

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



2023

Public sitting

held on Thursday, 14 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)

Verbatim Record

Uncorrected

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

List of delegations:

STATES PARTIES

Chile

Ms Ximena Fuentes Torrijo, Representative

Mr Antonio Correa Olbrich, General Consul of the Republic of Chile, Hamburg

Ms Valeria Chiappini Koscina, Legal Advisor

Ms Beatriz Pais Alderete, Legal Advisor

Portugal

Ms Patrícia Galvão Teles, Director-General for Legal Affairs, Ministry of Foreign Affairs

Mr Mateus Kowalski, Head, Public International Law Department, Ministry of Foreign Affairs

Mr Vasco Seruya, Consul-General of Portugal, Hamburg

Ms Ana Luísa Riquito, First Secretary, Embassy of Portugal, Berlin

Djibouti

Mr Yacin Houssein Doualé, Ambassador of the Republic of Djibouti, Germany

Mr Mohamed Osman Chireh, First Counsellor, Embassy of the Republic of Djibouti, Germany

Mr Guled Yusuf, Partner, Allen & Overy LLP

Mr Pierre-Baptiste Chipault, Associate, Allen & Overy LLP

Mr Pranay Lekhi, Associate, Allen & Overy LLP

1 **THE CLERK OF THE TRIBUNAL:** All rise.

2

3 **THE PRESIDENT:** Please be seated.

4

5 Good morning. Today we will continue the hearing in the *Request for an Advisory*
6 *Opinion submitted by the Commission of Small Island States on Climate Change and*
7 *International Law*. This morning we will hear oral statements from Chile, Portugal
8 and Djibouti.

9

10 At the outset, I wish to inform you that at 11 o'clock this morning, the German
11 authorities will be conducting a nationwide warning test to make sure that all
12 information systems work well in case of an emergency. The test is conducted
13 through several platforms, in particular, radio, phone applications and sirens. An "all
14 clear" siren will be sounded at 11:45. You may therefore hear sirens or receive
15 phone alerts at those specified times.

16

17 May I kindly ask that everyone ensure that their mobile phones are either on airplane
18 mode or switched off completely? Thank you.

19

20 I now give the floor to the representative of Chile, Ms Fuentes Torrijo, to make her
21 statement.

22

23 You have the floor, Madam.

24

25 **MS FUENTES TORRIJO:** Mr President, distinguished members of the International
26 Tribunal for the Law of the Sea, it is an honour to appear before you on behalf of the
27 Republic of Chile in these proceedings concerning the *Request for an Advisory*
28 *Opinion submitted by the Commission of Small Island States on Climate Change and*
29 *International Law*, henceforth referred to as "COSIS".

30

31 In response to the Tribunal's invitation to States Parties to the Convention to submit
32 written statements on the questions submitted by COSIS, on 16 June 2023, Chile
33 presented a written statement with its views about the two questions on which the
34 Tribunal has been asked to render an advisory opinion.

35

36 In its written statement, Chile considered it helpful to convey to the Tribunal its views
37 on the advisory jurisdiction of the Tribunal and its discretionary power to decide
38 whether or not to render an advisory opinion in this case. The position of Chile,
39 developed in the first section of its written presentation, is that the Tribunal has
40 jurisdiction to give the requested advisory opinion and that there are no compelling
41 reasons for the Tribunal to refuse to do so.

42

43 In the second section of its written statement, Chile highlighted the existence of
44 scientific consensus that climate change is causing serious detrimental impacts on
45 the ocean, including but not limited to, ocean warming, sea-level rise and ocean
46 acidification. In sections III and IV of its written statement, Chile put forward its views
47 about the interpretation and application of the relevant provisions of Part XII and
48 other provisions of the United Nations Convention on the Law of the Sea (which I will
49 refer further to as "UNCLOS" or "the Convention").

50

1 Following the Tribunal's indication that at this stage States should not simply
2 reiterate what they have already stated in their written statements, Chile would like to
3 take the opportunity of these oral hearings to develop further certain legal issues
4 which are at the basis of the questions posed to the Tribunal, and to add some
5 additional scientific information regarding the effects of climate change on Chile, as a
6 coastal State with a coast of more than 8,000 kilometres facing the Pacific and the
7 Antarctic Oceans.

8
9 In this oral presentation, I would like to develop four points on which Chile considers
10 there is still need for further consideration, namely:

11
12 First, the powers of the Tribunal to render advisory opinions and the absence of
13 compelling reasons for the Tribunal to decline to respond to COSIS's request;

14
15 Second, the irrefutable scientific evidence regarding the extent and seriousness of
16 the deleterious effects of climate change on the marine environment and how this
17 undeniable evidence should impact on the assessment of the due diligence standard
18 that States are expected to comply with in the context of UNCLOS;

19
20 The relationship between UNCLOS obligations, namely, the duty to prevent, reduce
21 and control pollution, and the more general obligation to protect and preserve the
22 environment, and the obligations contained in the United Nations Framework
23 Convention on Climate Change and in the Paris Agreement; and

24
25 Fourth, the relevance of international human rights law for the interpretation of
26 UNCLOS.

27
28 Concerning the powers of the Tribunal to render advisory opinions and the absence
29 of compelling reasons for the Tribunal to decline to respond to COSIS's request,
30 Chile supports the right of COSIS to request an advisory opinion from the Tribunal.
31 COSIS has exercised this right in accordance with the Statute and the Rules of the
32 Tribunal.

33
34 In their written statements submitted to the Tribunal, two States, at least, have asked
35 the Tribunal to refrain from rendering the requested advisory opinion on the basis
36 that the Tribunal lacks jurisdiction to do so in the present case. These States argue
37 that the Convention and, in particular, article 21 of the Statute of the Tribunal, has
38 not conferred advisory jurisdiction to the full Tribunal. Other States, while admitting
39 that the full Tribunal has advisory jurisdiction, in their written and oral statements
40 have asked the Tribunal to clarify the scope of its advisory jurisdiction.

41
42 In its Advisory Opinion on the *Request for an Advisory Opinion submitted by the*
43 *Sub-Regional Fisheries Commission (SRFC)*, Case No. 21, the Tribunal has already
44 confirmed that article 21 of the Statute allows that an international agreement related
45 to the purposes of the Convention may confer advisory jurisdiction on the full
46 Tribunal.

47
48 The Tribunal has concluded that it is the interplay between article 21 of the Statute
49 and the "other agreement" which confers advisory jurisdiction on the Tribunal. In

1 other words, the “other agreement” may confer jurisdiction on the Tribunal because it
2 is article 21 that has so provided.

3
4 The Statute of the Tribunal belongs to Annex VI to the Convention. Thus, it is an
5 integral part of the Convention. Therefore, States Parties to the Convention
6 themselves have admitted the possibility that the group of States may reach an
7 international agreement related to the purposes of the Convention, and that this
8 agreement may contemplate the option to request an advisory opinion from the
9 Tribunal.

10
11 In its turn, the Rules of the Tribunal establish certain prerequisites for the operation
12 of the advisory jurisdiction of the Tribunal, namely,

- 13
14 (a) the existence of an international agreement related to the purposes of the
15 Convention which specifically provides for the submission to the Tribunal of a
16 request for an advisory opinion;
17 (b) that the request shall be transmitted to the Tribunal by whatever body is
18 authorized by or in accordance with the agreement to make the request to the
19 Tribunal; and
20 (c) that the request must submit a legal question to the Tribunal.

21
22 All these prerequisites have been fulfilled in the present case.

23
24 Nevertheless, and beyond these formal prerequisites, Chile would like to elaborate
25 on the rationale behind article 21 of the Statute and article 138 of the Rules of the
26 Tribunal, the two provisions on which the advisory jurisdiction of the Tribunal rests.

27
28 It is Chile’s contention that the Convention has conceived the advisory jurisdiction of
29 the Tribunal as a way to assist States Parties to an international agreement related
30 to the purposes of the Convention, by assuring those Parties that the interpretation
31 and application of their agreement is consonant with the Convention.

32
33 UNCLOS has been described as the Constitution of the Ocean. Indeed, it is a
34 comprehensive agreement that attempts to establish the principles and general rules
35 governing almost all activities on the sea and the uses of its resources. From a
36 political and legal perspective, the comparison with a constitution is a very pertinent
37 one. In fact, the Convention shares many features with domestic constitutions.

38
39 In the first place, its purpose, as described in the Preamble, is to establish “a legal
40 order for the seas and oceans which will facilitate international communication and
41 will promote the peaceful uses of the seas and oceans, the equitable and efficient
42 utilization of their resources, the conservation of their living resources, and the study,
43 protection and conservation of the marine environment.” In other words, its purpose
44 is to regulate all activities on the seas and oceans.

45
46 A second feature that warrants the comparison with a domestic constitution is that
47 the Convention is not easy to amend, and, third, as domestic constitutions do, the
48 Convention relies on other agreements that will implement its principles and
49 objectives.

1 This third feature of the Convention, that is to say reliance on other agreements that
2 will contribute to implementing its principles and objectives can be very clearly
3 recognized in various provisions of Part XII. To start with, article 197 calls States “to
4 cooperate on a global basis and, as appropriate on a regional basis, directly or
5 through competent international organizations, in formulating and elaborating
6 international rules, standards and recommended practices and procedures
7 consistent with this Convention, for the protection and preservation of the marine
8 environment, taking into account characteristic regional features.”

9
10 In its turn, article 237 states that, and I quote:

11
12 (1) The provisions of this Part are without prejudice to the specific obligations
13 assumed by States under special conventions and agreements concluded
14 previously which relate to the protection and preservation of the marine
15 environment and to agreements which may be concluded in furtherance of the
16 general principles set forth in this Convention.

17
18 (2) Specific obligations assumed by States under special conventions, with
19 respect to the protection and preservation of the marine environment, should
20 be carried out in a manner consistent with the general principles and objectives
21 of this Convention.

22
23 Small island States have indeed created an international organization, the
24 Commission of Small Island States for Climate Change and International Law, with
25 the precise purpose of promoting and contributing, and I quote, “to the definition,
26 implementation and progressive development of rules and principles of international
27 law concerning climate change, including, but not limited to, the obligation of States
28 relating to the protection and preservation of the marine environment and their
29 responsibility for injuries arising from internationally wrongful acts in respect of the
30 breach of such obligations”.¹

31
32 In fulfilling its mandate, COSIS is required to abide by the principles and provisions
33 of the Convention. Therefore, the request for an advisory opinion from the Tribunal
34 regarding the identification of obligations of States Parties to the Convention with
35 regard to (a) the obligation to prevent, reduce and control pollution of the marine
36 environment in relation to the deleterious effects that result from climate change and
37 to (b) the obligation to protect and preserve the marine environment in relation to
38 climate change, will certainly assist COSIS in fulfilling its mandate in a manner that is
39 consonant with the Convention.

40
41 The advisory opinion that the Tribunal will render in the context of these advisory
42 proceedings is of the utmost importance. The interpretation of the obligations of the
43 Convention in relation to the detrimental effects of climate change will assist COSIS
44 in determining specific actions in fulfilment of its mandate, gaining certainty that
45 these actions comply with the provisions of the Convention. COSIS will be able to
46 rely on the authoritative interpretation of the relevant provisions of the Convention, to
47 take actions in a manner that concerns the very survival of small island States.

¹ Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law (31 October 2021), Article 1(3).

