WRITTEN PROCEEDINGS - PIÈCES DE LA PROCÉDURE ÉCRITE

Written Statement of the Federative Republic of Brazil

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
(CASE NO. 31)

REQUEST FOR AN ADVISORY OPINION SUBMITTED BY THE COMMISSION OF SMALL ISLAND STATES ON CLIMATE CHANGE AND INTERNATIONAL LAW

WRITTEN STATEMENT OF THE FEDERATIVE REPUBLIC OF BRAZIL

JUNE 15, 2023

1. Pursuant to the Order 2022/4 of the International Tribunal for the Law of the Sea (hereinafter ITLOS or "Tribunal"), the Federative Republic of Brazil has the honor to present this Written Statement.

2. The request for an advisory opinion, signed by the co-chairs of the Commission of Small Island States on Climate Change and International Law (hereinafter COSIS), Antigua and Barbuda and Tuvalu, includes the following questions:

> What are the specific obligations of the Parties to the United Nations Convention on the Law of the Sea, including under Part XII, to:
> a) prevent, reduce and control pollution of the marine environment in relation to the deleterious effects resulting from or that may result from climate change, including through ocean warming, sea-level rise and marine acidification caused by anthropogenic emissions of greenhouse gases into the atmosphere?
> b) protect and preserve the marine environment in relation to the impacts of climate change, including ocean warming, sea-level rise and marine acidification?

3. On December 16, 2022, the ITLOS published Decision ("Order") No. 4/2022, through which it invites intergovernmental organizations, Parties to UNCLOS, and COSIS to submit written comments regarding the request for an advisory opinion. The initially set deadline for submissions (5/16/2023) was extended to 6/6/2023 through Decision No. 1/2023, dated February 15, 2023.

4. This statement is structured in four parts, as follows: (i) considerations on jurisdiction; (ii) obligations to prevent, reduce and control pollution of the marine environment; (iii) obligations to protect and preserve the marine environment; and (iv) conclusion.

I - JURISDICTION

5. The present request for an advisory opinion bases the Tribunal´s jurisdiction on Article 21 of the Statute of the Tribunal, with its procedural aspects governed by Article 138 of its Rules of Procedures. According to Article 21, ITLOS has jurisdiction over "all disputes and all applications submitted to it in accordance with" the United Nations Convention to the Law of

the Sea (hereinafter UNCLOS or Convention) and "all matters specifically provided for in any other agreement which confers jurisdiction" to it.[1] The references to "all disputes and all applications" relates to contentious cases, as clearly recognized by ITLOS,[2] and not to advisory opinions – whose purpose is not to settle disputes.[3]

6. An issue raised in the SFRC advisory proceedings was whether Art. 138 of the Rules of Procedures could confer by itself advisory jurisdiction to ITLOS. This provision was included in the Rules of Procedures by the Tribunal, without previous agreement by the negotiating States. Considering that State consent is the cornerstone of international jurisdiction,[4] the provisions on the Rules of Proceedings must have a solid ground in the Convention or in the Tribunal´s Statute.

7. In the *SRFC Advisory Opinion*, the Tribunal based its jurisdiction on the reference to "all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal", found in Art. 21 of the Statute. During the proceedings, participants diverged on whether the Tribunal had jurisdiction, in light of the absence of explicit reference to its competence to give advisory opinions, both in the Convention and in the Statute. The phrase "all matters" in Art. 21 is ambiguous, leading to "opposite and equally plausible" interpretations [5] on whether it could include advisory proceedings. The Convention explicitly gives power only to the Seabed Disputes Chamber to issue advisory opinions, and not to the full Tribunal.

8. Although international tribunals have the competence to determine their own jurisdiction,[6] they tend to exercise utmost caution when invited to expand their competence beyond what their constituent instruments explicitly provide.[7] In general, international courts render

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[1] Statute of the International Tribunal for the Law of the Sea (Anex VI of UNCLOS, Art. 21).
[2] Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SFRC Advisory Opinion, p. 21, § 53): "The use of the word "disputes" in article 21 of the Statute is an unambiguous reference to the contentious jurisdiction of the Tribunal. Similarly, the word "applications" refers to applications in contentious cases submitted to the Tribunal in accordance with the Convention."
[3] International Court of Justice, Legality of the Threat or the Use of Nuclear Weapons, Advisory Opinion (ICJ Reports, 1996, p. 226, § 15).
[4] International Court of Justice, Western Sahara Advisory Opinion, p. 25.
[5] Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC Advisory Opinion), Declaration of Judge Cot, § 3.
[6] International Court of Justice, Arbitral Award of 1989, § 46.
[7] *See*, for instance, International Criminal Court, Decision on the Admissibility of the Appeal in the case of the Prosecutor vs. Mahamat Said Abdel Kani (ICC-021/14-01/21-514, 2022, § 23).

