

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

<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

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

Ms Valeria Chiappini Koscina, Legal Advisor

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Djibouti

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

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

Mr Pranay Lekhi, Associate, Allen & Overy LLP

1 **THE PRESIDENT:** Good morning. Today we will continue the hearing in the *Request*
2 *for an Advisory Opinion submitted by the Commission of Small Island States on*
3 *Climate Change and International Law*. This morning we will hear oral statements
4 from Chile, Portugal and Djibouti.

5
6 At the outset, I wish to inform you that at 11 o'clock this morning, the German
7 authorities will be conducting a nationwide warning test to make sure that all
8 information systems work well in case of an emergency. The test is conducted
9 through several platforms, in particular, radio, phone applications and sirens. An "all
10 clear" siren will be sounded at 11:45. You may therefore hear sirens or receive
11 phone alerts at those specified times.

12
13 May I kindly ask that everyone ensure that their mobile phones are either on airplane
14 mode or switched off completely? Thank you.

15
16 I now give the floor to the representative of Chile, Ms Fuentes Torrijo, to make her
17 statement.

18
19 You have the floor, Madam.

20
21 **MS FUENTES TORRIJO:** Mr President, distinguished members of the International
22 Tribunal for the Law of the Sea, it is an honour to appear before you on behalf of the
23 Republic of Chile in these proceedings concerning the *Request for an Advisory*
24 *Opinion submitted by the Commission of Small Island States on Climate Change and*
25 *International Law*, henceforth referred to as "COSIS".

26
27 In response to the Tribunal's invitation to States Parties to the Convention to submit
28 written statements on the questions submitted by COSIS, on 16 June 2023, Chile
29 presented a written statement with its views about the two questions on which the
30 Tribunal has been asked to render an advisory opinion.

31
32 In its written statement, Chile considered it helpful to convey to the Tribunal its views
33 on the advisory jurisdiction of the Tribunal and its discretionary power to decide
34 whether or not to render an advisory opinion in this case. The position of Chile,
35 developed in the first section of its written presentation, is that the Tribunal has
36 jurisdiction to give the requested advisory opinion and that there are no compelling
37 reasons for the Tribunal to refuse to do so.

38
39 In the second section of its written statement, Chile highlighted the existence of
40 scientific consensus that climate change is causing serious detrimental impacts on
41 the ocean, including but not limited to, ocean warming, sea-level rise and ocean
42 acidification. In sections III and IV of its written statement, Chile put forward its views
43 about the interpretation and application of the relevant provisions of Part XII and
44 other provisions of the United Nations Convention on the Law of the Sea (which I will
45 refer further to as "UNCLOS" or "the Convention").

46
47 Following the Tribunal's indication that at this stage States should not simply
48 reiterate what they have already stated in their written statements, Chile would like to
49 take the opportunity of these oral hearings to develop further certain legal issues
50 which are at the basis of the questions posed to the Tribunal, and to add some

1 additional scientific information regarding the effects of climate change on Chile, as a
2 coastal State with a coast of more than 8,000 kilometres facing the Pacific and the
3 Antarctic Oceans.

4
5 In this oral presentation, I would like to develop four points on which Chile considers
6 there is still need for further consideration, namely:

7
8 First, the powers of the Tribunal to render advisory opinions and the absence of
9 compelling reasons for the Tribunal to decline to respond to COSIS's request;

10
11 Second, the irrefutable scientific evidence regarding the extent and seriousness of
12 the deleterious effects of climate change on the marine environment and how this
13 undeniable evidence should impact on the assessment of the due diligence standard
14 that States are expected to comply with in the context of UNCLOS;

15
16 The relationship between UNCLOS obligations, namely, the duty to prevent, reduce
17 and control pollution, and the more general obligation to protect and preserve the
18 environment, and the obligations contained in the United Nations Framework
19 Convention on Climate Change and in the Paris Agreement; and

20
21 Fourth, the relevance of international human rights law for the interpretation of
22 UNCLOS.

23
24 Concerning the powers of the Tribunal to render advisory opinions and the absence
25 of compelling reasons for the Tribunal to decline to respond to COSIS's request,
26 Chile supports the right of COSIS to request an advisory opinion from the Tribunal.
27 COSIS has exercised this right in accordance with the Statute and the Rules of the
28 Tribunal.

29
30 In their written statements submitted to the Tribunal, two States, at least, have asked
31 the Tribunal to refrain from rendering the requested advisory opinion on the basis
32 that the Tribunal lacks jurisdiction to do so in the present case. These States argue
33 that the Convention and, in particular, article 21 of the Statute of the Tribunal, has
34 not conferred advisory jurisdiction to the full Tribunal. Other States, while admitting
35 that the full Tribunal has advisory jurisdiction, in their written and oral statements
36 have asked the Tribunal to clarify the scope of its advisory jurisdiction.