1 COSIS not requested an advisory opinion as an academic exercise, but in response
2 to a real need.

3
4 Now, I move to the second point: The irrefutable scientific evidence regarding the
5 extent and seriousness of the deleterious effects of climate change on the marine
6 environment and how this undeniable evidence impacts on the assessment of the
7 standard of conduct that States are expected to comply with in the context of
8 UNCLOS.

9
10 As stated in Chile's written statement, the scientific evidence regarding the
11 deleterious effects of greenhouse gas emissions on the ocean is irrefutable.

12
13 For decades, the effects of greenhouse gases on the ocean were unknown. The
14 Intergovernmental Panel on Climate Change was established by United Nations
15 General Assembly resolution 43/58 of 6 December 1988. In adopting this resolution,
16 the General Assembly expresses its concern that "certain human activities could
17 change global climate patterns, threatening present and future generations with
18 potentially severe economic and social consequences".

19
20 The 1988 resolution also speaks of, at that time, "the emerging evidence" that
21 "indicates that continued growth in atmospheric concentrations of 'greenhouse'
22 gases could produce global warming with an eventual rise in sea levels, the effects
23 of which could be disastrous for [hu]mankind if timely steps are not taken at all
24 levels."

25
26 The resolution also calls upon "Governments and intergovernmental organizations to
27 collaborate in making every effort to prevent detrimental effects on climate and
28 activities which affect the ecological balance" and also calls upon "non-governmental
29 organizations, industry and other productive sectors to play their due role."

30
31 Since then, 35 years have passed. What was then an "emerging evidence" is today
32 an irrefutable fact: anthropogenic greenhouse gases have caused global warming with
33 all its associated effects on the Earth's ecosystems. In July 2023 the Secretary-
34 General of the United Nations announced, and I quote, that "the era of global
35 warming ended and the era of global boiling has arrived".²

36
37 The particular vulnerability of the ocean to climate change risks is made clear in the
38 2019 Special Report on the Ocean and Cryosphere by the Intergovernmental Panel
39 on Climate Change, which concluded that the ocean absorbs 20 to 30 per cent of the
40 anthropogenic CO₂ emissions released into the atmosphere.³ Incidentally, Chile was
41 a promoter of this special report since its inception at COP21 in 2015.⁴

² United Nations Press Release: *Hottest July ever signals 'era of global boiling has arrived' says UN chief* (27 July 2023), available at <https://news.un.org/en/story/2023/07/1139162>

³ IPCC, 2019: Summary for Policymakers. In: IPCC Special Report on the Ocean and Cryosphere in a Changing Climate [H.-O. Portner, D.C. Roberts, V. Masson-Delmotte, P. Zhai, M. Tignor, E. Poloczanska, K. Mintenbeck, A. Alegria, M. Nicolai, A. Okem, J. Petzold, B. Rama, N.M. Weyer (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, p. 9. <https://doi.org/10.1017/9781009157964.001>.

⁴ Because the Ocean, The Initiative, available at <https://www.becausetheocean.org/the-initiative/>

1 The ocean has been warming continuously and taking up more than 90 per cent of
2 the excess heat present in the climate system.⁵ The consequences of the absorption
3 of heat and CO₂ are: ocean warming, ocean acidification and sea-level rise. These
4 changes are undeniably disturbing the marine environment, especially rare or fragile
5 ecosystems.

6
7 Small island States are specially affected by these detrimental effects on the ocean.
8 For them, ocean warming, sea-level rise and ocean acidification represent a threat to
9 their very survival as independent States and to the living conditions of their
10 population. Besides small island States, many other countries are looking with great
11 interest to what the Tribunal has to say about the obligations of States Parties to the
12 Convention to prevent, reduce and control pollution of the marine environment in
13 relation to the deleterious effects that result from climate change and to protect and
14 preserve the marine environment in relation to climate change impacts.

15
16 Chile, as a coastal State, is also vulnerable to the detrimental effects of climate
17 change. In this regard, we are witnessing the tropicalization of the South Pacific,
18 bringing changes to the marine ecosystem at the local level, affecting the distribution
19 of resources for small-scale fisheries.⁶ These fisheries are critical for our coastal
20 communities.⁷

21
22 In the Chilean Northern macrozone, the recollection of seaweeds (*Macrocystis*
23 species) and fishing are directly exposed to the climate variability associated with the
24 El Niño-Southern Oscillation (ENSO). Increase in temperature is unfavourable to
25 seaweeds, slowing down recovery times and putting their associated ecosystems in
26 jeopardy. In this region, we expect that the ocean surface temperature will increase
27 considerably by 2040-2050, posing a high threat to the humpback whales,⁸ the
28 Humboldt penguins⁹ and the common bottlenose dolphin.¹⁰

29
30 In the Chilean Centre-South macrozone, threats include precipitation deficit, loss of
31 estuarine areas and wetlands, and temperature rise. The precipitation deficit could
32 affect the contribution of essential nutrients for the biological production of
33 phytoplankton, which is at the base of the trophic chain, with direct impacts on the
34 availability of several resources, like Chilean hake, which is currently threatened by
35 overfishing.¹¹

⁵ Op. Cit., note 3.

⁶ Chile (2021). National Communication (NC). NC 4, p. 59, available at
https://unfccc.int/sites/default/files/resource/4NC_Chile_Spanish.pdf.

⁷ Undersecretary of Fisheries and Aquaculture (2016). Plan de Adaptación al Cambio Climático para Pesca y Acuicultura, available at <https://mma.gob.cl/wp-content/uploads/2016/12/Plan-Pesca-y-Acuicultura-CMS.pdf> p. 27.

⁸ Atlas de Riesgo Climático, available at
https://arclim.mma.gob.cl/atlas/view/paarc_coquimbo_biodiversidad_ballenajorobada/

⁹ Atlas de Riesgo Climático, available at
https://arclim.mma.gob.cl/atlas/view/paarc_coquimbo_biodiversidad_pinguinodeHumboldt/

¹⁰ Atlas de Riesgo Climático, available at
https://arclim.mma.gob.cl/atlas/view/paarc_coquimbo_biodiversidad_delfin_narizdebotella/

¹¹ Atlas de Riesgo Climático, available at https://cambioclimatico.mma.gob.cl/wp-content/uploads/2021/06/02_PESCA_COSTERA.pdf p. 16-17.

1 An increase in the sea level and tidal waves would contribute to coastal erosion and
2 geomorphology changes, which include changes in the marine current systems;
3 detachment of the substratum in the seaweeds; and loss of biomass and habitats for
4 fishes, molluscs and crustaceans.¹²

5
6 Considering that in Chile many human and natural systems are located within
7 10 metres above sea level, nearly one million people, about 5.5 per cent of our
8 national population, could be potentially exposed to sea-level rise and tidal waves,
9 and around 500,000 houses, that is 7.42 per cent of the national total, would be
10 exposed to these threats.¹³

11
12 In addition, many ecosystems and infrastructure are at risk, such as wetlands, fishing
13 coves, dune fields, beaches, places of interest for biodiversity, facilities (schools,
14 police stations) and ports. It is estimated that 12 critical coastal districts are in need
15 of adaptation action plans.¹⁴

16
17 As regards ocean acidification, this is causing a detrimental impact on the
18 reproduction, size, and palatability of molluscs and loss of biomass.¹⁵

19
20 Chile is the second global producer of *Mytilus chilensis* (the Chilean mussel) and the
21 leading exporter worldwide. Mussels in Chile are highly susceptible to climate
22 change, due to the fact that 99 per cent of the seeds come from natural banks.¹⁶
23 Ocean acidification interacts with the calcification of several species,¹⁷ including the

¹² Cubillos, L.; Soto, D.; Hernández, A. & Norambuena, R., 2020. Informe Proyecto ARClím: Pesca Costera. COPAS Sur-Austral, Universidad de Concepción e INCAR coordinado por Centro de Ciencia del Clima y la Resiliencia y Centro de Cambio Global UC para el Ministerio del Medio Ambiente a través de La Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), p. 5, Concepción, available at https://cambioclimatico.mma.gob.cl/wp-content/uploads/2021/06/02_PESCA_COSTERA.pdf.

¹³ Centro UC Cambio Global, Determinación del riesgo de los impactos del Cambio Climático en las costas de Chile, available at <https://cambioglobal.uc.cl/proyectos/272-determinacion-del-riesgo-de-los-impactos-del-cambio-climatico-en-las-costas-de-chile>

¹⁴ Chile (2021). National Communication (NC). NC 4, p. 59, available at https://unfccc.int/sites/default/files/resource/4NC_Chile_Spanish.pdf

¹⁵ Cubillos, L.; Soto, D.; Hernández, A. & Norambuena, R., 2020. Informe Proyecto ARClím: Pesca Costera. COPAS Sur-Austral, Universidad de Concepción e INCAR coordinado por Centro de Ciencia del Clima y la Resiliencia y Centro de Cambio Global UC para el Ministerio del Medio Ambiente a través de La Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), p. 5, Concepción, available at https://cambioclimatico.mma.gob.cl/wp-content/uploads/2021/06/02_PESCA_COSTERA.pdf

¹⁶ Soto, D.; León-Muñoz, J.; Molinet, C.; Soria-Galvarro, Y.; Videla, J.; Opazo, D.; Díaz, P.; Tapia, F. & Segura, C. 2020. Informe Proyecto ARClím: Acuicultura. INCAR, Universidad de Concepción, Universidad Católica de la Santísima Concepción, Universidad Austral de Chile, INFOP, Universidad de Los Lagos, e INTEMIT coordinado por Centro de Ciencia del Clima y la Resiliencia y Centro de Cambio Global UC para el Ministerio del Medio Ambiente a través de La Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), p. 7, Puerto Montt, available at https://cambioclimatico.mma.gob.cl/wp-content/uploads/2021/06/01_ACUICULTURA.pdf.

¹⁷ Buschmann, A. H, S. Gelcich, P. Díaz, R. Estévez, M. C. Hernández González, N. Lagos, M. Lardies, M. J. Martínez-Harms, S. V. Pereda y J. Pulgar (2019). Acuicultura, pesca y biodiversidad en ecosistemas costeros de Chile. Santiago: Comité Científico COP25; Ministerio de Ciencia, Tecnología, Conocimiento e Innovación, available at https://cdn.digital.gob.cl/filer_public/86/3b/863b82f8-b481-4c93-b83b-ac1ad69cb9b9/8biodiversidad-acuicultura-buschmann.pdf p. 14.

1 Chilean Mussel; studies have shown that acidification prevents the normal
2 development of shells, which in turn affects larvae, seeds and adult species.¹⁸

3
4 Marine and insular bird populations in Chile are declining due to sea-level rise and
5 increase in ocean temperatures, resulting in the loss of habitats and the decrease of
6 availability of marine prey. Decline in bird populations impacts the availability of
7 *guano*, and this affects the availability of nutrients for marine species.¹⁹

8
9 In Chile, the impacts of climate change can also be seen beyond the coast. In
10 particular, sea-level rise has had, and will continue to have, severe impacts on the
11 cryosphere, that is the Earth's snow and ice regions. The severe impacts on the
12 cryosphere prompted Chile and Iceland to lead a coalition of 20 governments at the
13 last COP in Sharm-el-Sheikh, the purpose of which is to create a high-level group on
14 sea-level rise and mountain water resources.