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advisory opinions only based on explicit authority given by States, as it is the case of the International Court of Justice and the Interamerican Court of Human Rights. As the International Court of Justice has noted in its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, "[i]nternational organizations are governed by the "principle of speciality", that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them'.[8] The same proposition applies to self-standing international tribunals such as ITLOs. It cannot be presumed that States have conferred on the Tribunal such an important function in the absence of any indication to that effect in the carefully crafted instruments that have established it.

9. Therefore, Brazil concurs with the view exposed by many States in the *SRFC* advisory proceedings, according to which the full Tribunal does not have jurisdiction to issue advisory opinions absent an express authorization by States. This view is confirmed by the *travaux préparatoires* of UNCLOS, which should inform the Convention's interpretation, in line with Article 32 of the Vienna Convention on the Law of Treaties.

10. In the alternative, even following the reasoning of the *SRFC Advisory Opinion,* the reference to "all matters" must be complemented by another agreement conferring advisory jurisdiction to ITLOS. In the present request, the international instrument is the "Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law", whose Art. 2(2) establishes that:

> Having regard to the fundamental importance of oceans as sinks and reservoirs of greenhouse gases and the direct relevance of the marine environment to the adverse effects of climate change on Small Island States, the Commission shall be authorized to request advisory opinions from the International Tribunal for the Law of the Sea ("ITLOS") on any legal question within the scope of the 1982 United Nations Convention on the Law of the Sea, consistent with article 21 of the ITLOS Statute and article 138 of its Rules.

11. Given the nature of this Agreement, even if the Tribunal decides to exercise jurisdiction in the present request, its scope must be restricted *ratione materiae,* in light of the requesting organization´s scope of activities. First, the advisory jurisdiction of ITLOS should be materially limited to legal issues related to the interpretation and/or application of UNCLOS and its

[8] International Court of Justice, Legality of the Use by a State of Nuclear Weapons in Armed Conflict, § 25.

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implementing agreements. Second, the legal issues addressed in the merits should be strictly limited to those that fall within the scope of activities of COSIS.

II - WHAT ARE THE SPECIFIC OBLIGATIONS OF STATE PARTIES TO THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (THE "UNCLOS"), INCLUDING UNDER PART XII,

(A) TO PREVENT, REDUCE AND CONTROL POLLUTION OF THE MARINE ENVIRONMENT IN RELATION TO THE DELETERIOUS EFFECTS THAT RESULT OR ARE LIKELY TO RESULT FROM CLIMATE CHANGE, INCLUDING THROUGH OCEAN WARM ING AND SEA LEVEL RISE, AND OCEAN ACIDIFICATION, WHICH ARE CAUSED BY ANTHROPOGENIC GREENHOUSE GAS EMISSIONS INTO THE ATMOSPHERE?

12. Article 194 of UNCLOS determines that States have an obligation to "take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities (...)". They shall also take measures to ensure that "activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment".[9] This is essentially an obligation "of conduct" and not "of result", thus requiring "best efforts" of the State to obtain the expected result.[10]

13. As evidenced above, Art. 194(1) of UNCLOS, which informs the entire marine pollution regime, determines that States shall adopt measures "in accordance with their capabilities". In the intersection between law of the sea and climate change, this provision is fully aligned with the principle of common but differentiated responsibilities, one of the cornerstones of the multilateral climate regime.

14. Moreover, the prevention, reduction and control of marine pollution in relation to climate change depends on international cooperation. In this regard, Article 197 of UNCLOS establishes the general duty of international cooperation for the protection and preservation of the marine environment, in the following terms:

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[9] United Nations Convention on the Law of the Sea (UNCLOS, Art. 194).
[10] Activities in the Area Advisory Opinion (ITLOS, Seabed Chamber, 2011, §110-112).

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> States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.

