

**INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA**



2023

Public sitting

held on Thursday, 21 September 2023, at 10 a.m.,  
at the International Tribunal for the Law of the Sea, Hamburg,  
President Albert J. Hoffmann presiding

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

**(REQUEST FOR ADVISORY OPINION SUBMITTED TO THE TRIBUNAL)**

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**Verbatim Record**

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Uncorrected

<i>Present:</i>	President	Albert J. Hoffmann
	Vice-President	Tomas Heidar
	Judges	José Luís Jesus
		Stanislaw Pawlak
		Shunji Yanai
		James L. Kateka
		Boualem Bouguetaia
		Jin-Hyun Paik
		David Joseph Attard
		Markiyán Z. Kulyk
		Alonso Gómez-Robledo
		Óscar Cabello Sarubbi
		Neeru Chadha
		Kriangsak Kittichaisaree
		Roman Kolodkin
		Liesbeth Lijnzaad
		María Teresa Infante Caffi
		Jielong Duan
		Kathy-Ann Brown
		Ida Caracciolo
		Maurice K. Kamga
	Registrar	Ximena Hinrichs Oyarce

*List of delegations:*

## **STATES PARTIES**

### **Comoros**

Mr Youssouf Mondoha Assoumani, Permanent Representative to the Federal Democratic Republic of Ethiopia and the African Union

Mr Iain Sandford, Partner, Sidley Austin LLP, Geneva; Barrister and Solicitor, High Court of New Zealand, Supreme Court of the Australian Capital Territory and High Court of Australia

Mr Dominic Coppens, Senior Managing Associate, Sidley Austin LLP, Brussels; Professor, Department of International and European Law, Maastricht University; Member, Brussels Bar – A list

Ms Katherine Connolly, Senior Managing Associate, Sidley Austin LLP, Geneva; Barrister and Solicitor, Supreme Court of New South Wales

### **Democratic Republic of the Congo**

Mr Ivon Mingashang, Professor of International Law, Law Faculty, University of Kinshasa; member of the International Law Commission; member, Kinshasa/Gombe Bar

Mr Jean-Paul Segihobe Bigira, Professor of International Law, Department of Public International Law and International Relations, Law Faculty, University of Kinshasa; Member of Parliament; member, Kinshasa/Gombe Bar

Mr Nicolas Angelet, Professor of International Law, Université libre de Bruxelles; member, Brussels Bar

Mr Sylvain Lumu Mbaya, Professor of International Law, Law Faculty, University of Kinshasa; Judge at the Constitutional Court of the DRC

Mr Martin Mulumba Tshitoko, Professor, Law Faculty, University of Kinshasa; Chief Adviser to the Head of State for Legal and Administrative Affairs; member, Kinshasa-Matete Bar

Mr François Habiyaemye Muhashy Kayagwe, Professor, University of Goma; researcher at the Royal Belgian Institute of Natural Sciences; specialist in applied natural sciences and ecodevelopment; full member of the Congolese Academy of Sciences (ACCOS)

Mr Ezéchiél Amani Cirimwami, Professor of International Law, Law Faculty, University of Kinshasa; researcher, Max Planck Institute Luxemburg for Procedural Law

Mr Blaise Ndombe, Magistrate and Legal Assistant to the Chief of Staff to the President of the Republic, Head of State

Mr Honoré Mitshiabo Tshitenge, Deputy Chief of Staff to the Minister of State, Minister of Justice and Keeper of the Seals; member, Kinshasa/Gombe Bar

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Ms Marta Duch Giménez, Assistant, Université catholique de Louvain; member, Brussels Bar

## **INTERGOVERNMENTAL ORGANIZATIONS**

### **International Union for Conservation of Nature (IUCN)**

Ms Christina Voigt, Chair, IUCN World Commission on Environmental Law (WCEL);  
Co-Chair, Paris Agreement Implementation and Compliance Committee; Professor,  
Department of Public and International Law, University of Oslo

Ms Cymie R. Payne, Chair, IUCN-WCEL Ocean Law Specialist Group; Associate  
Professor, Rutgers University, New Jersey

Ms Tara Davenport, Assistant Professor, Faculty of Law, National University of  
Singapore (NUS); Co-Head, Oceans Law and Policy Programme, Centre for  
International Law, Singapore

1 **THE PRESIDENT:** Please be seated. Good morning. Today the Tribunal will  
2 continue the hearing in the *Request for an Advisory Opinion Submitted by the*  
3 *Commission of Small Island States and International Law.*

4  
5 This morning we will hear oral statements from the Union of Comoros, the  
6 Democratic Republic of Congo and the International Union for the Conservation of  
7 Nature and Natural Resources.

8  
9 I now invite the representative of Comoros, Mr Assoumani, to make his statement.

10  
11 You have the floor, Sir.

12  
13 **MR ASSOUMANI:** (*Interpretation from French*) Mr President, distinguished members  
14 of the Tribunal, it is an honour for me to appear before you as Representative of the  
15 Union of the Comoros in these proceedings. Comoros currently has presidency of  
16 the African Union, so I shall begin by stating that Comoros entirely subscribes to the  
17 position of the African Union as set out in its written submissions.

18  
19 The matter before you is of fundamental importance for Comoros. In June of this  
20 year, Comoros joined 10 other African island and coastal States in order to adopt the  
21 Moroni Declaration for Ocean and Climate Action in Africa.<sup>1</sup> And just two weeks ago,  
22 our African leader was among other African leaders who adopted the Nairobi  
23 Declaration on Climate Change and Call to Action.<sup>2</sup>

24  
25 The Moroni Declaration underscored the fact that African island and coastal nations,  
26 such as Comoros, “are on the extreme frontlines of the impact of interconnected  
27 crises of biodiversity loss, climate change, and coastal zones degradation including  
28 impacts on the ocean”. It affirmed the need to safeguard the sensitive and  
29 interconnected maritime and coastal ecosystems. In order to meet these extreme  
30 challenges, the Moroni Declaration has launched a process known by the name of  
31 the “Moroni Process for Ocean and Climate Action in in Africa and Africa and African  
32 Island States specificities.”

33  
34 In the pursuit of the Moroni process, Comoros is aware of all of the obligations of the  
35 States Parties to UNCLOS as regards the protection and preservation of the marine  
36 environment. These obligations are vital if we are to face up to the crisis of climate  
37 change and its effects on the ocean, and if we are to safeguard the sensitive marine  
38 and coastal ecosystems, and particularly and including those of African island  
39 States. Comoros, as well as the African Union and other African States taking part in  
40 these proceedings, and indeed virtually all of the States and organizations involved,  
41 acknowledge that there are specific obligations that flow from Part XII of the  
42 Convention when they are faced with the challenge of climate change.

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<sup>1</sup> Déclaration de Moroni pour une action en faveur de l’océan et du climat en Afrique (14 juin 2023), disponible ici : <https://www.commissionoceanindien.org/wp-content/uploads/2023/06/Declaration-fr-1.pdf> (français) et [https://www.iucn.org/sites/default/files/2023-06/moroni-declaration-great-blue-wall\\_june-2023\\_0.pdf](https://www.iucn.org/sites/default/files/2023-06/moroni-declaration-great-blue-wall_june-2023_0.pdf) (anglais).

<sup>2</sup> Déclaration de Moroni pour une action en faveur de l’océan et du climat en Afrique (14 juin 2023), disponible ici : <https://www.commissionoceanindien.org/wp-content/uploads/2023/06/Declaration-fr-1.pdf> (français) et [https://www.iucn.org/sites/default/files/2023-06/moroni-declaration-great-blue-wall\\_june-2023\\_0.pdf](https://www.iucn.org/sites/default/files/2023-06/moroni-declaration-great-blue-wall_june-2023_0.pdf) (anglais).

1 Comoros welcomes the request made to the Tribunal by COSIS as regards the  
2 determination of these specific obligations. Comoros would respectfully urge the  
3 Tribunal to seize this opportunity to help guide global efforts, bearing in mind the  
4 specificities of small island States and in particular those in Africa.

5  
6 To assist the Tribunal in this important task, Comoros will set out a number of  
7 submissions on relevant questions.

8  
9 Ladies and gentlemen, Comoros is an African State, a small island State and a  
10 developing State, and it enjoys very close historical, cultural and economic relations  
11 with the sea. I shall move on shortly to an explanation that I would like to share with  
12 you as regards the devastating effect that climate change has on Comoros.

13  
14 I will then ask the Tribunal to give the floor to Mr Iain Sandford, who will go into some  
15 of the relevant legal issues to be taken on board by the Tribunal in examining the  
16 scope of its tasks. Mr Sandford will take a look at the relevance of other rules of  
17 international law, in particular, those of the climate regime, and he shall do so in  
18 order to answer the questions concerning the specific obligations of UNCLOS as  
19 regards climate change and climate impacts.

20  
21 I shall then ask the Tribunal to give the floor to Mr Dominic Coppens, who will  
22 answer the first question put by COSIS. Then it will be the turn of Ms Katherine  
23 Connolly who will answer the second question put by COSIS.

24  
25 Lastly, with the permission of the Tribunal, I shall once again take the floor in order to  
26 describe the actions Comoros has undertaken in order to deal with the devastating  
27 impact of climate change while ambitiously pursuing its sustainable development  
28 goals. And then I shall conclude the statement for Comoros.

29  
30 Mr President, distinguished members of the Tribunal, Comoros is a Small  
31 Developing Island State, and for a long time now it has enjoyed historic, cultural and  
32 economic relations with the sea.

33  
34 Our people enjoy significant historic and cultural links with the Indian Ocean, and  
35 traditionally, the islands have played a key role in the rich history of commerce and  
36 trade in the Indian Ocean. Sectors linked to natural resources, in other words,  
37 agriculture, fisheries, forestry, make up more than half of the official economic  
38 activity of Comoros.

39  
40 With an annual per capita GDP of US\$ 1,610,<sup>3</sup> our country is facing major  
41 development challenges. Climate change, however, risks hampering our ambitious  
42 development goals, including the efforts that we are deploying to develop a blue  
43 economy based on the sustainable use of marine resources and the fruits of the  
44 marine environment.

45  
46 Indeed the Union of the Comoros is confronted with some of the harshest  
47 consequences of climate change stemming from excessive emissions of carbon

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<sup>3</sup> Open Data of the World Bank:  
<https://data.worldbank.org/indicator/NY.GNP.PCAP.CD?locations=KM>

1 dioxide and other greenhouse gases throughout the world. Comoros is vulnerable to  
2 the direct effects of climate change, and this stems from our geographic situation  
3 and our archipelagic features.

4  
5 Comoros is an archipelago of four volcanic islands in the Indian Ocean with a total  
6 surface area of under 2,500 square kilometres. Climate change has an impact on our  
7 country in at least two ways.

8  
9 First of all, climate change exposes Comoros to an increase in annual rainfall  
10 variations, an increase in temperatures, seasonal changes as well as an increase in  
11 the frequency and the gravity of climate risks, *inter alia*, tropical cyclones. Secondly,  
12 Comoros is vulnerable to the rising sea levels which lead to saltwater intrusion of  
13 and coastal erosion.

14  
15 As regards the first of these effects, the UN Development Programme foresees that  
16 by 2090, Comoros could see a decrease of 47 per cent in its seasonal rainfall during  
17 the dry season as compared to current levels.<sup>4</sup> Extreme meteorological conditions  
18 are likely to be more frequent and more intense, particularly in the case of tropical  
19 cyclones, drought and floods.<sup>5</sup>

20  
21 As many as 80 per cent of the inhabitants of Comoros are small farmers who depend  
22 on rainfed crops.<sup>6</sup> Changes in temperature and in rainfall, and also prolonged dry  
23 seasons, floods and the resulting erosion, have an impact on food production and  
24 water resource management. Climate change has a serious adverse effect on  
25 farming and on the economic potential of Comoros.

26  
27 I turn now to the second impact: rising sea levels. This is already a severe threat to  
28 Comoros. Just three days ago, there was an extraordinary underwater tsunami that  
29 shifted the entire coastal region, which once again goes to show the effects of  
30 climate change.

31  
32 We estimate that in the next 20 years, more than 90 per cent of the beaches on the  
33 Grande Comore, the largest island, could disappear.<sup>7</sup> And continuing sea level rise  
34 and saltwater intrusion are likely to lead to a loss of 734 hectares of low-lying coastal  
35 areas on the islands.<sup>8</sup>

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<sup>4</sup> United Nations Development Programme – Climate change adaptation project (ensuring climate resilient water supplies in the Comoros Islands *assurer des ressources en eau durables et résilientes pour les Comores*): <https://www.adaptation-undp.org/projects/Comoros-water-GCF>.

<sup>5</sup> Adapting to climate change in the Comoros: <https://stateofgreen.com/en/solutions/adapting-to-climate-change-in-the-comoros/#:~:text=By%202090%2C%20the%20dry%20season,dependent%20on%20rain%2Dfed%20crops>

<sup>6</sup> United Nations Environment Programme - The Comors, Ecosystem-base adaptation (2017 - 2022): <https://wedocs.unep.org/bitstream/handle/20.500.11822/28424/ComorosEba.pdf?sequence=5>. See also Global Center on Adaptation, “This Vanilla Bourbon Producer is Fighting Hunger and Driving Climate Adaptation in the Comoros”, 21 March 2023: <https://gca.org/this-vanilla-bourbon-producer-is-fighting-hunger-and-driving-climate-adaptation-in-the-comoros/#:~:text=This%20means%20that%20Comorians%2C%2070,this%20Small%20Island%20Developing%20State>.

<sup>7</sup> Union of the Comoros, National Adaptation Programme of Action on Climate Change (PANA): [https://www.preventionweb.net/files/21866\\_15604panacomores1.pdf](https://www.preventionweb.net/files/21866_15604panacomores1.pdf)

<sup>8</sup> Ibid, p. 31.

1 With 65 per cent of the population expected to be living in coastal regions and low-  
2 lying lands between now and 2050,<sup>9</sup> our country is extremely vulnerable to the  
3 continuing sea-level rise. Together with sea-level rise, there's an increase in storm  
4 surges, cyclones and damage caused by floods owing to earthquakes, and this  
5 exposes our coastal populations to a major risk of displacement.

6  
7 The infrastructures and the associated fixed assets are and will continue to be  
8 damaged by these increases. Projections estimate that the cost of destruction of  
9 coastal infrastructures as a direct result of climate change to be at the level of  
10 US\$ 400 million.<sup>10</sup>

11  
12 Mr President, members of the Tribunal, the impact of climate change is severe, and  
13 Comoros sadly are on the "front line" of the climate crisis.

14  
15 The delegation for Comoros would now like to turn to the legal questions before the  
16 Tribunal.

17  
18 Comoros urges the Tribunal to take this opportunity to answer the questions put by  
19 COSIS. For the reasons set out by the African Union in its written submissions,  
20 Comoros agrees with the position that the Tribunal enjoys advisory jurisdiction.<sup>11</sup>  
21 Thus, Comoros believes there are no compelling reasons for the Tribunal to refuse  
22 to exercise its jurisdiction in this case. On the contrary, there are compelling reasons  
23 for the Tribunal to state that it does have jurisdiction. The existential threat caused by  
24 climate change to the marine environment and to small island States, such as  
25 Comoros, requires the Tribunal to exercise its jurisdiction and clarify the specific  
26 obligations of States Parties to UNCLOS in order to mitigate this unprecedented  
27 threat.

28  
29 I should like to thank you for your attention, Mr President, and I would ask you if  
30 I can now give the floor, as I've said at the beginning, first to Mr Sandford, then to  
31 Mr Coppens, and subsequently to Ms Connolly. They in turn will set out the  
32 remaining legal arguments of the Comoros' statement.

33  
34 **THE PRESIDENT:** Thank you, Mr Assoumani. I now invite Mr Sandford to make his  
35 statement. You have the floor, Sir.

36  
37 **MR SANDFORD:** Mr President, distinguished members of the Tribunal, the rules of  
38 international law concerning the marine environment in the Convention are not the  
39 only rules of international law bearing upon the global challenge of climate change. It  
40 is appropriate, therefore, to offer a few comments on the relationship between the  
41 UNCLOS and the international climate change regime.

42  
43 These proceedings focus upon the questions presented to the Tribunal by COSIS.  
44

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<sup>9</sup> Union of the Comoros, CCNUCC, Initial national communication, December 2002:  
<https://unfccc.int/sites/default/files/resource/comnc1.pdf>

<sup>10</sup> Union of the Comoros, CCNUCC, Initial national communication, December 2002:  
<https://unfccc.int/sites/default/files/resource/comnc1.pdf>

<sup>11</sup> Written observations of the African Union, paras. 65-86.



1 Those questions ask the Tribunal to identify “the specific obligations of States Parties  
2 to the [UNCLOS]” in connection with certain matters concerning the impact of climate  
3 change on the marine environment. In answering these questions, Comoros  
4 considers that such specific obligations are to be identified within the four corners of  
5 the UNCLOS. In other words, the UNCLOS is the applicable law in the present  
6 proceedings.

7  
8 Nevertheless, the UNCLOS does not exist in a vacuum; it is part of a broader  
9 framework of international law, which includes rules that bear upon how States must  
10 respond to climate change impacts.

11  
12 As work of the International Law Commission explains, in international law, there is a  
13 “strong presumption against normative conflict” between regimes.<sup>12</sup> In practical  
14 terms, this means that it is incumbent upon treaty interpreters to read treaty  
15 provisions harmoniously with other international norms, where possible. Indeed, the  
16 provisions of the UNCLOS express openness to other rules of international law,  
17 accommodating them through provisions including articles 197, 207, 212, 213, 237,  
18 and 293. In interpreting the UNCLOS to identify specific obligations in respect of  
19 climate change, the Tribunal must be conscious of the relationship between the  
20 UNCLOS and other areas of international law.

