

**WRITTEN REPLY BY THE REPUBLIC OF PANAMA
TO THE QUESTIONS PUT BY JUDGES CLEVELAND, TLADI, AURESCU
AND CHARLESWORTH AT THE END OF THE PUBLIC SITTING ON
13 DECEMBER 2024**

International Court of Justice

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?”

A. The Republic of Panama understands that fossil fuels subsidies represent any action taken by the government of any State not limited to financial benefits that reduces the cost of fossil fuel energy production, raises the price received by oil, gas or coal companies, or reduces the price paid by fossil fuel consumers, with effects in any State. Since their 2009 Pittsburgh Summit, G20 countries have committed to phase out fossil fuel subsidies encouraging wasteful consumption, a commitment also made in that year by the States members of the Asia-Pacific Economic Cooperation forum, or APEC. Those States, however, have made little or no progress toward reducing subsidies: according to the International Energy Agency (IEA), fossil fuel consumption subsidies stood at no less than \$620 billion in 2023.

States whose governments implement fossil fuel subsidies are aware that their adoption increases their consumption, generating higher greenhouse gas emissions that are causing global climate change. This conclusion has been reiterated by the Intergovernmental Panel on Climate Change (IPCC), which has stated that in order to keep the international community below 1.5°C of warming, it is urgently necessary not only to phase out fossil fuel subsidies, but fossil fuels altogether. Those States whose economy is mainly based on the subsidized production and use of fossil fuels are particularly obliged with respect to the damage caused to others in relation to their contribution to global warming.

In a few words, subsidies mean larger fossil fuel consumption and higher levels of environmental harm and destruction.

Long before the work of the International Law Commission on this matter, the obligation to make reparation, restitution, compensation and satisfaction by virtue of damage caused to others has been a foundation of international relations and customary international law.

The responsibility of States for harm caused to others may arise not only from wrongful acts, but also from lawful activities which, because of their dangerous nature, cause harm. This type of liability is known as international liability for acts not prohibited by international law or strict liability.

The Republic of Panama relies again on the work of the International Law Commission, having the Commission addressed the matter since 1996, and especially in its “Draft Principles” on the "Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law". This concept refers to situations in which a State, by carrying out legitimate but inherently dangerous activities, such as the emission of greenhouse gases, causes transboundary harm. Fossil fuel subsidies may not be prohibited by international law, but their adoption increases the injurious consequences of fossil fuel consumption to the global environment.

This principle is based on equity and the need to ensure that hazardous activities do not harm other States or the global environment.

The United Nations Framework Convention on Climate Change establishes in its recitals that States have the sovereign right to exploit their own resources, however, they must ensure that such activities are carried out without causing damage to the environment of other States or areas that are outside the limits of national jurisdiction. It also establishes that those States that are particularly dependent on fossil fuels must, albeit with difficulty, take action to limit greenhouse gas emissions.

The Paris Agreement in its recitals recognizes “that climate change is a problem of all humanity and that, in taking measures to address it, Parties should respect, promote and take into account their respective obligations relating to human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and persons in vulnerable situations and the right to development, as well as gender equality, women's empowerment and intergenerational equity” and “bearing in mind the importance of conserving and increasing, as appropriate, sinks and reservoirs of greenhouse gases referred to in the Convention”.

This regulatory text, in accordance with the Paris Agreement, considers as specific obligations that these States have to take actions to prevent and minimize the risk of foreseeable effects on the environment and human rights derived from climate change driven by fossil fuels.

The obligation to prevent and protect against foreseeable human rights violations requires States to limit fossil fuel-related activities. This responsibility is based on the need to prevent environmental and social damage from climate change driven by these fuels. Various reports and statements by international bodies, such as the United Nations, have underlined the urgency for States to act to reduce dependence on fossil fuels and promote sustainable energy alternatives, in order to safeguard human rights and the environment.

In addition to the above, the Paris Agreement establishes specific obligations in Articles 2.1(a), 2.1(c), 4.1 and 4.3, which require States to phase out the production of fossil fuels and end direct and indirect subsidies for these fuels. These measures are essential to achieve the global temperature target, in line with the purpose and objective of the climate regime, and to align financial flows with a low greenhouse gas emissions and climate-resilient development trajectory.

Article 2.1(a) of the Paris Agreement sets a target to keep the increase in global average temperature below 2°C above pre-industrial levels and to pursue efforts to limit this increase to 1.5°C. To achieve this goal, it is essential to reduce greenhouse gas emissions, which implies a decrease in the production and consumption of fossil fuels.