37
38 In its Advisory Opinion on the *Request for an Advisory Opinion submitted by the*
39 *Sub-Regional Fisheries Commission (SRFC)*, Case No. 21, the Tribunal has already
40 confirmed that article 21 of the Statute allows that an international agreement related
41 to the purposes of the Convention may confer advisory jurisdiction on the full
42 Tribunal.

43
44 The Tribunal has concluded that it is the interplay between article 21 of the Statute
45 and the "other agreement" which confers advisory jurisdiction on the Tribunal. In
46 other words, the "other agreement" may confer jurisdiction on the Tribunal because it
47 is article 21 that has so provided.

48
49 The Statute of the Tribunal belongs to Annex VI to the Convention. Thus, it is an
50 integral part of the Convention. Therefore, States Parties to the Convention

1 themselves have admitted the possibility that the group of States may reach an
2 international agreement related to the purposes of the Convention, and that this
3 agreement may contemplate the option to request an advisory opinion from the
4 Tribunal.

5
6 In its turn, the Rules of the Tribunal establish certain prerequisites for the operation
7 of the advisory jurisdiction of the Tribunal, namely,

8
9 (a) the existence of an international agreement related to the purposes of the
10 Convention which specifically provides for the submission to the Tribunal of a
11 request for an advisory opinion;

12 (b) that the request shall be transmitted to the Tribunal by whatever body is
13 authorized by or in accordance with the agreement to make the request to the
14 Tribunal; and

15 (c) that the request must submit a legal question to the Tribunal.
16

17 All these prerequisites have been fulfilled in the present case.
18

19 Nevertheless, and beyond these formal prerequisites, Chile would like to elaborate
20 on the rationale behind article 21 of the Statute and article 138 of the Rules of the
21 Tribunal, the two provisions on which the advisory jurisdiction of the Tribunal rests.
22

23 It is Chile's contention that the Convention has conceived the advisory jurisdiction of
24 the Tribunal as a way to assist States Parties to an international agreement related
25 to the purposes of the Convention, by assuring those Parties that the interpretation
26 and application of their agreement is consonant with the Convention.
27

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

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

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

46 This third feature of the Convention, that is to say reliance on other agreements that
47 will contribute to implementing its principles and objectives can be very clearly
48 recognized in various provisions of Part XII. To start with, article 197 calls States "to
49 cooperate on a global basis and, as appropriate on a regional basis, directly or
50 through competent international organizations, in formulating and elaborating

1 international rules, standards and recommended practices and procedures
2 consistent with this Convention, for the protection and preservation of the marine
3 environment, taking into account characteristic regional features.”

4
5 In its turn, article 237 states that, and I quote:

6
7 (1) The provisions of this Part are without prejudice to the specific
8 obligations assumed by States under special conventions and agreements
9 concluded previously which relate to the protection and preservation of the
10 marine environment and to agreements which may be concluded in
11 furtherance of the general principles set forth in this Convention.

12
13 (2) Specific obligations assumed by States under special conventions, with
14 respect to the protection and preservation of the marine environment,
15 should be carried out in a manner consistent with the general principles and
16 objectives of this Convention.

17
18 Small island States have indeed created an international organization, the
19 Commission of Small Island States for Climate Change and International Law, with
20 the precise purpose of promoting and contributing, and I quote, “to the definition,
21 implementation and progressive development of rules and principles of international
22 law concerning climate change, including, but not limited to, the obligation of States
23 relating to the protection and preservation of the marine environment and their
24 responsibility for injuries arising from internationally wrongful acts in respect of the
25 breach of such obligations”.¹

26
27 In fulfilling its mandate, COSIS is required to abide by the principles and provisions
28 of the Convention. Therefore, the request for an advisory opinion from the Tribunal
29 regarding the identification of obligations of States Parties to the Convention with
30 regard to (a) the obligation to prevent, reduce and control pollution of the marine
31 environment in relation to the deleterious effects that result from climate change and
32 to (b) the obligation to protect and preserve the marine environment in relation to
33 climate change, will certainly assist COSIS in fulfilling its mandate in a manner that is
34 consonant with the Convention.

35
36 The advisory opinion that the Tribunal will render in the context of these advisory
37 proceedings is of the utmost importance. The interpretation of the obligations of the
38 Convention in relation to the detrimental effects of climate change will assist COSIS
39 in determining specific actions in fulfilment of its mandate, gaining certainty that
40 these actions comply with the provisions of the Convention. COSIS will be able to
41 rely on the authoritative interpretation of the relevant provisions of the Convention, to
42 take actions in a manner that concerns the very survival of small island States.
43 COSIS not requested an advisory opinion as an academic exercise, but in response
44 to a real need.

45
46 Now, I move to the second point: The irrefutable scientific evidence regarding the
47 extent and seriousness of the deleterious effects of climate change on the marine
48 environment and how this undeniable evidence impacts on the assessment of the

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 standard of conduct that States are expected to comply with in the context of
2 UNCLOS.