21  
22 Of particular relevance in the present proceedings is the international climate regime,  
23 which consists primarily of the UN Framework Convention on Climate Change and  
24 the Paris Agreement. Although the international climate regime is not the applicable  
25 law in these proceedings, its rules are nevertheless important considerations in the  
26 Tribunal’s interpretation of the UNCLOS.

27  
28 Specifically, this regime must be “taken into account” by the Tribunal when  
29 interpreting the relevant UNCLOS provisions. This is because the regime constitutes  
30 “relevant rules of international law applicable in the relations between the parties” in  
31 the sense of article 31(3)(c) of the Vienna Convention on the Law of Treaties. The  
32 rules of the international climate regime are evidently “relevant” in these  
33 proceedings, which concern climate change impacts and the marine environment.  
34 Moreover, the parties to the treaties of the climate regime are virtually all parties to  
35 the UNCLOS.

36  
37 An interpretive approach that gives effect to the principle of systemic integration  
38 reflected in article 31(3)(c) is particularly important in the present proceedings  
39 because many of the specific obligations under the UNCLOS that arise in respect of  
40 climate change are *collective* obligations.

41  
42 Later in this statement, when addressing the two questions before the Tribunal,  
43 Comoros will argue, as has the African Union,<sup>13</sup> that the burden of fulfilling these  
44 collective obligations needs to be apportioned appropriately among States Parties.  
45 The rules of the climate regime inform the interpretation of the UNCLOS provisions  
46 in this regard.

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<sup>12</sup> International Law Commission, “Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law”, Report of the Study Group of the International Law Commission (UN Doc. A/CN.4/L.682), 13 April 2006 (“**ILC Fragmentation Report**”), para. 37.

<sup>13</sup> African Union’s written statement, paras. 232 – 234, 256.

1 Specifically, a central tenet of the international climate regime is recognition of the  
2 common, i.e., collective, but *differentiated* responsibilities of States with respect to  
3 climate change, and recognition that the respective capabilities of States to address  
4 climate change through mitigation or adaptation measures varies. This concept is  
5 often referred to through the term “common but differentiated responsibilities and  
6 respective capabilities”, or “CBDR-RC”.

7  
8 In elaborating the specific obligations of States Parties under Part XII of the  
9 UNCLOS in respect of climate change, the Tribunal must take account of this central  
10 tenet of the international climate regime. Specifically, collective obligations are  
11 apportioned to States taking CBDR into account. Comoros will discuss exactly how  
12 this is relevant, when discussing the interpretation of articles 192 and 194 of the  
13 UNCLOS later in this statement.

14  
15 Of course, taking the international climate regime into account in the interpretation of  
16 the obligations under the UNCLOS does not require a reading that subsumes or  
17 replaces UNCLOS obligations with those of the international climate regime. In other  
18 words, compliance with the rules of the climate regime does not exhaust the  
19 obligations of States Parties under the UNCLOS.

20  
21 Comoros notes that some of the participants’ written statements effectively take the  
22 position that the climate regime does exhaust the UNCLOS obligations.<sup>14</sup> They  
23 suggest that the international climate regime should be viewed as *lex specialis* in  
24 respect of climate change, effectively displacing the more general obligations under  
25 the UNCLOS concerning protection and preservation of the marine environment.<sup>15</sup>

26  
27 Although Comoros affirms its commitment to the requirements of the international  
28 climate regime, Comoros does not agree that its rules displace or exhaust States’  
29 UNCLOS obligations. The *lex specialis* rule applies where competing norms are in  
30 conflict, and where one norm is more specific than the other.<sup>16</sup> However, there is no  
31 conflict or incompatibility between the UNCLOS and the international climate regime.

32  
33 The climate regime is focused on atmospheric emissions and an atmospheric  
34 temperature goal, and does not deal specifically with the marine environment. By  
35 contrast, the UNCLOS has a number of provisions in Part XII that address protection  
36 and preservation of the marine environment, through both general obligations and  
37 more detailed requirements in relation to particular environmental challenges like  
38 marine pollution. In this way, the respective rules of the international climate regime  
39 and the UNCLOS overlap. However, the climate change regime does not displace  
40 the obligations of States Parties under the UNCLOS.

41  

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<sup>14</sup> See for example, India’s written statement, Request for an Advisory Opinion to the International Tribunal for the Law of the Sea by the Commission of Small Island States on Climate Change and International Law, paras. 16-17, available at: [https://www.itlos.org/fileadmin/itlos/documents/cases/31/written\\_statements/3/C31-WS-3-4-India.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/3/C31-WS-3-4-India.pdf) last accessed 18 September 2023.

<sup>15</sup> Ibid.

<sup>16</sup> ILC Fragmentation Report, p. 19.

1 As the Tribunal heard in the oral statement of COSIS earlier in this hearing, the  
2 relationship between the UNCLOS and the climate regime is one of  
3 “complementarity and mutual supportiveness”.<sup>17</sup>  
4

5 This complementary and supportive relationship is confirmed by the express text of  
6 the UNCLOS. Paragraph 1 of article 207 and paragraph 1 of article 212 require  
7 UNCLOS Parties to take into account external “international rules”, such as those of  
8 the international climate regime, for the protection and preservation of the marine  
9 environment.  
10

11 At the same time, when compliance with those “international rules” does not  
12 discharge the relevant UNCLOS obligations in their entirety, paragraph 2 of  
13 article 207 and paragraph 2 of article 212 expressly contemplate that UNCLOS  
14 Parties shall take “other action as may be necessary”, i.e., action that goes beyond  
15 what is contemplated by the other international rules.  
16

17 Mr President, the position that the law of the sea co-exists and operates  
18 harmoniously with other branches of international law is orthodox and should not be  
19 controversial. A treaty interpreter should not be quick to presume that non-UNCLOS  
20 rules conflict with or displace the UNCLOS.  
21

22 Mr President, distinguished members, thank you for your attention. Mr President,  
23 I ask you to request my colleague, Dr Coppens, to take the floor to present the views  
24 of Comoros on the first question posed in the COSIS request.  
25

26 **THE PRESIDENT:** Thank you, Mr Sandford. I now invite Mr Coppens to make its  
27 statement. You have the floor, Sir.  
28

29 **MR COPPENS:** Mr President, distinguished members of the Tribunal, Comoros will  
30 now consider the first question.  
31

32 Now, in this question the Tribunal is invited to identify the specific obligations of  
33 States Parties to the Convention to “prevent, reduce and control pollution of the  
34 marine environment” in relation to the deleterious effects resulting from climate  
35 change.  
36

37 The formulation of this question reflects that of article 194(1) of the Convention and,  
38 thus, the Tribunal should interpret this provision in the specific context of climate  
39 change. Now within this context, what “specific obligations” fall to States?  
40

41 There is broad consensus between the participants that the prerequisites for the  
42 application of article 194 are met and that the obligations flowing from that are  
43 applicable to the instant proceedings, and Comoros shares this point of view.  
44

45 By emitting greenhouse gases, humans indirectly introduce carbon dioxide, in other  
46 words a substance, and heat, that’s energy, into the marine environment, which  
47 causes adverse effects. This corresponds to the definition of pollution of the marine

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<sup>17</sup> ITLOS public sitting held on Monday, 11 September 2023, at 3 p.m., Hamburg. Verbatim Record, p. 30. 35 – 37.

1 environment within the meaning of article 1(1)(4) of the Convention. So the  
2 obligations contained in article 194 are applicable.

3  
4 Looking now at the obligations provided under article 194, Comoros notes that this  
5 provision uses three verbs, all of which invoke the need to take action and describe  
6 what States Parties must do in terms of marine pollution: prevent, reduce and  
7 control.

8  
9 Comoros shares the opinion of the African Union<sup>18</sup> and other participants,<sup>19</sup> that  
10 these three verbs impose distinct and cumulative obligations on States Parties.  
11 Mr President, deciding otherwise would deny the letter of article 194 and be contrary  
12 to the rules of treaty interpretation.

13  
14 These obligations apply within the context of climate change in at least three ways.

15  
16 First, States Parties have the collective obligation to take all measures necessary to  
17 reduce emissions significantly and urgently.

18  
19 Second, States Parties must collectively and immediately reduce emissions to levels  
20 compatible with the Paris goal in terms of temperature, namely, 1.5°C, and must go  
21 even further, by continuing to reduce emissions.

22  
23 Third, when apportioning these collective obligations between different States,  
24 developed States must shoulder the major part of the responsibilities for emission  
25 reduction.

26  
27 Mr President, the first of these obligations is evident. As we have already explained,  
28 anthropogenic emissions of greenhouse gases have led to marine pollution, so  
29 prevention, reduction and control of this pollution cannot be achieved without a  
30 significant and urgent reduction of emissions. As such, States Parties collectively  
31 have the specific obligation to take all measures necessary to significantly and  
32 urgently reduce their emissions.

33  
34 So the question is to what extent must they collectively reduce their emissions?

35  
36 Participants presented different points of view on this core question. Some  
37 participants maintain that States Parties are in compliance with their obligations  
38 under article 194 if they reduce their emissions to levels compatible with the  
39 temperature goal of the Paris Agreement. Comoros shares this opinion that there is  
40 an obligation to achieve the 1.5°C Paris goal. However, that in itself would not suffice  
41 to extinguish this obligation.

42  
43 As Comoros explained earlier, the international climate change regime coexists and  
44 functions in harmony with the Convention. Nevertheless, this regime does not  
45 replace, and has never been intended to replace, the obligations flowing from the  
46 Convention regarding pollution of the marine environment.

47  

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<sup>18</sup> Written submission of the African Union, paras. 165, 222.

<sup>19</sup> The written submission of the Democratic Republic of the Congo notes that “these obligations are differentiated and also entail the adoption of distinct measures”, para. 192.

1 Within the framework of the Paris Agreement, parties collectively agree to hold the  
2 global temperature increase to well below 2°C and to pursue efforts to limit  
3 temperature increase to 1.5°C. The objective of 1.5°C reflects the consensus that  
4 harm would be significantly more serious at 2°C than at 1.5°C, and at the same time  
5 the level of marine pollution would also be significantly much worse at 2°C than  
6 at 1.5°C.

7  
8 If States meet the 1.5°C goal, that will lead to a certain level of “control” over marine  
9 pollution, consistent with article 194. Thus, article 194 obliges States Parties to  
10 comply with this collective obligation. The Paris Agreement also represents an  
11 “internationally agreed standard” which States Parties to the Convention must take  
12 into account when they take measures to prevent, reduce and control pollution under  
13 article 207(1) and article 212(1).

14  
15 However, merely taking into account the obligations of the Paris Agreement and its  
16 1.5°C goal does not exhaust obligations under article 194. Indeed, article 194  
17 requires States Parties not only to control marine pollution, but also that they prevent  
18 and reduce this pollution. Furthermore, article 207(2) and article 212(2) expressly  
19 provide that even if internationally agreed standards exist, States Parties must “take  
20 other measures as may be necessary to prevent, reduce and control” this pollution.

21  
22 Now as the African Union has explained,<sup>20</sup> if the Paris temperature goal is met,  
23 States Parties will still continue to emit large quantities of greenhouse gases at levels  
24 which will continue to cause significant harm to the marine environment. The  
25 accumulated pollution of the marine environment will continue to worsen day by day.

26  
27 Even today, as we appear before you, with temperature increases well below the  
28 1.5°C, the world’s oceans and countries such as Comoros are subject to significant  
29 damage, such as the destruction of the coastline. And, as UNEP warns, on the basis  
30 of IPCC models, “the risks and projected adverse impacts from climate change will  
31 escalate with every increment of global warming”.<sup>21</sup>

32  
33 To allow marine pollution and the resulting significant harm to continue, and even to  
34 increase daily, does not meet the obligation to “prevent” and to “reduce” marine  
35 pollution. Accordingly, Comoros echoes the standpoint of the African Union, which is  
36 of the opinion that States Parties must collectively take all measures necessary to  
37 reduce emissions to levels which no longer cause harm to the marine environment.

38  
39 In examining what measures are “necessary” to meet the due diligence obligation  
40 under article 194, Comoros recall that “due diligence” is a “variable concept” which  
41 may “change over time” and “in relation to the risks involved”.<sup>22</sup> Consequently,  
42 “measures considered sufficiently diligent at a certain moment may become not  
43 diligent enough in light, for instance, of new scientific or technological knowledge.”<sup>23</sup>  
44

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<sup>20</sup> Written submission of the African Union, paras. 222-231.

<sup>21</sup> Written submission of UNEP, para. 30.

<sup>22</sup> ITLOS, Advisory Opinion of 1 February 2011, *Responsibilities and obligations of States sponsoring Persons and Entities with Respect to Activities in the Area* (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), Case No.17, para. 117.

<sup>23</sup> Ibidem.

1 Mr President, distinguished members of the Tribunal, in taking the floor today – with  
2 the current state of scientific and technological knowledge – we know that, as African  
3 leaders said early this month, “climate change is the single greatest challenge facing  
4 humanity and the single biggest threat to all life on Earth.”<sup>24</sup> Comoros requests the  
5 Tribunal, in defining the required level of due diligence, to take into account the  
6 seriousness and urgency of the situation and to express the obligations of States  
7 Parties in appropriate terms.

8  
9 In the coming decades, our children and grandchildren will read the Tribunal's  
10 judgment – a judgment which will for them be of the highest significance. They will  
11 look upon the knowledge we have today at our disposal and they will likely expect to  
12 read that, in 2023, it wasn't considered significantly “diligent” for States Parties to  
13 continue to emit the levels which threaten the very existence of Small Island  
14 Developing States.

15  
16 Confronted with the single biggest threat to humanity, States Parties must – for  
17 present and future generations – “do the utmost”<sup>25</sup> to reduce emissions to levels  
18 which no longer cause harm to the marine environment.

19  
20 This brings Comoros to the question of how this obligation should be apportioned  
21 amongst different States Parties. Article 194 expressly recognizes that obligations  
22 are shared between States Parties “in accordance with their capabilities”. Thus in  
23 these express terms, the obligation is both differentiated and asymmetric.

24  
25 This interpretation is confirmed by the principle of common but differentiated  
26 responsibilities and respective capabilities, which is anchored in the very foundations  
27 of international environmental law.<sup>26</sup> As Comoros has already explained, the  
28 obligations flowing from the Convention must be interpreted in the light of the climate  
29 change regime, and the rules of this regime must be taken into account in conformity  
30 with articles 207(1) and 212(1).

31  
32 As the UN Framework Convention of Climate Change stipulates, parties have to  
33 protect the climate system “in accordance with their common but differentiated  
34 responsibilities and respective capabilities.”<sup>27</sup> Comoros is a Small Developing Island  
35 State. The contribution of Small Island Developing States to historical cumulative  
36 emissions is virtually zero. Indeed, Comoros's own contribution represents less than  
37 0.0003 per cent of cumulative emissions.<sup>28</sup> It is therefore evident that, on the one  
38 hand, Comoros has a *responsibility* which is fundamentally different from that of  
39 other countries in combating emissions-based marine pollution, and, on the other  
40 hand, Comoros has significantly different capabilities compared to other countries to  
41 combat this pollution.

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<sup>24</sup> Nairobi Declaration, 6 September 2023, para. 7.

<sup>25</sup> ITLOS, Advisory Opinion of 1 February 2011, *Responsibilities and obligations of States sponsoring Persons and Entities with Respect to Activities in the Area*, para. 110.

<sup>26</sup> Philippe Cullet, “Differentiation” in Lavanya Rajamani, Jacqueline Peel (eds.), *The Oxford Handbook of International Environmental Law*, 2nd ed. (Oxford University Press, 2021), p. 325

<sup>27</sup> Article 3(1) de la Convention cadre des Nations Unies sur les changements climatiques (CCNUCC), New York, 9 mai 1992.