Article 2.1(c) highlights the need to make financial flows consistent with a trajectory towards low-greenhouse gas emissions and climate-resilient development. This implies redirecting investments towards clean and sustainable energies, eliminating subsidies that favor the production and consumption of fossil fuels.

Article 4.1 states that, in order to achieve the long-term temperature objective, Parties must ensure that global greenhouse gas emissions peak as soon as possible and thereafter rapidly reduce emissions. This requires a transition to cleaner energy sources and the phasing out of fossil fuel production.

Finally, Article 4.3 provides that each Party's Nationally Determined Contributions shall represent a progression from the current situation and reflect its highest possible level of ambition. This implies that states must commit to increasingly ambitious measures to reduce emissions, including eliminating fossil fuel subsidies and promoting clean energy.

“The Human Rights Treaty Bodies play a very important role in specifying the obligations of States in relation to fossil fuels: clarifying that the production and export of fossil fuels is not compatible with human rights obligations, establishing their duty to stop issuing permits for extraction and for the construction or expansion of petrochemical infrastructure, as well as its duty to gradually reduce the current extraction of oil, gas and coal with the best available technology. This can be done through the State's review process, but also through general comments/recommendations, due to its authoritative nature in interpreting the conventions”.

It is completely contrary to public international law and an attack on fundamental human rights, to promote or subsidize activities based on the production and commercialization of fossil fuels, which should rather be progressively reduced and transitioned to renewable energy sources or with less capacity to damage the environment.

In that regard, States have important obligations with respect to fossil fuels as the main drivers of climate change, as well as other dimensions such as avoiding harm in the context of climate-related loss and damage, preventing further harm that could result from geoengineering activities, and fulfilling the right to a healthy environment.

Question put by Judge Tladi

“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?”

A. The reading of the various paragraphs of Article 4 of the Paris Agreement has led some participants to conclude that the obligations related to Nationally Determined Contributions (NDCs) are procedural in nature. When considering the “object and purpose” of the Paris Agreement and the climate change treaty framework in general, however, it is clear that these obligations also have a significant substantive component.

Article 31(1) of the Vienna Convention on the Law of Treaties provides that a treaty must be interpreted in good faith in accordance with the ordinary meaning of its terms, in its context and in the light of its object and purpose.

Article 2 of the Paris Agreement defines its main objective: to strengthen the global response to the threat of climate change, keeping the global temperature increase below 2°C and striving to limit it to 1.5°C.

Article 4.1 states that, in order to achieve this objective, Parties must maximise greenhouse gas emissions as soon as possible and reduce them rapidly thereafter.

Article 4.2 requires each Party to prepare, communicate and maintain successive Nationally Determined Contributions and to implement them with the aim of achieving the purposes and objectives (of a substantive nature) of the Agreement.

Although the obligation to submit Nationally Determined Contributions may be considered procedural, the commitment to implement them to achieve the objectives of the Agreement implies a substantive obligation. This interpretation is aligned with the object and purpose of the Paris Agreement, which seeks effective and ambitious climate action by all States.

Therefore, by interpreting Article 4 in light of the object and purpose of the Paris Agreement, it is concluded that the obligations of Parties are not merely procedural, but also include substantive commitments to reduce emissions and contribute to the global goal of limiting global warming.

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?”

A. The undisputed right to a clean, healthy and sustainable environment has been recognized and developed in various international instruments and practice of arbitral and judicial tribunals, reflecting its fundamental importance to the protection of human rights.

The Stockholm Declaration of 1972, in its Principle 1, affirms that human beings have the fundamental right to freedom, equality and adequate living conditions, in an environment of quality that allows them to live with dignity.

Subsequently, the Rio Declaration of 1992, in its Principle 1, establishes that human beings are at the center of concerns related to sustainable development and have the right to a healthy and productive life in harmony with nature.

In the context of our region, the American Convention on Human Rights of 1969 (Pact of San José), although it does not explicitly mentions the right to a healthy environment, it has been interpreted by the Inter-American Court of Human Rights in a recent decision of 6 September 2020 in the case of *Lhaka Honhat (Our Land) v. Argentina* in the sense of that “the right to a healthy environment constitutes a universal interest” and “is a fundamental right for the existence of humanity”, and that “as an autonomous right [...] protects the components of the [...] environment, such as forests, seas, rivers and others, as legal interests in themselves, even in the absence of certainty or evidence about the risk to individuals. It is about protecting nature,” not only for its “usefulness” or “effects” on human beings, “but for its importance for the other living organisms with whom the planet is shared.” “The foregoing does not prevent, of course, that other human rights may be violated as a result of environmental damage. It includes this concept in attention to Advisory Opinion OC-23/17, paras. 59, 62 and 64.”