3
4 As stated in Chile's written statement, the scientific evidence regarding the
5 deleterious effects of greenhouse gas emissions on the ocean is irrefutable.

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

13
14 The 1988 resolution also speaks of, at that time, "the emerging evidence" that
15 "indicates that continued growth in atmospheric concentrations of 'greenhouse'
16 gases could produce global warming with an eventual rise in sea levels, the effects
17 of which could be disastrous for [hu]mankind if timely steps are not taken at all
18 levels."

19
20 The resolution also calls upon "Governments and intergovernmental organizations to
21 collaborate in making every effort to prevent detrimental effects on climate and
22 activities which affect the ecological balance" and also calls upon "non-governmental
23 organizations, industry and other productive sectors to play their due role."

24
25 Since then, 35 years have passed. What was then an "emerging evidence" is today
26 an irrefutable fact: anthropogenic greenhouse gases have caused global warming with
27 all its associated effects on the Earth's ecosystems. In July 2023 the Secretary-
28 General of the United Nations announced, and I quote, that "the era of global
29 warming ended and the era of global boiling has arrived".²

30
31 The particular vulnerability of the ocean to climate change risks is made clear in the
32 2019 Special Report on the Ocean and Cryosphere by the Intergovernmental Panel
33 on Climate Change, which concluded that the ocean absorbs 20 to 30 per cent of the
34 anthropogenic CO₂ emissions released into the atmosphere.³ Incidentally, Chile was
35 a promoter of this special report since its inception at COP21 in 2015.⁴

36
37 The ocean has been warming continuously and taking up more than 90 per cent of
38 the excess heat present in the climate system.⁵ The consequences of the absorption
39 of heat and CO₂ are: ocean warming, ocean acidification and sea-level rise. These
40 changes are undeniably disturbing the marine environment, especially rare or fragile
41 ecosystems.

42

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/>

⁵ Op. Cit., note 3.

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

9
10 Chile, as a coastal State, is also vulnerable to the detrimental effects of climate
11 change. In this regard, we are witnessing the tropicalization of the South Pacific,
12 bringing changes to the marine ecosystem at the local level, affecting the distribution
13 of resources for small-scale fisheries.⁶ These fisheries are critical for our coastal
14 communities.⁷

15
16 In the Chilean Northern macrozone, the recollection of seaweeds (*Macrocystis*
17 species) and fishing are directly exposed to the climate variability associated with the
18 El Niño-Southern Oscillation (ENSO). Increase in temperature is unfavourable to
19 seaweeds, slowing down recovery times and putting their associated ecosystems in
20 jeopardy. In this region, we expect that the ocean surface temperature will increase
21 considerably by 2040-2050, posing a high threat to the humpback whales,⁸ the
22 Humboldt penguins⁹ and the common bottlenose dolphin.¹⁰

23
24 In the Chilean Centre-South macrozone, threats include precipitation deficit, loss of
25 estuarine areas and wetlands, and temperature rise. The precipitation deficit could
26 affect the contribution of essential nutrients for the biological production of
27 phytoplankton, which is at the base of the trophic chain, with direct impacts on the
28 availability of several resources, like Chilean hake, which is currently threatened by
29 overfishing.¹¹

30
31 An increase in the sea level and tidal waves would contribute to coastal erosion and
32 geomorphology changes, which include changes in the marine current systems;
33 detachment of the substratum in the seaweeds; and loss of biomass and habitats for
34 fishes, molluscs and crustaceans.¹²

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.

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,

1
2 Considering that in Chile many human and natural systems are located within
3 10 metres above sea level, nearly one million people, about 5.5 per cent of our
4 national population, could be potentially exposed to sea-level rise and tidal waves,
5 and around 500,000 houses, that is 7.42 per cent of the national total, would be
6 exposed to these threats.¹³

7
8 In addition, many ecosystems and infrastructure are at risk, such as wetlands, fishing
9 coves, dune fields, beaches, places of interest for biodiversity, facilities (schools,
10 police stations) and ports. It is estimated that 12 critical coastal districts are in need
11 of adaptation action plans.¹⁴

12
13 As regards ocean acidification, this is causing a detrimental impact on the
14 reproduction, size, and palatability of molluscs and loss of biomass.¹⁵

15
16 Chile is the second global producer of *Mytilus chilensis* (the Chilean mussel) and the
17 leading exporter worldwide. Mussels in Chile are highly susceptible to climate
18 change, due to the fact that 99 per cent of the seeds come from natural banks.¹⁶
19 Ocean acidification interacts with the calcification of several species,¹⁷ including the
20 Chilean Mussel; studies have shown that acidification prevents the normal
21 development of shells, which in turn affects larvae, seeds and adult species.¹⁸
22

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. Gelfich, 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.

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 .