<sup>28</sup> OurWorldInData: “CO<sub>2</sub> and Greenhouse Gas Emissions”. Disponible ici : <https://ourworldindata.org/co2-emissions>

1 The differentiated and asymmetric nature of the obligation provided in article 194 is  
2 lastly confirmed by the nature of due diligence of this obligation. Within the  
3 framework a due diligence obligation, the level of such due diligence required of a  
4 State is determined according to the “means at its disposal.”<sup>29</sup> It is obvious that the  
5 means at the disposal of a Small Island Developing State, such as Comoros, are  
6 very different to the means at the disposal of other countries.  
7

8 Mr President, in practice, that means that there is a specific obligation for developed  
9 States Parties to take on the greater part of the responsibility for emissions  
10 reductions. It is regrettable that the NDCs notified within the framework of the Paris  
11 Agreement, taken as a whole, are far from enabling the Paris goal of 1.5°C to be  
12 attained and are, thus, well below the level which would allow the pollution of the  
13 marine environment to be prevented or reduced. In order to respect and comply with  
14 the obligations flowing from article 194(1), developed States must take all measures  
15 necessary to immediately achieve significant and collective reductions of emissions  
16 at levels which would no longer cause harm to the marine environment.  
17

18 I thank you for your attention. Mr President, I would now request that you call to the  
19 podium Ms Katherine Connolly. Thank you.  
20

21 **THE PRESIDENT:** (*Continued in English*) Thank you, Mr Coppins. I now invite  
22 Ms Connolly to make her statement. You have the floor, Madam.  
23

24 **MS CONNOLLY:** Mr President, members of the Tribunal, Comoros now turns to the  
25 second of the two questions presented to the Tribunal. This question concerns the  
26 specific obligations relevant for climate change that flow from the general obligation  
27 to protect and preserve the marine environment under article 192 of UNCLOS.  
28

29 The obligation in article 192 applies in a broader set of circumstances than the  
30 obligation in article 194. Article 192 requires UNCLOS Parties to protect and  
31 preserve the marine environment against all types of harm. Article 194 sets out  
32 obligations of the parties with respect to a particular form of harm, namely, pollution  
33 of the marine environment.  
34

35 Comoros agrees with the African Union on the meaning of the terms “protect” and  
36 “preserve” in Article 192.<sup>30</sup> In using those two verbs, Article 192 requires UNCLOS  
37 Parties to safeguard the marine environment from ongoing and future harm, and to  
38 maintain and improve its existing state.  
39

40 Climate change is already causing significant harm to the marine environment  
41 through the absorption of carbon dioxide, leading to acidification and the absorption  
42 of heat, leading to higher sea temperatures, deoxygenation and sea-level rise. The  
43 intensification of these same phenomena threaten to severely degrade the marine  
44 environment over time. Article 192 requires States to act to address these present  
45 and future threats to the marine environment.  
46

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<sup>29</sup> CIJ, arrêt du 20 avril 2010, *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay)*, CIJ Recueil 2010, p. 14, para. 101.

<sup>30</sup> African Union’s written statement, paras. 250-252.

1 In particular, Comoros echoes the African Union’s observations about the  
2 heightened level of due diligence that must be employed by UNCLOS Parties in  
3 discharging the due diligence aspects of their obligations under article 192. As  
4 African leaders have recently noted, “climate change is the single greatest challenge  
5 facing humanity and the single biggest threat to all life on Earth.”<sup>31</sup>  
6

7 For the marine environment, and for humanity itself, to have any chance against this  
8 unprecedented threat, States must act with the highest level of diligence to meet  
9 their obligations under article 192. As such, Comoros urges the Tribunal to express  
10 these obligations in terms that convey the sense of urgency that humanity as a  
11 whole, and small island States like Comoros in particular, currently face.  
12

13 Turning to the content of the specific obligations in article 192, Comoros notes that  
14 protecting and preserving the marine environment requires urgent mitigation and  
15 adaptation actions. UNCLOS parties are obliged under article 192 to take such  
16 actions. In this respect, Comoros agrees with the African Union’s identification of  
17 specific mitigation and adaptation obligations in its written statement.<sup>32</sup>  
18

19 While both mitigation and adaptation are important in the protection and preservation  
20 of the marine environment, and are thus part of the obligation in article 192,  
21 Comoros will focus, in this section, on adaptation obligations. Given that the effects  
22 of climate change are already being felt on the marine environment and pose an  
23 existential threat to Comoros and its people, Comoros wishes to emphasize the need  
24 for urgent adaptation measures.  
25

26 The international community has long recognized that such measures require  
27 effective cooperation. Indeed, the importance and necessity of cooperative  
28 engagement in addressing threats to the marine environment is a cornerstone  
29 principle of the UNCLOS, reflected in numerous provisions of the Convention and  
30 related legal instruments. Two specific aspects of the obligation bear emphasis.  
31

32 *First*, effective cooperation requires institutions to develop and coordinate adaptation  
33 actions at the national, regional and global level. It is only through such coordinated  
34 action that blind spots in research and suboptimal regulation can be avoided. While  
35 States have already made concerted efforts within the cooperative framework of the  
36 UNFCCC, it may be necessary for the UNCLOS States Parties to augment that  
37 framework to ensure that climate change impacts on the marine environment are  
38 adequately addressed.  
39

40 The UNFCCC and the Paris Agreement are focused on stabilizing anthropogenic  
41 GHG emissions in the atmosphere. Mr President, neither instrument establishes any  
42 specific objectives or targets relating to the marine environment, as regards either  
43 mitigation or adaptation.  
44

45 In Comoros’ view, therefore, the specific obligation to protect and preserve the  
46 marine environment requires States to collectively consider whether existing

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<sup>31</sup> Nairobi Declaration, para. 7.

<sup>32</sup> African Union’s written statement, paras. 260-335.



1 frameworks should be reviewed to address the marine environment specifically and  
2 in more detail.

3  
4 *Second*, the developed UNCLOS States Parties bear an obligation to deliver on their  
5 commitments under the international climate change regime regarding financial  
6 assistance, technology transfer and capacity-building. These commitments are part  
7 and parcel of the obligation to cooperate, and necessitated by the fact that the  
8 resources required to identify and adopt effective adaptation measures are heavily  
9 concentrated in developed States. It cannot be forgotten, in this regard, that  
10 developing States, including African States, have made minimal contribution to the  
11 climate crisis but face a disproportionate adaptation burden.

12  
13 To this end, Comoros echoes the calls, in the African Leaders' Nairobi Declaration,  
14 for, among others, the following measures: the creation of a measurable Global Goal  
15 on Adaptation; prioritizing and mainstreaming adaptation into development policy-  
16 making and planning; and building effective inter-regional partnerships to meet the  
17 needs for financial and technical support on climate change adaptation.<sup>33</sup>

18  
19 Most adaptation measures will occur within the territory of individual States. As such,  
20 it is the territorial State that is best placed to assess its adaptation needs and plan  
21 adaptation measures. As an island State facing urgent adaptation needs, Comoros  
22 has been proactive in identifying its own priorities. Let me offer a few of the most  
23 important examples.

24  
25 *First*, some 70 to 80 per cent of Comoros' workforce is engaged in agriculture.<sup>34</sup> This  
26 sector faces some of the most severe climate change impacts, in the form of coastal  
27 flooding, erosion and increased salinity of groundwater. For its agricultural sector to  
28 survive, Comoros requires urgent scientific research into alternative agricultural  
29 production systems, such as salt-resistant seeds. These efforts need urgent support  
30 through measures such as building sea walls, or transfer of technology capable of  
31 providing early warnings of extreme weather events.

32  
33 *Second*, due to frequent climate disasters as well as sea-level rise, water scarcity  
34 and increased salinity of groundwater adversely affect access to drinking water.<sup>35</sup> A  
35 possible solution lies in developing a climate-resilient water resource management  
36 for drinking water supply. It could take the form of setting up desalination plants and  
37 rainwater harvesting systems. Both solutions require technical expertise and  
38 increased investment.

39  
40 *Third*, climate change has caused severe damage to Comoros' fisheries sector and  
41 to marine biodiversity. Coral reefs have already suffered more than 60 per cent  
42 bleaching due to rising sea temperatures.<sup>36</sup> Comoros needs scientific resources to  
43 study the surrounding marine environment to identify potential marine protected

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<sup>33</sup> Nairobi Declaration, paras. 20, 32 and 33.

<sup>34</sup> Union of Comoros, National Action Programme of Adaptation to climate change (NAPA) Report, p. 19. Available here: <https://unfccc.int/resource/docs/napa/com01e.pdf>.

<sup>35</sup> Union of Comoros, UNFCCC - Initial National Communication On Climate Change, December 2002, pp. 7-8. Available at:

[https://unfccc.int/sites/default/files/resource/Comoros%20INC\\_Exec.%20Summary\\_English.pdf](https://unfccc.int/sites/default/files/resource/Comoros%20INC_Exec.%20Summary_English.pdf).

<sup>36</sup> *Ibid.*, p. 7.

1 areas, and better understand what technology is required to maintain marine  
2 habitats.

3  
4 These focus areas for Comoros are also focus areas for other developing and least  
5 developed nations. They intersect with specific obligations detailed in the African  
6 Union's written statement concerning protection and preservation of the marine  
7 environment. Obligations concerning the development of technology, climate-  
8 resilient infrastructure and policies for resilient ecosystems form the *sine qua non* of  
9 any State's efforts to enhance resilience of the marine environment as well as the  
10 human environment.

11  
12 Mr President, the Tribunal should legally recognize these specific obligations as  
13 necessary to discharge States' obligation to preserve and protect the marine  
14 environment under 192 of the UNCLOS.

15  
16 While Comoros, as a coastal State, has identified these adaptation priorities for  
17 areas under its jurisdiction, it will struggle to realize them effectively without urgent  
18 assistance from other nations. These adaptation measures require financing  
19 estimated at a minimum of EUR 399 million.<sup>37</sup> That is a significant sum for a small  
20 island developing nation. That burden should not rest solely on a State which has  
21 contributed 0.0003 per cent to global greenhouse gas emissions but bears a  
22 disproportionate share of the existential threat posed by climate change.<sup>38</sup>

23  
24 In this context Comoros reiterates the particular importance of the specific obligation,  
25 described in the African Union's written statement,<sup>39</sup> that developed countries make  
26 good on their commitment under the international climate regime to provide financial  
27 assistance, technology transfers and capacity-building to developing countries,  
28 including in respect of adaptation.

29  
30 This obligation is firmly rooted in the UNCLOS. Article 197 of the UNCLOS requires  
31 UNCLOS parties to cooperate in formulating "international rules" for the protection  
32 and preservation of the marine environment. Implicit in that provision is an obligation  
33 to abide by such "international rules" once cooperatively formulated. In the context of  
34 climate change, the climate regime represents "international rules" by which  
35 UNCLOS parties must abide under article 197, and must take into account under  
36 articles 207(1) and 212(1). One of the key pillars of the international climate change  
37 regime is the principle of CBDR-RC, pursuant to which developed States have  
38 undertaken commitments to support and finance the adaptation needs of developing  
39 States.

40  
41 Thank you, Mr President. That concludes my presentation. I ask that you give the  
42 floor again to the Ambassador who will complete the statement of Comoros.

43

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<sup>37</sup> Nationally Determined Contribution of the Union of the Comoros (updated NDC): Rapport de synthèse 2021-2030, p. 13. Available at: [https://unfccc.int/sites/default/files/NDC/2022-06/CDN\\_r%C3%A9vis%C3%A9e\\_Comores\\_vf.pdf](https://unfccc.int/sites/default/files/NDC/2022-06/CDN_r%C3%A9vis%C3%A9e_Comores_vf.pdf) ("Comoros' NDC").

<sup>38</sup> OurWorldInData: "CO<sub>2</sub> and Greenhouse Gas Emissions". Available at: <https://ourworldindata.org/co2-emissions>

<sup>39</sup> African Union's written statement, paras. 269-275.

1 **THE PRESIDENT:** Thank you, Ms Connolly. I now invite Mr Assoumani to continue  
2 his statement. You have the floor, Sir.

3  
4 **MR ASSOUMANI:** (*Interpretation from French*) Mr President, members of the  
5 Tribunal, I was saying earlier on that, as a small island African State, Comoros was  
6 on the front line of the climate crisis and yet Comoros has virtually no responsibility  
7 to bear for the emissions behind these challenges. Comoros is currently one of the  
8 smallest contributors to greenhouse gas emissions and historically Comoros'  
9 contribution to such emissions is negligible.<sup>40</sup>

10  
11 Notwithstanding its negligible responsible for global warming, its development needs  
12 and the legitimate aspirations of its population, Comoros has adopted ambitious  
13 measures to combat the adverse impacts of the growing climate crisis.

14  
15 Comoros has committed to NDCs within the context of the Paris Agreement and, in  
16 so doing, has committed to reducing its emissions level by 23 per cent between now  
17 and 2030.<sup>41</sup> Comoros has implemented a broad gamut of policies with a view to  
18 reaching that objective referred to in our NDC under the Paris Agreement – a 23 per  
19 cent reduction in emissions and a 47 per cent increase in carbon dioxide absorption  
20 between now and 2030 – in order to attain our ambitious goals.

21  
22 That includes a policy, a strategy and an action plan for climate change. The  
23 overarching objective is to face the challenges of climate change, including by  
24 implementing a series of adaptation measures through the systemic inclusion of  
25 climate aspects and planning processes in order to prevent the process that  
26 heightens vulnerability.

27  
28 In order to meet climate goals, Comoros has also introduced a national committee  
29 on climate change which is in charge of monitoring the implementation of national  
30 mitigation and adaptation efforts and also issuing recommendations to combat the  
31 climate crisis.

32  
33 What is more, in 2020, our country adopted the Comoros Emerging Plan<sup>42</sup> and the  
34 marine environment is at the very heart of that plan. Through this plan, the  
35 Government of the Union of the Comoros aims to achieve significant, sustainable  
36 and equitable development by taking account of measures for the enhancement,  
37 conservation, restoration and convergence of biodiversity, and protection of the  
38 marine environment, as well as for the sustainable management at national level.

39  
40 Comoros is also working with international organizations and development partners  
41 in order to implement the necessary mitigation and adaptation measures to reduce  
42 the impacts of global warming. For instance, in 2022, the Government of the Union  
43 of the Comoros launched a major reforestation campaign to protect catchment areas  
44 and implement the NDC. The aim of the campaign, called “One Comorian, One

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<sup>40</sup> See H. Ritchie et M. Roser, Comoros: CO2 Country Profile, *Our World in Data*:  
<https://ourworldindata.org/co2/country/comoros> (en anglais).

<sup>41</sup> Nationally Determined Contribution of the Union of the Comores (updated NDC): Summary report  
2021-2030, p. 13: [https://unfccc.int/sites/default/files/NDC/2022-06/CDN\\_r%C3%A9vis%C3%A9e\\_Comores\\_vf.pdf](https://unfccc.int/sites/default/files/NDC/2022-06/CDN_r%C3%A9vis%C3%A9e_Comores_vf.pdf)

<sup>42</sup> See [https://climate-laws.org/document/comores-emerging-plan-pce-2030\\_72f2](https://climate-laws.org/document/comores-emerging-plan-pce-2030_72f2)

1 Tree”, is to plant 613,000 new trees over an expanse of 571 hectares of land  
2 throughout the country.

3  
4 However, despite significant national efforts, it is extremely difficult to garner the  
5 resources necessary for the sustainable development of the Comoros’ economy  
6 while taking mitigation and adaptation measures to confront the climate crisis that  
7 have resulted from past and present emissions from other countries. Comoros  
8 continues to face difficulties in mobilizing funds for the climate because of the global  
9 inequalities in resource distribution.

10  
11 Developed States that are parties to the UNFCCC and the Paris Agreement have  
12 undertaken to finance mitigation and adaptation measures in the context of climate  
13 change with a view to preserving the marine environment. Developed States must  
14 stay true to their commitments, but that has not been the case so far. Comoros  
15 recalls that last year the parties to the Paris Agreement once again expressed  
16 “serious concern” at the fact that developed countries do not always respect their  
17 financial commitments and urge developed countries to meet their goals. As recently  
18 stated by African leaders in the declaration of the last meeting that took place in  
19 Nairobi, the international financial architecture must be redesigned in order to ensure  
20 equality among nations and to promote the sustainable use of Africa’s natural  
21 resources, including its marine resources, while moving towards the low carbon  
22 development of the continent and contributing to global decarbonization.

23  
24 To conclude this statement, please allow me to say that I am well aware of the  
25 presence of the African Union and some other African States. I will conclude the  
26 statement for Comoros by echoing the appeal addressed by the African Union to the  
27 Tribunal for the latter to pay particular attention to the African perspective in  
28 examining the questions that have been put to it.

29  
30 On behalf of Comoros, and on behalf of the presidency of the African Union and my  
31 delegation, I should like to thank the Tribunal for its attention.

32  
33 **THE PRESIDENT:** (*continued in English*) Thank you, Mr Assoumani. I now invite the  
34 representative of the Democratic Republic of Congo, Mr Mingashang, to make his  
35 statement. You have the floor, Sir.

36  
37 **MR MINGASHANG:** (*Interpretation from French*) Mr President, members of the  
38 Tribunal, I feel a particular sense of honour and responsibility in appearing before  
39 you this morning. I am here with our entire delegation to set out the views of the  
40 Democratic Republic of the Congo on the fundamental questions of international law  
41 that have been raised before this august Tribunal.

42  
43 However, I should point out, as of now, that the Democratic Republic of the Congo is  
44 intervening at this stage in the oral proceedings at a time when many things that are  
45 both relevant and forceful have already been admirably set out by the honorable  
46 members of the delegations who have spoken before us.

