

INTERNATIONAL COURT OF JUSTICE

Request for Advisory Opinion

“OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE”

Written Comments of the Federative Republic of Brazil

15th August 2024

INTRODUCTION

1. Pursuant to the Court's Order of 30 May 2024, and having reviewed the Written Statements presented to the Court in this proceeding, Brazil has the honour to present its Written Comments on statements brought to the Court's attention.

2. In its Written Statement of 21 March 2024, Brazil detailed its views on some key legal issues arising from the climate change regime, particularly the recognition of the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC) as a structural legal principle for the interpretation and implementation of climate change obligations, founded on the unequal harm historically caused to the climate system and on the diversity of capacities and resources among States. Additionally, Brazil provided scientific data showing the causality between cumulative historical emissions and temperature increase. Brazil also explained the political process that led to the adoption of the three fundamental treaties of the climate change regime: the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol, and the Paris Agreement thereunder.

3. In these Written Comments, Brazil focuses on topics raised in a number of statements presented to the Court, namely: historical responsibility for global temperature increase, the principle of common but differentiated responsibilities, due diligence, the legal status of the three fundamental treaties on climate change, the duty to cooperate, the legal status of Conferences of the Parties decisions, and the strength of obligations arising from climate change treaty clauses.

Historical responsibilities

4. As Brazil emphasized in its Written Submission, the issue of climate change cannot be detached from developed countries' historical responsibilities for the increase in global temperatures caused by the growing concentration of greenhouse gases in the atmosphere from cumulative emissions. These historical emissions have been the main cause of the current climate change scenario, and the Court cannot disregard the fact that the accumulation of gases due to decades and centuries of emissions has a direct bearing on the current state of climate change.

5. Historical responsibility is not just a theoretical concept. It is scientifically possible to assess each country's contribution to climate change based on historical data of emissions, especially on the use of fossil fuels. Brazil is ready to support the launch of methodological work to enable State Parties to climate change treaties to quantify their national historical contributions to global warming. This

would allow the establishment of quantitative targets for reducing and limiting emissions for developed countries, whilst helping advance the existing commitments of developing countries. Such an exercise would translate the principle of common but differentiated responsibilities into policy. It would also show that such a principle is not a subterfuge to justify inaction.

6. The main components of such methodological work would consist of: i) a compilation of emissions of greenhouse gases by all Parties over a certain period; and ii) an assessment of the effect of such emissions on climate change, measured by the increase in the global average surface temperature. This exercise would objectively assign a greater share of the reduction obligations to States most responsible for climate change while accounting for reduction obligations for all Parties. Such scientific work would also make it possible for Parties to adopt compensation guidelines in case their commitments had not been fully met. Countries failing to meet their emission reduction obligations, according to their historical responsibilities, would be able to either (a) contribute to a fund managed by the UNFCCC financial mechanism to promote preventive measures in developing countries or (b) negotiate credits, insofar as some Parties managed to reduce emissions beyond their obligations. This would be a reasonable way to make policies in line with historical responsibilities, based on science, fairness, and good faith.

7. In previous Written Submissions, some States argued that there was no agreed scientific methodology to attribute climate change to the emissions of individual States (see the statement by the United Kingdom). It is true that there is no agreed methodology because proposals submitted by Brazil in 1997, 2013, and 2023 to quantify national historical contributions to climate change were blocked by developed countries. Nevertheless, the Court may wish to bear in mind that it is scientifically possible to assess historical responsibilities for climate change.

8. Some States tried to attenuate the significance of historical emissions in climate change in their Written Statements. It is not possible to ignore that current climate change results from the historical accumulation of emissions in the atmosphere in the last 200 years. To a large extent, the process of temperature increase is independent of the profile of emissions each year – annual emissions represent just marginal additions. The process of historic accumulation is fundamental to defining the bigger picture of temperature increase. The causality link between action/omission and harm cannot be determined merely as a product of current emissions of GHG. It is rather the result of cumulative contributions to a historical process of increasing the concentration of GHG in the atmosphere, thereby causing unnatural global warming and climate change effects. Some States “polluted” their way to development and higher standards of living. Others – by far the largest share of the international community – are unable to achieve the same living

standards (or will have to commit a much higher portion of public resources) because of the impact of climate change on their societies and the costs to combat and adapt to climate change.

