

Written Statement of the Socialist Republic of Viet Nam

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

**REQUEST FOR AN ADVISORY OPINION SUBMITTED BY THE COMMISSION OF SMALL ISLAND
STATES ON CLIMATE CHANGE AND INTERNATIONAL LAW
(CASE NO. 31)**

WRITTEN STATEMENT BY THE SOCIALIST REPUBLIC OF VIETNAM

16 JUNE 2023

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I. Introduction

1.1. During its third meeting on 26 August 2022, the Commission of Small Island States on Climate Change and International Law (hereinafter “the Commission”, or “COSIS”) adopted a decision, in accordance with article 2(2) of the Agreement for the establishment of the Commission of 31 October 2021 (hereinafter “the Agreement”), by which it decided to request an advisory opinion from the International Tribunal for the Law of the Sea (hereinafter “the Tribunal », or “ITLOS”). The request asks:

“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 warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?

(b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?”

1.2. In its Order 2022/4 dated 16 December 2022, the Tribunal invited, in accordance with article 133(3) of the Rules of the Tribunal, the States Parties to the 1982 United Nations Convention on the Law of the Sea (hereinafter “the Convention”, or “UNCLOS”) to present written statements on a the questions submitted by COSIS for an advisory opinion.

1.3. As a coastal State Party to UNCLOS, Viet Nam wishes to avail itself of the opportunity afforded by the Tribunal to make a written statement pertaining to the request. Viet Nam’s statement will establish that:

- The Tribunal has jurisdiction to deliver the advisory opinion requested by COSIS;
- Anthropogenic greenhouse gas emissions fall under the definition of "pollution of the marine environment" in Article 1(1) of UNCLOS;
- Anthropogenic greenhouse gas emissions fall under Article 194(3)(a) of UNCLOS, which relates to the release of toxic, harmful or noxious substances, especially those which are persistent, from or through the atmosphere;
- The principle of common but differentiated responsibilities must be taken into account in the consideration and determination of the respective obligations of States Parties to UNCLOS in the protection and preservation of the marine environment from deleterious impacts caused by greenhouse gas emissions.

II. The Tribunal has jurisdiction to deliver the advisory opinion requested by COSIS

2.1. Article 21 of the Statute of the Tribunal provides that

“The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.”

2.2. Article 138 of the Rules of the Tribunal provides that

“the Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission of a request for such an opinion.”

2.3. According to these provisions, the Tribunal may give an advisory opinion if three prerequisites are satisfied: (i) an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for an advisory opinion; (ii) the request is transmitted to the Tribunal by a body authorized by or in accordance with the agreement mentioned above; and (iii) the question on which an advisory opinion is requested is “a legal question”.¹

2.4. Viet Nam is of the opinion that all three prerequisites are satisfied in the present case.

(i) The Agreement for the establishment of COSIS is an international agreement initially concluded by two countries, then acceded by four other countries. Its preamble refers to matters relating to maritime zones, marine living resources, and obligations of States under UNCLOS, applicable to the protection and preservation of the climate system and marine environment, Art 2(1) of the Agreement on the activities of COSIS emphasizes the protection and preservation of the marine environment, reflecting thereby that the purported aims of the Commission are closely related to the purposes of UNCLOS.

Article 2(2) of the Agreement also provides specifically for the submission to ITLOS of a request for an advisory opinion. This provision reads as follows:

“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 ITLOS on any legal question within the scope of UNCLOS, consistent with Article 21 of the ITLOS Statute and Article 138 of its Rules”.

2.5. (ii) The request for an advisory opinion has been transmitted to the Tribunal by a body authorized by the Agreement establishing COSIS. Indeed, on 26 August 2022, the Commission adopted a decision to request an advisory opinion from ITLOS in accordance with Article 2(2) of the Agreement.

