

Case Concerning Responsibility for Climate Change (Benzenia v. Forestania and Forestania v. Benzenia), ICJ General List no. 187.

Agreed Statement of Facts, submitted to the Court:

Forestania is a member of the G77 with significant forest cover. 25 percent of the land territory is forested land, including 12 percent of primary forests. During the dry season (December to April), forest fires are common. In fact, certain keystone, endemic plant species depend on fires to germinate.

During the dry season in 2022, however, forest fires were more frequent and affected a larger area than at any time since 1965, when records began. Compared to the 2021 season, the number of fires increased by 35%. Also, the fires had expanded to primary forest regions, as well as to carbon-rich peat land. An independent research institution assessed that the overall volume of greenhouse gases emitted from the 2022 forest fires in Forestania amounts to about 250 million tonnes CO₂eq., and the researchers warned that ‘there is a significant risk that Forestania’s forests will switch from being a net carbon dioxide sink to a carbon dioxide source within a decade if immediate action is not taken to conserve them.

Welcoming the report, the Government of Forestania made a statement explaining that the fires are primarily located in areas which are already deforested. Wood and biomass are harvested and left to dry, and eventually burned during the dry season, in order to provide fertile, arable land for the production of soy and palm oil. Moreover, the worsening of fires, they argue, is due to the impacts of climate change. The independent report had shown that average annual temperatures in the forested areas have become hotter, and conditions drier during the last decade, with the highest temperatures ever recorded in three years during that decade.

The Government also states that most of the deforestation is done in violation of national regulations and laws which aim to conserve forests, in particular the National Forest Code, which requires landowners in designated ‘forest zones’ to maintain 80 percent of their property under native vegetation. However, the Government states that due to capacity and financial constraints, it does not have the capability to enforce existing laws and to stop illegal deforestation activities. Some of the funds previously used to enforce the Forest Code have been withdrawn and re-allocated to other purposes. While not officially supporting extended illegal forest clearing activities, Government officials have expressed little criticism of, and in some cases even admiration for, illegal deforestation activities.

Forestania submitted its first Nationally Determined Contribution (NDC) under Article 4 of the Paris Agreement in 2017. Its NDC stated that ‘Forestania intends to pursue economic growth in a way which respects the need to safeguard our common future and in accordance with the principle of common but differentiated responsibility.’ The NDC states that ‘Forestania will safeguard and enhance its existing carbon sinks as well as pursuing economy-wide low-carbon development’ but does not set a specific date for achieving net-zero GHG emissions.

Benzenia is an advanced industrial State with a GDP in the upper tenth percentile worldwide. Although it has made efforts to cut its greenhouse gas emissions in recent years, its development since the start of the industrial age has been fuelled by the combustion of its large domestic hydrocarbon resources. It ranks 9th worldwide for historical greenhouse gas emissions, and its emissions in 2021 represented the 17th largest contribution to global greenhouse gas emissions.

Benzenia was one of the first States to submit an NDC following the entry into force of the Paris Agreement in 2016, which set ‘a target of reducing its greenhouse gas emissions by 30 percent by 2030 and an aspirational target of reducing emissions to net zero by 2055’. In the years from 2016 to 2019, Benzenia succeeded in cutting its emissions, largely through investments in decarbonising its power grid and reducing

the output of its offshore oil and gas projects. Following an economic downturn in the Spring of 2019, however, investment in renewables has fallen and the Government has openly advocated expanding hydrocarbon exploration in its territorial sea and EEZ. Since the start of the downturn, Benzenia's achievement of its 2030 GHG-reduction targets has increasingly relied on offsetting its own emissions by purchasing UN-approved carbon credits. In 2020 Benzenia submitted its second NDC, in which it committed itself to a 'balanced strategy of domestic and overseas projects' in order to 'achieve net zero emissions by 2060'. The second NDC was transposed into national law by Benzenia's 2021 Climate Change Act.

Since 2021, Benzenia's government officials have repeatedly expressed concern about the forest fires in Forestania. They are worried that the burning of wood and biomass, as well as of the peat, releases significant amounts of greenhouse gases, which contribute to global climate change, and that the logging of forests reduces the capacity to take up and store carbon dioxide.

In the spring of 2022, the Foreign Minister of Benzenia visited Forestania for 'urgent discussions relating to Forestania's stewardship of its primary forests', which, in her view 'are a common heritage of humankind'. Forestania's Minister for Forests responded angrily to Benzenia's intervention, saying 'the neo-colonialists in Benzenia should get their own house in order before they lecture others about climate change. It is our people who are suffering from their decades-long failure to uphold the principle of common but differentiated responsibility.'

Both Forestania and Benzenia are parties to the United Nations Framework Convention on Climate Change, as well as the Paris Agreement. Neither has submitted a declaration under Article 14 of the UNFCCC or Article 24 of the Paris Agreement. The two States do, however, have a bilateral Treaty of Amity of 1949, which includes a provision on the peaceful settlement of disputes. Article 17 provides, in relevant part, that 'any dispute between the Parties not adequately adjusted by negotiation shall be submitted to the International Court of Justice'.

Both States are members of the UN, parties to the Statute of the Court, and have signed and ratified the Vienna Convention on the Law of Treaties. Both States take an active part in discussions in the IPCC.

On the 18th of January 2023, Benzenia submitted an application to the Court under Article 17 of the 1933 Treaty. Forestania submitted its response on 14th of February 2023.

Benzenia argues:

- A. That Forestania is in breach of its obligations under international law, in particular Articles 2 and 4 of the Paris Agreement as well as the customary international obligation to prevent significant harm to the territory of other states and to areas beyond national jurisdiction; and
- B. That Forestania is failing to fulfil its commitments under its 2017 NDC.

In its combined statement of responses and counterclaim, Forestania argues:

- A. That Benzenia owes reparation for its high historical contribution to climate change, which is a primary cause of the worsening forest fires in Forestania; and
- B. That Benzenia is in breach of Article 4 of the Paris Agreement.

Please provide a legal analysis of Benzenias and Forestanias arguments.