47  
48 So our delegation will be embarking upon an exercise which is delicate, to say the  
49 least. On the one hand, its task seems, *a priori*, to have been eased as regards its  
50 duty to demonstrate, but, at the same time, paradoxically, it is somewhat reinforced

1 because of the requirement to show clarity and conviction in our statements if we  
2 want to avoid repeating what has already been said.  
3  
4 So it is for these two reasons that the oral statement by the DRC will be articulated in  
5 a schematic fashion made up of four elements.  
6  
7 Professor Sylvain Lumu Mbaya will take the floor shortly after me to establish the  
8 jurisdiction of your Tribunal and the question of admissibility of the request for an  
9 opinion put the Commission of Small Island States on Climate Change and  
10 International Law (COSIS).  
11  
12 He will then be followed by Mr Jean-Paul Segihobe Bigira, who will demonstrate the  
13 relevance of a systemic interpretative approach of the relevant provisions on the UN  
14 Convention on the Law of the Sea, in that, as far as we are concerned, it constitutes  
15 a reading grid most likely to lead to a true functional understanding of the rules of  
16 international law as regards the obligations of States in the context of climate  
17 change.  
18  
19 Mr Nicolas Angelet will take the floor to deal with certain substantive questions that  
20 the DRC deems essential in order to ensure effective compliance with the provisions  
21 of the Convention that are relevant and applicable to climate change.  
22  
23 And then I, Ivon Mingashang, will come back to plead for CBDR in the context of the  
24 combat against climate change, and I shall consequently set out the concluding  
25 remarks of the DRC.  
26  
27 Mr President, before that, let me begin by setting out briefly the moral stance and the  
28 motivations for the DRC's involvement in these proceedings.  
29  
30 The considerations that have led the DRC to get involved in these proceedings are  
31 to be divided into three: the commitment to the climate cause; the moral conviction  
32 set out by the existential stakes implicit in COSIS' combat; and the interest that we  
33 have as a State facing the disastrous ecological results of tragic and dramatic events  
34 stemming from climate change.  
35  
36 On Friday, 8 September last, in other words the weekend before the hearing opened,  
37 the President of the DRC, Felix Antoine Tshisekedi Tshilombo, officially announced  
38 during his inaugural address to the Council of Ministers, for the benefit of public  
39 opinion, that these oral proceedings were due to begin.  
40  
41 He took the opportunity, as head of the DRC State, to reiterate the determination of  
42 the DRC to assume – together with partner countries of, *inter alia*, the Congo Basin  
43 and the Amazon, who are involved in this combat – its status as “solution country” in  
44 that respect and to capitalize on steps and actions that will tend to restore climate  
45 justice.  
46  
47 All of that, in the interest of present and future generations.  
48

1 Such a commitment is based on the urgent need on us all to avoid sticking our  
2 heads in the sand when there are real, imminent and irreversible perils threatening  
3 the very survival of mankind and the collapse of our shared civilization.

4  
5 Consequently, the DRC strongly recommends all inhabitants of the planet to pay  
6 attention to the wise African saying: “When your neighbour’s hut is burning, it would  
7 be dangerously naïve to stay indifferently in your hut waiting for the fire to reach  
8 you,” precisely because in this instance the small island States are not the  
9 neighbour’s hut; they are building blocks of the edifice that make up humankind.

10  
11 You have surely understood that the interest of the DRC is based on a convergence  
12 between its economic and geographical situation, and that of small island States.  
13 Indeed, we bear a disproportionate and crushing burden of the harmful effects of  
14 greenhouse gas emissions even although our contribution to those same emissions  
15 is undeniably negligible.

16  
17 I would ask you, Mr President, at this point, to give the floor to Professor Sylvain  
18 Lumu Mbaya to set out the first point of our statement. Thank you.

19  
20 **THE PRESIDENT:** (*continued in English*) Thank you, Mr Mingashang. I now invite  
21 Mr Lumu Mbaya to make his statement. You have the floor, Sir.

22  
23 **MR LUMU MBAYA:** (*Interpretation from French*) Mr President, distinguished  
24 members of the Tribunal, it is a particular honour for me to speak before you for the  
25 very first time and to do this in the context of these proceedings concerning the  
26 *Request for an Advisory Opinion submitted by the Commission of Small Island*  
27 *States on Climate Change and International Law*, henceforth to be referred to as  
28 “COSIS”. As has just been stated, much has already been argued in the written  
29 submission of the Democratic Republic of the Congo. Here, I shall focus on one of  
30 the legal questions that remains critical following the interventions of a number of  
31 other States, and that is the question of the Tribunal’s jurisdiction and the manner in  
32 which it is to be exercised.

33  
34 Under article 21 of its Statute, the jurisdiction of the Tribunal comprises all disputes  
35 and all applications submitted to it in accordance with the Convention and all matters  
36 whenever that is specifically provided for in any other agreement which confers  
37 jurisdiction on it.

38  
39 According to article 138(1) of the Rules, the Tribunal may give an advisory opinion  
40 on “a legal question” if an international agreement “related to the purposes of the  
41 Convention” specifically provides for it.

42  
43 It follows that the Tribunal may be given advisory jurisdiction in respect of  
44 substantive law provisions in an international agreement other than the UN  
45 Convention on the Law of the Sea. The only condition is that that other international  
46 agreement must relate to the purposes of the Convention. If the Tribunal can render  
47 an advisory opinion on *another* treaty, then that is all the more so when it comes to  
48 the Convention itself.

1 This is confirmed by article 21 of the Statute, the formulation of which is all-  
2 encompassing. The Tribunal has jurisdiction for "all applications", whenever that is  
3 "provided for in any other agreement."  
4

5 Numerous States and organizations, moreover, have strongly supported the  
6 application of COSIS because of its vital importance, in the true sense of the term,  
7 given the nature and the effects of climate change and the role played by the marine  
8 environment. This justifies the full exercise of the Tribunal's jurisdiction.  
9

10 However, Mr President, distinguished members of the Court, certain States have  
11 expressed restrictions, voiced nuances or cause for caution, whether it's to do with  
12 the scope of the jurisdiction of the Tribunal or the way in which it is exercised in this  
13 instance.  
14

15 Several of them that are not members of COSIS have called for caution from the  
16 point of view of consent or, indeed, the lack thereof. New Zealand highlights the fact  
17 that the Tribunal's response may have a significant impact on States Parties to the  
18 Convention that are not members of the Commission. The United Kingdom, which  
19 deems that consent of States is fundamental to the jurisdiction of international courts  
20 and tribunals, observes that the COSIS application is supported – as it submits – by  
21 a small number of States and that the United Kingdom, and a series of other States,  
22 have not agreed to any aspect of it, although it focuses on the obligations of all  
23 States Parties to the Convention.  
24

25 Mr President, members of the Court, the Democratic Republic of the Congo does not  
26 share that reasoning.  
27

28 That is why we ask you to state, when you deliberate on the matter of your  
29 jurisdiction, that an advisory opinion can always be requested by a limited number of  
30 States that are party to an international convention, even when the application, by  
31 definition, concerns all States Parties. Thus, according to article 159(10) of the  
32 Convention, one fourth of the members of the Seabed Disputes Authority may  
33 request an advisory opinion even when voting by the assemblies is then deferred.  
34 There is no difference when it comes to requests for an advisory opinion that may be  
35 sought by the Security Council or the United Nations General Assembly.  
36

37 It is the advisory character of the proceedings and the non-binding nature of opinions  
38 that warrants the rendering of an opinion without the consent of all States parties to  
39 the treaty concerned. The International Court of Justice issued an advisory opinion  
40 on the *Legal Consequences of the Construction of a Wall in the Occupied*  
41 *Palestinian Territory*, although Israel does not accept its jurisdiction and it could not  
42 be seized of a dispute involving Israel on that same question.  
43

44 This conclusion is all the more compelling here, as the request for an opinion has  
45 nothing to do with an existing dispute; so it cannot be alleged here that the Tribunal  
46 is being called upon to settle a dispute under cover of a request for an advisory  
47 opinion by COSIS.  
48

49 However, it is clearly established that the questions submitted to the Tribunal, in  
50 other words, the relationship between the Convention and climate change, are of the

1 utmost interest to all States Parties to UNCLOS. It is, thus, entirely justified that the  
2 Tribunal should decide on the questions put to it for the benefit of all States Parties.

3  
4 Other reservations or calls for caution have been issued as regards the formulation  
5 of the questions that have been put to you. France, for instance, on the grounds that  
6 the vast majority of the States Parties to the Convention were not involved in the  
7 drafting of the questions, argues that the Tribunal must show particular caution in  
8 exercising its advisory jurisdiction.

9  
10 Mr President, the DRC does not share that analysis either. The questions put by  
11 COSIS are not part of what we could refer to in English procedural law as “leading  
12 questions”. On the contrary, they are entirely neutral in that they paraphrase  
13 articles 192 and 194 of the Convention. They are, therefore, very broad and can  
14 encompass all of the interests and points of view that might exist under Part XII of  
15 the Convention in the context of climate change.

16  
17 There is another reservation that has been voiced by Indonesia, which argues that  
18 the Tribunal’s advisory opinion would only be used to guide COSIS as the requesting  
19 body in conducting its activities and would not be applicable outside that framework;  
20 that the Tribunal’s advisory jurisdiction cannot impact the application of the  
21 Convention. Brazil, challenging the jurisdiction of the Tribunal in its principal claim,  
22 formulated a similar reservation in the alternative, pointing out that the Tribunal’s  
23 advisory jurisdiction would be restricted *ratione materiae* in light of the organization’s  
24 scope of activities.

25  
26 Mr President, the Democratic Republic of Congo does not share that position for the  
27 following reasons.

28  
29 First of all, such a restriction is not apparent from the applicable text. As we have  
30 already pointed out, article 21 of the Statute of the Tribunal refers to “all  
31 applications”, whenever that is provided for in “any other agreement”. These are  
32 obviously non-restrictive terms *par excellence*. Similarly, article 138 of the Rules  
33 posits that the agreement providing for advisory jurisdiction may relate to “a legal  
34 question”, without any restrictions, if the advisory jurisdiction provided for an  
35 agreement relates to the purposes of the Convention. This text is different from that  
36 of article 131(1) of the Rules that expressly refers to applications for advisory opinion  
37 on legal questions that fall within the “scope of the activities of the Assembly of the  
38 Council of the [Seabed] Authority.” Such a restriction is not something that can be  
39 envisaged in this instance.

40  
41 Then, and in any case, restricting it to COSIS’ activities would in no way restrict the  
42 scope of your opinion. Article 2 of the COSIS Agreement authorizes COSIS to  
43 request that the Tribunal express an advisory opinion “on any legal question within  
44 the scope of the ... Convention”; so COSIS’ activity relates to the Convention in its  
45 entirety.

46  
47 This is fully warranted, bearing in mind the global nature of climate change and the  
48 effects thereof, which is referred to in the same article 2 of the Agreement,  
49 considering “the fundamental importance of oceans as sinks and reservoirs of



1 greenhouse gases, and the direct relevance of the marine environment to the  
2 adverse effects of climate change on Small Island States.”

3  
4 Mr President, members of the Tribunal, the Tribunal thus has jurisdiction and it is  
5 justified and necessary that it exercise fully its jurisdiction.

6  
7 This brings me to the end of my statement. I should like to thank you for your  
8 attention and respectfully ask you to give the floor now to my honourable colleague  
9 Professor Jean-Paul Segihobe Bigira.

10  
11 **THE PRESIDENT:** (*continued in English*) Thank you, Mr Mingashang. I now invite  
12 Mr Segihobe Bigira to make his statement. You have the floor, Sir.

13  
14 **MR SEGIHOBE BIGIRA:** (*Interpretation from French*) Mr President, I would like to  
15 thank you for giving me the floor.

16  
17 Mr President, distinguished members of the Tribunal, it is an honour for me to  
18 appear before you on behalf of the DRC to say that the Montego Bay Convention is  
19 a living instrument that must be interpreted in the light of current times. This  
20 constitution of the ocean, far from being the expression of a norm frozen in time,  
21 calls on you, as its guardian, to speak the oracle of its implicit as-yet-unexplored  
22 meaning.

23  
24 I shall do this in two parts: to begin with, I will set out the merits of a systemic  
25 interpretation; and, secondly, I will interact with some of the observations and  
26 comments by other States, and I will set out the views of the DRC as regards the  
27 opinion that you are called upon to render.

28  
29 In answer to the questions that have been put to you, the DRC believes that it is still  
30 relevant to embark upon a systemic interpretation. It makes it possible to identify the  
31 concrete obligations that lie between conservatism and the ecological legal  
32 temporality of the moment.

33  
34 The articulation is both synchronic and diachronic. The systemic interpretation  
35 makes it easier for UNCLOS to be understood in the light of other relevant rules of  
36 contemporary international law.

37  
38 By drawing on the context in which the Montego Bay Convention was formulated and  
39 applied at a time when climate change, on a regular basis, was revealing the  
40 vulnerability of our planet Earth, a systemic interpretation makes it possible to  
41 identify and understand the inherent meaning of the constitution of the oceans at a  
42 time when diverging interests have aggravated the risk of fragmentation, with each  
43 exploiting the disagreement as regards the urgent measures to be taken.

44  
45 The DRC considers that systemic interpretation makes it possible to find concrete  
46 answers to the paradox facing us. In other words, the bipolar opposition between the  
47 protagonists and the victims of climate change. On the one hand, there are the  
48 industrialized countries that are rich, largely responsible for climate change, and on  
49 the other hand, are the developing countries, including small island States which, to  
50 a large extent, suffer the consequences of the actions of the first group.

1 By resorting to a systemic interpretation, the Tribunal will have the opportunity to  
2 make a connection between the past of the negotiations of the Convention and the  
3 present of its writing. A connection between the present of climate change and the  
4 future of the consequences thereof, which are certain and irreversible, affecting  
5 oceans, life on Earth, mainly in small island States and Small Island Developing  
6 States.

7  
8 In this regard, article 293(1) of the Convention indeed enshrines the possibility –  
9 I would even say, the duty – to include other rules of international law that are  
10 compatible with the Convention. Consequently, as has been stated also by France,  
11 Norway, the Netherlands and Italy, the UNFCCC and the Paris Agreement are  
12 relevant when it comes to answering the questions put to your Tribunal.

13  
14 The DRC has set out in its written submissions that the same applies when it comes  
15 to international human rights law. As pointed out last week by Chile in this room, the  
16 DRC believes that climate change is jeopardizing fundamental rights of peoples.  
17 Aside from the right to self-determination that is jeopardized by the action of certain  
18 States. The consequences of those actions on the oceans threaten the very  
19 existence of small island States, as climate change has a negative impact on several  
20 human rights: the right to life, the right to health, the right to a healthy environment.

21  
22 Mr President, secondly, I would like to provide clarifications on certain observations  
23 made by parties in these proceedings.

24  
25 Firstly, certain States have insisted on the fact that the Tribunal must limit itself to  
26 answering questions according to *lex lata*, not *lex ferenda*. That is indisputable, but it  
27 does not mean that there has to be a restrictive interpretation of the Convention that  
28 has no basis in the rules for the interpretation of treaty law. From *lege lata*, States  
29 Parties to the Convention have significant obligations linked to climate change.  
30 Clarifying these obligations is not a matter of curbing States in any way; it's there to  
31 help them to meet the huge challenges posed by climate change.

32  
33 Secondly, to come back to the interaction between the Convention and other rules of  
34 international law, the European Union argues that “UNCLOS does not impose on  
35 States Parties more stringent obligations than those laid down in the ... Paris  
36 Agreement.”

37  
38 Singapore says that the UNFCCC provides *lex specialis* as regards greenhouse gas  
39 emissions. Australia considers as well that it should be enough to comply with the  
40 obligations under the UNFCCC and under the Paris Agreement. The DRC does not  
41 share these analyses. Climate agreements are not intended to limit commitments  
42 under UNCLOS. The UNFCCC and the Paris Agreement do not set out any binding  
43 norm applicable to all parties as regards greenhouse gas emissions.

44  
45 According to the NDC mechanism, each State Party to the agreement decides itself  
46 what its contribution will be to the reduction of greenhouse gas emissions. Thus,  
47 there can be no conflict between the two regimes. There is no reason to describe the  
48 UNFCCC as a *lex specialis*, nor to restrict the obligations under UNCLOS with  
49 regard to climate agreements. These are different and complementary. This is all the  
50 more so because, as observed by France, in accordance with article 237 of the

1 Convention, States Parties must fulfil their obligations under the Paris Agreement “in  
2 a manner consistent with the general principles and objectives of [UNCLOS].” Thus,  
3 there can be no question of subordinating UNCLOS to the climate treaties.  
4

5 In no way does this prevent us from seeing that the climate agreements clarify and  
6 concretize the obligations of States Parties to UNCLOS. They do so by  
7 acknowledging the scientific facts concerning climate change. They do so by  
8 acknowledging urgency, enshrining the need to limit the rise in average temperature  
9 of a planet to 1.5°C which in fact is the least that can be done to preserve the marine  
10 environment. Thus, the collective goal of limiting temperatures under the Paris  
11 Agreement supports UNCLOS and contributes to identifying the measures that are  
12 “necessary” to prevent, reduce and control pollution of the marine environment  
13 caused by greenhouse gases.  
14

15 The DRC would like to point out that under article 194, it’s necessary to “take all  
16 measures necessary” and to use the best “practicable means” available to States in  
17 accordance with their capabilities. Article 194(3) uses the terms “to the fullest  
18 possible extent.” “To the fullest possible extent” can be literally translated to “in the  
19 most complete way possible”. So, for States Parties it means they have to make the  
20 greatest efforts imaginable. And this is particularly necessary for climate change,  
21 given the urgency that has been acknowledged by the climate treaties.  
22

23 So, to conclude on this point, I would like to come back to an analysis set out before  
24 your Tribunal as regards the notion of “necessary” as meaning “indispensable”. We  
25 agree that it is indispensable that action be taken. However, Mr President, we do not  
26 believe that the notion of “necessary”, in this case, should be assimilated to  
27 “indispensable”. Saying that the “indispensable” has to be done is more restrictive  
28 than “doing what is necessary”. It means that you only have to do “what is strictly  
29 necessary”. But, in this instance, “everything necessary” has to be done and even  
30 “everything that is useful”.  
31

32 Mr President, distinguished members of the Tribunal, I should like to thank you for  
33 your attention and would respectfully ask you to give the floor now to my colleague  
34 Nicolas Angelet.  
35

36 **THE PRESIDENT:** *(continued in English)* Thank you, Mr Segihobe Bigira. We have  
37 now reached almost 11:30. At this stage, the Tribunal will withdraw for a break of  
38 30 minutes. We will continue the hearing at 12 o’clock. Thank you.  
39

40 *(Short break)*  
41

42 **THE PRESIDENT:** Please be seated. I now invite Mr Angelet to make his statement.  
43 You have the floor, Sir. You have the floor, Sir.  
44

45 **MR ANGELET:** *(Interpretation from French)* Mr President, distinguished members of  
46 the Tribunal, it is an honour for me to appear before you today. I’m going to look at a  
47 number of questions that the DRC considers essential to clarify the scope of the  
48 Convention, but also to ensure effective compliance with it.  
49

1 We join, thereby, the Attorney-General of Vanuatu who requested, on the very first  
2 day of the hearings, that you should go beyond abstract principles.

