

Memorial on Behalf of the Organization for Economic Co-operation and Development (OECD)

INTERNATIONAL COURT OF JUSTICE

REQUEST FOR AN ADVISORY OPINION CONCERNING FRESHWATER RIGHTS
UNDER INTERNATIONAL LAW IN RELATION TO THE POTENTIAL LEGAL
PERSONALITY OF RIVERS AND THE CLIMATE CRISIS



MEMORIAL FOR THE ORGANIZATION FOR ECONOMIC CO-OPERATION AND
DEVELOPMENT (OECD)

THE 1st WCEL INTERNATIONAL WATER JUSTICE MOOT COURT AT THE
CONFERENCE OF JUDGES AND PROSECUTORS ON WATER JUSTICE DURING THE
8th WORLD WATER FORUM IN BRASÍLIA, BRAZIL

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MISCELLANEOUS

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I. STATEMENT OF JURISDICTION

The United Nations General Assembly adopted resolution A/RES/72/Water, requesting an advisory opinion from the International Court of Justice (“The Court”) pursuant to Article 65 of the Statute of The Court. In accordance with Article 66, the Court invited all interested State parties entitled to appear before the Court to submit memorials through regional intergovernmental organizations as an efficient way to represent the multiplicity of State interests in the proceedings. Therefore, the Organization for Economic Co-Operation and Development (“OECD”) submits this memorial in answer to the question presented.

II. PROBLEM PRESENTED

1. Freshwater Rights under International Law in Relation to the Potential Legal Personality of Rivers and the Climate Crisis

The theme of the World Water Forum is sharing water and water justice. The OECD supports these themes and understands the necessity of having frameworks that adequately address water as a limited resource in light of the climate crisis. Recognizing the rights of freshwater relates to the themes of the World Water Forum because the problem creates the potential of a new framework for sharing water. The OECD does not support this recognizing water as having legal personality as an approach to water justice, but it does support establishing clear guidelines regarding who owns water, water usage, and protective measures of rivers.

III. IN CONTEXT: ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD)

The Organization for Economic Co-operation and Development (“OECD”) strives to promote sustainable economic growth and promote stable open markets.¹ The OECD’s main goal is to promote economic and social well-being of all people.

Today, one of OECD’s objectives is helping governments around the world foster and support new sources of growth through innovation, environmentally friendly “green growth” strategies, and the development of emerging economies. In this area, OECD has a specific mandate to contribute for the implementation of the Paris Agreement, leading governments towards a more resource-efficient, circular economy. OECD recognizes that the climate crisis poses a serious threat to economic well-being and development. Additionally, OECD has developed water governance principles to aid States in developing policies to address climate crisis and water disputes.

¹ The members of the OECD may be found here: <http://www.oecd.org/about/membersandpartners/list-oecd-member-countries.htm>.

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IV. QUESTION 1: UNDER WHAT CIRCUMSTANCES DOES INTERNATIONAL LAW RECOGNIZE THE RIGHTS OF RIVERS AS HAVING LEGAL PERSONALITY?

A. Rivers do not have legal personality under international law

As international law develops, questions of who and what have legal personality expand. International law puts in place protections over rivers and the environment, which obligate States to ensure the environmental protection and equitable usage of rivers. These protections adequately protect rivers without recognizing legal personality.

International law has started to recognize international organizations and individuals as having legal personality in some instances, moving beyond the traditional view of non-State actors and individuals as objects under international law. The ICJ first addressed the legal personality of a non-State actor in *Reparations for Injuries Suffered in Service of the United Nations*.² In determining the competency of a non-State actor to bring a case, the ICJ looked to the functional capacity of the organization.³ The functional capacity of the organization is its purposes and operations must perform.⁴ Essentially, for a non-State actor to have legal personality, the need to bring a claim must be imperative to the discharge of its functions.⁵ To recognize a river as having legal personality under international law, the river would have to have functional capacity; thus, the river would need to be able to bring a claim to discharge its function. A river, although critical to an ecosystem, does not have functional capacity in this manner. Instead, States have obligations to rivers as objects of international law. Treaty law and