In this decision, it is also established that States are obliged to use all means at their disposal in order to prevent the activities carried out under their jurisdiction from causing significant damage to the environment. This obligation must be fulfilled under a standard of due diligence, these preventive measures can be: Regulate, supervise and supervise, require and approve environmental impact studies, establish contingency plans and mitigate in cases of occurrence of environmental damage.

Additionally, the Court has taken into account that various rights can be affected by environmental problems, and that this “can occur with greater intensity in certain groups in vulnerable situations”, including indigenous peoples and “communities that depend, economically or for their survival, fundamentally on environmental resources [such as] forest areas or river domains”. Therefore, “based on international human rights law, States are legally obliged to address these vulnerabilities, in accordance with the principle of equality and non-discrimination”. In this context, the Court points out that there are environmental threats that can affect food: the respective right, as well as the right to participate in cultural life and the right to water, are “particularly vulnerable” to “environmental impacts”.

Article 11 of the Protocol of San Salvador of 1988 recognizes the right of every person to live in a healthy environment and establishes the duty of States to promote the protection, preservation and improvement of the environment.

More recently, UN Human Rights Council Resolution 48/13 of 2021 formally recognizes the right to a safe, clean, healthy, and sustainable environment, and calls on States to work together for its implementation.

This right is intrinsically related to other fundamental human rights.

The right to life, for example, can be compromised in a degraded environment, as pollution and the destruction of essential ecosystems affect human survival.

Likewise, the right to health is directly influenced by the quality of the environment; Air, water, and soil pollution can cause a variety of diseases.

The right to water, implicit in the rights to health and life, is threatened when a polluted environment compromises access to drinking water, which is essential for life and health.

Similarly, the right to food, recognized in Article 12 of the Protocol of San Salvador, can be affected by environmental degradation, which impacts food production and puts food security at risk.

Finally, the right to adequate housing, established in Article 11 of the International Covenant on Economic, Social and Cultural Rights, requires a healthy environment to be fully enjoyed; Pollution and environmental disasters can deteriorate living conditions.

In more recent developments, the UN General Assembly, in 2022, adopted Resolution 76/300, which recognizes the human right to a clean, healthy, and sustainable environment, urging States to intensify their efforts to guarantee this right.

These instruments and judicial rulings reflect a global trend towards the recognition and protection of the right to a healthy environment, highlighting its interconnectedness with other fundamental human rights and the responsibility of States to ensure their effective fulfilment.

Question put by Judge Charlesworth

“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?”

A. The Republic of Panama considers that the declarations made by some States upon acceding to the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement, indicating that nothing in these agreements should be construed as derogating from the principles of general international law or from any claim or right relating to compensation or liability for the adverse effects of climate change, are of significant importance in the field of international law.

These declarations act as official interpretations of States, clarifying that their participation in these treaties does not imply a waiver of the rights and remedies granted to them by general international law. Particularly, they emphasize that the obligations set out in the UNFCCC and the Paris Agreement do not replace or limit responsibilities under customary international law, especially in regard to redress for harm caused by activities that contribute to climate change.

In the context of compensation and liability for the adverse effects of climate change, these statements underscore the sensitivity and complexity around the issue of “loss and damage”. During the Paris Agreement negotiations, the inclusion of Article 8, which addresses loss and damage associated with the impacts of climate change, was a significant development. However, Decision 1/CP.21, paragraph 51, explicitly states that Article 8 does not imply or provide a basis for any liability or compensation.

By issuing these declarations, States seek to preserve their right to claim full reparations for the damages already caused by conduct that has contributed to climate change. This includes measures such as cessation of harmful activities, guarantees of non-repetition and adequate compensation, in accordance with the rules of State responsibility in international law. Moreover, these statements reflect the understanding that climate treaties do not constitute a “*lex specialis*” that excludes the application of general international law or other relevant rules related to remedies, such as the right to reparation protected by international human rights law.

In summary, these statements reaffirm that participation in the UNFCCC and the Paris Agreement does not limit or replace existing obligations or remedies available under general international law. States explicitly state that any harm caused by conduct responsible for climate change remains subject to the full range of remedial measures provided for in international law, thus ensuring the protection of their rights and the possibility of seeking compensation for the adverse effects of climate change.