15
16 The consequences of a changing cryosphere due to global warming and the
17 greenhouse gas emissions will be felt within and far beyond polar and mountain
18 regions. Polar fisheries will be affected by ocean warming, but also by the increasing
19 acidification of the polar oceans, which scientists predict will reach a critical threshold
20 at 450 ppm – a level we are on track to reach in just 12 years.²⁰

21
22 Thus, the Ambition on Melting Ice Declaration signed in November 2022 by Chile,
23 Iceland and 18 other mountain, polar and low-lying nations puts the protection of the
24 cryosphere at the forefront of vigorous climate action. This is not a matter of concern
25 for these States alone. The protection of the cryosphere should be an urgent global
26 concern because the greatest impacts on human communities will be felt beyond
27 these regions.²¹ The best option to slow progressive cryosphere loss and the
28 resulting widespread catastrophes is to rapidly decrease global CO₂ and other
29 greenhouse gas emissions, across all sectors.²²

30
31 Let me now move to an important legal question: How does this undeniable scientific
32 evidence impact on the assessment of the standard of conduct that States are
33 expected to comply with, in the context of their obligations under UNCLOS?

34
35 COSIS has posed two questions to the Tribunal. The Request for an Advisory
36 Opinion reads as follows:
37

¹⁸ Soto, D.; León-Muñoz, J.; Molinet, C.; Soria-Galvarro, Y.; Videla, J.; Opazo, D.; Díaz, P.; Tapia, F. & Segura, C. 2020. Informe Proyecto ARClím: Acuicultura. INCAR, Universidad de Concepción, Universidad Católica de la Santísima Concepción, Universidad Austral de Chile, INFOP, Universidad de Los Lagos, e INTEMIT coordinado por Centro de Ciencia del Clima y la Resiliencia y Centro de Cambio Global UC para el Ministerio del Medio Ambiente a través de La Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), p. 9, Puerto Montt, available at https://cambioclimatico.mma.gob.cl/wp-content/uploads/2021/06/01_ACUICULTURA.pdf

¹⁹ Uribe Botero, Eduardo (2015). El cambio climático y sus efectos en la biodiversidad en América Latina, p. 18, available at https://repositorio.cepal.org/bitstream/handle/11362/39855/S1501295_en.pdf?sequence=1

²⁰ Declaration Ambition on Melting Ice (AMI) on Sea-level Rise and Mountain Water Resources, 16 November 2022, available at <https://ambitionmeltingice.org/ami-declaration/>

²¹ Ibid.

²² Ibid.

1 What are the specific obligations of State Parties to the United Nations
2 Convention on the Law of the Sea (the “UNCLOS”), including under Part XII:

3
4 (a) to prevent, reduce and control pollution of the marine environment in
5 relation to the deleterious effects that result or are likely to result from climate
6 change, including through ocean warming and sea-level rise, and ocean
7 acidification, which are caused by anthropogenic greenhouse gas emissions
8 into the atmosphere?
9

10 (b) to protect and preserve the marine environment in relation to climate
11 change impacts, including ocean warming and sea-level rise, and ocean
12 acidification?
13

14 With regard to questions (a) and (b), articles 192 and 194 of the Convention are the
15 basic provisions on the basis of which the Tribunal can draw specific conclusions
16 regarding the obligations of the States Parties to prevent, reduce and control
17 pollution of the marine environment in relation to the deleterious effects of climate
18 change and to protect and preserve the marine environment in relation to climate
19 change impacts, including ocean warming and sea-level rise, and ocean
20 acidification.
21

22 Article 192 prescribes that “States have the obligation to protect and preserve the
23 environment.” For its part, article 194(1) prescribes that: “States shall take,
24 individually or jointly as appropriate, all measures consistent with this Convention
25 that are necessary to prevent, reduce and control pollution of the marine
26 environment from any source, using for this purpose the best practicable means at
27 their disposal and in accordance with their capabilities, and they shall endeavour to
28 harmonize their policies in this connection.”
29

30 Despite the fact that the main focus of article 194 appears to be the prevention,
31 reduction and control of pollution, paragraph 5 is relevant to answering the question
32 about the obligation to protect and preserve the marine environment in relation to
33 climate change impacts, insofar as this provisions prescribes that:
34

35 “The measures taken in accordance with this Part shall include those necessary to
36 protect and preserve rare or fragile ecosystems as well as the habitat of depleted,
37 threatened or endangered species and other forms of marine life.” Various other
38 provisions of the Convention are relevant to give a more specific content to this
39 obligation contained in article 194(5). In its written statement, Chile has already
40 identified articles 117, 123, 197, 203, 204 and 237 as relevant provisions that will
41 assist the Tribunal in identifying specific obligations in this regard.
42

43 Now, having said this, Chile would like to dwell upon the standard of conduct
44 required to comply with these obligations. In this connection, it is usual to describe
45 the obligations contained in articles 192 and 194 of the Convention as due diligence
46 obligations. This means that States have an obligation of conduct to take all
47 measures necessary to prevent, reduce and control pollution of the marine
48 environment and all measures necessary to protect and preserve the marine
49 environment in relation to climate change impacts.
50

1 Oliver Wendell Holmes wrote in 1881 that: “The life of the law has not been logic; it
2 has been experience”.²³ Experience shows that since 1988, at least, States have
3 been aware that greenhouse gas emissions are causing detrimental effects on the
4 ocean; however, States have, to a large extent, continued business as usual.
5 Therefore, the Tribunal has the very important task of interpreting what it means that
6 States have the obligation to take “all measures necessary”. If we know that
7 greenhouse gas emissions will condemn small island States to disappear or will
8 destroy marine life as we know it, and if we also know what actions are causing this
9 injury, then due diligence cannot be interpreted as a simple best effort standard.

10
11 In relation to this, I come to our third point, which is the relationship between
12 UNCLOS obligations, namely, the duty to prevent, reduce and control pollution and
13 the obligation to protect and preserve the marine environment, and the obligations
14 contained in the United Nation’s Framework Convention on Climate Change and the
15 Paris Agreement.

16
17 The threat of climate change is addressed today by the international community of
18 States through negotiations under the UNFCCC. Under the umbrella of the
19 UNFCCC, the Paris Agreement is the latest negotiated treaty that “aims to
20 strengthen the global response to the threat of climate change”.

21
22 The UNFCCC entered into force on 21 March 1994. Its objective, stated in article 2,
23 is “the stabilization of GHG concentration in the atmosphere at a level that would
24 prevent dangerous anthropogenic interference with the climate system”. This
25 objective “would be achieved with a time frame sufficient to allow ecosystems to
26 adapt naturally to climate change, to ensure that food production is not threatened
27 and to enable economic development to proceed in a sustainable manner.” In case
28 of a threat of irreversible damage, the UNFCCC contemplates the application of a
29 precautionary approach, which means that measures cannot be postponed. That is
30 in article 3.3.

31
32 The UNFCCC is a framework agreement. This means that its implementation
33 requires the conclusion of successive treaties or protocols. This law-making
34 technique might tell us something about the nature of the problem that a framework
35 agreement attempts to tackle.

36
37 Normally, the problem at hand requires detailed regulation and not all the negotiating
38 States are in a position to accept all the rules. Participation in these kind of treaties
39 often requires sticks and carrots as incentives. Another typical feature of this kind of
40 framework agreement is that they tend to show some flexibility with regard to breach
41 of treaty obligations. Therefore, when States are unable to fulfil their obligations, they
42 may be assisted by a non-compliance procedure, the purpose of which is to promote
43 compliance instead of allocating responsibilities.

44
45 As explained by Professor Alan Boyle: “Solutions to global climate change have not
46 been so easily forthcoming. In principle, the same legal tools could be used to
47 regulate greenhouse gas emissions and construct an international regime for

²³ Holmes, Oliver W: *The Common Law* (orig ed 1881), Harvard University Press, 2009, p. 3.

1 tackling climate change, but the intimate connection with economic growth has made
2 international agreement on effective solutions especially hard to achieve”.²⁴

3
4 In this context, the 2015 Paris Agreement is the latest implementing treaty of the
5 UNFCCC today in force. But it is not clear that this agreement will be able to
6 successfully tackle climate change.

7
8 Therefore, from the perspective of the Convention, the UNFCCC and the Paris
9 Agreement have to be approached through the lens of articles 207 and 212 of the
10 Convention, as relevant agreed rules, standards, practices and procedures that
11 States should take into account in the adoption of their laws and regulations to
12 prevent pollution of the marine environment.

13
14 However, it is necessary to be clear that the UNFCCC and the Paris Agreement
15 neither derogate nor modify the obligations contained in the Convention with regard
16 to the obligation to prevent, reduce and control pollution of the marine environment in
17 relation to the deleterious effects that result or are likely to result from climate
18 change and to protect and preserve the marine environment in relation to climate
19 change impacts.

20
21 In particular situations in which State commitments under the Paris Agreement fall
22 short of compliance with the obligations under UNCLOS, States Parties to the
23 Convention must nonetheless take action to address the deleterious effects of
24 climate change on the ocean, by virtue of the Convention.

25
26 And I have come to my last, and fourth, point, which is the relevance of international
27 human rights law in the interpretation of the United Nations Convention on the Law
28 of the Sea.

29
30 Article 293 of the Convention provides that: “A court or tribunal having jurisdiction
31 under this section shall apply this Convention and other rules of international law not
32 incompatible with this Convention.”

33
34 Article 293 is under Section 2 of Part XV of the Convention, which governs the
35 settlement of disputes, specifically, compulsory procedures entailing binding
36 decisions.

37
38 Advisory proceedings are not a dispute settlement procedure and they do not entail
39 a binding decision. Nevertheless, the Tribunal, in the *Southern Regional Fisheries*
40 *Commission Advisory Opinion*, relied on article 23 of the Statute of the Tribunal and
41 on article 130 of the Rules of Procedure, to apply article 293 of the Convention in the
42 context of an advisory proceeding.

43
44 Therefore, in the present proceedings, the applicable law comprises UNCLOS and
45 other rules of international law not incompatible with this Convention. The systemic
46 interpretation rule enshrined in article 31(3)(c) of the Vienna Convention on the Law
47 of Treaties has been explicitly included, then, in article 293 of UNCLOS.

48

²⁴ Boyle and Redgwell, *International Law and the Environment* (4th ed. OUP, 2021) p. 356.

1 In this vein, Chile requests the Tribunal to consider international human rights law
2 when responding to this request for an advisory opinion.

3
4 The Preamble of the Convention recognizes that the rules establishing a legal order
5 for the seas and oceans have the purpose, among others, to promote the equitable
6 and efficient utilization of the resources of the seas and oceans, the conservation of
7 their living resources and the protection and preservation of the marine environment.
8 Furthermore, the Preamble adds that the achievement of these goals will contribute
9 to the realization of a just and equitable international economic order which takes
10 into account the interests and needs of humankind as a whole and, in particular, the
11 special interests and needs of developing countries.

12
13 Such a just and equitable economic order needs to consider international human
14 rights law, especially the right to self-determination.

15
16 The first human right included in the International Covenant on Civil and Political
17 Rights and in the International Covenant on Social, Economic and Cultural Rights is
18 the right to self-determination. Article 1 of the two covenants prescribes that:

19
20 (1) All peoples have the right of self-determination. By virtue of that right, they
21 freely determine their political status and freely pursue their economic, social
22 and cultural development.