9. Several States and organizations have recognized, in their Written Statements, that the legal repercussions of climate change cannot be limited to the period beginning in the 1990s, when the First Assessment Report of the Intergovernmental Panel on Climate Change was published and endorsed the relationship between the emission of polluting gases and climate change (see statements by China, the Committee of Small Island States, India, Saudi Arabia, and South Africa).

10. Thus, the claim by some States (see statements by the United Kingdom, Germany, and the Netherlands) that international legal obligations concerning climate change only emerged in the 1990s is untenable. Climate Change treaties are not a tabula rasa. They are built on fundamental rules and principles of international law, many of which were established centuries ago. A prime example is the mandate to respect the sovereignty of States and the resulting obligation not to cause harm to other States. Drawing on these general rules and principles, climate change treaties acknowledge the essential link between the past and present – particularly through the principle of common but differentiated responsibilities – grounding themselves in the concept of historical responsibility (see Argentina's statement). It is on this foundation that these treaties establish appropriate measures for mitigation, prevention, and adaptation to the adverse effects of climate change, including corresponding means of implementation and provisions on loss and damage.

The principle of common but differentiated responsibilities and respective capabilities

11. The principle of common but differentiated responsibilities and respective capabilities (CBDR-RC) was the centerpiece of Brazil's Written Statement. The assertion that this legal principle is structural to the implementation and interpretation of climate change norms is confirmed by the fact that the three main treaties that make up the climate regime not only mention it expressly but also give it great prominence. Other States have also emphasized the fundamental nature of the principle, referring to it as a "cornerstone" (see statements by China, Saudi Arabia), a "core principle" (see statements by South Africa, Argentina) or highlighting its structuring role in the climate change regime (see the statement by Mexico).

12. Recently, the International Tribunal for the Law of the Sea referred to the principle of common but differentiated responsibilities as a “key principle” in the following terms:

"227. (...) The Tribunal notes in this regard that both the UNFCCC and the Paris Agreement recognize the principle of common but differentiated responsibilities and respective capabilities as a key principle in their implementation." (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. Advisory Opinion, 21 May 2024).

13. The principle of common but differentiated responsibilities must first be understood from its enshrinement in the UNFCCC. This Convention sets the basis for the interpretation of the other treaties on climate change, notably the Kyoto Protocol and the Paris Agreement thereunder.

14. Brazil emphasizes once again that the Paris Agreement did not bring about any change in the legal nature of the principle, which continues to bind States Parties. It merely promoted a change of focus in its implementation. The Paris Agreement maintains the differentiation between developed and developing countries. Although all States Parties are bound by the rules set out in the Agreement, it prescribes that developed countries must take the lead in fulfilling these obligations (see the manifestations of China, India, Saudi Arabia, and South Africa). Developed States also recognize in their Written Statements that the differentiation between States remains even after the Paris Agreement (see statements by the United States, France, the Netherlands, and the European Union).

15. The reference to “national circumstances” after “common but differentiated responsibilities” in the Paris Agreement does not override the understanding that States have contributed differently to anthropogenic emissions of greenhouse gases and have distinct capabilities and resources to prevent the adverse effects of climate change. Rather, the Agreement presents a broader approach to States’ capacities to take action, allowing for progressive commitments, such as the enhanced transparency framework (ETF, Article 13), while recognizing the need to support developing countries. What is dynamic and must evolve is not a legal principle, but the level of ambition of States Parties and their commitments to curb emissions.

16. The differentiated obligations of developed countries imply, therefore, reaching “net zero” earlier than the dates they have announced, massive investment in technology to offset their historical emissions, and the obligation to cooperate, including financially, so that developing countries fulfil their obligations under the

climate change treaties (see India's statement). The fulfilment of obligations by developing States is dependent upon the fulfilment of obligations by developed States (see statements by China, India, and Argentina).