2.6. (iii) The question on which the advisory opinion is requested is a legal question. In its advisory opinion of 2 April 2015 on the request submitted by the Sub-Regional Fisheries Commission, the Tribunal explained that, in order to be considered as being of a legal nature, a question has to be “framed in terms of law”.² It added that, to respond to the question, “the Tribunal will be called upon to interpret the relevant provisions of the Convention [...] and to identify other relevant rules of international law”.³ Such is clearly the case here. The Tribunal

¹*Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 22, para 60.

² *Ibid.*, at p 23, para. 65.

³ *Ibid.*

is asked to clarify legal obligations of States under UNCLOS related to marine environment protection and preservation. To do this, the Tribunal must identify relevant provisions under UNCLOS and “other relevant rules of international law”, interpret and apply them to this matter. The question is therefore of a legal nature.

2.7. It can be argued that the question also includes other aspects, such as political aspects. Whatever those aspects are, the legal nature of the questions is undeniable, and the Tribunal has jurisdiction to give the advisory opinion regardless of those other aspects. As the I.C.J. pointed out in its 1996 advisory opinion on *Nuclear Weapons*, “[t]he fact that [a] question also has a political aspect, as, in the nature of things, is the case with so many questions that arise in international life, does not suffice to deprive it of its character as a ‘legal question’ [...]”.⁴ Furthermore, the Tribunal may give an answer on all legal questions, abstract or otherwise, and whether they also raise factual issues or not.⁵

2.8. In the present case, the advisory opinion will clarify the scope of specific provisions of UNCLOS on marine environment protection and preservation in relation to adaptation and mitigation of climate change effects in order to support COSIS in its operation. It will undeniably contribute to the implementation of UNCLOS as the Constitution of the Oceans.

III. Anthropogenic greenhouse gas emissions (AGHGE) fall under the scope of "pollution" under Article 1(1) of UNCLOS

3.1. According to Article 1(1)(4) of UNCLOS,

“Pollution of the marine environment” means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities”.

3.2. On this basis, Viet Nam is of the opinion that the current understanding of AGHGE corresponds to the above three elements, namely: (i) the indirect or direct introduction of substances or energy into the marine environment by human beings; (ii) resulting or being likely to result in deleterious effects; and (iii) such deleterious effects must be something as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.

⁴ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 234, para.13.

⁵ *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, p. 61; see also *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I. C.J. Reports 1954*, p. 51; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 27, para. 40; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 236, para.15.

3.3. (i) AGHGE indeed directly and indirectly introduce substances and energy into the sea and ocean water column, which is the basic element of “marine environment”. The ocean has directly absorbed greenhouse gases such as carbon dioxide, methane, and nitro oxide induced by the human activities, causing the increase of carbon dioxide’s level in the ocean.⁶ Also, the increasing heat trapped by greenhouse gases goes into the oceans, which causes the rise of ocean temperature.⁷

Furthermore, in application of the general rule of interpretation enshrined in Article 31(1) of the 1969 Vienna Convention on the law of treaties, requiring that the provisions of a treaty be interpreted “in accordance with the ordinary meaning to be given to the[ir] terms”, “marine environment” includes the air column above the sea and ocean water column. One can for instance refer in that sense to the International Seabed Authority Regulations on Prospecting and Exploration of Polymetallic Nodules in the Area, according to which

“[m]arine environment includes the physical, chemical, geological and biological components, conditions and factors which interact and determine the productivity, state, condition and quality of the marine ecosystem, the waters of the seas and oceans *and the airspace above those waters* [...]”.⁸

Interpreting “marine environment” in the context of the terms of UNCLOS and in the light of its object and purpose leads to the same conclusion. Indeed, the pollution of the marine environment from or through the atmosphere is explicitly mentioned and regulated by Article 212 of UNCLOS. Also, Article 194(1) refers to “the release of ... harmful... substances... from or through the atmosphere”. Because of the ordinary meaning of the term “release”, the act of “releasing (...) substances through the atmosphere” is committed at the moment the concerned substances leave their source and get into the air, whether such substances would later get into the sea water column or not. Wherever the place of emission is, the marine environment is forced to receive “substances” through the process of AGHGEs.