23
24 (2) All peoples may, for their own ends, freely dispose of their natural wealth
25 and resources without prejudice to any obligations arising out of international
26 economic co-operation, based upon the principle of mutual benefit, and
27 international law. In no case may a people be deprived of its own means of
28 subsistence.

29
30 The deleterious effects of climate change affect the human right to self-determination
31 of the entire population of the small island States. Climate change affects the very
32 survival of these communities.

33
34 The right to self-determination requires the full enjoyment of a panoply of rights,
35 without any of which this right cannot be fulfilled. These subsidiary rights include the
36 right to life, adequate food, water, health, adequate standard of living, the use of and
37 enjoyment of property, and the enjoyment of culture. Regretfully, anthropogenic
38 greenhouse gas emissions, and the deleterious effects on the ocean, have direct
39 negative effects on the enjoyment of these rights, effectively depriving peoples of
40 their right to self-determination.²⁵

41
42 Respect for the right to self-determination is an obligation *erga omnes*. This means
43 that all States have a legal interest in protecting that right, as has been stated by the
44 International Court of Justice in the *East Timor* case between Portugal v. Australia
45 and in the *Chagos Advisory Opinion*, amongst others.

²⁵ Tekau Frere, Clement Yow Mulalap & Tearinaki Tanielu, Climate Change and Challenges to Self-Determination: Case Studies from French Polynesia and the Republic of Kiribati (24 FEB 2020), The Yale Law Journal, 129 available at <https://www.yalelawjournal.org/forum/climate-change-and-challenges-to-self-determination#:~:text=self%2Ddetermination%20in%20the%20face,%2C%20cultural%2C%20and%20economic%20rights>

1 The Declaration on the Principles of International Law concerning Friendly Relations
2 and Co-operation among States in accordance with the Charter of the United
3 Nations states that: “Every State has the duty to promote, through joint and separate
4 action, realization of the principle of equal rights and self-determination of peoples, in
5 accordance with the provisions of the Charter, and to render assistance to the United
6 Nations in carrying out the responsibilities entrusted to it by the Charter regarding the
7 implementation of the principle.”

8
9 In the case of the small island States, the protection of the marine environment is
10 inseparable from the protection of the self-determination of these States and their
11 population. Sea-level rise, ocean warming and ocean acidification are already
12 affecting their right to life, health, food, water and sanitation, housing, property, their
13 cultural rights, and, in a short span of time, the habitability of their territory.

14
15 In sum, in addition to the conclusions already detailed in Chile’s written statement,
16 Chile considers that, in accordance with article 21 of the Statute of the Tribunal and
17 article 138 of the Rules of Procedure, the Tribunal should render the requested
18 advisory opinion because there are no compelling reasons to refuse to do so.

19
20 Chile also reaffirms the existence of the deleterious effects of climate change on the
21 marine environment, and this is, undeniably, a conclusion that is sustained on
22 evidence that has been endorsed by the international scientific community and by
23 States themselves, demonstrating that a global consensus on this matter has been
24 reached.

25
26 Furthermore, in regard to the relationship between UNCLOS obligations and the
27 obligations contained in the United Nations Framework Convention on Climate
28 Change and the Paris Agreement, Chile considers that where the obligations set in
29 the UNFCCC and the Paris Agreement are not appropriate or sufficient to address
30 the impacts of climate change on the oceans, the obligations under UNCLOS remain
31 applicable on their own.

32
33 Lastly, Chile requests the Tribunal to take into account international human rights
34 law when responding to this *Request for an Advisory Opinion on Climate Change
35 and International Law*, in particular the right of self-determination.

36
37 Chile would like to end with a quote by former United Nations High Commissioner for
38 Human Rights, and former President of the Republic of Chile, Ms Michelle Bachelet:
39 “The world has never seen a threat to human rights of this scope”.²⁶ And the
40 Secretary-General of the United Nations who urged the international community in
41 the following sense: “No more hesitancy. No more excuses. No more waiting for
42 others to move first”.

43
44 Chile respectfully asks this Tribunal to consider this urgent call and with this,
45 Mr President, I finish my call. Thank you very much.

46

²⁶ United Nations Press Release: We are ‘burning up our future’, UN’s Bachelet tells Human Rights Council (9 September 2019), available at <https://news.un.org/en/story/2019/09/1045862>.

1 **THE PRESIDENT:** Thank you Ms Fuentes Torrijo. I now give the floor to the
2 representative of Portugal, Ms Galvão Teles, to make her statement.

3
4 You have the floor, Madam.

5
6 **MS GALVÃO TELES:** Mr President, distinguished members of the Tribunal, it is a
7 great honour to address you today on behalf of the Portuguese Republic in these
8 advisory proceedings. Let me start with a few brief words about the central role of
9 the oceans in addressing climate change. This short overview is largely factual in
10 nature and based on available scientific evidence, notably the reports produced by
11 the IPCC.

12
13 The Portuguese Republic recognizes that any advisory opinion issued by ITLOS will
14 be legal in nature. However, the international treaties relevant to the response to this
15 advisory request, in particular UNCLOS, expressly refer to the best available
16 scientific evidence as a basis for determining the international obligations of subjects
17 of international law, particularly States. Accordingly, Portugal believes that ITLOS
18 must necessarily consider in its legal determinations what science says about the
19 central role of the oceans in addressing climate change and the nexus between
20 oceans and climate, which was reaffirmed in the Oceans Declaration adopted last
21 year in Lisbon, and I quote:

22
23 We recognize that the ocean is fundamental to life on our planet and to our
24 future. The ocean is an important source of the planet's biodiversity and plays
25 a vital role in the climate system and water cycle. The ocean provides a range
26 of ecosystem services, supplies us with oxygen to breathe, contributes to food
27 security, nutrition and decent jobs and livelihoods, and acts as a sink and
28 reservoir of greenhouse gases and protects biodiversity, provides a means for
29 maritime transportation, including for global trade, forms an important part of
30 our natural and cultural heritage and plays an essential role in sustainable
31 development, a sustainable ocean-based economy and poverty eradication.

32
33 The ocean plays thus an important role in the context of climate change and affects
34 our climate system in profound ways. Scientific research underscores the crucial role
35 of the ocean as a climate regulator. In addition to producing along with forests, about
36 50 per cent of our atmospheric oxygen, the ocean (i) stores large amounts of heat,
37 (ii) acts as a global thermostat, and (iii) absorbs about a quarter of our CO₂
38 emissions, including those emitted by humans. All this makes the ocean a
39 cornerstone of the Earth's carbon cycle.

40
41 But that comes at costs – warming and acidification – and the evidence is clear.
42 Human activities, particularly greenhouse gas emissions, have caused a 1.1°C
43 increase in global surface temperature since the 1800s. Melting ice caps and thermal
44 expansion are causing sea levels to rise rapidly. If emissions continue, sea levels
45 could rise by as much as a meter by 2100, affecting not only wildlife but coastal
46 communities.

47
48 In addition, extreme events throughout the climate system are disrupting ecosystems
49 and causing mass mortality of marine life. Predictions indicate that these events (i)
50 will become more frequent and intense and (ii) are already posing a significant threat
51 to marine ecosystems.

1 Changes in ocean circulation patterns and temperature-induced shifts affect primary
2 production in the marine environment and have cascading effects on food chains
3 and our livelihoods. Increased temperatures also stress marine life, as evidenced by
4 coral bleaching. These factors, combined with acidification, create food insecurity by
5 altering bioaccumulation, increasing disease incidence and affecting the metabolism
6 of marine organisms.

7
8 Doing nothing leads to dire consequences: water scarcity, crop loss, flooding, ocean
9 acidification and rising sea levels.

10
11 Portugal, as a maritime country and with one of the largest EEZs in Europe and the
12 world, and also as one of the European countries most vulnerable to climate change,
13 fully supports the initiative by COSIS to bring these matters before ITLOS in the
14 current advisory proceedings, to clarify the state of international law and thus provide
15 States with the necessary legal tools to better protect and preserve the marine
16 environment and to fight climate change.

17
18 Science compels us to act and so does international law.

19
20 Mr President, distinguished members of the Tribunal, this oral statement, following
21 our written statement, will look specifically at what Part XII of UNCLOS actually
22 requires of its States Parties in the context of climate change.

23
24 For this purpose, UNCLOS is the central legal instrument to be interpreted by ITLOS
25 in the context of the present proceedings, since it is at the heart of the legal
26 framework dedicated to the preservation and protection of the ocean. However, as a
27 living instrument and a constitution for the oceans, UNCLOS must be put in the
28 context of other international legal instruments also binding on its Parties and of
29 rules of customary international law that have developed in the meantime.

30
31 UNCLOS provisions today must be informed by the global climate regime and other
32 international environmental legal instruments with respect to the impacts of climate
33 change on the ocean and *vice versa*. To this end, this oral statement will *first* discuss
34 the issue of the openness of UNCLOS and its synergies and complementarity with
35 other international instruments relating to the environment and climate change, such
36 as the OSPAR Convention, the UNFCCC and the Paris Agreement.

37
38 Second, it will discuss the main legal characteristics of the United Nations
39 Framework Convention on Climate Change and the Paris Agreement and their
40 relevance in the context of the interpretation of Part XII of UNCLOS for the purposes
41 of the present advisory proceedings.

42
43 Third, it will examine how these legal treaties impact the obligations of States Parties
44 arising from Part XII of UNCLOS. It will focus, in particular, on what the obligations
45 enshrined in articles 192, 194, 207 and 212 require of States Parties to UNCLOS in
46 light of a coherent and comprehensive interpretation.

47
48 Mr President, distinguished members of the Tribunal, on the openness of UNCLOS
49 and its relationship to other instruments of international law related to the
50 environment and climate change: UNCLOS is a treaty that is also key to determining

1 the international obligations of States in the context of climate change. It is
2 comprehensive and embodies a holistic view of ocean governance. Its ambition is
3 nothing less than the establishment of a legal framework that promotes the peaceful
4 use of the ocean, the equitable use of resources, and the preservation and
5 protection of the marine environment.

6
7 Adequate interpretation and application of UNCLOS is therefore of paramount
8 importance. This requires that we treat UNCLOS as a dynamic and not a self-
9 contained treaty. This means that the interpretation and application of its provisions
10 require the consideration of other international legal instruments in an exercise of
11 complementary and mutual reinforcement. This is particularly important when
12 dealing with legal issues that are not explicitly addressed in UNCLOS, such as
13 climate change.

14
15 The questions posed to the Tribunal in these advisory proceedings have a direct
16 relation with climate change. One question, by broadly addressing States Parties'
17 obligations regarding the marine environment. And the other question, by focusing
18 on obligations aimed at preventing pollution tied to the detrimental effects associated
19 with climate change.

20
21 Therefore, the openness of UNCLOS to other international treaties is particularly
22 important for the interpretation and application of its Part XII, including with respect
23 to the environment and climate change. Indeed, this link has been recognized by the
24 United Nations General Assembly, already in its resolution 66/288 of 2012, entitled
25 "The future we want", which states, and I quote,

26
27 We recognize that oceans, seas and coastal areas form an integrated and
28 essential component of the Earth's ecosystem and are critical to sustaining it,
29 and that international law, as reflected in the United Nations Convention on
30 the Law of the Sea, provides the legal framework for the conservation and
31 sustainable use of the oceans and their resources. We stress the importance
32 of the conservation and sustainable use of the oceans and seas, of their
33 resources for sustainable development, including through their contributions
34 to poverty eradication, sustained economic growth, food security and creation
35 of sustainable livelihoods and decent work, while at the same time protecting
36 biodiversity and the marine environment and addressing the impacts of climate
37 change.