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

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

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

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

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

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

35 What are the specific obligations of State Parties to the United Nations
36 Convention on the Law of the Sea (the "UNCLOS"), including under
37 Part XII:
38

39 (a) to prevent, reduce and control pollution of the marine environment in
40 relation to the deleterious effects that result or are likely to result from
41 climate change, including through ocean warming and sea-level rise, and
42 ocean acidification, which are caused by anthropogenic greenhouse gas
43 emissions into the atmosphere?
44

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 (b) to protect and preserve the marine environment in relation to climate
2 change impacts, including ocean warming and sea-level rise, and ocean
3 acidification?
4

5 With regard to questions (a) and (b), articles 192 and 194 of the Convention are the
6 basic provisions on the basis of which the Tribunal can draw specific conclusions
7 regarding the obligations of the States Parties to prevent, reduce and control
8 pollution of the marine environment in relation to the deleterious effects of climate
9 change and to protect and preserve the marine environment in relation to climate
10 change impacts, including ocean warming and sea-level rise, and ocean
11 acidification.
12

13 Article 192 prescribes that “States have the obligation to protect and preserve the
14 environment.” For its part, article 194(1) prescribes that: “States shall take,
15 individually or jointly as appropriate, all measures consistent with this Convention
16 that are necessary to prevent, reduce and control pollution of the marine
17 environment from any source, using for this purpose the best practicable means at
18 their disposal and in accordance with their capabilities, and they shall endeavour to
19 harmonize their policies in this connection.”
20

21 Despite the fact that the main focus of article 194 appears to be the prevention,
22 reduction and control of pollution, paragraph 5 is relevant to answering the question
23 about the obligation to protect and preserve the marine environment in relation to
24 climate change impacts, insofar as this provisions prescribes that:
25

26 “The measures taken in accordance with this Part shall include those necessary to
27 protect and preserve rare or fragile ecosystems as well as the habitat of depleted,
28 threatened or endangered species and other forms of marine life.” Various other
29 provisions of the Convention are relevant to give a more specific content to this
30 obligation contained in article 194(5). In its written statement, Chile has already
31 identified articles 117, 123, 197, 203, 204 and 237 as relevant provisions that will
32 assist the Tribunal in identifying specific obligations in this regard.
33

34 Now, having said this, Chile would like to dwell upon the standard of conduct
35 required to comply with these obligations. In this connection, it is usual to describe
36 the obligations contained in articles 192 and 194 of the Convention as due diligence
37 obligations. This means that States have an obligation of conduct to take all
38 measures necessary to prevent, reduce and control pollution of the marine
39 environment and all measures necessary to protect and preserve the marine
40 environment in relation to climate change impacts.
41

42 Oliver Wendell Holmes wrote in 1881 that: “The life of the law has not been logic; it
43 has been experience”.²³ Experience shows that since 1988, at least, States have
44 been aware that greenhouse gas emissions are causing detrimental effects on the
45 ocean; however, States have, to a large extent, continued business as usual.
46 Therefore, the Tribunal has the very important task of interpreting what it means that
47 States have the obligation to take “all measures necessary”. If we know that
48 greenhouse gas emissions will condemn small island States to disappear or will

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

1 destroy marine life as we know it, and if we also know what actions are causing this
2 injury, then due diligence cannot be interpreted as a simple best effort standard.

3
4 In relation to this, I come to our third point, which is the relationship between
5 UNCLOS obligations, namely, the duty to prevent, reduce and control pollution and
6 the obligation to protect and preserve the marine environment, and the obligations
7 contained in the United Nation's Framework Convention on Climate Change and the
8 Paris Agreement.

9
10 The threat of climate change is addressed today by the international community of
11 States through negotiations under the UNFCCC. Under the umbrella of the
12 UNFCCC, the Paris Agreement is the latest negotiated treaty that "aims to
13 strengthen the global response to the threat of climate change".

14
15 The UNFCCC entered into force on 21 March 1994. Its objective, stated in article 2,
16 is "the stabilization of GHG concentration in the atmosphere at a level that would
17 prevent dangerous anthropogenic interference with the climate system". This
18 objective "would be achieved with a time frame sufficient to allow ecosystems to
19 adapt naturally to climate change, to ensure that food production is not threatened
20 and to enable economic development to proceed in a sustainable manner." In case
21 of a threat of irreversible damage, the UNFCCC contemplates the application of a
22 precautionary approach, which means that measures cannot be postponed. That is
23 in article 3.3.

24
25 The UNFCCC is a framework agreement. This means that its implementation
26 requires the conclusion of successive treaties or protocols. This law-making
27 technique might tell us something about the nature of the problem that a framework
28 agreement attempts to tackle.

29
30 Normally, the problem at hand requires detailed regulation and not all the negotiating
31 States are in a position to accept all the rules. Participation in these kind of treaties
32 often requires sticks and carrots as incentives. Another typical feature of this kind of
33 framework agreement is that they tend to show some flexibility with regard to breach
34 of treaty obligations. Therefore, when States are unable to fulfil their obligations, they
35 may be assisted by a non-compliance procedure, the purpose of which is to promote
36 compliance instead of allocating responsibilities.