The principle of due diligence

17. In its Written Statement, Brazil emphasized, in line with the case law of the International Court of Justice, that the obligation of States to prevent transboundary harm is an obligation of conduct. It is clearly an obligation of due diligence. It is essential to understand, however, that the obligation of due diligence must take into account the different levels of development of States. The principle of common but differentiated responsibilities is therefore essential for analyzing on a case-by-case basis whether a State's conduct complies with its due diligence obligation.

18. Several States and entities have recognized the relationship between the obligation of due diligence and the principle of common but differentiated responsibilities. This fact has a direct impact on the higher ambitions expected from Parties in fulfilling their climate change due diligence obligations. Such obligations must be interpreted according to the principle of common but differentiated responsibilities (see statements by the United Kingdom and the European Union).

19. This understanding was confirmed by the International Tribunal for the Law of the Sea in its recent Advisory Opinion on the subject:

"241. (...) In light of such information, the Tribunal considers that the standard of due diligence States must exercise in relation to marine pollution from anthropogenic GHG emissions needs to be stringent. However, its implementation may vary according to States' capabilities and available resources. Such implementation requires a State with greater capabilities and sufficient resources to do more than a State not so well placed." (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. Advisory Opinion, 21 May 2024).

20. In a similar vein, Brazil also drew the Court's attention to a relevant interpretation (see South Africa's statement), based on the Pulp Mills case. In paragraph 101 of the judgement, the Court stated, "a State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State." (INTERNATIONAL COURT OF JUSTICE. Pulp

Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010). In the climate change regime, such a statement leads to the interpretation that not all States Parties have the same means at their disposal and, consequently, do not have the same obligations with regard to mitigating emissions. Therefore, the due diligence obligation must necessarily take into account the principle of common but differentiated responsibilities.

The fundamental treaties of the climate change regime

21. As Brazil's Written Statement makes clear, the climate change regime comprises three fundamental treaties: the UNFCCC, the Kyoto Protocol, and the Paris Agreement thereunder. As pointed out (see, e.g., China's statement), these three treaties, and not just one or two of them, structure the regime.

22. Brazil believes that the UNFCCC has a foundational role in the climate change regime, insofar as both the Kyoto Protocol and the Paris Agreement are clearly established on the basis of that Convention. The treaties that were adopted under the UNFCCC must be interpreted in light of it.

23. Brazil also believes that each of the three treaties fulfils different regulatory functions. Therefore, Brazil strongly disagrees with the assertion made by some States and organizations that the Kyoto Protocol has been superseded by the Paris Agreement (see statements by the United States and the European Union), or that the main treaty of the regime is the Paris Agreement (see statements by the Nordic countries and the European Union), or even that the centrality of the regime lies in the Paris Agreement (see statements by France, the United Kingdom, the European Union, and Germany). Brazil believes that the Kyoto Protocol and the Paris Agreement do not replace the UNFCCC or formally revoke it (see statements by Saudi Arabia and South Africa). This was not the intention of the negotiating parties, nor can any such intention be inferred. Treaties must be understood in an integrated and systemic way. As set out in its Article 2.1, the very purpose of the Paris Agreement is to enhance the implementation of the Convention, including its ultimate objective.

24. In this respect, it is important to note that the International Tribunal for the Law of the Sea has clearly referred to the Kyoto Protocol as a treaty in force that makes up the climate change regime:

"137. As reflected in paragraphs 67 to 82 above, there is an extensive treaty regime addressing climate change that includes the UNFCCC, the Kyoto Protocol, the Paris Agreement, Annex VI to MARPOL, Annex 16 to the Chicago Convention, and the Montreal Protocol, including the Kigali Amendment. The Tribunal considers that, in the present case, relevant external rules may be found, in particular, in those agreements."