3  
4 Now, that is very necessary. Why? Well, international law relative to climate changes  
5 suffers from a deficit of efficacy, as evidenced by decades of delay we are  
6 experiencing.

7  
8 This is why the DRC is asking you to interpret and apply the Convention in such  
9 fashion as to enshrine the obligations which are not abstract or illusory, but concrete  
10 and effective.

11  
12 Now, we have borrowed this wording from the regional courts of human rights, but  
13 the same principle applies as well in international environmental law, as the dictum  
14 of the ICJ indicates: “The environment is not an abstraction.”<sup>43</sup> This passage has  
15 been quoted many, many times before you, not so much for its rhetorical value as for  
16 its legal value in interpreting the Convention.

17  
18 Mr President, let me move on to four questions which we feel can contribute to fulfil  
19 this objective of efficacy.

20  
21 My first question is as follows: How do the obligations to prevent and preserve the  
22 marine environment and the obligations to prevent, reduce and control pollution  
23 apply to climate change and how can they be breached?

24  
25 We tend to look at the climate issue in terms of preventing various events from  
26 occurring. According to a number of statements made before you, Tribunal, we have  
27 to prevent new damage from being caused to the marine environment because we  
28 need to prevent climate change, and the UN Framework on Climate Change (the  
29 UNFCCC), provides, in its second article, that it has, as an objective, to stabilize  
30 greenhouse gases at a level which prevents “any dangerous anthropogenic  
31 interference with the climate system.”

32  
33 So, the accent is put on prevention, and that can have legal implications. According  
34 to certain sources external to the Convention, the breach of an obligation of  
35 prevention takes place only when the event that had to be prevented occurs. If the  
36 obligation consists of preventing harm, the breach would occur only when the harm  
37 has been done.

38  
39 Yet, climate change causes time-lagged and irreversible harm. If State responsibility  
40 could be engaged under the Convention as and when the damage has been  
41 occurred, then the Convention wouldn’t be offering effective protection. States could  
42 be held responsible only when it would be too late.

43  
44 Now, I submit that this is not so according to Part XII of the Convention.

45  
46 According to article 3 of the UNFCCC, it falls to parties “to protect the climate  
47 system”. The measures of stabilization and reduction of greenhouse gases are, thus,  
48 measures of “protection” within the meaning of the Framework Convention. As such,

---

<sup>43</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion.

1 they fall within the obligation to “protect” the marine environment within the meaning  
2 of article 192 of UNCLOS.

3

4 Furthermore, article 2 of the Framework Convention, the UNFCCC, sets out that the  
5 Framework Convention has, as an objective, the “stabilization of greenhouse gas  
6 concentrations”. To stabilize is to control. According to article 4 of the Paris  
7 Agreement, this means “undertak[ing] ... reductions” of emissions. So, measures to  
8 combat climate change fall within the obligation to prevent, reduce and control  
9 pollution within the meaning of article 194(1) of UNCLOS.

10

11 This shows that the application of the Convention in combating climate change  
12 should not be considered solely in terms of prevention.

13

14 Furthermore, when you look at prevention, article 194(2), of course, deals with  
15 preventing “damage by pollution”. However, paragraph 1 covers the prevention of  
16 pollution more generally, and there is a very broad consensus which says that  
17 emissions of greenhouse gases fall within the definition of article 1. So, here, it’s an  
18 obligation of prevention at the source. In consequence, State responsibility may be  
19 engaged under articles 192 and 194 of the Convention

20

21 not only if their climate actions or inactions cause damage to the marine  
22 environment;

23

24 and not only if their actions or inactions cause a temperature increase to above  
25 1.5°C; not only, in other words, when it would be too late;

26

27 but also before this fateful moment – and especially if States have not taken all the  
28 measures required to be on the right pathway to achieve the 1.5°C limit, at a moment  
29 when it is still possible to correct the trajectory to attain this objective.

30

31 Now, this enumeration is in no way exhaustive. It is aimed only at showing that  
32 Part XII of the Convention does not wait until it’s too late to engage the responsibility  
33 of States.

34

35 Thus, in our opinion, the Attorney-General of Australia<sup>44</sup> was in error when arguing  
36 against the application of article 194 of the Convention to climate change, saying that  
37 these changes result from the cumulative impact of emissions from different sources  
38 and different periods, which would lead, according to him, to major problems in  
39 establishing causation. Well, these questions could be relevant for reparation, but  
40 they are not relevant for the argument regarding cessation nor the applicability of the  
41 Convention to climate change. No State, I will add, may hide behind the problems of  
42 causality, which are numerous, to relieve itself of its individual responsibility pursuant  
43 to the Convention.

44

45 Mr President, let me come to my second point.

46

---

<sup>44</sup> Sitting of 13 September, a.m., Australia, p. 6-7.

1 Now, what I would like you to rule is that no State may hide from its individual  
2 obligations under the Convention on the grounds that climate change and its effects  
3 are global, and that a State alone would not have been able to prevent them.

4  
5 In this respect, the International Court of Justice held that in *Application of the*  
6 *Convention on Genocide* “it is irrelevant whether the State whose responsibility is in  
7 issue claims or even proves that even if it had employed all means reasonably at its  
8 disposal, they would not have sufficed to prevent the [the event to be prevented]”.  
9 Indeed, “the possibility remains that the combined efforts of several States, each  
10 complying with its obligation to prevent, might have achieved the result ... which the  
11 efforts of only one State were insufficient to produce.”<sup>45</sup> And this rule also applies to  
12 the obligations of the Convention, be it the obligations of means or result.

13  
14 So, contrary to the propositions of the Attorney-General of Australia, the applicability  
15 of the Convention may not be challenged on the grounds that climate change can be  
16 resolved solely by negotiation and collective action. No State may hide behind the  
17 necessity for collective action to divest itself of its individual responsibility under the  
18 Convention.

19  
20 Mr President, this brings me now to my third point, and I will be succinct.

21  
22 The DRC requests you rule that in the circumstances of the instant case, States  
23 have the international obligation to adopt compliance plans. These plans should  
24 detail, on the basis of recognized scientific methods, the process that the States will  
25 follow to verifiably comply with their international obligations.

26  
27 Distinguished members of the Tribunal, Mr President – where necessary, help States  
28 draw up these plans giving examples as the Court did in the *Pulp Mills* case. As  
29 Ms Galvao Teles requested, on behalf of Portugal, “Give us the best legal tools  
30 available.”

31  
32 Now, let me come to my fourth and last point.

33  
34 At the beginning of the hearing, we saw the courage of people and communities  
35 affected by climate change, embodied by Ms Naima Te Maile Fifita.

36  
37 It is for these people and these communities that article 230 of the Convention  
38 enshrines the obligation to create and ensure effective relief leading to adequate and  
39 effective compensation.

40  
41 The DRC has shown, in its written observations, that this obligation, which is a  
42 primary obligation, takes the form of, on the one hand, the legal criteria of a fair trial  
43 under international human rights law, and, on the other, the specificities and  
44 particularities of climate change. Let me emphasize only two points.

45  
46 First of all, given that climate change is a global phenomenon, the mechanisms of  
47 relief must be accessible to foreign victims who suffer harm in another country.

---

<sup>45</sup> ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*,  
*Op. cit.*, p. 221, §430.

1 International or administrative cooperation is required to ensure the efficacy of relief.  
2 And I must point out that in the written submissions of our colleagues from the IUCN  
3 include very interesting sources on this matter.  
4

5 Secondly, given that climate change is generally irreversible, relief mechanisms must  
6 include provisions measures of cessation. Once again, the efficacy of remedies is a  
7 condition for the efficacy of Part XII of the Convention.  
8

9 Mr President, distinguished members of the Tribunal, this brings my presentation to  
10 an end, and the DRC expresses the hope that your advisory opinion will make its  
11 mark upon the law and also on the lives of the oceans and of human beings, too.  
12

13 Thank you very much, Mr President, and I would like you to invite to the podium my  
14 colleague and friend, Professor Mingashang.  
15

16 **THE PRESIDENT:** (*continued in English*) Thank you, Mr Angelet. I now invite  
17 Mr Mingashang to continue his statement. You have the floor, Sir.  
18

19 **MR MINGASHANG:** (*interpretation from French*) Mr President, distinguished  
20 members of the Tribunal, I return before you this time to close the oral submissions  
21 of the DRC, and I will start with the principle of common but differentiated  
22 responsibilities and respective capabilities of States.  
23

24 The idea behind this principle goes back to the UN Conference on Trade and  
25 Development, UNCTAD, created in 1964. Now, this can be considered as aligning  
26 with the prospect of a new international climate order, on that would contribute to the  
27 advent of an economic and social system that would have the virtue of correcting the  
28 inequalities and injustices in order to eliminate that gulf which exists today, and had  
29 already existed, between developing and developed countries.  
30

31 The legitimacy of such a principle is simple and clear. Given that environmental  
32 crises of our times are the inevitable consequences of intensive industrialization of  
33 certain countries, it would be wholly unjust to submit developing countries to the  
34 same measures of redress and reparation as those that have been at the source of  
35 this disruption since the 19<sup>th</sup> century.  
36

37 The principle in question is thus based on the idea of positive discrimination between  
38 States, which would take on board the causal link between the degradation of the  
39 global environment and the production and the consumption models of those  
40 countries that have largely profited from it and continue to do so.  
41

42 Its implementation framework in the context of the current ecological transition is  
43 provided, *inter alia*, by Principle 7 of the Rio Declaration.  
44

45 Under article 3(1) of the UNFCCC:

46       The parties should protect the climate system for the benefit of present and  
47       future generations of humankind on the basis of equity and in accordance with  
48       their common but differentiated responsibilities and respective capabilities.  
49  
50

1 Now, the Paris Agreement, which refers to this principle in its preamble, also  
2 stipulates in article 2 that

3  
4 it will be implemented to reflect equity and the principle of common but  
5 differentiated responsibilities and respective capabilities in light of different  
6 national circumstances.

7  
8 Still within the context of State obligations to prevent, reduce and control pollution of  
9 the marine environment, it is appropriate to recall that article 194(1) of UNCLOS had  
10 recommended, already in 1982, that “States ... use for this purpose the best  
11 practicable means at their disposal and in accordance with their capabilities”.

12  
13 This brings us very much to the heart of Part XII of UNCLOS.

14  
15 Now, to remain faithful to this broad brush approach of the DRC’s oral submissions,  
16 I will divide the rest of my proposition into three points.

17  
18 I will start by looking at the factors explaining the principle in question, then I will  
19 point out three avenues for reflection which may provide a legal foundation for an  
20 orthodox interpretation of its scope, before, finally, highlighting the possible  
21 interpretive ambiguities which will need to be reframed for a lucid and useful  
22 understanding of this principle in its current context.

23  
24 There are potentially three decisive factors of the regime of common but  
25 differentiated responsibilities.

26  
27 The first factor is the criterion relating to the degree of contribution to greenhouse  
28 gas emissions.

29  
30 This is the coefficient of evaluation, which in this case is to be assessed in terms of  
31 duration and output. From this point of view, it is important to consider that the  
32 situation of developing States particularly involved today in emitting greenhouse  
33 gases should be assessed comparatively with that of those States which pioneered  
34 the Industrial Revolution. As you know, that was a movement driven by humans  
35 themselves, and specifically as of the beginning of the 19<sup>th</sup> century.

36  
37 Now, the reason is simple. It is because greenhouse gases generally decompose  
38 very slowly, in such fashion that anthropogenic emissions from the beginning of the  
39 last century still have, and will continue to have over time to come, a considerable  
40 impact on ecosystemic equilibrium.

41  
42 Furthermore, there is no need to recall that industrialized societies with failing  
43 economic growth and desperate for technological performance are those which  
44 continue to engender all sorts of stress on the integrity of the global environment.

45  
46 The second factor is the capacity for resilience or criterion of vulnerability.

47  
48 It is important to spell out in this context of these proceedings that damage due to  
49 industrialization in the mad race for economic growth is damage which is irreversible  
50 for all but much more immediately present for some. In this respect, the fate of small



1 island States is alarming. This must be admitted unequivocally. It is no less evident  
2 that numerous other States share this disastrous fate even though they are among  
3 the least equipped to deal with it.

4  
5 Let me give you an illustration. The UNFCCC recognizes in its preamble that

6  
7 low-lying and other small island countries, countries with low-lying coastal arid  
8 and semi-arid areas or areas liable to drought and desertification, developing  
9 countries with fragile mountainous ecosystems are particularly vulnerable to  
10 the adverse effects of climate change.

11  
12 As to the third factor, this relates to the premise based on the respective capacities  
13 of States.

14  
15 In short, such premise should be realized according to economic and financial  
16 potential, on the one hand, and technological and scientific capabilities, on the other,  
17 of the States concerned.

18  
19 Mr President, so what are the three avenues of reflection for an orthodox  
20 interpretation of the scope of the principle in question?

21  
22 Well, you can take, into consideration, respectively, the contribution threshold to the  
23 climate crisis, the level of resultant harm, and, finally, the availability of means to  
24 confront the situation.

25  
26 Let me point out, to start with, that these different factors combine in an infuriatingly  
27 paradoxical fashion.

28  
29 Because industrialized States have at their disposal financial and technical  
30 capacities that are superior to those that are not, or not yet, available to developing  
31 countries, and that such capacities have been acquired, *inter alia*, thanks to  
32 economic development which have ridden roughshod over the limits reasonable for  
33 our planet. Curiously, it is these industrialized States which, relatively speaking,  
34 suffer the least from this climate change, despite being the principal authors and  
35 main contributors.

36  
37 *A contrario* – and this is where the absurdity reaches its peak – it is developing  
38 States, and small island States in particular, who have contributed the least possible  
39 – or perhaps even not yet enough – to climate change which are among those that  
40 are frequently subject to the appalling consequences of atmospheric disruption and  
41 *de facto* sometimes find themselves without the means to do anything about it, very  
42 often risking their own survival.

43  
44 Now, in very concrete fashion, to say this another way. If this paradox of extremes  
45 were to be represented on a graph, the industrialized countries would be at one end  
46 and the developing countries and small island States at the other. But, in between  
47 these two ends of the chain, there is a variety of intermediate stations in a legion of  
48 possible positions.

1 The deplorable consequence which then results is the dilution of the normative  
2 content of the principle itself, on account of the modulation and flexibility of the  
3 positions of different States. Consequently, some States may use this as an excuse  
4 to hide from their responsibilities to others, despite these responsibilities being  
5 established.

6  
7 That is why it is particularly indispensable to clarify this regime, *inter alia*, in the  
8 framework of this request for an advisory opinion.

9  
10 This would ensure – I am quite sure you realize this – that the effectiveness of the  
11 fight against climate change would not be impacted by the specificity of differing  
12 bases which might be used to assess the responsibility and capabilities of any given  
13 State.

14  
15 Why? Because that would, quite simply, deprive the scope of Part XII of UNCLOS of  
16 its *effet utile*.

17  
18 Mr President, distinguished members of the Tribunal, I come now to my last point,  
19 namely, the possible ways around the intellectual artifices aimed at hindering the  
20 efficacy of the principle of common but differentiated responsibilities.

21  
22 Allow me to suggest to your Tribunal at least three different ways to achieve this:

23  
24 First, it is always possible to consider that the regime of common but differentiated  
25 responsibilities and respective capabilities of States is already included in due  
26 diligence obligations, thus there would be no need to add an express reference to  
27 shared common responsibilities. The problem is that that would risk making it  
28 problematic to integrate differentiated responsibilities into all the other relevant  
29 provisions of UNCLOS.

30  
31 Secondly, it might be possible to modulate the obligations to the Convention solely in  
32 relation to the two groups of States situated at the two extremes of the responsibility  
33 chain, namely, developed States on the one hand, and developing States and small  
34 island States on the other. It is, to a certain extent, what the Paris Agreement does;  
35 principally, in article 4(4) and (6) combined.

36  
37 Let me point out in this respect that article 7 of the Paris Agreement, which deals  
38 with adaptation, provides in its paragraph 2, that account must be taken of “the  
39 urgent and immediate needs of developing country Parties that are particularly  
40 vulnerable to the adverse effects of climate change”.

41  
42 And, thirdly, the Tribunal could also apply the principle of shared but differentiated  
43 responsibilities:

44  
45 on the one hand, by setting out the obligations falling to States Parties saying that  
46 this block specifically concerns “industrialized States Parties to the Convention”;

47  
48 and, on the other hand, by identifying *expressis verbis* the situations in which  
49 “account must be taken of the specific needs of less developed States, developing  
50 small island States and developing countries which are particularly vulnerable to the

1 harmful effects of climate change”, in such fashion as to avoid these being saddled  
2 with “a disproportionate or abnormal burden”.

3  
4 As a conclusion, the differentiation is dangerous when it gives States a pretext to  
5 avoid their responsibilities.