38
39 We therefore commit to protect, and restore, the health, productivity and
40 resilience of oceans and marine ecosystems, to maintain their biodiversity,
41 enabling their conservation and sustainable use for present and future
42 generations, and to effectively apply an ecosystem approach and the
43 precautionary approach in the management, in accordance with international
44 law, of activities having an impact on the marine environment to deliver on all
45 three dimensions of sustainable development.

46
47 From a legal standpoint, UNCLOS is open to outside influence for its evolutionary
48 interpretation in three different ways, all of which find support in article 31 of the
49 Vienna Convention on the Law of Treaties and in the customary rule contained
50 therein.

1 First, by considering subsequent agreements and subsequent practice as well as
2 any other international rule that may be applicable between the States Parties.

3
4 Second, by using *renvoi* rules that explicitly link UNCLOS to other instruments.

5
6 Third, by formulating provisions that are inherently open-ended. In all cases, the
7 interpretation and application of UNCLOS must be consistent with its principles and
8 objectives pursuant to articles 237 and 311 of the Convention.

9
10 In this regard, Portugal has highlighted in its written submission several relevant
11 international instruments, in particular the United Nations Framework Convention on
12 Climate Change, the Paris Agreement and the OSPAR Convention. This is the
13 reason why understanding their core features and structure plays an important role
14 in determining the international obligations of States Parties to UNCLOS in the
15 context of climate change.

16
17 Mr President, distinguished members of the Tribunal, let me first address the
18 relevance of regional treaties to the interpretation and application of UNCLOS. There
19 are several provisions in Part XII requiring States Parties to cooperate at both the
20 global and regional levels to formulate and develop international rules, standards
21 and recommended practices and procedures consistent with this Convention for the
22 protection and preservation of the marine environment. Articles 197, 207(4) and
23 212(3) are just a few examples. Therefore, cooperation to protect and preserve the
24 marine environment is an internationally binding obligation under UNCLOS. It is not
25 merely a matter of policy preference.

26
27 One such regional instrument is the 1992 Convention on the Protection of the Marine
28 Environment of the North-East Atlantic, also known as the OSPAR Convention.
29 Portugal is one of its sixteen parties. The territorial scope of the OSPAR Convention
30 is limited to the Northeast Atlantic, more precisely to the maritime area referred to in
31 article 1(a) of the OSPAR Convention.

32
33 The importance of the OSPAR Convention for the interpretation and application of
34 UNCLOS lies in the fact that it contains international rules applicable between the
35 States Parties to UNCLOS. But, in addition to the text of the OSPAR Convention,
36 one also needs to consider all other international rules adopted under the OSPAR
37 Convention, including the decisions and measures adopted by the OSPAR
38 Commission. The interpretation and application of the provisions of UNCLOS in the
39 light of the international rules contained in the OSPAR Convention finds legal
40 support in the Vienna Convention on the Law of Treaties, in particular in its
41 article 31(3)(c).

42
43 It is undisputed that such international rules must, in any case, be consistent with the
44 principles and objectives of UNCLOS. This is what the OSPAR Convention does.

45
46 First, in the opening paragraphs of its preamble, it recognizes the critical importance
47 of the marine environment and the need to protect it by emphasizing, among other
48 things, the need for cooperative action at the national, regional and global levels to
49 prevent marine pollution.

1 Second, it requires States Parties to act on the basis of the ecosystem approach;
2 that is, a holistic management strategy of the marine environment based on sound
3 science. States are, therefore, bound (i) to apply the precautionary principle; (ii) to
4 use the best available techniques and the best environmental practices; and (iii) to
5 apply the principles that preventive action should be taken and that priority is given
6 to environmental damage being rectified at source.

7
8 Third, and more importantly, it requires in article 2(1) that its States Parties take all
9 possible steps to prevent and eliminate pollution and shall take the necessary
10 measures to protect the maritime area against the adverse effects of human
11 activities, including to conserve marine ecosystems and, when practical, restore
12 marine areas which have been adversely affected.

13
14 Finally, the Strategy of the OSPAR Commission for the Protection of the Marine
15 Environment of the North-East Atlantic 2030 translates the obligation of the OSPAR
16 Convention and related instruments into measurable goals to tackle climate change's
17 cascading effects. Each of these objectives underscores the urgency to prevent
18 pollution from hazardous substances, protect and conserve biodiversity, restore
19 degraded habitats, and enhance awareness and adaptation to climate change.

20
21 In conclusion, the OSPAR Convention is a regional instrument whose provisions
22 embody international obligations that are consistent with the broader objectives of
23 UNCLOS. This is especially true for those obligations dealing with climate change
24 and the preservation of the marine environment.

25
26 Mr President, I turn now to the 1992 United Nations Framework Convention on
27 Climate Change, which is a foundational legal instrument in its field. It is a treaty that
28 contains clearly defined goals and recognizes climate change as a shared concern.
29 Article 2 establishes the fundamental international obligation of its States Parties: to
30 stabilize greenhouse gas concentrations in a manner that would prevent dangerous
31 interference with our climate system.

32
33 As a framework convention, it further defines many critical concepts related to
34 climate change and establishes key principles that must guide our global efforts to
35 combat it. First, by emphasizing the need for international cooperation and
36 participation by the entire global community. Second, by recognizing the uneven
37 distribution of responsibility for climate change. And third, by establishing a
38 commitment to address climate change together.

39
40 The 2015 Paris Agreement further reshaped the landscape of climate change law.
41 This agreement emphasizes the importance of a strong, progressive response based
42 on the best available science and presents an array of international obligations to
43 achieve this goal. It further highlights the importance of conserving and enhancing
44 greenhouse gas sinks in article 5(1). This aligns with the scientific reality that the
45 ocean acts as a vital sink and reservoir and further reflects the necessity of
46 ecosystem integrity and the protection of biodiversity.

47
48 More importantly, article 2(1) of the Paris Agreement sets out its core obligations. On
49 the one hand, the obligation to keep the global temperature increase well below 2°C
50 above pre-industrial levels; on the other hand, States Parties must make every effort

1 to limit the increase even further to 1.5°C. Both obligations have a due process
2 character. They are an obligation of means. States Parties are not required to
3 achieve a specific result, but only to take all necessary measures to achieve the set
4 thresholds. They enjoy discretion in determining policies and measures to this end.

5
6 These obligations are collective in nature, binding the international community as a
7 whole and reflecting a shared responsibility to combat climate change. The
8 normative structure of these obligations constitutes a legal novelty. However, these
9 legal complexities should not deter us from pursuing legal accuracy, particularly with
10 what is required from States Parties to UNCLOS.

11
12 Mr President, distinguished members of the Tribunal, what does this all mean then to
13 the interpretation and application of the provisions of UNCLOS, in particular those of
14 Part XII which the Tribunal is required to interpret in the context of the present
15 advisory proceedings? Articles 192 and 194 are the more general provisions
16 concerning the preservation and protection of the marine environment.

17
18 Article 192 serves as a cornerstone. The obligation it contains has both a positive
19 and a negative character. States Parties to UNCLOS must safeguard and improve
20 the marine environment while simultaneously having an obligation not to harm it. And
21 such has been recognized by several international courts and tribunals, including by
22 this Tribunal in the *Request for an Advisory Opinion submitted by the Sub-Regional*
23 *Fisheries Commission*.

24
25 As mentioned earlier, the Paris Agreement strengthened the landscape of
26 international climate change law. This has not been without impact on UNCLOS and
27 the obligations of its States Parties. The Paris Agreement sets specific, measurable
28 goals – to hold the increase in global average temperature to well below 2°C above
29 pre-industrial levels and to pursue efforts limiting it to 1.5°C. There is abundant
30 scientific evidence showing that ocean preservation and protection are of paramount
31 importance because a healthy and vibrant ocean is central to achieving these goals.
32 Accordingly, the discretion that UNCLOS States Parties have under article 192 is
33 narrower and more demanding.

34
35 This is also true for the interpretation and application of articles 194, 207 and 212 of
36 UNCLOS, and this is because these provisions are similar in nature and they aim to
37 achieve similar normative objectives. On the one hand, by recognizing that States
38 Parties have discretion in discharging their obligations to take measures to prevent,
39 reduce and control pollution of the marine environment. But, on the other hand, by
40 also demanding from them the harmonization of their policies and measures.

41
42 Article 194 is undeniably more general than articles 207 and 212, which address
43 specifically pollution from land-based sources and from or through the atmosphere,
44 respectively. And the same can be said, for example, about article 211, which deals
45 with pollution from vessels.

46
47 But all these provisions outline specific legal regimes that revolve around the
48 common theme of pollution. Accordingly, an adequate and shared understanding of
49 the term “pollution of the marine environment” is imperative. Article 1(4) of UNCLOS
50 provides the definition and clarifies that the term encompasses the introduction of

1 substances or energy by humans into the marine environment resulting in adverse
2 effects such as harm to marine life, hazards to human health, hindrance to maritime
3 activities, degradation of water quality and a decline in amenities.

4
5 Anthropocene greenhouse gases emissions clearly meet the definition of pollution of
6 the marine environment under UNCLOS, as they result in the introduction of energy
7 and substances into the marine environment, thus causing deleterious effects to the
8 marine environment.

9
10 The discharge of each of these obligations by States Parties to UNCLOS has not
11 been the same since the Paris Agreement. And this is because the discretion that
12 States Parties currently enjoy under articles 194, 207 and 212 of UNCLOS is also
13 narrower and more demanding in light of the measurable targets enshrined in
14 article 2(1) of the Paris Agreement.

15
16 The global goal of limiting temperature increase undeniably shapes today the
17 obligations concerning the issue of pollution of the marine environment and thus its
18 preservation and protection.

19
20 This is, in our view, a fundamental takeaway resulting from the comprehensive
21 interpretation of Part XII of UNCLOS in light of the climate change legal instruments,
22 namely, the UNFCCC and the Paris Agreement.

23
24 And States have already recognized this in the Declaration adopted in the Lisbon
25 Oceans Conference in 2022 entitled “Our Ocean, Our Future, Our Responsibility”,
26 and I quote:

27
28 We emphasize the particular importance of implementing the Paris Agreement
29 adopted under the United Nations Framework Convention on Climate Change,
30 including the goal to limit the temperature increase to well below 2°C above
31 pre-industrial levels and to pursue efforts to limit the temperature increase to
32 1.5°C, recognizing that this would significantly reduce the risks and impacts of
33 climate change and help to ensure the health, productivity, sustainable use
34 and resilience of the ocean and thus our future.

35
36 It is now high time to implement these commitments fully and as a matter of urgency.

37
38 Mr President, distinguished members of the Tribunal, let me close this statement on
39 behalf of the Portuguese Republic by making the following final five remarks:

40
41 One, unlike at the time of the UNCLOS negotiations, the nexus between the ocean
42 and climate is now well established from a scientific point of view. On the one hand,
43 the fight against climate change is inextricably linked to preserving the well-being of
44 the ocean. On the other hand, all efforts to combat global warming will be ineffective
45 if the effects of climate change on the oceans and their influence on climate change
46 are neglected.