² UN Reparations Case.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

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customary international law obligate States to ensure equitable usage and environmental protection of rivers.⁶

The Convention on the Law of the Non-Navigational Uses of International Water Courses does not view rivers as having legal personality.⁷ Rather, it focuses on the riparian rights between States and a dispute resolution framework for when States infringe on other States riparian rights.⁸ States must use international watercourses in an equitable manner so as not to infringe on other States usage rights.⁹ The Convention also obligates States to protect international watercourses from environmental degradation.¹⁰

The Convention on Biological Diversity identifies the need for sustainable development. States have a responsibility to engage in sustainable development to ensure the maintenance of biological diversity and conservation of resources.¹¹

The United Nations Framework Convention on Climate Change (UNFCCC) articulated responsibilities of nations with developed economies to reduce greenhouse gas (GHG) emissions to slow down climate change.¹² The UNFCCC maintains the need for ecosystems and the environment to adapt naturally and calls upon States to ensure their GHG emissions do not prevent natural adaptation.¹³ The Paris Agreement also obligates States to protect the

⁶ See generally UNFCCC; CBD; Paris Agreement.

⁷ UN Watercourses Convention.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ CBD.

¹² UNFCCC.

¹³ *Id.*

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Memorial on Behalf of the Organization for Economic Co-operation and Development (OECD) environment.¹⁴ It acts as an update to the UNFCCC, creating a new framework for combatting the climate crisis that addresses technological advances and the needs of developing States.¹⁵

The OECD considers freshwater use a critical problem as populations grow and water-intensive industries develop.¹⁶ To address this problem, the OECD developed principles on water governance, which focus on three interwoven themes: efficiency, effectiveness, and trust and management.¹⁷ This framework does not recognize legal personality of rivers because proper governance of water presents a more effective solution to conserving limited resources.¹⁸ The OECD principles on water governance recognize that each State needs an individualized plan to manage water; thus, the principles allow for flexible adaptation.¹⁹ Nevertheless, the principles call upon States to define who owns water.²⁰ States may allow private, public, or mixed ownership, but the framework does not allow a river to have legal personality.²¹ Water is a resource to which all people have a human right, and sustainable management of this shared resource depends on proper management.²² Without defining ownership, effective management of freshwater is impossible.²³

Recently, some States have developed domestic precedent for rivers and nature having legal personality. Although this new trend certainly establishes legal theory for extending legal personhood to rivers, not enough States have created this legal precedent to consider it customary international law. At best, it rises to a general principle of international law, but even

¹⁴ Paris Agreement.

¹⁵ *Id.*

¹⁶ OECD Water Governance.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

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this is unlikely because so few states have this type of precedent, and the extent that rivers or nature gain legal personality differs between each state.

The development of rivers as having legal personality has developed domestically in some States. Indigenous rights present a strong argument for recognizing legal personality because degrading a river violates cultural practices in many cases. Nonetheless, indigenous peoples may enforce their rights through legal frameworks protecting cultural practices. Creating a new legal framework in which rivers have legal personality is unnecessary.

In New Zealand, the parliament recently recognized the Whanganui River as having legal personality and gave it the name, Te Awa Tupua.²⁴ For years, Maori fought for the protection of the Whanganui River from industrial development and environmental degradation.²⁵ For Maori, the river constituted a being with rights.²⁶ After years of advocacy on the part of Maori, the New Zealand Parliament enshrined the rights of the river as having legal personality.²⁷

The Ganga and Yamuna Rivers in India almost gained legal personality. In Mohammed Salim v. State of Uttarakhand, the high court initially recognized the Ganga and Yamuna Rivers as legal persons, noting that the rivers provide physical and spiritual sustenance.²⁸ The State of Uttarakhand challenged the high court's decision, and the Supreme Court stayed the case on the grounds that it may be unsustainable in the law.²⁹

²⁴ Te Awa Tupua.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Salim*, High Court.

²⁹ *Salim*, Supreme Court.