6  
7 But it is appropriate and necessary when it consists of lightening the burden of  
8 developing and most vulnerable countries, in such fashion as to fit the combat  
9 against climate change within the context of sustainable development and efforts to  
10 eradicate poverty. That, indeed, is what article 2(1) of the Paris Agreement  
11 recommends.

12  
13 The differentiation is a manifestation of equity in the name of solidarity, and  
14 pragmatism from the real world perspective, in contemporary international relations.

15  
16 It is, thus, indispensable to enable countries of the South, which have large sinks  
17 and reservoirs of greenhouse gases, be they marine or terrestrial, to conserve and  
18 stabilize them.

19  
20 This is specifically relevant for a country like the DRC whose tropical forest, possibly  
21 the last extant lung on the planet but which unceasingly suffers from climate change  
22 whilst paying a high price for all the armed conflict which are arbitrarily transported  
23 onto its territory.

24  
25 Yet if the Congolese forest were to disappear, it wouldn't be only the people of the  
26 Congo who would suffer but surely humanity as a whole.

27  
28 The principle of common but differentiated responsibilities and respective capabilities  
29 isn't only in the interests of the most vulnerable and the most dispossessed States  
30 but also, and more especially, in the interests of the planet Earth as a whole.

31  
32 In this vein, it is necessary to recall the arresting title of the former Judge Dworkin,  
33 “Taking Law Seriously” – in this particular instance, international law applicable to  
34 the obligations of States in view of the response to this request for an advisory  
35 opinion.

36  
37 This would be akin to escaping the potential trap of dogmatic interpretation to instead  
38 draw from the resources required for it from an anthropological point of view, inspired  
39 by the metaphysics which inform the poetry of John Donne, the celebrated 16<sup>th</sup>  
40 century English thinker, to be specific.

41  
42 I will merely paraphrase an extract of his poem entitled “No Man is an Island”,<sup>46</sup>  
43 whose message, imbued with wisdom and human sensitivity, is perfectly  
44 transposable to the alarming situation in which the contemporary world finds itself.

---

<sup>46</sup> *No Man is an Island*:

“No man is an island entire of itself; every man  
is a piece of the continent, a part of the main;  
if a clod be washed away by the sea, Europe  
is the less, as well as if a promontory were, as  
well as any manor of thy friends or of thine

1 No [country] is an island entire of itself;  
2 every [country] is a piece of the continent, a part of the main;  
3 if a clod be washed away by the sea, [the world itself] is the less, as well as if a  
4 promontory were;  
5 And thus, if an island or one of these small island State were egulfed by the waves, it  
6 is the whole planet that would left mutilated.

7  
8 So, now, given the exceptional predicament in which our planet finds itself on  
9 account of the ecological crisis, ask not for whom the bell tolls; it tolls quietly for us  
10 all, inhabitants of planet Earth; it tolls for you, distinguished members of the Tribunal,  
11 it tolls for you, Mr President.

12  
13 I would like to thank you for your kind attention.

14  
15 **THE PRESIDENT:** (*continued in English*) Thank you, Mr Mingashang. I now give the  
16 floor to the representative of the International Union for Conservation of Nature and  
17 Natural Resources, Ms Voigt, to make her statement. You have the floor, Madam.

18  
19 **MS VOIGT:** Mr President, distinguished members of the Tribunal, it is a great honour  
20 to appear before you on behalf of the International Union for Conservation of Nature,  
21 or 'IUCN'. We sincerely thank the Tribunal for the opportunity to contribute again to its  
22 important proceedings, this time on an advisory opinion on the obligations of States  
23 under UNCLOS with respect to climate change and ocean acidification.

24  
25 In our statement, IUCN seeks to provide the Tribunal with its legal analysis of these  
26 obligations, supported by sound science. We will also respond to the questions put  
27 to IUCN by the Tribunal. References are provided in our written transcript.

28  
29 We request to divide our time between Ms Payne, Ms Davenport and myself.  
30 Ms Payne will begin by addressing the distinction between obligations of result and  
31 those of due diligence under the Convention. Ms Davenport will address the question  
32 of when and how external law informs the interpretation of the Convention.

33  
34 Finally, I will focus on the role and function of the United Nations climate treaties in  
35 this respect.

36  
37 I would now kindly request the Tribunal to give the floor to Ms Payne.

38  
39 **THE PRESIDENT:** Thank you, Ms Voight. I now invite Ms Payne to make her  
40 statement. You have the floor, Madam.

41  
42 **MS PAYNE:** Mr President, distinguished members of the Tribunal, good morning. It  
43 is a privilege to appear before you on behalf of IUCN. I thank the Tribunal for the  
44 opportunity to contribute to these proceedings.

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own were; any man's death diminishes me,  
because I am involved in mankind.  
And therefore never send to know for whom  
the bell tolls; it tolls for thee."  
[John Donne, MEDITATION XVII :  
Devotions upon Emergent Occasions]

1 In our written statement, IUCN has acknowledged this Tribunal's jurisdiction for this  
2 matter.

3  
4 There is wide agreement that article 192 imposes a duty on States Parties to protect  
5 and preserve the marine environment.<sup>47</sup> IUCN concurs with other submissions in this  
6 case reflecting general agreement that because greenhouse gases are pollutants as  
7 defined in article 1(1)(4) and are therefore within the scope of the Convention,  
8 States' duties under both articles 192 and 194 encompass climate change and  
9 ocean acidification. Therefore, States must take steps to mitigate greenhouse gas  
10 pollution and to support ocean resilience as a measure to adapt to observed and  
11 predicted warming, deoxygenation, and acidification.<sup>48</sup>

12  
13 We note that the urgency to take these steps increases with every year, as too little  
14 mitigation locks in trajectories with more profound negative consequences. It clearly  
15 follows from the scientific evidence that the marine environment cannot be effectively  
16 protected and preserved without addressing pollution by greenhouse gas emissions.  
17 IUCN underscored, in its written statement, that States need to close the gap  
18 between the actions dictated by the best available science and steps that they have  
19 taken so far to address these dire problems. We identified treaties that are relevant  
20 to the interpretation of these obligations under the Convention, including the UN  
21 Framework Convention on Climate Change and the Paris Agreement.

22  
23 My task this morning is to respond to the question from the Bench that was directed  
24 to IUCN and reads as follows:

25  
26 In light of paragraph 74 et seq. of your written statement, could you please clarify  
27 further which specific obligations mentioned by you insofar as they are relevant to the  
28 Request for an Advisory Opinion are, in your view, obligations of conduct and which  
29 ones are obligations of result, and why?<sup>49</sup>

30  
31 States' duties of protection and preservation of the marine environment through  
32 mitigation of climate change and addressing its adverse effects can take the form of  
33 obligations of result or obligations of conduct depending on the provision in question  
34 and the circumstances. We submit that at least two factors can be used to analyse  
35 whether an obligation should be understood as one of result or conduct; there may  
36 be others. First, does the obligation entail inherently governmental functions?<sup>50</sup>  
37 Second, what aspects of the obligation can be objectively determined to have been  
38 satisfied or breached? While the categories of obligations may not always be sharply  
39 defined, for some obligations the State does have the duty to achieve a specific  
40 result, while for others it must apply its best efforts.

---

<sup>47</sup> *South China Sea Arbitration (Philippines v. China)*, PCA Case No. 2013-19, Award, 12 July 2016, para. 941.

<sup>48</sup> IUCN written statement, paras 209-220; IPCC, *Climate Change 2023: Synthesis Report of the IPCC Sixth Assessment Report* (2023); IPCC, *Special Report on the Ocean and Cryosphere in a Changing Climate* (2019); IPCC, *Global Warming of 1.5°C* (2018); D. Laffoley and J.M. Baxter, (eds.), *Ocean deoxygenation: Everyone's problem - Causes, impacts, consequences and solutions* (IUCN, 2019); D. Laffoley and J.M. Baxter (eds), *Explaining Ocean Warming: Causes, Scale, Effects and Consequences* (IUCN, 2016).

<sup>49</sup> Questions by Individual Judges.

<sup>50</sup> See ILC, *Responsibility of States for Internationally Wrongful Acts*, UN Doc. A/56/49 (2001), article 5.

1 First, I will discuss how these two factors apply to the obligations described as  
2 “obligations of result” in the Convention and in the Seabed Advisory Opinion.<sup>51</sup> Then  
3 I will examine how they apply to States’ obligations with regard to greenhouse gas  
4 emissions.

5  
6 My first example, the requirement for States to assess the potential effects of certain  
7 activities on the marine environment and to communicate reports of the results, is a  
8 well-accepted obligation of result that is found in the Convention, articles 204, 205  
9 and 206. Commentators have identified other obligations of result found in the  
10 Convention, such as article 62(2), the duty of a coastal State to “determine its  
11 capacity to harvest the living resources of the exclusive economic zone”.<sup>52</sup>

12  
13 Quoting from the Seabed Advisory Opinion: “Under the Convention and related  
14 instruments, sponsoring States also have obligations with which they have to comply  
15 independently of their obligation to ensure a certain behaviour by the sponsored  
16 contractor.” That is, the State has obligations that it must perform, and it also has  
17 obligations with regard to the sponsored contractor. In this sense, we understand the  
18 Seabed Advisory Opinion to indicate that the former obligations are generally  
19 obligations of result, and the obligations with regard to the contractor are obligations  
20 of conduct.<sup>53</sup>

21  
22 One obligation of result in that opinion included the duty to perform environmental  
23 impact assessment, which follows because preparing an environmental impact  
24 assessment is a government responsibility. It is also readily apparent whether an  
25 assessment has been conducted or not.

26  
27 With respect to the State’s governance role in “the exercise of control over activities  
28 in the Area”,<sup>54</sup> the sponsoring State is the international actor working in concert with  
29 the authority to oversee compliance by contractors it sponsors, an inherently  
30 governmental function. The result that is required of the State is that it takes  
31 measures within its legal system and that the measures must be “reasonably  
32 appropriate”.<sup>55</sup> The requirement is not that the State always succeeds in preventing  
33 accidents or noncompliance by non-State actors.

34  
35 The Chamber also identified the obligation to apply a precautionary approach and  
36 the obligation to apply best environmental practices as binding on sponsoring States  
37 through both the Mining Code and customary international law.<sup>56</sup> These State  
38 obligations would apply to the State’s own decisions and acts, and those of its  
39 organs and agents.

40  
41 The Seabed Advisory Opinion thus illustrates the kind of obligations that can be “of  
42 result” in the context of protecting and preserving the marine environment from the

---

<sup>51</sup> *Responsibilities and Obligations of States with Respect to Activities in the Area*, Case No. 17, Advisory Opinion, 2011 ITLOS Rep. 10 (1 February).

<sup>52</sup> See Irini Papanicolopulu, “Due Diligence in the Law of the Sea,” in *Due Diligence in the International Legal Order* (Heike Krieger, Anne Peters, and Leonhard Kreuzer, eds, Oxford University Press, 2020).

<sup>53</sup> Seabed Advisory Opinion, para 121.

<sup>54</sup> Seabed Advisory Opinion, para 122.

<sup>55</sup> Seabed Advisory Opinion, para 124; UNCLOS, article 139.

<sup>56</sup> Seabed Advisory Opinion, paras 125-140.

1 deleterious effects of greenhouse gas emissions. The following are indicative of  
2 obligations of result:

3  
4 Under article 194(1) of the Convention, States must individually take *all* measures  
5 consistent with the Convention. Greenhouse gas emissions from State operations  
6 and state-owned property, are within the State's control, and its management of  
7 them is an inherently governmental function. Therefore, using "the best practicable  
8 means at their disposal and in accordance with their capabilities" States must  
9 prevent, reduce and control greenhouse gas emissions from State properties and  
10 operations. If a State takes *no* measures in this respect, it will be in breach of  
11 article 194(1). It is submitted that the need to make those findings does not convert  
12 this obligation of result into an obligation of conduct.

13  
14 Cooperation on a global basis, on a regional basis, directly or through a competent  
15 international organization, as described in article 197, is a State function and an  
16 obligation of result. States may not reach agreement, but they must strive to do so in  
17 good faith. The adoption of the BBNJ Agreement on 19 June 2023 is an example of  
18 successful cooperation that should lead to implementation of environmental impact  
19 assessments and establishment of marine protected areas in areas beyond national  
20 jurisdiction, two mitigation and adaptation strategies to protect and preserve the  
21 marine environment. We understand that more than 60 States signed the BBNJ  
22 Agreement yesterday at the United Nations in New York, the next step in fruitful  
23 cooperation to achieve the objectives of Part XII. The Paris Agreement is another  
24 example that my colleagues, Professor Davenport and Professor Voigt, will discuss.

25  
26 Environmental monitoring, impact assessment and communicating the assessment  
27 reports are all obligations of result required with respect to activities that may cause  
28 substantial greenhouse gas emissions or significant ocean warming, deoxygenation  
29 and acidification. The BBNJ Agreement, which may be considered to embody best  
30 environmental practices for EIA, provides that environmental assessments of all  
31 covered activities must include a cumulative impact analysis that includes the  
32 "consequences of climate change, ocean acidification and related impacts".<sup>57</sup> This  
33 requirement responds to the risk that in dynamic and complex ocean systems, where  
34 multiple factors act together, negative feedback loops can accelerate change and  
35 provoke system changes. In this regard, the *South China Sea* arbitral tribunal  
36 explained that "[w]hile the terms 'reasonable' and 'as far as practicable' contain an  
37 element of discretion for the State concerned, the obligation to communicate reports  
38 of the results is absolute."<sup>58</sup> That is, States have some discretion in how the  
39 assessment is performed, but the article 206 obligation to perform one, and the  
40 article 205 obligation to publish it are obligations of result.

41  
42 It is submitted that States have obligations of result to adopt laws and regulations to  
43 prevent, reduce and control pollution of the marine environment and enforce them  
44 within the framework of its legal system, where an international legal obligation  
45 requires government control over non-State entities.<sup>59</sup> Fulfilling these governmental

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<sup>57</sup> BBNJ Agreement, A/CONF.232/2023/4\* (19 June 2023), Art 1.6, 27, 30, 31, 33.

<sup>58</sup> *South China Sea Arbitration (Philippines v. China)* PCA Case No. 2013-19, Award, 12 July 2016, para. 948.

<sup>59</sup> UNCLOS, Part XII, Section V; Seabed Advisory Opinion, paras 75, 119 ("The purpose of requiring the sponsorship of applicants for contracts ... is to achieve the result that the obligations set out in the

1 functions is uniquely the role of the State, and “a violation of this obligation entails  
2 ‘liability’”, in the words of the Seabed Advisory Opinion.<sup>60</sup>

3  
4 Where a State’s obligations concern the activities of non-state actors that are not  
5 attributable to the State under international law, the standard of care is due  
6 diligence.<sup>61</sup> The State still has important obligations of conduct in its regulation of  
7 private actors, even though international law recognizes that the State cannot be  
8 expected to exercise total control over their acts.<sup>62</sup> The State “may be responsible for  
9 the effects of the conduct of private parties if it failed to take necessary measures to  
10 prevent those effects”.<sup>63</sup>

11  
12 When the State’s obligation is one of due diligence, it must “deploy adequate means  
13 ... exercise best possible efforts ... do the utmost, to obtain this result.”<sup>64</sup> In other  
14 words, a State must use its best efforts to address the conduct of non-state actors,  
15 including through legislation and regulation, in light of the risk at stake and based on  
16 the precautionary principle, informed by best available science, and it must adopt  
17 effective compliance measures.

18  
19 My colleagues will further address the measures that States are required to  
20 implement under the Convention in light of relevant international law, in particular the  
21 Paris Agreement.

22  
23 Thank you, Mr President and members of the Tribunal, for your kind attention.  
24 Mr President, I respectfully request that you call upon my colleague, Ms Davenport.

25  
26 **THE PRESIDENT:** Thank you, Ms Payne. I now invite Ms Davenport to make her  
27 statement. You have the floor, Madam.

28  
29 **MS DAVENPORT:** Good afternoon, Mr President and distinguished members of the  
30 Tribunal. It is truly an honour and privilege to appear before you today.

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Convention, a treaty under international law which binds only States Parties thereto, are complied with by entities that are subjects of domestic legal systems.”).

<sup>60</sup> Seabed Advisory Opinion, para. 109.

<sup>61</sup> *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion of 1 February 2011) ITLOS Reports 2011, para 146 “as the violation of such laws and regulations by vessels is not per se attributable to the flag State. The liability of the flag State arises from its failure to comply with its “due diligence” obligations concerning IUU fishing activities conducted by vessels flying its flag in the exclusive economic zones of the SRFC Member States.”

<sup>62</sup> *Alabama Claims of the United States of America against Great Britain*, Arbitral Award of 14 September 1872, (2011) 29 RIAA 125–34; 145 CTS 99; Treaty between the United States and Great Britain, 1871 (Washington Treaty) (Determining whether Great Britain breached a treaty of neutrality by failing to exercise due diligence in preventing private actors from selling ships).

<sup>63</sup> ILC, Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/49 (2001), Commentary to chapter II, 39, para 4; see Seabed Advisory Opinion, para. 131 (“This obligation applies in situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks. A sponsoring State would not meet its obligation of due diligence if it disregarded those risks. Such disregard would amount to a failure to comply with the precautionary approach.”); N. Craik, T. Davenport, & R. Mackenzie, “Allocation of Liability for Environmental Harm in Areas beyond National Jurisdiction,” *in* *Liability for Environmental Harm to the Global Commons* (Cambridge University Press 2023) pp. 95-132.