37
38 As explained by Professor Alan Boyle: "Solutions to global climate change have not
39 been so easily forthcoming. In principle, the same legal tools could be used to
40 regulate greenhouse gas emissions and construct an international regime for
41 tackling climate change, but the intimate connection with economic growth has made
42 international agreement on effective solutions especially hard to achieve".²⁴

43
44 In this context, the 2015 Paris Agreement is the latest implementing treaty of the
45 UNFCCC today in force. But it is not clear that this agreement will be able to
46 successfully tackle climate change.

47

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

1 Therefore, from the perspective of the Convention, the UNFCCC and the Paris
2 Agreement have to be approached through the lens of articles 207 and 212 of the
3 Convention, as relevant agreed rules, standards, practices and procedures that
4 States should take into account in the adoption of their laws and regulations to
5 prevent pollution of the marine environment.
6

7 However, it is necessary to be clear that the UNFCCC and the Paris Agreement
8 neither derogate nor modify the obligations contained in the Convention with regard
9 to the obligation to prevent, reduce and control pollution of the marine environment in
10 relation to the deleterious effects that result or are likely to result from climate
11 change and to protect and preserve the marine environment in relation to climate
12 change impacts.
13

14 In particular situations in which State commitments under the Paris Agreement fall
15 short of compliance with the obligations under UNCLOS, States Parties to the
16 Convention must nonetheless take action to address the deleterious effects of
17 climate change on the ocean, by virtue of the Convention.
18

19 And I have come to my last, and fourth, point, which is the relevance of international
20 human rights law in the interpretation of the United Nations Convention on the Law
21 of the Sea.
22

23 Article 293 of the Convention provides that: “A court or tribunal having jurisdiction
24 under this section shall apply this Convention and other rules of international law not
25 incompatible with this Convention.”
26

27 Article 293 is under Section 2 of Part XV of the Convention, which governs the
28 settlement of disputes, specifically, compulsory procedures entailing binding
29 decisions.
30

31 Advisory proceedings are not a dispute settlement procedure and they do not entail
32 a binding decision. Nevertheless, the Tribunal, in the *Southern Regional Fisheries
33 Commission Advisory Opinion*, relied on article 23 of the Statute of the Tribunal and
34 on article 130 of the Rules of Procedure, to apply article 293 of the Convention in the
35 context of an advisory proceeding.
36

37 Therefore, in the present proceedings, the applicable law comprises UNCLOS and
38 other rules of international law not incompatible with this Convention. The systemic
39 interpretation rule enshrined in article 31(3)(c) of the Vienna Convention on the Law
40 of Treaties has been explicitly included, then, in article 293 of UNCLOS.
41

42 In this vein, Chile requests the Tribunal to consider international human rights law
43 when responding to this request for an advisory opinion.
44

45 The Preamble of the Convention recognizes that the rules establishing a legal order
46 for the seas and oceans have the purpose, among others, to promote the equitable
47 and efficient utilization of the resources of the seas and oceans, the conservation of
48 their living resources and the protection and preservation of the marine environment.
49 Furthermore, the Preamble adds that the achievement of these goals will contribute
50 to the realization of a just and equitable international economic order which takes

1 into account the interests and needs of humankind as a whole and, in particular, the
2 special interests and needs of developing countries.

3
4 Such a just and equitable economic order needs to consider international human
5 rights law, especially the right to self-determination.

6
7 The first human right included in the International Covenant on Civil and Political
8 Rights and in the International Covenant on Social, Economic and Cultural Rights is
9 the right to self-determination. Article 1 of the two covenants prescribes that:

10
11 (1) All peoples have the right of self-determination. By virtue of that right,
12 they freely determine their political status and freely pursue their economic,
13 social and cultural development.

14
15 (2) All peoples may, for their own ends, freely dispose of their natural wealth
16 and resources without prejudice to any obligations arising out of
17 international economic co-operation, based upon the principle of mutual
18 benefit, and international law. In no case may a people be deprived of its
19 own means of subsistence.

20
21 The deleterious effects of climate change affect the human right to self-determination
22 of the entire population of the small island States. Climate change affects the very
23 survival of these communities.

24
25 The right to self-determination requires the full enjoyment of a panoply of rights,
26 without any of which this right cannot be fulfilled. These subsidiary rights include the
27 right to life, adequate food, water, health, adequate standard of living, the use of and
28 enjoyment of property, and the enjoyment of culture. Regretfully, anthropogenic
29 greenhouse gas emissions, and the deleterious effects on the ocean, have direct
30 negative effects on the enjoyment of these rights, effectively depriving peoples of
31 their right to self-determination.²⁵

32
33 Respect for the right to self-determination is an obligation *erga omnes*. This means
34 that all States have a legal interest in protecting that right, as has been stated by the
35 International Court of Justice in the *East Timor* case between Portugal v. Australia
36 and in the *Chagos Advisory Opinion*, amongst others.