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The Atrato River experienced heavy pollution from mining, causing Tierra Digna to bring a case in Colombia.³⁰ The Constitutional Court of Colombia inferred that biocultural rights exist within Colombian Constitutional law and held nature is the subject of full legal rights. Specifically regarding the Atrato River, the Court determined it a legal subject with specific rights and created a commission of guardians to protect the river.³¹

In Ecuador, the Constitution gives any member of the public the ability to force public authorities to enforce the rights of nature.³² The Constitutional Court of Ecuador, in 2015, held that the rights of nature are central tenets of the Ecuadorian Constitution, disbanding the anthropocentric view of nature as merely a provider of resources.³³ Another case involving the Vilcabamba River in Ecuador resulted in the Provincial Court's declaration that the nature has its own rights to exist and carry on its vital processes.³⁴

Considering developments in domestic law, there is limited and varied legal precedent establishing legal personhood for rivers. International conventions obligate States to protect rivers from environmental degradation and enforce equitable usage of international watercourses. Rivers do not have legal personality under any circumstance because they lack functional capacity.

B. Rivers should not have legal personality under any circumstance

The UN framework and the OECD framework on water and environmental protection are adequate solutions of the water crisis. International environmental law protects rivers through; UN Convention on the Non-Navigational Uses of Watercourses, UNFCCC, Paris Agreement,

³⁰ *Atrato River Case*.

³¹ *Id.*

³² Ecuador Constitution.

³³ Corte Constitucional [C.C.] [Constitutional Court], mayo 20, 2015.

³⁴ Provincial Court of Justice of Loja, sentence No. 11121-2011-0010, March 30, 2011 (Ecuador).

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Memorial on Behalf of the Organization for Economic Co-operation and Development (OECD) and the Convention on Biological Diversity. Recognizing legal personality does not aid management of natural resources.³⁵ Instead, it diminishes the capacity of governments to control and monitor water usage.³⁶ Governments need to implement programs that monitor usages and allot usage amounts to different sectors.³⁷ This type of program promotes sustainable development, a key goal of the OECD.

Indigenous peoples have cultural claims to rivers; however, this does not lay a framework for recognizing legal personalities because the cultural claim to water is about indigenous rights not the rights of nature. Furthermore, human rights law also covers rights to water, but this does not recognize the legal personality of rivers because these rights are still the rights of people to use and access water.

V. QUESTION 2: IS INTERNATIONAL WATER LAW ADEQUATE TO RESPOND TO THE GLOBAL CLIMATE CRISIS, WHICH CAUSES SIGNIFICANT DISRUPTION IN THE HYDROLOGIC CYCLE, BY PROVIDING A FRAMEWORK FOR PREVENTING AND RESOLVING DISPUTES AMONG STATES OVER THE PROTECTION FROM POLLUTION AND SHARING OF WATER QUANTITIES FROM TRANSBOUNDARY RIVERS, LAKES, AND AQUIFERS?

A. Justification for water sharing dispute resolution system

The OECD recognizes that the limited availability of freshwater presents a problem amongst States.³⁸ To prevent disputes, the OECD studies water usage and needs in its member States.³⁹ Additionally, the OECD works with member States to implement the principles on water governance it developed at the 6th World Water Forum.⁴⁰ These principles target water usage and allocation in the present and future to prevent conflicts from arising over water usage

³⁵ See OECD Water Governance.

³⁶ See *id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

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in the future.⁴¹ By clearly defining how the State will allocate water, how the State will use water, and who owns water, States can maintain peaceful relations regarding freshwater.⁴²

B. International Dispute Resolution Mechanisms

The United Nations Charter establishes that States have an obligation to settle disputes peacefully.⁴³ Article 33 articulates that States must first engage in meaningful mediation, negotiations, or other peaceful means.⁴⁴ The Security Council may call upon States to settle their disputes through such means.⁴⁵ Article 34 gives the Security Council the power to investigate any dispute or potential conflict that may arise.⁴⁶ Under Article 35, States may bring disputes to the Security Council.⁴⁷ This dispute resolution framework, although general, covers disputes regarding transboundary freshwater sources.⁴⁸