47
48 Two, as a living instrument, UNCLOS is subject to evolutionary interpretation. This is
49 fundamental for the purposes of having a comprehensive and up-to-date legal
50 regime for the oceans. Therefore, the interpretation of UNCLOS must also consider
51 other international legal instruments and regimes, particularly international

1 environmental and climate change law. And to this end, the UNFCCC, the Paris
2 Agreement and the OSPAR Convention are three of the most relevant international
3 instruments.

4
5 This is part three. Part XII of UNCLOS addresses the protection and preservation of
6 the marine environment. The answers to the questions posed in these advisory
7 proceedings are closely linked to the obligations arising from the provisions of this
8 Part. The structure of Part XII of UNCLOS resembles an inverted pyramid. On the
9 lowest level, article 192 of UNCLOS establishes the overarching and general
10 obligation that informs the entirety of Part XII.

11
12 On a second level stands article 194 of UNCLOS, which focuses on the obligation of
13 States Parties to adopt measures to prevent, reduce and control pollution of the
14 marine environment. In this case, the scope of the provisions is broad enough to
15 include any source of pollution of the marine environment, including greenhouse gas
16 emissions. And then at the third level, there are the other provisions that seek to
17 develop the provisions of the previous levels, namely articles 192 and 194.

18
19 Four, all in all, the interpretation of these provisions justifies the conclusion that
20 UNCLOS lays down obligations for States to (i) protect and preserve the marine
21 environment; (ii) to prevent, reduce and control pollution in the marine environment,
22 including in view of the deleterious effects of climate change caused by
23 anthropogenic GHG emissions that constitute a form of pollution of the marine
24 environment.

25
26 For this purpose, the Paris Agreement notably lowers the threshold and the level of
27 discretions that States Parties have under Part XII of UNCLOS, by setting the 1.5°C
28 goal based on the best available science. This is true even if the Paris Agreement
29 does not go beyond imposing a collective obligation of result on the Parties. The
30 Paris Agreement should be considered a minimum standard for compliance with Part
31 XII of UNCLOS as concerns the deleterious effects of climate change.

32
33 And finally, five, moreover, these legal regimes, taken as a whole, require that States
34 Parties – acting individually and in the context of international cooperation –
35 endeavour to do everything in their power, in accordance with the principles of due
36 diligence and common but differentiated responsibilities: first, to address the adverse
37 impacts of climate change; and, second, to preserve and protect the marine
38 environment, particularly taking into account the abovementioned nexus between the
39 ocean and the climate system.

40
41 I thank you for your attention.

42
43 **THE PRESIDENT:** Thank you, Ms Galvão Teles. We have reached 11:25. At this
44 stage the Tribunal will withdraw for a break of 30 minutes.

45
46 We will continue the hearing at 11:55.

47
48 **THE CLERK OF THE TRIBUNAL:** All rise.

49
50 *(Short break)*

1 **THE PRESIDENT:** Please be seated. I now give the floor to the representative of
2 Djibouti, Mr Yacin Houssein Doualé, to make his statement. You have the floor, Sir.

3
4 **MR DOUALÉ:** (*Interpretation from French*) Mr President, distinguished members of
5 the Tribunal. As Ambassador to Germany of the Republic of Djibouti, I have the
6 honour to appear before you to set out the position of the Republic of Djibouti
7 concerning the request for advisory opinion before your Tribunal.

8
9 These advisory proceedings mark a turning point in the global movement aiming at
10 combating climate change and, I hope, will contribute to the change that the
11 protection of the environment and the ocean requires.

12
13 The position of Djibouti will be presented in two phases. To start with, in the first
14 stage I will set out the major stakes, be they environmental, human, economic, which
15 underpin the questions before you. In a second phase, Mr Guled Yusuf, counsel for
16 the Republic of Djibouti, will deal with the strictly legal aspects of this case.

17
18 I will address the subject in three parts. First of all, I will recall the importance of
19 oceans for the Earth as a whole and specifically for coastal States, and that they are
20 an essential resource for life itself and has to be protected and preserved from
21 climate change. Then I will look at why this subject is so important for the Republic of
22 Djibouti, and, finally, I will elaborate on the usefulness of the instant proceedings.

23
24 Oceans, which cover more than 70 per cent of the surface of the Earth are
25 indispensable, both to the existence and the equilibrium of all living beings, be they
26 human, animal or plants. Oceans are essential to our survival, our well-being and our
27 prosperity. They play a key role the ecosystem, absorbing 25 per cent of the annual
28 emissions of carbon dioxide and counterbalancing extreme temperatures. They also
29 constitute a food source, a vector of transport and a base for trade. Furthermore,
30 they are home to a biodiversity that is both exceptional and precious; in other words,
31 the oceans are life itself.

32
33 Climate change threatens the oceans and consequently, all life forms that depend
34 upon them. If nothing is done, human beings, *inter alia*, the millions of people who
35 live close to the coast, including Djiboutians, will risk losing their means of
36 subsistence as they lose the natural wealth of coastal and underwater flora and
37 fauna.

38
39 As you are aware, the oceans are warming because of climate change. In 2019, the
40 IPCC observed in its Special Report on the Ocean and Cryosphere, that it is
41 “virtually certain” that oceans have been warming continuously since 1970 and that
42 human influence has been the principal driver of this phenomenon.

43
44 The consequences of climate change on oceans are numerous and manifold. First
45 of all, climate change brings about sea-level rise. This rise has accelerated over the
46 last decades and the World Meteorological Organization has demonstrated that the
47 sea level worldwide has increased on average by 4.5 millimetres over the 2013-2021
48 period. This increase in sea level constitutes a danger for coastal States and millions
49 of people, as well as animal and plant species living in those coastal regions, given

1 that sea-level rise increases the frequency of coastal floods, wrecking en route
2 infrastructure and ecosystems, and impacting the availability of fresh drinking water.

3
4 The very existence of some coastal States and their sovereignty are threatened, to
5 the extent that their lands could become totally uninhabitable if climate change were
6 to continue.

7
8 The nationals of these States, such as Djibouti, are thus confronted with the risk of
9 losing their homes and of being displaced. This situation is evidently a source of
10 extreme concern, all the more so given that 680 million people worldwide live in
11 low-lying coastal zones.

12
13 Furthermore, climate change impacts the pH balance of the oceans and thereby
14 harms marine life and ecosystems. According to many surveys, oceans are about
15 30 per cent more acidic than they were during the pre-industrial era. This
16 acidification of seawater is of particular concern. On the one hand, it threatens
17 marine life, which then threatens those people dependent upon that marine life. In
18 other terms, climate change not only has an impact on marine biological diversity but
19 also constitutes a threat to food security, given that fish contributes to the protein
20 intake of about 4 billion people worldwide.

21
22 Acidification weakens the capacity of oceans to absorb greenhouse gases and,
23 thereby, to limit the effects of climate change. In other terms, the more the climate
24 changes, the less the oceans can mitigate the effects – thus clearing the way to an
25 acceleration of climate change as the IPCC indicates.

26
27 Finally, climate change has led to an increase in marine heatwaves, both in terms of
28 frequency and intensity. Sea-level rise has had a supplementary impact on marine
29 life, provoking widespread coral bleaching and reef degradation. The United Nations
30 Environment Programme has estimated that between 25 and 50 per cent of coral
31 reefs on this planet have already been destroyed and that all coral reefs will be dead
32 by the end of the century if greenhouse gas emissions are not drastically reduced.
33 That would be an irreversible loss for humanity.

34
35 Even though the existence of climate change and its deleterious effects have been
36 well known for at least two decades, the necessary measures haven't been taken,
37 with the result being that harm caused to the oceans have attained a critical point. It
38 is urgent to act to protect and restore this essential resource before it is too late.

39
40 With these advisory proceedings, the Tribunal can contribute to safeguarding a
41 livable and sustainable future. As the main guardian of the judicial order of the
42 oceans, this Tribunal is particularly well placed to contribute to the protection and the
43 conservation of these oceans. Furthermore, it has the duty to do so, as Mr Yusuf will
44 explain shortly.

45
46 If you will allow me now to address the second point of my presentation, which is the
47 impact of climate change on the Republic of Djibouti. While climate change is a
48 threat for everyone, the Republic of Djibouti seems to be one of the States with the
49 most immediate exposure.

50

1 Located in the Horn of Africa, the Republic of Djibouti has very little arable land on
2 account of the aridity of its territory. On account of its geographical situation, Djibouti
3 has always been exposed to natural disasters such as drought and floods. With
4 climate change, natural disasters impacting Djibouti are increasingly severe. For
5 example, in 2018, Tropical Cyclone Sagar caused unprecedented flooding in Djibouti
6 and engendered incomparable destruction of infrastructures and houses. Some
7 50 per cent of the city of Djibouti – home to about half the population of the entire
8 Republic of Djibouti – was affected.

9
10 Djibouti is also highly vulnerable to the consequences of climate change because it
11 is a coastal State. The economy of the Republic of Djibouti depends to a great extent
12 on service activities in the maritime transport sector; 76 per cent of GDP and
13 53 per cent of total employment of the Republic of Djibouti are directly linked to
14 economic activities located in coastal zones and other low-lying areas. Turning to
15 demographics now, 80 per cent of the population live on the coast and principally in
16 the major residential areas of Djibouti City, Obock and Tadjoura.

17
18 Climate change and sea-level rise will have devastating consequences for Djibouti if
19 no measures are taken. According to the International Monetary Fund, absent
20 appropriate measures, sea-level rise will flood the coastal areas and impact up to
21 half of our population and economic activities and a third of extant capital stock. The
22 macroeconomic implications will be extremely serious: the Republic of Djibouti will
23 have to confront excessive costs in order to adapt and to limit the effects of climate
24 change. Overall cost will far exceed the resources currently available for our country.

25
26 For these reasons, the Republic of Djibouti has been ranked as the seventh most
27 vulnerable State to climate change among the small developing States. The situation
28 is all the more alarming given that the Republic of Djibouti is only one example
29 among many other States confronting the immediate dangers of climate change. Its
30 situation is not unique; it illustrates the urgency of the challenge weighing on the
31 world through climate change. Despite the situation and its status as a developing
32 economy, Djibouti has shown great determination and strong resilience by adopting
33 – under the regime of the President of the Republic of Djibouti, His Excellency Ismaïl
34 Omar Guelleh – Vision 2035, which advocates, *inter alia*, for the development of
35 renewable energies, thus playing its part in the world's combat against climate
36 change.

37
38 In particular, Djibouti has established an electrical interconnection with Ethiopia in
39 the framework of regional cooperation, rather than building a new thermal power
40 plant that would only add additional greenhouse gases. It has also undertaken to
41 develop a number of geothermal energy projects, in particular in Fialé and Gale Le
42 Koma. It has signed a memorandum of understanding to develop a 25-megawatt
43 solar power plant in Grand Bara and completed the construction of a 60-megawatt
44 wind park in Ghoubet, which was inaugurated on 10 September 2023 and is now
45 operational. In 2022, Djibouti also set up a Regional Observatory for Environmental
46 and Climate Research (ORREC), whose mandate is to monitor the effects of climate
47 change in the region.

48
49 All of these projects will prevent very large quantities of carbon dioxide from being
50 emitted into the atmosphere.