3.4. (ii) The fact that AGHGE result in deleterious effects for the marine environment is also clearly established. The warming of the atmosphere, oceans and land as a result of human activities has been scientifically demonstrated by the United Nations Intergovernmental Panel on Climate Change (hereinafter “IPCC”), the World Meteorological Organization and the United Nations Environment Program, amongst others.⁹

3.5. (iii) The last element in the definition of “pollution” under UNCLOS refers to the seriousness of deleterious effects of the introduction of substance or energy in the marine environment. “Harm” must be caused to living resources or marine life or “hindrance” must be occasioned

⁶ <https://www.iaea.org/bulletin/how-carbon-emissions-acidify-our-ocean>

⁷ <https://www.unep.org/news-and-stories/story/greenhouse-gases-are-depriving-our-oceans-oxygen>

⁸ International Seabed Authority Regulations on Prospecting and Exploration of Polymetallic Nodules in the Area, Annex to the Decision of the Council of the International Seabed Authority relating to amendments to the Regulations on Prospecting and Exploration of Polymetallic Nodules in the Area and related matters, 22 July 2013, Doc. ISBA/19/C/17; emphasis added.

⁹ <https://www.un.org/en/global-issues/climate-change>. See

also: https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf

to “marine activities, including fishing and other legitimate uses of the sea”. This last element is present in relation to marine environment, due to the extremely adverse effects of climate change caused by AGHGE, which have accumulated over the years. According to the 2023 report of the IPCC, “human activities, principally through emissions of greenhouse gases, have unequivocally caused global warming”.¹⁰ The report also mentions the damages and harms resulting from global warming and climate change such as “the hundreds of local losses of species”, “the increasing occurrence of climate-related food-borne and water-borne diseases”, “mental health challenges associated with increasing temperatures”, the adverse impact on “food production from fisheries and shellfish aquaculture”, “severe water scarcity”, and “loss of livelihoods and culture”.¹¹

IV. Anthropogenic greenhouse gas emissions fall under Article 194(3)(a) of UNCLOS, which relates to the release of toxic, harmful or noxious substances, especially those which are persistent, from or through the atmosphere

4.1. Article 194(3) of UNCLOS provides that

“...the measures taken pursuant to this Part [Part XII of UNCLOS] shall deal with all sources of pollution of the marine environment. These measures shall include, inter alia, those designed to minimize to the fullest possible extent: (a) the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping”.

4.2. Viet Nam is of the view that AGHGE come within the scope of Article 194(3)(a), namely (i) the release of toxic, harmful or noxious substances, especially those which are persistent, (ii) from land-based sources, from or through the atmosphere or by dumping. Various scientific and legal sources have demonstrated beyond doubt the harmful and noxious character of now out-of-balance greenhouse gases presence in the atmosphere. While some key GHGs, may be naturally present in the atmosphere and the “release” of those in small quantity is a result of any living creature breathing, carbon dioxide (CO₂), a main component of greenhouse gases, for instance, enters the atmosphere mostly through, among others, the burning of fossil fuels (coal, natural gas, and oil), solid waste, trees and other biological materials. Methane (CH₄), another crucial element, is emitted during the production and transport of coal, natural gas, and oil¹². AGHGE in the atmosphere are now harmful because of the combined effect of their persistence in nature, their accumulation and concentration as a result of centuries of industrialization and the present pace of emissions which increasingly exceeds the re-absorbance capacity of the earth¹³.

4.3. As AGHGE correspond to the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping, Viet Nam submits that UNCLOS, especially Part XII, imposes obligations on States, to

¹⁰https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf

¹¹ *Ibid.*

¹²<https://www.epa.gov/ghgemissions/overview-greenhouse-gases>

¹³<https://www.un.org/esa/sustdev/natlinfo/indicators/indisd/english/chapt9e.htm>;

<https://www.ohchr.org/en/calls-for-input/2023/call-inputs-toxic-impacts-some-climate-change-solutions>

take all measures in accordance with the Convention, that are necessary to prevent, reduce and control AGHGE. Viet Nam emphasizes the obligation of States to use the best practicable means at their disposal and in accordance with their capabilities to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by AGHGE to other States and their environment and to minimize AGHGE to the fullest extent.