37
38 The Declaration on the Principles of International Law concerning Friendly Relations
39 and Co-operation among States in accordance with the Charter of the United
40 Nations states that: "Every State has the duty to promote, through joint and separate
41 action, realization of the principle of equal rights and self-determination of peoples, in
42 accordance with the provisions of the Charter, and to render assistance to the United
43 Nations in carrying out the responsibilities entrusted to it by the Charter regarding the
44 implementation of the principle."
45

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 In the case of the small island States, the protection of the marine environment is
2 inseparable from the protection of the self-determination of these States and their
3 population. Sea-level rise, ocean warming and ocean acidification are already
4 affecting their right to life, health, food, water and sanitation, housing, property, their
5 cultural rights, and, in a short span of time, the habitability of their territory.
6

7 In sum, in addition to the conclusions already detailed in Chile's written statement,
8 Chile considers that, in accordance with article 21 of the Statute of the Tribunal and
9 article 138 of the Rules of Procedure, the Tribunal should render the requested
10 advisory opinion because there are no compelling reasons to refuse to do so.
11

12 Chile also reaffirms the existence of the deleterious effects of climate change on the
13 marine environment, and this is, undeniably, a conclusion that is sustained on
14 evidence that has been endorsed by the international scientific community and by
15 States themselves, demonstrating that a global consensus on this matter has been
16 reached.
17

18 Furthermore, in regard to the relationship between UNCLOS obligations and the
19 obligations contained in the United Nations Framework Convention on Climate
20 Change and the Paris Agreement, Chile considers that where the obligations set in
21 the UNFCCC and the Paris Agreement are not appropriate or sufficient to address
22 the impacts of climate change on the oceans, the obligations under UNCLOS remain
23 applicable on their own.
24

25 Lastly, Chile requests the Tribunal to take into account international human rights
26 law when responding to this *Request for an Advisory Opinion on Climate Change
27 and International Law*, in particular the right of self-determination.
28

29 Chile would like to end with a quote by former United Nations High Commissioner for
30 Human Rights, and former President of the Republic of Chile, Ms Michelle Bachelet:
31 "The world has never seen a threat to human rights of this scope".²⁶ And the
32 Secretary-General of the United Nations who urged the international community in
33 the following sense: "No more hesitancy. No more excuses. No more waiting for
34 others to move first".
35

36 Chile respectfully asks this Tribunal to consider this urgent call and with this,
37 Mr President, I finish my call. Thank you very much.
38

39 **THE PRESIDENT:** Thank you Ms Fuentes Torrijo. I now give the floor to the
40 representative of Portugal, Ms Galvão Teles, to make her statement.
41

42 You have the floor, Madam.
43

44 **MS GALVÃO TELES:** Mr President, distinguished members of the Tribunal, it is a
45 great honour to address you today on behalf of the Portuguese Republic in these
46 advisory proceedings. Let me start with a few brief words about the central role of
47 the oceans in addressing climate change. This short overview is largely factual in

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 nature and based on available scientific evidence, notably the reports produced by
2 the IPCC.

3
4 The Portuguese Republic recognizes that any advisory opinion issued by ITLOS will
5 be legal in nature. However, the international treaties relevant to the response to this
6 advisory request, in particular UNCLOS, expressly refer to the best available
7 scientific evidence as a basis for determining the international obligations of subjects
8 of international law, particularly States. Accordingly, Portugal believes that ITLOS
9 must necessarily consider in its legal determinations what science says about the
10 central role of the oceans in addressing climate change and the nexus between
11 oceans and climate, which was reaffirmed in the Oceans Declaration adopted last
12 year in Lisbon, and I quote:

13
14 We recognize that the ocean is fundamental to life on our planet and to our
15 future. The ocean is an important source of the planet's biodiversity and
16 plays a vital role in the climate system and water cycle. The ocean provides
17 a range of ecosystem services, supplies us with oxygen to breathe,
18 contributes to food security, nutrition and decent jobs and livelihoods, and
19 acts as a sink and reservoir of greenhouse gases and protects biodiversity,
20 provides a means for maritime transportation, including for global trade,
21 forms an important part of our natural and cultural heritage and plays an
22 essential role in sustainable development, a sustainable ocean-based
23 economy and poverty eradication.

24
25 The ocean plays thus an important role in the context of climate change and affects
26 our climate system in profound ways. Scientific research underscores the crucial role
27 of the ocean as a climate regulator. In addition to producing along with forests, about
28 50 per cent of our atmospheric oxygen, the ocean (i) stores large amounts of heat,
29 (ii) acts as a global thermostat, and (iii) absorbs about a quarter of our CO₂
30 emissions, including those emitted by humans. All this makes the ocean a
31 cornerstone of the Earth's carbon cycle.