(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. Advisory Opinion, 21 May 2024)

Duty of cooperation

25. As emphasized by a number of States and organizations (see statements by China, the Commission of Small Islands States, France, Germany, the Netherlands, Saudi Arabia, and Mexico), Brazil once again stresses that climate change treaties establish a duty for States to cooperate in mitigating and preventing the effects of climate change. Brazil's understanding is that this duty falls especially on developed countries, due to the principle of common but differentiated responsibilities. In this regard, it should be noted (see statements by the United Kingdom and South Africa) that Article 9(1) of the Paris Agreement provides for the obligation of developed countries to provide financial resources to developing countries.

COPs decisions

26. Brazil emphasizes once again that the decisions of the Conferences of the Parties to the climate change treaties can constitute agreements and subsequent practice for the interpretation of these same conventions (see France's statement). As such, they are not without legal value, but are relevant instruments for implementing the obligations set out in the conventions.

27. Brazil believes that the decisions of the COPs that established the need for developed countries to mobilize resources to address the adverse effects of climate change represent an authentic interpretation by the Parties of their obligations previously established in the climate change treaties. They are not a mere political commitment (see the US statement) or of voluntary compliance (see the UK statement). The obligation to mobilize these resources stems from the obligations authentically interpreted by the Parties to the same treaties. There is a significant number of COP, CMP and CMA decisions that are firmly grounded on the principle of common but differentiated responsibilities and on the expectation that developed States take the lead in climate change action, while supporting developing States in their own efforts.

Language of climate change treaties

28. Contrary to what some States emphasize (see statements by the United States, Germany, and South Africa), the use of certain words – such as "may", "shall", or "will" – is not the only factor in identifying whether provisions of climate change treaties, including the Paris Agreement, are binding. The assessment of the use of such words must be complemented by an investigation into the intention of the Parties in using them. Only with recourse to the intention of the Parties can it be determined whether such provisions are binding.

The relationship between international trade and climate change

29. In its statement, Brazil clearly criticized States that use climate change to breach free trade obligations. This concern is also shared by other States that, when referring to the issue, mention the “green protectionism” of developed countries (see Argentina's statement). Others emphasize the obligation of States not to take unilateral measures or trade protection measures that affect efforts to address climate change (see China's statement). It is worthwhile to recall that, according to General Agreement on Tariffs and Trade GATT and the World Trade Organization (WTO) case law, trade-related environmental measures must not, as a rule, result in discrimination between “like” products. On similar lines, UNFCCC Article 3.5 (UNFCCC, 1992) stipulates, “Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.”

Conclusions

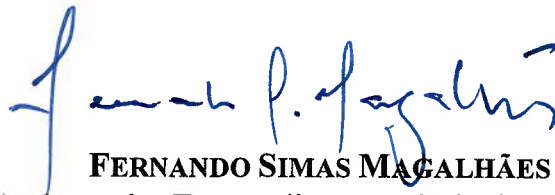
30. Brazil reaffirms the following essential points of its Written Statement, which should guide the answers to the questions posed to this Court by the General Assembly of the United Nations:

- a) The principle of common but differentiated responsibilities and respective capabilities is binding – it is a structural legal principle for the implementation and interpretation of the whole climate change regime, based on international law, on moral imperatives, and on science;
- b) the obligation of due diligence must take into account the different levels of development of States, in light of the CBDR-RC principle;
- c) the climate change regime is comprised of three fundamental treaties: the UNFCCC, the Kyoto Protocol, and the Paris Agreement thereunder – the Kyoto Protocol and the Paris Agreement are clearly established on the basis of that Convention and must be interpreted in light of the principles and provisions of the UNFCCC;
- d) these treaties contain a duty for States to cooperate in mitigating and

preventing the effects of climate change, and this duty falls especially on developed countries due to the principle of common but differentiated responsibilities.

Additionally, Brazil recalls that no obligations derived from the climate regime treaties are tantamount to the derogation of obligations under the GATT and international trade law of non-discrimination and fair trade principles.

31. Brazil reserves its right to participate in the public hearings to be held at this Court at a later stage of these proceedings.

A handwritten signature in blue ink, appearing to read "Fernando Simas Magalhães".

FERNANDO SIMAS MAGALHÃES

Ambassador Extraordinary and Plenipotentiary
of the Federative Republic of Brazil to the Kingdom of the Netherlands