<sup>64</sup> Seabed Advisory Opinion, para. 110.



1 My task today is to address the Tribunal on how the obligations under Part XII of the  
2 Convention are necessarily informed by external instruments with a focus on the  
3 UNFCCC and the Paris Agreement, given its pertinence to the questions posed by  
4 COSIS. I will make two points in support of this.

5  
6 First, the Convention, as the cornerstone of the international regime on marine  
7 environmental protection, was clearly intended to adapt to changing circumstances  
8 and advances in scientific knowledge.<sup>65</sup> Second, external instruments play a vital  
9 role in ensuring the continuing durability of the Convention as a living instrument.  
10 These arguments are supported by both the provisions in the Convention, as well as  
11 the rules of treaty interpretation.

12  
13 With regard to my first point, the Convention stands at the apex of marine  
14 environmental protection, as evidenced by the Convention itself.<sup>66</sup> The preamble  
15 reflects the intention of the parties to “settle all issues relating to the law of the sea”  
16 and to “establish a legal order of the seas and oceans” that, amongst other things,  
17 promotes the protection and preservation of the marine environment. The  
18 Convention is the only global treaty that comprehensively addresses all matters  
19 related to the protection of the marine environment.<sup>67</sup> Moreover, article 237(2)  
20 provides that obligations assumed by States Parties under other marine  
21 environmental treaties “should be carried out in a manner consistent with the general  
22 principles and objectives” of the Convention.<sup>68</sup>

23  
24 The Convention, as a living treaty and bedrock for marine environmental protection,  
25 must be interpreted to address the most pressing environmental development since  
26 its adoption, namely, the grave and potentially catastrophic impact that emissions of  
27 greenhouse gases have on the marine environment. First, the Convention uses  
28 general terms deliberately intended by the negotiators to have meaning or content  
29 capable of evolving over time. The Convention thus falls squarely within the concept  
30 of “evolutionary treaties” characterized by the ICJ in the *Dispute regarding*  
31 *Navigational Rights and Related Rights* as treaties that use generic terms; have  
32 been in force for a long time or are of a continuing duration; and where the parties  
33 “must be presumed, as a general rule, to have intended those terms to have an  
34 evolving meaning.”<sup>69</sup>

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<sup>65</sup> Alan Boyle, “Further Development of the 1982 Convention on the Law of the Sea: Mechanisms for Change”, in David Freestone, Richard Barnes and David Ong (eds), *The Law of the Sea: Progress and Prospects* (Oxford University Press, 2006), 40 - 62; Alan Boyle, “Protecting the Marine Environment from Climate Change: The LOSC Part XII Regime”, in Elise Johansen et al, *The Law of the Sea and Climate Change* (Cambridge University Press, 2021), 81 - 103, p. 83; Tomas Heidar, “Introduction: How Does the Law of the Sea Adapt to New Knowledge and Changing Circumstances”, in Tomas Heidar (ed), *New Knowledge and Changing Circumstances in the Law of the Sea* (Brill 2020), 1-12, pp. 1-2.

<sup>66</sup> Robin Churchill, Vaughan Lowe and Amy Sander, *The Law of the Sea, Fourth Edition* (Melland Schill Studies in International Law, 2022), pp. 603 - 604; D. Czybulka, article 192, in A. Proelss, *United Nations Convention on the Law of the Sea: A Commentary* (Hart, 2017), 1277 - 1287, p. 1278.

<sup>67</sup> Churchill et al, 640.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* ICJ Reports 2009, p. 33. para. 65.

1 Second, Part XII relies on rules and standards developed by competent international  
2 organizations or diplomatic conferences to implement Convention obligations in  
3 relation to specific sources of pollution. This ensures that the Convention “adapts to  
4 new knowledge and changing circumstances” as it links obligations under the  
5 Convention to rules and standards that are continually being promulgated to address  
6 new threats to the environment.<sup>70</sup> Third, article 237(1) envisages the adoption of  
7 subsequent marine environmental protection agreements “which may be concluded  
8 in furtherance of the general principles” of the Convention to implement Convention  
9 obligations.

10  
11 This leads to my second point on the critical role that the UNFCCC and the Paris  
12 Agreement play in informing the content of obligations under Part XII and particularly  
13 articles 192, 194, 207, and 212.

14  
15 First, the rules, principles and norms under these treaties inform the article 192  
16 obligation to protect and preserve the marine environment, as well as article 194  
17 obligations to take all necessary measures to prevent, reduce and control pollution  
18 from *any* source, including the “release of toxic, harmful or noxious substances,  
19 especially those which are persistent” from land-based sources or from or through  
20 the atmosphere.<sup>71</sup>

21  
22 The UNFCCC and the Paris Agreement are binding legal treaties which clearly  
23 constitute “other rules of international law not incompatible” with the Convention  
24 under article 293. The global climate treaties are in no way incompatible with the  
25 Convention. In fact, the UNFCCC defines the global climate system as including the  
26 hydrosphere and recognizes the interactions between the climate system and marine  
27 ecosystems, as well as the possible adverse effects of sea-level rise on islands and  
28 coastal areas.<sup>72</sup> It also sets the overarching goal of promoting the enhancement of  
29 sinks and reservoirs of all greenhouse gases, which include ocean and marine  
30 ecosystems.<sup>73</sup> Similarly, the preamble of the Paris Agreement affirms the importance  
31 of ensuring the integrity of all ecosystems, including the oceans. 5(1) encourages  
32 Parties to take actions to conserve and enhance carbon sinks and reservoirs, which  
33 include the oceans.<sup>74</sup>

34  
35 The global climate treaties also constitute “relevant rules of international law  
36 applicable in relations between the parties” which shall be taken into account in  
37 interpreting a treaty under article 31(3)(c) of the Vienna Convention on the Law of  
38 Treaties. 31(3)(c) expresses the principle of “systemic integration”<sup>75</sup> and ensures, as  
39 observed by the ICJ, that treaties do not operate in isolation but are “interpreted and  
40 applied within the framework of the entire legal system prevailing at the time of

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<sup>70</sup> Heidar, Introduction, p. 6.

<sup>71</sup> Alan Boyle, Protecting the Marine Environment from Climate Change, p. 89.

<sup>72</sup> UN Framework Convention on Climate Change, preamble.

<sup>73</sup> UN Framework Convention on Climate Change, art 2 and art 4 (1) (d).

<sup>74</sup> Paris Agreement, preamble, para. 13; art 5 (1).

<sup>75</sup> International Law Commission (ILC), "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission Finalized Martin Koskenniemi," UN Doc A/CN.4/L.682 (13 April 2006).

1 interpretation”.<sup>76</sup> The global climate treaties have received nearly universal  
2 acceptance, with 198 parties to the UNFCCC and 195 parties to the Paris  
3 Agreement, and represent the consensus of States on how to address the  
4 multifaceted issue of climate change. Importantly, all the parties to the Convention  
5 are parties to both the UNFCCC and the Paris Agreement, and these treaties are  
6 clearly applicable in the relations between States Parties to the Convention.

7  
8 The Tribunal has relied on other treaties and instruments in determining the meaning  
9 of terms and obligations in the Convention and subsidiary instruments. For example,  
10 in the *M/V Saiga* case, this Tribunal referred to three international conventions in  
11 determining the meaning of “genuine link” in article 91 of the Convention.<sup>77</sup> Similarly,  
12 in assessing what constitutes a precautionary approach, the Seabed Disputes  
13 Chamber referred to Principle 15 of the Rio Declaration and “to a growing number of  
14 international treaties and other instruments which reflect the formulation of  
15 Principle 15”.<sup>78</sup>

16  
17 In the *South China Sea* arbitration, the arbitral tribunal found that article 192 imposes  
18 an obligation on States Parties, the content of which is informed by other provisions  
19 of Part XII and *other applicable rules of international law*, including “the corpus of  
20 international law relating to the environment.”<sup>79</sup> Notably, it said that while it did not  
21 have the jurisdiction to decide on violations of the Convention on Biological Diversity,  
22 it could consider the “relevant provisions of the [CBD] for purposes of interpreting the  
23 content and standard of articles 192 and 194 of the Convention”.<sup>80</sup> It also referred to  
24 the appendices of the Convention on International Trade in Endangered Species of  
25 Wild Fauna and Flora “which it considered to be the subject of nearly universal  
26 adherence”, and thus forming part of the general corpus of international law that  
27 informs the content of article 192 and article 194(5).<sup>81</sup>

28  
29 In addition, we would like to reiterate that instruments which are considered non-  
30 binding are also relevant to the interpretation of the Convention. The ICJ found that  
31 recommendations of the Whaling Commission, which take the form of resolutions,  
32 are relevant for the interpretation of the International Convention on the Regulation  
33 of Whaling because they were adopted by consensus or by a unanimous vote.<sup>82</sup> The  
34 Seabed Disputes Chamber has also found that non-binding recommendations on  
35 environmental impact assessments issued by the Legal and Technical Commission  
36 added precision and specificity to the environmental impact assessment obligations

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<sup>76</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (Advisory Opinion) [1971] ICJ Rep 16, para. 31.

<sup>77</sup> *M/V Saiga (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10, paras. 83 - 86. These are: the United Nations Convention on Conditions for Registration of Ships; UN Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks; and the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Sea.

<sup>78</sup> Seabed Advisory Opinion, paras.125-129.

<sup>79</sup> *South China Sea Arbitration* (2016), para. 941.

<sup>80</sup> *South China Sea Arbitration* (Philippines v. China), PCA Case No. 2013-19, Award on Jurisdiction and Admissibility, 29 October 2015, para. 176.

<sup>81</sup> *South China Sea Arbitration* (2016), para. 956.

<sup>82</sup> *Whaling in the Antarctic* (Australia v. New Zealand Intervening), ICJ Reports 2014, ICJ, Judgment, 31 March 2014, p. 248, para. 46.

1 in article 206 of the Convention.<sup>83</sup> As Professor Voigt will explain, this is particularly  
2 relevant when considering the normative impact of decisions adopted under the  
3 auspices of the global climate treaties.

4  
5 The UNFCCC and the Paris Agreement are also relevant to the obligations to  
6 prevent, reduce and control pollution from land-based and atmospheric sources  
7 under article 207, respectively. In particular, paragraph 1 of article 207 and 212  
8 oblige States Parties to adopt laws and regulations to prevent, reduce and control  
9 land-based and atmospheric pollution “taking into account internationally agreed  
10 rules, standards and recommended practices and procedures”. Again, these treaties  
11 have received nearly universal acceptance and clearly meet the threshold of  
12 “internationally agreed rules and standards”.

13  
14 Furthermore, given that all Convention States Parties are already legally bound by  
15 the UNFCCC and the Paris Agreement, the obligation to “take into account” means,  
16 at the minimum, adopting laws and regulations that give effect to the obligations  
17 under these treaties. To be clear, our argument is not that these treaties are directly  
18 applicable to States Parties to the Convention, but that by becoming parties to the  
19 Convention, States agreed that these “internationally agreed rules, standards and  
20 recommended practices and procedures” would set the relevant standards of States  
21 Parties to combat land-based and atmospheric pollution.

22  
23 To conclude, we wish to reiterate that while the Convention is at the centre of marine  
24 environmental protection for the oceans, and the global climate treaties are at the  
25 centre of the international climate change regime, this in no way means that they are  
26 mutually exclusive. The global climate treaties are not *lex specialis* and there is no  
27 conflict between these treaties and the Convention. Instead, they are mutually  
28 supportive and reinforcing, with the Convention serving an integrative role. The rules,  
29 principles and norms under the global climate treaties provide invaluable specificity  
30 to the obligations under the Convention and both must be applied complementarily.

31  
32 This does not involve a revision or rewriting the Convention but an interpretation that  
33 is faithful to the ordinary meaning and context of the Convention, including Part XII,  
34 in light of its overarching object and purpose which we submit is to protect and  
35 preserve the marine environment. To hold otherwise, weakens the Convention’s  
36 robust provisions on marine environmental protection. Moreover, an interpretation  
37 that is not informed by the global climate treaties renders the Convention frozen in  
38 time instead of the “dynamically evolving legal framework for all ocean activities” that  
39 was intended by the negotiators.<sup>84</sup>

40  
41 Thank you very much for your kind attention and I would now like to respectfully  
42 request the Tribunal to give the floor to my colleague Professor Christina Voigt.  
43 Thank you.

44  
45 **THE PRESIDENT:** Thank you, Ms Davenport. We have reached 1 o’clock. I would  
46 like to get an indication from Ms Voigt whether you wish to complete your statement

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<sup>83</sup> Seabed Advisory Opinion, para. 149.

<sup>84</sup> Catherine Redgwell, “Treaty Evolution, Adaptation and Change: Is the LOSC ‘Enough’ to Address Climate Change Impacts on the Marine Environment? (2019) 34 International Journal of Marine and Coastal Law 440–457, 445.

1 at this time, or would you prefer to do it after the lunch break? Please, you may  
2 address us from the podium.

3

4 **MS VOIGT:** My statement is timed for exactly 20 minutes. If that is acceptable to the  
5 Tribunal, I would prefer to do it now but I am in your hands.

6

7 **THE PRESIDENT:** Please do.

8

9 **MS VOIGT:** Thank you so much. Thank you.

10

11 In my statement, I follow on from the argument presented by Ms Davenport that the  
12 Convention must be interpreted consistently with, but not limited to, the United  
13 Nations climate treaties, especially the Paris Agreement. I will limit my statement to  
14 addressing the legal standards established in the Paris Agreement and how they are  
15 relevant to the interpretation of Part XII of the Convention.

16

17 My first point is that the goal of holding warming to 1.5°C as expressed in the Paris  
18 Agreement must guide our understanding of the obligations in Part XII of the  
19 Convention, in the context of climate change.

20

21 The Paris Agreement was adopted under the Framework Convention on Climate  
22 Change, or the UNFCCC, with the aim to strengthen the global response to the  
23 threat of climate change. It is the most recent and the most comprehensive  
24 multilateral climate treaty. It is not a protocol to the UNFCCC nor an implementing  
25 agreement.

26

27 With 195 parties, the Paris Agreement reflects in its goals contained in article 2(1), a  
28 global, almost universal, science-based, political and legal consensus on the  
29 acceptable threshold of climatic change and how to address its adverse effects.  
30 These goals set international standards with significant legal implications.<sup>85</sup>

31

32 Where the UNFCCC in article 2 sets forth the objective to stabilize greenhouse gas  
33 concentrations in the atmosphere at a level that would prevent dangerous  
34 interference with the climate system, there is now overwhelming scientific evidence  
35 and political consensus indicating that this is a level at which global average  
36 temperature increases do not surpass 1.5°C.<sup>86</sup>

37

38 This is reflected in article 2(1)(a) of the Paris Agreement as: “Holding the increase in  
39 the global average temperature to well below 2°C above pre-industrial levels and  
40 pursuing efforts to limit the temperature increase to 1.5°C”.<sup>87</sup>

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<sup>85</sup> L Rajamani, “The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligation” (2016) 28 *Journal of Environmental Law* 337; D Bodansky, “The Legal Character of the Paris Agreement” (2016) 25 *Review of European, Comparative and International Environmental Law* 2; BJ Preston, “The Influence of the Paris Agreement on Climate Litigation: Legal Obligations and Norms (Part I)” (2020) 33 *Journal of Environmental Law* 1; C Voigt “The Power of the Paris Agreement in International Climate Litigation” (2023) 32 *Review of European, Comparative and International Environmental Law* 2, 237-249 (open access).

<sup>86</sup> IPCC, 2023: Summary for Policymakers, in: *Climate Change 2023: Synthesis Report, Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, H. Lee and J. Romero (eds.)].

<sup>87</sup> Paris Agreement, article 2(1)(a).

1 While the Paris Agreement sets a twofold temperature goal, Parties in their  
2 successive decisions have accepted the *priority* of holding increases to 1.5°C.

3  
4 In 2021 in Glasgow, all Parties by consensus “*resolved* to pursue efforts to limit the  
5 temperature increase to 1.5°C”.<sup>88</sup> This is *because* they recognize “that the impacts of  
6 climate change will be much lower at the temperature increase of 1.5°C compared  
7 with 2°C.”<sup>89</sup> Last year in Sharm-el Sheikh, all Parties *reiterated* this resolve.<sup>90</sup>

8  
9 This is in line with science. At the request of the Paris Agreement Parties, the IPCC  
10 dedicated a special report to the 1.5°C threshold, published in 2018,<sup>91</sup> where it found  
11 significant differences in impacts between keeping temperature increases within  
12 1.5°C as compared to 2°C, such as severe coral reef losses, and increasing multiple  
13 risks to low-lying countries.<sup>92</sup> Every additional increment of emissions, and every  
14 fraction of a degree of consequent warming, has significant impacts on marine  
15 environment.

16  
17 Mr President, members of the Tribunal, 1.5°C is a critical threshold, with real  
18 biophysical consequences if surpassed. It would be reckless to contemplate  
19 trajectories that allow for overshooting and returning to 1.5°C in the longer term. It is  
20 particularly critical for several key ecosystems which already are in a precarious  
21 situation.<sup>93</sup> The maximum threshold of 1.5°C warming must inform the interpretation

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<sup>88</sup> Decision 1/CMA.3 Glasgow Climate Pact, para 21.

<sup>89</sup> Decision 1/CMA.3 Glasgow Climate Pact, para 21.

<sup>90</sup> Decision 1/CMA.4, Sharm el-Sheikh Implementation Plan, para 8.