1 In the same vein, as His Excellency, the President of the Republic of Djibouti, Ismaïl
2 Omar Guelleh, recalled in his allocution at the last summit of Climat Afrique in
3 Nairobi, the Republic of Djibouti established, in 2023, a National Blue Economy
4 Strategy, whose vision and main guiding principles for the nation will steer the
5 actions of the government, its partners and the civil society in the maritime and
6 coastal sectors. The blue economy aims at creating partnerships enabling oceans to
7 be exploited in such fashion as to shift the current paradigm towards sustainable
8 development. The same applies to the region of the Intergovernmental Authority on
9 Development (IGAD), which has drawn up a five-year strategy (2021-2025) and an
10 implementation plan for the blue economy, both aligned on the blue economy
11 strategy for Africa.

12
13 Similarly, Djibouti ratified the 1995 UNFCCC, the 2001 Kyoto Protocol, the 2014
14 Doha amendment to the Kyoto Protocol and the 2016 Paris Agreement.

15
16 Pursuant to its obligations under the Paris Agreement, the Republic of Djibouti has
17 submitted its Nationally Determined Contribution in 2016. Despite its very marginal
18 contribution to global warming, the Republic of Djibouti has voluntarily committed to
19 reducing its greenhouse gas emissions by 20 per cent by 2030, unconditionally, and
20 by 40 per cent by 2030, subject to technical or financial assistance from the
21 international community.

22
23 But despite these efforts, it is evident that the development of renewable energies in
24 a State such as Djibouti requires adequate technology transfer and substantial
25 financial support from the international community.

26
27 It seems imperative to recall two essential points.

28
29 First, climate change doesn't affect all States the same way. In this respect, the
30 African Union quite rightly recalled in its written statement that the African continent
31 is particularly vulnerable to all the adverse consequences of climate change and that
32 the environmental risks confronting African States will compound in the coming
33 decades.

34
35 Secondly, the States most affected are those which contribute the least to climate
36 change. For example, the World Bank Group confirms that, in 2020, the Republic of
37 Djibouti emitted 1,395 kilotonnes of greenhouse gases, which represents
38 0.003 per cent of the world's greenhouse gas emissions.

39
40 The Republic of Djibouti is presenting these facts not to reveal its powerlessness
41 with respect to climate change, but to show that States can and must strengthen its
42 commitment to combating climate change.

43
44 The Republic of Djibouti invites the Tribunal to take the urgent measures which are
45 required to combat climate change and to help those who live in the world's coastal
46 States to survive and to prosper.

47
48 I think it would be useful at this point to refer to the purpose of the instant
49 proceedings.

50

1 The purpose of the instant proceedings is none other than to contribute to combating
2 climate change by protecting and preserving marine life, and, thereby, the lives and
3 means and subsistence of people and biodiversity, above all, in coastal areas.

4
5 The advisory opinion that COSIS requests from the Tribunal falls within the
6 Tribunal's role as a custodian of that. This role is twofold.

7
8 The Tribunal is, first of all, the custodian of the UN Convention on the Law of the
9 Sea, and the Tribunal ensures compliance with the Convention by States Parties to
10 it.

11
12 And, by ensuring that all States comply with their obligations under the Convention,
13 the Tribunal ensures, at the same time, that other States do not suffer the
14 consequences of breaches of the Convention.

15
16 The Republic of Djibouti is of the opinion that these proceedings offer to the Tribunal
17 – and, more largely, to the international community – the opportunity to participate in
18 combating marine pollution and the harmful consequences of climate change, by
19 issuing an opinion which will influence the conduct of States by encouraging them to
20 do more to defend the environment.

21
22 The Republic of Djibouti appears before you as a fervent defender of the
23 international legal order of the resources which our planet offers and of coastal
24 States, and that is why we are participating in the instant proceedings.

25
26 Through my presentation, you will have noted that it is urgent to take the necessary
27 measures, and that this Tribunal, via the questions put to it, has the opportunity to
28 place a cornerstone in the combat against the adverse effects of climate change.

29
30 Now, with your permission, I would now, Mr President, like to give the floor to
31 Mr Guled Yusuf, counsel for the Republic of Djibouti, who will complete my
32 presentation by addressing the purely legal aspects of the instant proceedings.

33
34 Thank you for your very kind attention.

35
36 **THE PRESIDENT:** Thank you, Mr Yacin Houssein Doualé. I now give the floor to
37 Mr Guled Yusuf to make his statement. You have the floor, Sir.

38
39 **MR YUSUF:** Thank you. Mr President, distinguished members of the Tribunal, it is
40 an honour for me to take the floor after his Excellency, Mr Yacin Houssein Doualé.

41
42 I shall add to what has been said on behalf of the Republic of Djibouti by covering
43 the following three points.

44
45 First of all, I shall come back to matter of the Tribunal's jurisdiction to deal with the
46 request of the Commission and explain why it is established in this instance and why
47 the Tribunal must exercise it.

48
49 Secondly, I shall briefly go into the reasons why the questions put by the
50 Commission are indeed admissible.

1 Thirdly, I shall enunciate the position of the Republic of Djibouti concerning the
2 questions put to the Tribunal.

3
4 I will begin, therefore, with the first of these points: the Tribunal's jurisdiction.

5
6 The Tribunal has jurisdiction to deal with the questions of the Commission. Article 21
7 of the Rules provides that "[t]he jurisdiction of the Tribunal comprises all disputes
8 and all applications submitted to it in accordance with this Convention and all matters
9 specifically provided for in any other agreement which confers jurisdiction on the
10 Tribunal." This provision confers advisory jurisdiction on the Tribunal. Article 21
11 refers to "all disputes and all applications". This provision is unequivocal: the Tribunal
12 has jurisdiction to deal with both contentious and non-contentious proceedings, and
13 that includes requests for advisory opinions. Moreover, the Tribunal has already held
14 that it had jurisdiction to deal with a request in the past, in the case of *Request for an*
15 *Advisory Opinion submitted by the Sub-Regional Fisheries Commission*.

16
17 The Tribunal thus has jurisdiction to answer the questions put to it by the
18 Commission, and I note that this is the view held by a large number of the States
19 intervening in these proceedings.

20
21 That is not all. Not only does the Tribunal have jurisdiction to give the advisory
22 opinion sought, but what is more, the conditions for the exercise of such jurisdiction
23 are met.

24
25 Under article 138 of the Rules of the Tribunal, the Tribunal may give an advisory
26 opinion when the following three cumulative conditions are met:

27
28 There must be an international agreement related to the purposes of the Convention
29 specifically providing for the submission to the Tribunal for the request for such an
30 opinion;

31
32 the request must be submitted by a body authorized by article 21 of the Statute or in
33 accordance with an agreement within the meaning of that article; and

34
35 thirdly, the opinion sought must relate to a legal question.

36
37 In this instance, all three conditions are met.

38
39 As regards the first condition, we are indeed in the presence of an international
40 agreement relating to the purposes of the Convention. The Preamble of the
41 Agreement creating the Commission of Small Island States on Climate Change and
42 International Law expressly refers to the Convention in paragraphs 5 and 10. It
43 provides that the Commission is established "[h]aving regard to the obligations of
44 States under ... the 1982 United Nations Convention on the Law of the Sea, and
45 other conventions and principles of international law applicable to the protection and
46 preservation of the climate system and the marine environment". The remainder of
47 the provisions of the Agreement are also in line with the purposes of Convention.²⁷

²⁷ For example, article 2.1 provides: "The activities of the Commission shall include inter alia assisting Small Island States to promote and contribute to the definition, implementation, and progressive development of rules and principles of international law concerning climate change, in particular the

1 What is more, the Agreement expressly provides for the Tribunal's advisory
2 jurisdiction. Article 2(2) provides that "the Commission shall be authorized to request
3 advisory opinions from the International Tribunal for the Law of the Sea ("ITLOS") on
4 any legal question within the scope of the 1982 United Nations Convention on the
5 Law of the Sea, consistent with Article 21 of the ITLOS Statute and Article 138 of its
6 Rules."

7
8 The first condition for the exercise of the Tribunal's advisory jurisdiction is thus met.

9
10 As for the other two conditions, they are also met.

11
12 The Commission is expressly authorized, pursuant to article 2(2) of the Agreement,
13 to refer any requests for an advisory opinion to this Tribunal. It has, moreover,
14 submitted its request to the Tribunal, which is competent to deal with it under
15 article 21 of the Tribunal's Statute.

16
17 In addition, the questions put by the Commission are indeed of a legal nature. As
18 has been confirmed by this Tribunal and by the Seabed Disputes Chamber in two
19 past cases (*SRFC Advisory Opinion* and the *Advisory Opinion in the Responsibilities*
20 *and Obligations of States in the context of activities carried out in the Area*), a
21 question is deemed to be of a "legal" nature when it is "framed in terms of law", and
22 where the Tribunal can respond to it by interpreting the provisions of UNCLOS and
23 by identifying "other relevant rules of international law".²⁸

24
25 In this instance, the questions put by the Commission expressly relate to the
26 obligations of States Parties to the Convention. They are, thus, manifestly of a legal
27 nature.

28
29 The possible political dimension of a question in no way eradicates its legal
30 character. To cite the terms of the International Court of Justice in its *Advisory*
31 *Opinion on the Legality of the Threat or Use of Nuclear Weapons*, the political aspect
32 of a question "does not suffice to deprive it of its character as a 'legal question'".

33
34 In other words, the three conditions for the Tribunal to exercise its advisory
35 jurisdiction are met in this instance. There is nothing to prevent the Tribunal from
36 responding to the request of the Commission. On the contrary, the fact that the
37 environmental situation is so deteriorated, as we know, invites the Tribunal to deal
38 with the questions that the Commission has put to it.

39
40 This position is also consistent with the statement made by President Hoffmann
41 when, during his speech before the General Assembly of the United Nations in

protection and preservation of the marine environment, including through the jurisprudence of international courts and tribunals". Moreover, the Convention recognizes, in paragraph 4, the desirability of establishing a legal order for the seas and oceans which will promote the protection and preservation of the marine environment. Part XII of the Convention, at the core of the present proceedings, sets out the obligations of States with respect to the protection and preservation of the marine environment. The Convention also establishes this Tribunal with a specific role – to interpret its obligations.

²⁸ In the same vein, in the *Western Sahara* case, the Tribunal suggested that the questions are of a "legal" nature by nature if they are "by their very nature susceptible of a reply based on law" [*Western Sahara, Advisory Opinion of 16 October 1975, ICJ Report 1975*, para. 15].

1 December 2022, confirmed that the “Tribunal stands ready to discharge any
2 mandate, including through its advisory function, that States might wish to entrust to
3 it”.

4
5 This brings me now to the second point of my presentation: the admissibility of the
6 questions put to the Tribunal.

7
8 I understand that there are certain Parties that would claim that the Tribunal should
9 not examine the request of the Commission, notwithstanding its having the
10 jurisdiction to do so, if:

11
12 first of all, the Rules of the Tribunal require a “precise statement of the question”,
13 which is not provided by the questions put by the Commission and, furthermore, the
14 Commission’s request would challenge the rights and obligations of States that did
15 not consent to the submission of the Commission’s request to the Tribunal.

16
17 I think that these two concerns – although they might be legitimate in certain
18 contexts – are unwarranted in the case before us.

19
20 First of all, it seems to me that the questions put to the Tribunal are sufficiently clear.
21 They seek to determine the specific obligations arising from certain general
22 obligations of the Convention. The general obligations in question have been
23 precisely identified; there are two of them, and, as I shall explain shortly, they reflect
24 articles 192 and 194 of the Convention.