32
33 But that comes at costs – warming and acidification – and the evidence is clear.
34 Human activities, particularly greenhouse gas emissions, have caused a 1.1°C
35 increase in global surface temperature since the 1800s. Melting ice caps and thermal
36 expansion are causing sea levels to rise rapidly. If emissions continue, sea levels
37 could rise by as much as a meter by 2100, affecting not only wildlife but coastal
38 communities.

39
40 In addition, extreme events throughout the climate system are disrupting ecosystems
41 and causing mass mortality of marine life. Predictions indicate that these events (i)
42 will become more frequent and intense and (ii) are already posing a significant threat
43 to marine ecosystems.

44
45 Changes in ocean circulation patterns and temperature-induced shifts affect primary
46 production in the marine environment and have cascading effects on food chains
47 and our livelihoods. Increased temperatures also stress marine life, as evidenced by
48 coral bleaching. These factors, combined with acidification, create food insecurity by
49 altering bioaccumulation, increasing disease incidence and affecting the metabolism
50 of marine organisms.

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

3
4 Portugal, as a maritime country and with one of the largest EEZs in Europe and the
5 world, and also as one of the European countries most vulnerable to climate change,
6 fully supports the initiative by COSIS to bring these matters before ITLOS in the
7 current advisory proceedings, to clarify the state of international law and thus provide
8 States with the necessary legal tools to better protect and preserve the marine
9 environment and to fight climate change.

10
11 Science compels us to act and so does international law.

12
13 Mr President, distinguished members of the Tribunal, this oral statement, following
14 our written statement, will look specifically at what Part XII of UNCLOS actually
15 requires of its States Parties in the context of climate change.

16
17 For this purpose, UNCLOS is the central legal instrument to be interpreted by ITLOS
18 in the context of the present proceedings, since it is at the heart of the legal
19 framework dedicated to the preservation and protection of the ocean. However, as a
20 living instrument and a constitution for the oceans, UNCLOS must be put in the
21 context of other international legal instruments also binding on its Parties and of
22 rules of customary international law that have developed in the meantime.

23
24 UNCLOS provisions today must be informed by the global climate regime and other
25 international environmental legal instruments with respect to the impacts of climate
26 change on the ocean and *vice versa*. To this end, this oral statement will *first* discuss
27 the issue of the openness of UNCLOS and its synergies and complementarity with
28 other international instruments relating to the environment and climate change, such
29 as the OSPAR Convention, the UNFCCC and the Paris Agreement.

30
31 Second, it will discuss the main legal characteristics of the United Nations
32 Framework Convention on Climate Change and the Paris Agreement and their
33 relevance in the context of the interpretation of Part XII of UNCLOS for the purposes
34 of the present advisory proceedings.

35
36 Third, it will examine how these legal treaties impact the obligations of States Parties
37 arising from Part XII of UNCLOS. It will focus, in particular, on what the obligations
38 enshrined in articles 192, 194, 207 and 212 require of States Parties to UNCLOS in
39 light of a coherent and comprehensive interpretation.

40
41 Mr President, distinguished members of the Tribunal, on the openness of UNCLOS
42 and its relationship to other instruments of international law related to the
43 environment and climate change: UNCLOS is a treaty that is also key to determining
44 the international obligations of States in the context of climate change. It is
45 comprehensive and embodies a holistic view of ocean governance. Its ambition is
46 nothing less than the establishment of a legal framework that promotes the peaceful
47 use of the ocean, the equitable use of resources, and the preservation and
48 protection of the marine environment.

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

8
9 The questions posed to the Tribunal in these advisory proceedings have a direct
10 relation with climate change. One question, by broadly addressing States Parties'
11 obligations regarding the marine environment. And the other question, by focusing
12 on obligations aimed at preventing pollution tied to the detrimental effects associated
13 with climate change.

14
15 Therefore, the openness of UNCLOS to other international treaties is particularly
16 important for the interpretation and application of its Part XII, including with respect
17 to the environment and climate change. Indeed, this link has been recognized by the
18 United Nations General Assembly, already in its resolution 66/288 of 2012, entitled
19 "The future we want", which states, and I quote,

20
21 We recognize that oceans, seas and coastal areas form an integrated and
22 essential component of the Earth's ecosystem and are critical to sustaining
23 it, and that international law, as reflected in the United Nations Convention
24 on the Law of the Sea, provides the legal framework for the conservation
25 and sustainable use of the oceans and their resources. We stress the
26 importance of the conservation and sustainable use of the oceans and
27 seas, of their resources for sustainable development, including through
28 their contributions to poverty eradication, sustained economic growth, food
29 security and creation of sustainable livelihoods and decent work, while at
30 the same time protecting biodiversity and the marine environment and
31 addressing the impacts of climate change.

32
33 We therefore commit to protect, and restore, the health, productivity and
34 resilience of oceans and marine ecosystems, to maintain their biodiversity,
35 enabling their conservation and sustainable use for present and future
36 generations, and to effectively apply an ecosystem approach and the
37 precautionary approach in the management, in accordance with
38 international law, of activities having an impact on the marine environment
39 to deliver on all three dimensions of sustainable development.