15. The duty of interstate cooperation is crucial for the prevention, reduction and control of marine pollution.[11] As the Tribunal clearly affirmed in the *Mox Plant* provisional measures decision, "the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law".[12] The importance of cooperation is reinforced by the language contained in Part XII of UNCLOS, whose Section 3 is entirely dedicated to the matter. The Convention recognizes the obligation to grant special treatment to developing States in the allocation of appropriate funds and technical assistance from international organizations and the utilization of their specialized services.[13] Moreover, Art. 202, referring to scientific and technical cooperation to developing States, establishes a clear obligation (as expressed by the term "shall") to:

> (a) **promote programmes of scientific, educational, technical and other assistance to developing States for the protection and preservation of the marine environment and the prevention, reduction and control of marine pollution**. Such assistance shall include, inter alia:
> (i) training of their scientific and technical personnel;
> (ii) facilitating their participation in relevant international programmes;
> (iii) supplying them with necessary equipment and facilities;
> (iv) enhancing their capacity to manufacture such equipment;
> (v) advice on and developing facilities for research, monitoring, educational and other programmes;
> (b) provide appropriate assistance, especially to developing States, for the minimization of the effects of major incidents which may cause serious pollution of the marine environment; (c) provide appropriate assistance, especially to developing States, concerning the preparation of environmental assessments.

16. Part XIII of UNCLOS, dedicated to marine scientific research, and Part XIV, dealing with development and transfer of marine technology, also contain provisions establishing the obligation to cooperate. According to the Convention, States "shall actively promote the flow of scientific data and information and the transfer of knowledge resulting from marine scientific research, especially to developing States, as well as the strengthening of the autonomous

[11] Tanaka, Y., The International Law of the Sea (Cambridge University Press, 3rd edn, 2019, p. 335- 445).
[12] International Tribunal for the Law of the Sea (ITLOS, MOX Plant, §82); and ITLOS (SRFC Advisory Opinion, §140). Similarly, *see* ITLOS (Land Reclamation in and around the Straits of Johor, 2003, §92); ITLOS (Ghana/Côte d'Ivoire, 2015, §73); and Southern Bluefin Tuna (1999, §§48, 78).
[13] United Nations Convention on the Law of the Sea (UNCLOS, Art. 203).

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marine scientific research capabilities of developing States".[14] They must also "promote actively the development and transfer of marine science and marine technology on fair and reasonable terms and conditions"; and "promote the development of the marine scientific and technological capacity of States (...) with a view to accelerating the social and economic development of the developing States."[15]

17. The Convention set a robust legal framework for the fair and productive cooperation between developed and developing countries in the protection and preservation of the marine environment, as Articles 202, 203, 244, 266, 268(e), 270, 275 and 276 clearly show. It imposes obligations on developed countries in respect of financing, capacity building, transfer of knowledge and technology to developing States. In the context of climate change, the principle of common but differentiated responsibilities (CBDR) reinforces these obligations.

18. International law unequivocally recognizes the CBDR principle, as reflected in the Rio Declaration (1992):

> Principle 7.
>
> States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem.
>
> In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

19. The CBDR principle is not only an independent source of international law, but it is also recognized in several normative instruments of the multilateral climate change regime.[16] It is reflected as well in other international agreements,[17] domestic legislation and decisions of international bodies, such as the Interamerican Court of Human Rights[18] and the WTO Dispute Settlement Body, either directly or by reference to Principle 7 of the Rio Declaration. In the *US-Shrimp Case,* the WTO Panel affirmed the principle according to which "States have

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[14] United Nations Convention on the Law of the Sea (UNCLOS, Art. 244(2)).
[15] United Nations Convention on the Law of the Sea (UNCLOS, Art. 266).
[16] Paris Agreement (preamble and arts. 2(2), 4(3) and 4(19)); the Kyoto Protocol (Art. 10); and the United Nations Framework Convention on Climate Change (UNFCCC, preamble, arts. 3(1) and 4(1)).
[17] See, e.g. Partnership Agreement between the EU and the Organization of African, Caribbean and Pacific States (OACPS, 2021, Art. 58(2)).
[18] Interamerican Court of Human Rights (Inter-American Court, OC 23/17, § 183).