25
26 Moreover, I understand from the jurisprudence of the Tribunal and of the
27 International Court of Justice that they confirm their general jurisdiction to “give an
28 advisory opinion on any legal question, abstract or otherwise”.

29
30 As regards the implication of third Parties, I agree that, as a matter of principle, no
31 proceedings should affect the rights and obligations of another State without the
32 consent of the latter, but I understand from the jurisprudence of the Tribunal and of
33 the International Court of Justice that this principle does not apply to advisory
34 proceedings on general points of law, as is the case in these proceedings.

35
36 In these circumstances, I see that there is no obstacle to the admissibility of the
37 Commission’s request, which can, indeed, be examined by the Tribunal.

38
39 This brings me now to my third and final point: the questions put to the Tribunal.

40
41 Mr President, members of the Tribunal, as you know, the question that the
42 Commission is inviting you to define the “specific obligations of States Parties to
43 UNCLOS, including under Part XII” and, more precisely, the specific obligations that
44 arise:

45
46 first of all, from the obligation to prevent, reduce and control pollution of the marine
47 environment, as set out in article 194 of the Convention;

48
49 and furthermore, from the obligation to protect and preserve the marine environment,
50 which is contained in article 192 the Convention.

1 I shall go over both of these obligations in turn and explain the duties that arise from
2 each.

3
4 First of all, the duty to prevent, reduce and control pollution of the marine
5 environment.

6
7 Pursuant to article 194(1) the Convention, States must take the necessary measures
8 to “prevent, reduce and control” pollution of the marine environment. According to
9 the Republic of Djibouti, these measures, which are not defined by the Convention,
10 contain a number of specific obligations.

11
12 Firstly, these include the obligation to prevent, reduce and control pollution caused
13 by anthropogenic greenhouse gas emissions, which, furthermore, implies that there
14 is an obligation to maintain the global average temperature increase to well below
15 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase
16 to 1.5°C above pre-industrial levels.

17
18 The concept of “pollution of the marine environment” is defined in a sufficiently broad
19 fashion in the Convention to cover anthropogenic greenhouse gas emissions; in
20 other words, those produced by human activity. Under article 1(4), “pollution”, within
21 the meaning the Convention, is caused by the introduction by man into the marine
22 environment of “substances” or “energy” having “deleterious effects” – that includes
23 any harm to living resources and marine life, hazards to human health and hindrance
24 to maritime activities – “from any source”.

25
26 It is clear, at least for Djibouti, that the concept of “pollution of the marine
27 environment” includes all anthropogenic greenhouse gas emissions. As you know,
28 these gases constitute a form of pollution, *inter alia*, of the marine environment, in
29 that they disturb the natural carbon cycle by trapping a part of the solar radiation
30 reflected off the Earth’s surface. The obligation to prevent, reduce and control
31 pollution of the marine environment naturally, therefore, includes the specific duty to
32 reduce and control pollution caused by anthropogenic greenhouse gas emissions.

33
34 The Republic of Djibouti would like to point out, moreover, that the obligation to
35 prevent, reduce and control pollution of the marine environment covers all specific
36 obligations of States resulting from the obligation to reduce and control pollution
37 caused by greenhouse gas emissions, including the obligation to maintain the global
38 average temperature increase well below 2°C above pre-industrial levels and to
39 pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels,
40 as set out in the UNFCCC and in the Paris Agreement.

41
42 The reference to these texts are warranted. Here, the UNFCCC and the Paris
43 Agreement, in the light of which the Convention can be interpreted, provide that
44 States Parties to these texts have undertaken to combat GHG emissions by
45 maintaining temperature increases.

46
47 Secondly, the Republic of Djibouti considers that the obligation to “prevent, reduce
48 and control” pollution of the marine environment also includes the obligation for
49 States to cooperate in order to prevent, reduce and control pollution of the marine
50 environment.

1 Indeed, article 194 of the Convention provides that “States shall take, individually or
2 jointly as appropriate, all measures consistent with the Convention that are
3 necessary to prevent, reduce and control pollution of the marine environment.” By
4 referring to States taking action “jointly”, article 194 clearly implies that there is an
5 obligation for States to cooperate with each other when their joint action is necessary
6 in order to prevent, reduce and control pollution of the marine environment.

7
8 This obligation to cooperate has a number of different ramifications, as explained by
9 the Tribunal in the *MOX Plant* case. It includes, *inter alia*, the obligation for State
10 Parties to “enter into consultations” with a view to exchanging information among
11 themselves; monitoring risks or the effects on the environment of planned activities;
12 and working together on the international standards and rules necessary to combat
13 the marine pollution that can result from greenhouse gas emissions.

14
15 Cooperation between States is all the more important – as His Excellency in his
16 introductory speech recalled – since combat against climate change doesn’t stop at
17 national borders and cannot be undertaken by one country alone. It is necessary for
18 States to take joint action. In the words of the International Court of Justice in *Pulp*
19 *Mills*, “it is by co-operating that the States will can jointly manage the risks of damage
20 to the environment”.

21
22 Lastly, I note that this interpretation is in line with the spirit of the Convention of
23 which there are a number of other provisions that include that requirement of
24 cooperation between States. For example, article 197 of the Convention requires,
25 and I quote, that: “States shall cooperate on a global basis and, as appropriate, on a
26 regional basis”. Similarly, article 201 requires States to establish “directly or through
27 competent international organizations ... appropriate scientific criteria for the
28 formulation and elaboration of rules, standards and recommended practices and
29 procedures for the prevention, reduction and control of pollution of the marine
30 environment.”

31
32 To conclude on the obligation to “prevent, reduce and control pollution” of the marine
33 environment, Djibouti asserts that this includes the following specific duties:

34
35 first of all, the duty to prevent, reduce and control pollution caused by anthropogenic
36 greenhouse gas emissions, which implies that there is an obligation to keep the
37 global average temperature increase well below 2°C above pre-industrial levels and
38 to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial
39 levels; secondly, the obligation incumbent on States to cooperate with each other in
40 order to prevent, reduce and control pollution of the marine environment.

41
42 The Republic of Djibouti respectfully asks the Tribunal to confirm this reading the
43 Convention.

44
45 I come now to the second obligation covered by the Commission’s request: the
46 obligation to protect and preserve the marine environment, as set out in article 192
47 the Convention.

1 According to the Republic of Djibouti, this obligation includes, more specifically, the
2 obligation incumbent upon States to monitor and control activities likely to pollute the
3 marine environment.

4
5 Article 192 of the Convention provides, in general terms, that “States have the
6 obligation to protect and preserve the marine environment.” In order to protect and
7 preserve that environment, it is necessary to anticipate all actions that might have a
8 negative impact on it. As recalled by His Excellency the Ambassador just before, the
9 effects of climate change are, unfortunately, all too often irreversible. If these effects
10 are not anticipated, they cannot be avoided and their effects cannot be corrected, so
11 the marine environment cannot be effectively protected and preserved if States do
12 not monitor and control activities that could have an potential impact on it.

13
14 This reading of the obligation to protect and preserve the marine environment is
15 consistent with jurisprudence:

16
17 In the *Certain Activities* case, the International Court of Justice held that “a State
18 must, before embarking on an activity having the potential adversely to affect the
19 environment of another State, ascertain if there is a risk of significant transboundary
20 harm, which would trigger the requirement to carry out an environmental impact
21 assessment.”

22
23 And, in the *Pulp Mills* case, the Court also confirmed that the obligation to carry out
24 an environmental impact assessment existed under customary international law.
25 This was subsequently confirmed by the Seabed Disputes Chamber in its *Advisory
26 Opinion on Responsibilities and Obligations of States with respect to Activities in the
27 Area*.

28
29 The position of the Republic of Djibouti concerning the obligation to protect and
30 preserve the marine environment is, furthermore, in line with the spirit of the
31 Convention, in which other provisions require States to monitor and control activities
32 that are likely to pollute the marine environment. For example, article 206 requires
33 States, as far as practicable, to assess activities under their jurisdiction or control,
34 where there are reasonable grounds for believing that those activities may pollute
35 the marine environment. Similarly, article 204(2) requires that States Parties “keep
36 under surveillance” the effects of any activities they permit.

37
38 To summarize, the Republic of Djibouti respectfully asks the Tribunal to confirm that
39 the obligation to protect and preserve the marine environment includes the specific
40 obligation for States to monitor and control activities likely to pollute that
41 environment.

42
43 Mr President, members of the Tribunal, the UN Convention on the Law of the Sea is
44 an essential legal framework for the protection of the marine environment and for
45 cooperation between States facing the challenges of climate change and ocean
46 pollution.

47
48 According to the Republic of Djibouti, this text, which imposes on States general
49 obligations to prevent, reduce and control pollution of the marine environment, and to
50 protect and preserve this environment, also implies specific obligations for States to

1 prevent, reduce and control pollution caused by anthropogenic greenhouse gas
2 emissions; cooperate with each other to prevent, reduce and control pollution of the
3 marine environment; and monitor and control activities likely to pollute that
4 environment.

5
6 These specific obligations do not undermine the sovereignty that States have over
7 their natural resources; on the contrary, they are an expression of their responsibility
8 to protect and to preserve the common heritage of humankind, which is the ocean.

9
10 Article 193 of the Convention supports this view, providing that “States have the
11 sovereign right to exploit their natural resources pursuant to their environmental
12 policies and in accordance with their duty to protect and preserve the marine
13 environment.” What is more, States are free to define the means they use in fulfilling
14 these duties – strengthening the legislative and regulatory arsenal, adopting
15 administrative measures or creating monitoring mechanisms.

16
17 Similarly, acknowledgment of these specific duties is consistent with the principle of
18 common but differentiated responsibilities, which recognizes the differences that
19 exist between States in terms of capabilities, needs, contributions and vulnerability in
20 the face of the impacts of global warming; implies that developed States are to take
21 the initiative to reduce their greenhouse gas emissions and provide financial and
22 technical support to developing States, such as Djibouti; and recognizes that
23 less-developed States also contribute to the fight against climate change, but in
24 proportion to their means.

25
26 Mr President, members of the Tribunal, the United Nations Convention on the Law of
27 the Sea is a living and evolving instrument that must adapt to the realities and the
28 requirements of the 21st century. It offers a sound and universal legal framework, but
29 it requires genuine commitment and collective action on the part of all its States
30 Parties.

31
32 The protection of the marine environment and the combat against climate change
33 and pollution of the oceans are ethical, ecological, economic and security
34 imperatives that concern humankind as a whole. His Excellency the Ambassador set
35 out the main challenges and the outlook for the effective implementation of the
36 Convention in the face of the growing threats of global warming, ocean acidification
37 and loss of biodiversity.

38
39 That is why I invite the Tribunal to reaffirm its commitment to UNCLOS by supporting
40 its enforcement and its evolution in order to play an active role in international
41 cooperation to save our common resource: the oceans.

42
43 I would like to thank you for your attention.

44
45 **THE PRESIDENT:** Thank you, Mr Guled Yusuf. This brings us to the end of this
46 morning’s sitting. The hearing will be resumed at 3:00 p.m. The sitting is now closed.

47
48 **THE CLERK OF THE TRIBUNAL:** All rise.

49
50 *(Lunch break)*