The study noted that rising sea levels due to global warming threaten the very existence of small island States, with “implications for the right to self-determination, as well as for the full range of human rights for which

individuals depend on the State for their protection.”¹³ In his first mapping report, in 2013, the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment stated that “environmental degradation can and does adversely affect the enjoyment of a broad range of human rights.”¹⁴

The establishment of the human right to a clean, healthy and sustainable environment seeks to contribute to the recognition of the importance of the environment in the enjoyment of all human rights and to guarantee its protection in the face of the environmental crisis.

15. Spain considers that the human right to a clean, healthy and sustainable environment offers greater coherence to the human rights system. Due to its cohesive nature, the human right to a clean, healthy and sustainable environment is pertinent to several categories of rights: as a right to life, it imposes positive obligations on States; as an economic and social right, it promotes progress that should be much more inclusive; and finally as a collective and solidary right it protects the environment, while its democratic nature allows the ecosystem protection and management model to be decided by and for all.

In Europe, constitutional protection of the environment as a human right has been linked to various rights in States’ respective constitutions, the EU acquis of supra-state law, the contribution of the Council of Europe, the European Social Charter and the social and economic human rights guaranteed therein, the Aarhus Convention, which plays a key role by

¹³ *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, of 15 January 2009, 10/61, para. 41.

¹⁴ *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, of 24 December 2012, 22/43, para. 34.

introducing procedural rights and their connection to substantive environmental rights, as well as the interpretative work of the courts, which continues to evolve and expand. The case law of the European Court of Human Rights has determined that environmental degradation can interfere with the enjoyment of the rights protected in the European Convention on Human Rights, including the right to life (Article 2); the right to a fair trial (Article 6); the right to respect for private and family life (Article 8).

With regard to Spain, we must mention Article 45 of the Spanish Constitution, which states that: "Everyone has the right to enjoy an environment suitable for personal development, as well as the duty to preserve it." This right is enshrined in Chapter III of Title I of the Constitution as a guiding principle of economic and social policy.

16. The Special Rapporteur on Human Rights and the Environment has insisted during his mandate that "approaching climate change from a human rights perspective highlights the principles of universality and non-discrimination, emphasizing that rights are guaranteed for all persons, including vulnerable groups."¹⁵ These include, at least, women, environmental defenders and farmers.

The Committee on the Elimination of All Forms of Discrimination against Women has repeatedly pointed to multiple forms of environmental harm, such as natural disasters, climate change, nuclear and water pollution, which can negatively impact on the rights enshrined

¹⁵ *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean and healthy and sustainable environment*, of 15 July 2019, 74/161, paragraph 27.

in the Convention on the Elimination of All Forms of Discrimination against Women.

The respect for human rights necessarily requires recognition of the work of those defending the environment and combating climate change. Spain has proven its commitment through the Ministry of Foreign Affairs, European Union and Cooperation's system for the support of human rights defenders at risk, which temporarily hosts defenders of the right to territory, defenders of the rights of indigenous peoples and the environment, who support the recognition of the right to care for and respect the environment and its biodiversity.

The agricultural sector as a whole represents an economic activity with a high degree of exposure to environmental risk. In relation to the current context of climate change, it should be taken into consideration that agricultural production is highly dependent on natural conditions and, therefore, on climate conditions. The increased frequency and intensity of adverse weather events such as floods, droughts and hail storms have a greater impact on the production conditions of agricultural holdings, causing damage of various kinds when they occur. Farmers therefore represent a significant group of people who are vulnerable to climate change. Spain wishes to point out that the policies to be developed can be both supportive in the face of the losses suffered, as well as preventive, adaptive and mitigating.

17. Lastly, together with the human right to a clean, healthy and sustainable environment, Spain would like to refer to a major development that will

accelerate progress towards a sustainable future, according to the Special Rapporteur on Human Rights and the Environment: the rights of Nature.¹⁶

Spain has attributed legal personality to the Mar Menor lagoon and its basin with the adoption of Act 19/2022 of 30 September, to recognise legal personality to the Mar Menor lagoon and its basin (Official State Gazette [BOE] no. 237, of 3 October 2022). The preamble of this Act states that: "The great challenge facing environmental law today is to achieve the effective protection of nature and the human cultures and ways of life that are closely associated with it, as is the case of the municipalities bordering the Mar Menor lagoon. In this regard, it is necessary to interpret the applicable law and the subjects worthy of legal protection in accordance with the profound degree of ecological degradation in which the Mar Menor finds itself. Article 45 of our Constitution has been interpreted by the Supreme Court as meaning that nature, as an ecosystem, is the unit that includes human beings as one of its elements and, therefore, that which enables personal development."

18. At a time when several important international courts are deliberating various aspects of States' obligations with respect to climate change, the International Court of Justice is of note for its wide general remit. Spain therefore asks the Court to answer the questions posed, in order to provide clarity on States' climate-related obligations, based on the principle of systemic integration, as permitted by its broad purview.

¹⁶ *Harmony with Nature*, Report of the Secretary General of the United Nations of 26 July 2019, 74/236, para. 17.

All of the reflections set out by Spain in this written statement on the need for an integrated perspective on climate-related obligations have been formulated with due consideration of the challenge of guaranteeing the well-being of present and future generations, which, as underscored by General Assembly Resolution 77/276, calls for an immediate and urgent response.