4.4. The Tribunal in the *South China Sea Arbitration* stated that Articles 192 and 194 of UNCLOS “set forth obligations not only in relation to activities directly taken by States and their organs, but also in relation to ensuring activities within their jurisdiction and control do not harm the marine environment”¹⁴. This “due diligence” obligation is an obligation of conduct, which requires States not only to adopt appropriate rules and measures but also to demonstrate a “certain level of vigilance in their enforcement and the exercise of administrative control” to deal with all sources of pollution of the marine environment¹⁵.

4.5. Accordingly, States should use the best practicable means at their disposal and in accordance with their capabilities to ensure that activities under their jurisdiction or control are so conducted as to minimize to the fullest extent AGHGE and not to cause damage by AGHGE to other States and their environment, or to marine areas beyond national jurisdiction.

V. The principle of common but differentiated responsibilities (CBDR) shall be taken into account in the consideration and determination of the respective obligations of States Parties to UNCLOS in the protection and preservation of the marine environment from deleterious impacts caused by AGHGE.

5.1. In considering and determining the respective obligations of States Parties to UNCLOS with regard to the prevention, reduction and control of pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming, sea level rise, and ocean acidification, Viet Nam is of the view that the principle of common but differentiated responsibilities (CBDR) must be taken into account.

5.2. According to generally accepted definitions, the principle of common but differentiated responsibilities “entails that while pursuing a common goal [...], States take on different obligations, depending on their socio-economic situation and their historical contribution to the environmental problem at stake.”¹⁶

In accordance with Article 31(3)(c) of the 1969 Vienna Convention on the Law of treaties, in the process of interpretation of any treaty, “[t]here shall be taken into account, together with the context”, “any relevant rules of international law applicable in the relations between the parties.”

¹⁴ *South China Sea Arbitration (Philippines v. China)*, Final Award, 12 July 2016 PCA Case No 2013-19, para. 944.

¹⁵ *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, *Advisory Opinion of 2 April 2015*, *ITLOS Reports 2015*, para. 131; quoting *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Judgment*, *ICJ Reports 2010*, p. 79, para. 197.

¹⁶ E. Hey and S. Paulini, “Common but Differentiated Responsibilities”, MPEPIL

(<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1568>)

5.3. In Viet Nam's view, the principle of CBDR is a relevant rule of international law applicable in the relations between the parties to UNCLOS. The principle satisfies the requirements set out in Article 31(3)(c), namely: (i) it is a rule of international law; (ii) it is relevant and applicable in the relations between the parties to UNCLOS.

First, the principle of CBDR is a rule of international law. The principle of common but differentiated responsibility is reflected in several treaties. It is enshrined in Article 3(2) of the United Nations Framework Convention on Climate Change (UNFCCC), Article 10 of the Kyoto Protocol, the preamble and Article 2(2) of the Paris Agreement, to name just a few. It has been noted in that respect that "[w]ithin the climate change regime, the concept of common but differentiated responsibilities qualifies as a legally binding principle given its explicit inclusion in [the relevant] instruments."¹⁷

Second, it is applicable in the relations between the Parties. At the time of the present submission, the UNFCCC, the Kyoto Protocol and the Paris Agreement have achieved (quasi) universal participation, with 198, 192 and 195 Parties, respectively. The vast majority of the Parties to UNCLOS are also parties to these instruments. Therefore, the CBDR principle is applicable in the relations between almost all States Parties to UNCLOS.

Third, the CBDR principle is a relevant rule of international law. This principle underpins all treaties dealing with AGHGE and therefore must be considered "relevant" in the determination of the obligations of States in the protection and preservation of the environment, including the marine environment, from the deleterious impacts caused by AGHGE.

¹⁷ *Ibid.*