<sup>91</sup> IPCC, 2018: *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* [Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA

<sup>92</sup> With respect to the ocean, the report noted: «Limiting global warming to 1.5°C compared to 2°C is projected to reduce increases in ocean temperature as well as associated increases in ocean acidity and decreases in ocean oxygen levels (*high confidence*). Consequently, limiting global warming to 1.5°C is projected to reduce risks to marine biodiversity, fisheries, and ecosystems, and their functions and services to humans, as illustrated by recent changes to Arctic sea ice and warm-water coral reef ecosystems (*high confidence*).” Headline statements, IPCC, 2018: Summary for Policymakers. In: *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* [Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA.

<sup>93</sup> Chapter 15 of the IPCC Working Group II AR6 report states that ‘Models are currently predicting large-scale loss of coral reefs by mid-century under even low-emission scenarios. Even achieving emission reduction targets consistent with the ambitious 1.5°C of global warming under the Paris Agreement will result in the further loss of 70-90per cent of reef-building corals compared to today, with 99per cent of coral reefs being lost under warning of 2°C or more above the preindustrial period.’ Mycoo, M., M. Wairiu, D. Campbell, V. Duvat, Y. Golbuu, S. Maharaj, J. Nalau, P. Nunn, J. Pinnegar, and O. Warrick, 2022: *Small Islands*. In: *Climate Change 2022: Impacts, Adaptation and Vulnerability*. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, at 2056. The IPCC Sixth Assessment Report is clear that near-term actions that limit global warming to close to 1.5°C, or remaining below 1.5°C, would substantially reduce projected losses and damages. Projected impacts are less severe with shorter duration and lower levels of

1 of the obligations contained in Part XII of UNCLOS, as warming beyond 1.5°C would  
2 result in dangerous anthropogenic interference with the climate system, including the  
3 marine environment.

4  
5 Let us remember that the ocean is part of the climate system as defined in  
6 article 1(3) of the United Nations Framework Convention on Climate Change where it  
7 says that climate system means “the totality of the atmosphere, hydrosphere,  
8 biosphere and geosphere and their interactions”.

9  
10 My second point breaks down the 1.5°C threshold to specific timelines and collective  
11 emission pathways.

12  
13 The temperature threshold cannot be viewed in isolation from article 4(1) of the Paris  
14 Agreement, which sets a *timeline* for achieving it. This timeline foresees to “reach  
15 global peaking of greenhouse gas emissions *as soon as possible*, recognizing that  
16 peaking will take longer for developing country parties, and to undertake rapid  
17 reductions thereafter in accordance with best available science, so as to achieve a  
18 balance between anthropogenic emissions by sources and removals by sinks of  
19 greenhouse gasses in the second half of this century”.<sup>94</sup> This “balance between  
20 emissions and removals” is often referred to as “net-zero emissions” or sometimes  
21 as “climate neutrality”.

22  
23 This timeline is consistent with the IPCC 6<sup>th</sup> Assessment Report. The only scenario  
24 that, according to the IPCC, is very likely to keep temperature increases close to  
25 1.5°C without overshoot includes reducing global carbon dioxide emissions by  
26 45 per cent by 2030 (that is seven years from now) and have emissions declining to  
27 net-zero around 2050, followed by net-negative emissions until the end of the  
28 century and most likely long thereafter.<sup>95</sup> The time frame set out in article 4(1) of the  
29 Paris Agreement for achieving global net zero emissions is therefore *fully supported*  
30 by the findings of the IPCC.

31  
32 This understanding was endorsed by *all* parties to the Paris Agreement when they  
33 unanimously recognized in 2021 “that limiting temperature increases to 1.5°C  
34 requires rapid, deep and sustained reductions in global greenhouse gas emissions,  
35 including reducing global carbon dioxide emissions by 45 per cent by 2030 relative to  
36 the 2010 level and to net zero around mid-century, as well as deep reductions in  
37 other greenhouse gases”.<sup>96</sup>

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overshoot of 1.5°C. IPCC, 2022: Summary for Policymakers. In: *Climate Change 2022: Impacts, Adaptation and Vulnerability*. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, at 13, 19.

<sup>94</sup> Paris Agreement, article 4(1).

<sup>95</sup> Already the IPCC Report on 1.5°C of Global Warming (2018) noted that “In model pathways with no or limited overshoot of 1.5°C, global net anthropogenic CO<sub>2</sub> emissions decline by about 45 per cent from 2010 levels by 2030 (40–60 per cent interquartile range), reaching net zero around 2050 (2045–2055 interquartile range)” IPCC (2018). This was confirmed by the IPCC in the sixth Assessment report, stating “Pathways that limit warming to 1.5°C (>50per cent) with no or limited overshoot reach net zero CO<sub>2</sub> in the early 2050s, followed by net negative CO<sub>2</sub> emissions.” IPCC, 2023: Summary for Policymakers. In: *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, B.6.1.

<sup>96</sup> Decision 1/CMA.3, Glasgow Climate Pact, para 22.

1 This, Mr President, distinguished members of the Tribunal, is – at a minimum – what  
2 parties collectively need to do.

3  
4 My third point addresses the standard of conduct for each party of the Paris  
5 Agreement.

6  
7 In order to reach the temperature goal set in the Paris Agreement, each Party has a  
8 number of legal obligations. Most of these are obligations of result, but they are  
9 procedural in nature and require parties to submit specific information at certain  
10 points in time in regular intervals and to report or account in accordance with agreed  
11 rules. The core legal obligation of all Parties is to prepare, communicate and  
12 maintain successive nationally determined contributions (or NDCs).<sup>97</sup>

13  
14 But does this mean that everything goes? Certainly not.

15  
16 The Paris Agreement is often wrongly characterized as a purely “bottom-up”  
17 agreement, assuming that the level of ambition included in NDCs is entirely left to  
18 parties’ own discretion. We submit, respectfully, that this is not correct.

19  
20 The Agreement incorporates several normative parameters to progressively scale up  
21 mitigation ambition in light of the temperature goal. These include that each Party’s  
22 successive NDC “will represent a progression beyond the Party’s then current NDC  
23 and reflect its highest possible ambition, reflecting common but differentiated  
24 responsibilities and respective capabilities, in the light of different national  
25 circumstances”, as stated in article 4(3). Moreover, Parties’ NDCs must be informed  
26 by the outcome of the Global Stocktake – which is taking place this year for the first  
27 time.<sup>98</sup> These elements are embedded within the multilaterally agreed, iterative five-  
28 year processes under the Paris Agreement, which are purpose-built to increase  
29 climate action over time, and many of which are only about to start as we speak.

30  
31 These normative parameters circumscribe the conduct expected of parties when  
32 carrying out their legal obligation to prepare and communicate their respective  
33 NDCs. They are, in other words, “ambition drivers” of Parties’ NDCs.

34  
35 We submit to the Tribunal that article 4(3) can be understood as a due diligence  
36 standard.<sup>99</sup> It contains the substantive expectation of each party to deploy its “best

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<sup>97</sup> Paris Agreement, article 4(2).

<sup>98</sup> Paris Agreement, article 14 and article 4(9). The Global Stocktake (GST) takes place for the first time in 2023 and every five years thereafter. The outcome of the GST shall inform the next round of NDCs which are due in 2025 and every 5 years thereafter. Linking with the requirements of progression and highest possible ambition in article 4.3, the GST outcome is an important normative element to be considered by Parties when preparing their successive NDC. article 14 (3) states that “3. The outcome of the global stocktake shall inform Parties in updating and enhancing, in a nationally determined manner, their actions and support in accordance with the relevant provisions of this Agreement, as well as in enhancing international cooperation for climate action”, while article 4(9) states “9. Each Party *shall* communicate a nationally determined contribution every five years in accordance with decision 1/CP21 and any relevant decisions of the Conference of the Parties serving as the meeting of the Parties to this Agreement *and be informed by the outcomes of the global stocktake referred to in article 14.*” (emphasis added) The synthesis of the first Global Stocktake was released on 8 September 2023 and can be accessed here: <https://unfccc.int/documents/631600>

<sup>99</sup> L Rajamani, “Due Diligence in International Climate Law” in H Krieger et al (eds), *Due Diligence in the International Legal Order* (Oxford University Press 2020) 169; C Voigt and F Ferreira “Dynamic



1 efforts”, or simply do the best it can in each successive NDC.<sup>100</sup> The operative word  
2 “will” was deliberately chosen by consensus by all parties, because it carries  
3 stronger legal weight than “should”, although it does not amount to a strict legal  
4 obligation of “shall”. Rather, it can be seen as a standard of conduct<sup>101</sup> that each  
5 party will take all appropriate measures at its disposal.<sup>102</sup> This was recognized in the  
6 IPCC Working Group III chapter on international cooperation, which observed that  
7 “[w]hile what represents a Party’s highest possible ambition and progression is not  
8 prescribed by the Agreement or elaborated in the Paris Rulebook ... these  
9 obligations *could be read to imply a due diligence standard*.”<sup>103</sup>

10  
11 Mr President, members of the Tribunal, in light of the significant risk that climate  
12 change poses to the ocean, we submit to this Tribunal that “highest possible  
13 ambition” be understood in a way that each Party exerts its best efforts and uses all  
14 the means at its disposal to reduce, over time, all greenhouse gas emissions from  
15 activities which take place in its territory, or are under its jurisdiction or control,  
16 aligned with the 1.5°C threshold.

17  
18 As the Seabed Disputes Chamber confirmed, in order to act with due diligence, a  
19 party must deploy adequate means, exercise best efforts and do the utmost.<sup>104</sup>  
20 Accordingly, parties need to exercise best efforts in their climate action, laws, plans,  
21 regulations, including in their NDC. The NDC would need to be based on a  
22 comprehensive assessment of all mitigation options in all relevant economic sectors.  
23 “Highest possible ambition” means “doing the utmost”. It also implies that the  
24 extraterritorial consequences, including on the marine environment, need to be taken  
25 into account.<sup>105</sup> This includes scope 1, 2 and 3 emissions. It would, for example,  
26 hardly be justifiable for a State with significant fossil fuel exports, to claim “highest  
27 possible ambition” in its climate policy and to have acted with due diligence, if  
28 emissions caused by these exports remain entirely unaddressed.

29  
30 Acting with due diligence requires Parties to deploy all adequate political, regulatory,  
31 legal, socioeconomic, financial, and institutional capacities in defining their NDC  
32 objectives. Moreover, parties are expected to align their level of ambition with their  
33 respective responsibilities and capabilities, in light of different national

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Differentiation”: The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement” (2016) 5 *Transnational Environmental Law* 2, 285-303.

<sup>100</sup> B Mayer “International Law Obligations Arising in relation to Nationally Determined Contributions» (2018) *Transnational Environmental Law* 7(2), 251-275; C Voigt “The Power of the Paris Agreement in International Climate Litigation” (2023) 32 *Review of European, Comparative and International Environmental Law* 2, 237-249 (open access).

<sup>101</sup> Rajamani considers the concept ‘a regime-specific marker of due diligence’; see L Rajamani “Due Diligence in International Climate Law” in H Krieger et al (eds) *Due Diligence in the International Legal Order* (Oxford University Press 2020) 169.

<sup>102</sup> See, e.g., the first report of the International Law Association (ILA) Study Group on Due Diligence in International Law, ‘First Report (7 March 2014) <[https://www.ila-hq.org/en\\_GB/documents/first-report-washington-dc-2014](https://www.ila-hq.org/en_GB/documents/first-report-washington-dc-2014)>.

<sup>103</sup> A Patt et al, “International Cooperation” in PR Shukla et al (eds), *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2022) 1451, 1466.

<sup>104</sup> Seabed Advisory Opinion, para. 110.

<sup>105</sup> This issue is relevant in several climate cases pending before the ECtHR, most directly in *Duarte Agostinho and others v Portugal and 32 Other States* App No 39371/20 (ECtHR, communicated 13 November 2020, Hearing scheduled for 27 September 2023).

1 circumstances. This means that countries with higher responsibility and/or more  
2 capacity must go further and faster in their NDC objectives consistent with the  
3 emission pathways necessary to stay at maximum 1.5°C. Countries with less  
4 capacity may need more time, technical assistance and financial support in order to  
5 implement policies, plans and laws that reduce greenhouse gas emissions to these  
6 levels.

7  
8 Now, while it is clear that parties have the obligation to prepare, communicate and  
9 maintain an NDC, they arguably do not have the obligation of result under the Paris  
10 Agreement to achieve the objectives of their NDCs.<sup>106</sup> The second sentence of  
11 article 4(2) provides that “Parties shall pursue domestic mitigation measures, with  
12 the aim of achieving the objectives of such NDCs”.<sup>107</sup> This has been interpreted as  
13 not establishing an obligation of result on each party to implement or achieve its  
14 NDC, but to act in good faith with the intention to do so.<sup>108</sup>

15  
16 This does not mean, however, that the implementation and achievement of NDCs fall  
17 entirely outside the scope of the Agreement. It is submitted that the second sentence  
18 of article 4(2) contains a legal obligation of result to pursue domestic mitigation  
19 measures. If a party takes no measure, this would be a violation of that provision, but  
20 this obligation is coupled with a due diligence standard to achieve the NDC.<sup>109</sup> The  
21 achievement does not become legally binding, but the measures adopted must be  
22 necessary, must be meaningful, timely and, indeed, effective to function as a means  
23 to this end.

24  
25 Mr President, members of the Tribunal, the simple truth is that the marine  
26 environment cannot be effectively protected and preserved without addressing  
27 climate change and its adverse effects. Our core legal argument, therefore, is that  
28 Part XII needs to be read in light of the legal standards of result and of conduct  
29 contained in the Paris Agreement, which implies that States have to reduce their  
30 land-based, marine-based and atmospheric emissions at a level aligned with the  
31 collective 1.5°C threshold in a way that reflects each party's highest possible  
32 ambition, and to adopt effective national measures to this end.

33  
34 This requires parties to take all necessary measures aligned with the collective  
35 pathway to rapidly, deeply and immediately reduce greenhouse gas emissions by  
36 45 per cent in 2030 with a view to achieving global net-zero CO<sub>2</sub> emissions by 2050  
37 and net-negative emissions thereafter. Reducing CO<sub>2</sub> emissions at this level also  
38 addresses the challenge of ocean acidification.

39  
40 My fourth and final point is that parties also have obligations to take adaptation  
41 measures to protect and preserve the marine environment. The science is clear that  
42 coral reefs and other rare or fragile ecosystems are facing mass extinction at 1.5°C

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<sup>106</sup> Paris Agreement, article 4 (2).

<sup>107</sup> Paris Agreement, article 4 (2).

<sup>108</sup> L Rajamani “The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligation” (2016)  
28 *Journal of Environmental Law* 337; D Bodansky “The Legal Character of the Paris Agreement”  
(2016) 25 *Review of European, Comparative and International Environmental Law* 2.

<sup>109</sup> B Mayer “Obligations of Conduct in the International Law on Climate Change: A Defence” (2018)  
27 *Review of European, Comparative and International Environmental Law* 130, 135.

1 warming.<sup>110</sup> Therefore article 194(5), with respect to these specific ecosystems, adds  
2 a layer of additional urgency.

3  
4 For the high seas, the main legal instrument for such adaptive measures is the BBNJ  
5 Agreement,<sup>111</sup> in particular the establishment of marine protected areas in areas  
6 especially vulnerable to climate change and ocean acidification.<sup>112</sup> Moreover, the  
7 BBNJ Agreement includes cumulative impacts analysis as an important  
8 environmental impact assessment measure to take account of climate change and  
9 ocean acidification impacts.<sup>113</sup> We therefore would like to end our statement by  
10 expressing the hope that parties speed up their national ratification processes in  
11 order for the BBNJ Agreement to rapidly enter into force.

12  
13 Mr President, members of the Tribunal, I thank you for granting the time to conclude  
14 our statement. We thank you for your attention and wish you all the best for your  
15 deliberations.

16  
17 **THE PRESIDENT:** Thank you Ms Voigt. This brings us to the end of this morning's  
18 sitting. The hearing will be resumed at 3 p.m. when we will hear an oral statement  
19 from the African Union. This sitting is now closed.

20  
21 **CLERK OF THE TRIBUNAL:** All rise.

22  
23 *(Luncheon break)*

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<sup>110</sup> Chapter 15 of the IPCC Working Group II AR6 report states that "Models are currently predicting large-scale loss of coral reefs by mid-century under even low-emission scenarios. Even achieving emission reduction targets consistent with the ambitious 1.5°C of global warming under the Paris Agreement will result in the further loss of 70-90 per cent of reef-building corals compared to today, with 99 per cent of coral reefs being lost under warning of 2°C or more above the preindustrial period." Mycoo, M., M. Wairiu, D. Campbell, V. Duvat, Y. Golbuu, S. Maharaj, J. Nalau, P. Nunn, J. Pinnegar, and O. Warrick, 2022: *Small Islands*. In: *Climate Change 2022: Impacts, Adaptation and Vulnerability*. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, at 2056.

<sup>111</sup> Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ Agreement), General Assembly, A/CONF.232/2023/4, 19 June 2023.

<sup>112</sup> BBNJ Agreement, Art. 17 and 19(4), and Annex I Indicative criteria for identification of areas, f.

<sup>113</sup> BBNJ Agreement, Art. 27(c). Cumulative impacts are defined as "the combined and incremental impacts resulting from different activities, including known past and present and reasonably foreseeable activities, or from the repetition of similar activities over time, and the consequences of climate change, ocean acidification and related impacts", BBNJ Agreement, Art. 1(6).