States may also settle disputes at the ICJ.⁴⁹ If both States agree to submit their dispute to the ICJ, they may create a bilateral agreement, granting the court jurisdiction to hear their dispute.⁵⁰ If only one State wishes to bring the dispute to the ICJ, the State may give the ICJ an application to hear the case.⁵¹ In the application, the State must indicate where in treaty law the conflict arises from, and it must establish that the ICJ has compulsory jurisdiction over the respondent State.⁵²

⁴¹ *Id.*

⁴² *Id.*

⁴³ UN Charter.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ ICJ Statute.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

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OECD has members all over the globe, many of which belong to regional bodies that have dispute resolution mechanisms. This includes, the Organization of American States, European Union, African Union, Alliance of Small Island States, and Association of Southeast Asian Nations. Each of these regional organizations has dispute resolution mechanisms that States can utilize to solve freshwater disputes.

C. International law prevents and settles freshwater disputes

OECD plays an active role in transitioning to a low carbon economy in an effort to generate inclusive economic growth in the short term and additionally to securing longer-term growth and well-being for all citizens.⁵³ In the view of OECD, G20 countries in particular need to undertake a wide array of policy priorities to launch a decisive transition, including: a) integrating the climate imperative in all national development strategies, raising the environmental factor as a fundamental pillar for sustainable growth; b) speeding up national (and collective, including all stakeholder) efforts toward the full implementation of the Paris Agreement; c) promoting an inclusive growth, transitioning towards a low-emission, climate-resilient economy, with socially progressive policies; d) adopting forward-looking approaches to decision-making to increase climate resilience; e) realizing greenhouse gases mitigation potential across the economy; f) mobilizing financing for the transition.⁵⁴

OECD has concluded that the costs of delaying action towards the referred transition would be elevated and far more damaging than acting now.⁵⁵ After all, if more stringent policies

⁵³ OECD Low-Carbon Economy.

⁵⁴ *Id.*

⁵⁵ *Id.*

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were only introduced later, they would end up affecting a larger stock of high-carbon infrastructure, leading to higher levels of stranded assets across the economy.⁵⁶

The position and action of OECD is a result of compliance with a net of international and multilateral environmental agreements, and respective principles of international law.⁵⁷

Climate change has been regulated by the international community – and thus by domestic legislation as well – for more than two decades now. The main framework on the topic is the United Nations Framework Convention on Climate Change (“UNFCCC”), of which the most recent instrument is the Paris Agreement, an accord aiming for more ambitious and effective implementation of the UNFCCC.⁵⁸ Both the Convention and Paris Agreement impose legal obligations to States Parties regarding adaptation and mitigation action, assistance and support to developing countries, capacity building, technology transfer and others – all under the umbrella of keeping a global temperature rise well below two degrees Celsius this century – an amount above pre-industrial levels, and in an effort to limit the temperature increase even further to 1.5 degrees Celsius.⁵⁹

Furthermore, the 2030 Agenda for Sustainable Development presents a plan of action for all nations around the globe – both developed and developing.⁶⁰ Taking urgent action to combat climate change and its impacts is one of the goals to reach sustainable development, and it is one of the goals without which it is impossible to reach sustainable development.⁶¹ The Agenda sets

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ UNFCCC.

⁵⁹ UNFCCC; Paris Agreement.

⁶⁰ 2030 Agenda.

⁶¹ *Id.*

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goals that are integrated and indivisible, balancing the three core dimensions of sustainable development – economic, environmental and social.⁶²

All of these international and multilateral environmental agreements and frameworks are based on common principles of international law, particularly: a) integration and sustainable development; b) intergeneration equity; c) prevention; d) precaution.⁶³

The existing framework adequately accounts for disputes arising out of the disruption of the hydrological cycle. The general environmental conflicts the framework covers are similar to the freshwater conflicts States need to resolve. Consequently, there is already a well-established global framework that sets the obligations and action needed from countries to cope with climate change, and OECD complies with these obligations.

⁶² *Id.*

⁶³ *Id.*

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VI. CONCLUSION

The OECD maintains that current international law adequately addresses freshwater disputes arising out of changes to the hydrological cycle from the climate crisis. International law does not recognize rivers as having legal personality, and international law does not need to recognize the legal personality of rivers because the environmental obligations and existing dispute resolution mechanisms adequately address the impending water crisis.