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common but differentiated responsibilities to conserve and protect the environment".[19] Moreover, the CBDR principle has been applied by domestic courts of several countries, from different regions and with various development levels.[20]

20. The interpretation of UNCLOS provisions in relation to the potential effects of climate change in the ocean should be guided by the basic principles of the multilateral climate regime. This is not to say that ITLOS should interpret the climate change treaties, which would go beyond its jurisdiction. It rather means that the principles underpinning the climate change regime shed light on UNCLOS under the principle of systemic integration articulated in Article 31(3)(c) of the Vienna Convention.[21]

(B) TO PROTECT AND PRESERVE THE MARINE ENVIRONMENT IN RELATION TO CLIMATE CHANGE IMPACTS, INCLUDING OCEAN WARMING AND SEA LEVEL RISE, AND OCEAN ACIDIFICATION?

21. According to Article 192 of UNCLOS, States Parties have an obligation to protect and preserve the marine environment. This provision reflects customary international law and is therefore applicable to all States, including those that are not Parties to UNCLOS.[22] It is a general obligation imposed on the international community, and includes the protection and conservation of marine resources.[23] Part XII of UNCLOS, and Article 192 in particular, is applicable to all maritime zones, within and beyond state jurisdiction.[24] It entails both the positive obligation to adopt measures for the protection and preservation of the marine

[19] World Trade Organization (WTO, Panel Report, US-Shrimp, WT/DS58/RW, 2001, §7.2).
[20] Brazil (11ª Vara Federal de Curitiba, GP Distribuidora de Combustíveis S.A. vs. DG-ANP, 2021); Netherlands (Dutch Supreme Court, Urgenda v. Netherlands, (2019)); Germany (Federal Constitutional Court, Neubauer vs. Germany, 2020); France (Conseil d'État, Commune de Grande-Synthe vs. France (Decision nº 427301; Admissibility, 2020) and Notre Affaire à Tous and Others vs. France, 2021); Ecuador (Baihua Caiga et. al., vs. Petro Oriental S.A.,2020); Mexico (District Court in Administrative Matters, Nuestros Derechos al Futuro y Medio Ambiente Sano et. al., vs. Mexico, 2022); Norway (Supreme Court, Greenpeace Nordic Ass'n vs. Ministry of Petroleum and Energy, People vs. Arctic Oil, 2020); New Zealand (High Court, Thomson vs. Minister for Climate Change Issues, 2017); Australia (High Court, Gloucester Resources Limited vs. Minister for Planning, 2019); and Belgium (4th Chamber of Brussels, VZW Klimaatzaak vs. Kingdom of Belgium & Others, 2021).
[21] Vienna Convention on the Law of Treaties, Art. 31(3)(c); ILC, Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law. In: Yearbook of the International Law Commission, 2006, vol. II, Part Two, p. 180; International Court of Justice, Pulp Mills, 2010, §§65-66.
[22] International Court of Justice (ICJ, Alleged Violations, Nicaragua vs. Colombia, Merits, 2022, §95).
[23] Southern Bluefin Tuna (1999, §70); ITLOS, Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SFRC Advisory Opinion, 2015, §120, p. 216).
[24] South China Sea (Jurisdiction and Admissibility, 2015, §408(a)); and South China Sea (Award, 2016, §940).

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environment and the negative obligation not to degrade it.[25] It also requires States to adopt rules and measures in their domestic legal systems to prevent activities under their jurisdiction and control from causing harm to the marine environment.[26]

22. The duties and obligations of States regarding the protection and preservation of the marine environment must be guided by the principle of common but differentiated responsibilities, detailed in the previous section. This principle applies to all activities that contribute, directly or indirectly, to the exacerbation of the effects of climate change on the marine environment.

CONCLUSION

23. For the reasons presented above, Brazil submits that:

i) The Tribunal does not have jurisdiction to issue this advisory opinion;

ii) In the alternative, the Tribunal's advisory jurisdiction is limited *ratione materiae*, in light of the requesting organization's scope of activities;

iii) In the merits, States have obligations of conduct to prevent, reduce and control pollution of the marine environment, and to protect and preserve the marine environment, in accordance with their capabilities;

iv) The CBDR principle applies to activities that contribute, directly or indirectly, to the exacerbation of the effects of climate change on the marine environment.

[25] South China Sea (Award, 2016, §941).
[26] International Court of Justice (ICJ, Pulp Mills, 2010, §197); International Tribunal for the Law of the Sea (ITLOS, SRFC Advisory Opinion, 2015, §131; and ITLOS/SDC (Activities in the Area Advisory Opinion, 2011, §§110-112).

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