40
41 From a legal standpoint, UNCLOS is open to outside influence for its evolutionary
42 interpretation in three different ways, all of which find support in article 31 of the
43 Vienna Convention on the Law of Treaties and in the customary rule contained
44 therein.

45
46 First, by considering subsequent agreements and subsequent practice as well as
47 any other international rule that may be applicable between the States Parties.

48
49 Second, by using *renvoi* rules that explicitly link UNCLOS to other instruments.
50

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

4
5 In this regard, Portugal has highlighted in its written submission several relevant
6 international instruments, in particular the United Nations Framework Convention on
7 Climate Change, the Paris Agreement and the OSPAR Convention. This is the
8 reason why understanding their core features and structure plays an important role
9 in determining the international obligations of States Parties to UNCLOS in the
10 context of climate change.

11
12 Mr President, distinguished members of the Tribunal, let me first address the
13 relevance of regional treaties to the interpretation and application of UNCLOS. There
14 are several provisions in Part XII requiring States Parties to cooperate at both the
15 global and regional levels to formulate and develop international rules, standards
16 and recommended practices and procedures consistent with this Convention for the
17 protection and preservation of the marine environment. Articles 197, 207(4) and
18 212(3) are just a few examples. Therefore, cooperation to protect and preserve the
19 marine environment is an internationally binding obligation under UNCLOS. It is not
20 merely a matter of policy preference.

21
22 One such regional instrument is the 1992 Convention on the Protection of the Marine
23 Environment of the North-East Atlantic, also known as the OSPAR Convention.
24 Portugal is one of its sixteen parties. The territorial scope of the OSPAR Convention
25 is limited to the Northeast Atlantic, more precisely to the maritime area referred to in
26 article 1(a) of the OSPAR Convention.

27
28 The importance of the OSPAR Convention for the interpretation and application of
29 UNCLOS lies in the fact that it contains international rules applicable between the
30 States Parties to UNCLOS. But, in addition to the text of the OSPAR Convention,
31 one also needs to consider all other international rules adopted under the OSPAR
32 Convention, including the decisions and measures adopted by the OSPAR
33 Commission. The interpretation and application of the provisions of UNCLOS in the
34 light of the international rules contained in the OSPAR Convention finds legal
35 support in the Vienna Convention on the Law of Treaties, in particular in its
36 article 31(3)(c).

37
38 It is undisputed that such international rules must, in any case, be consistent with the
39 principles and objectives of UNCLOS. This is what the OSPAR Convention does.

40
41 First, in the opening paragraphs of its preamble, it recognizes the critical importance
42 of the marine environment and the need to protect it by emphasizing, among other
43 things, the need for cooperative action at the national, regional and global levels to
44 prevent marine pollution.

45
46 Second, it requires States Parties to act on the basis of the ecosystem approach;
47 that is, a holistic management strategy of the marine environment based on sound
48 science. States are, therefore, bound (i) to apply the precautionary principle; (ii) to
49 use the best available techniques and the best environmental practices; and (iii) to

1 apply the principles that preventive action should be taken and that priority is given
2 to environmental damage being rectified at source.

3
4 Third, and more importantly, it requires in article 2(1) that its States Parties take all
5 possible steps to prevent and eliminate pollution and shall take the necessary
6 measures to protect the maritime area against the adverse effects of human
7 activities, including to conserve marine ecosystems and, when practical, restore
8 marine areas which have been adversely affected.

9
10 Finally, the Strategy of the OSPAR Commission for the Protection of the Marine
11 Environment of the North-East Atlantic 2030 translates the obligation of the OSPAR
12 Convention and related instruments into measurable goals to tackle climate change's
13 cascading effects. Each of these objectives underscores the urgency to prevent
14 pollution from hazardous substances, protect and conserve biodiversity, restore
15 degraded habitats, and enhance awareness and adaptation to climate change.

16
17 In conclusion, the OSPAR Convention is a regional instrument whose provisions
18 embody international obligations that are consistent with the broader objectives of
19 UNCLOS. This is especially true for those obligations dealing with climate change
20 and the preservation of the marine environment.

21
22 Mr President, I turn now to the 1992 United Nations Framework Convention on
23 Climate Change, which is a foundational legal instrument in its field. It is a treaty that
24 contains clearly defined goals and recognizes climate change as a shared concern.
25 Article 2 establishes the fundamental international obligation of its States Parties: to
26 stabilize greenhouse gas concentrations in a manner that would prevent dangerous
27 interference with our climate system.

28
29 As a framework convention, it further defines many critical concepts related to
30 climate change and establishes key principles that must guide our global efforts to
31 combat it. First, by emphasizing the need for international cooperation and
32 participation by the entire global community. Second, by recognizing the uneven
33 distribution of responsibility for climate change. And third, by establishing a
34 commitment to address climate change together.

35
36 The 2015 Paris Agreement further reshaped the landscape of climate change law.
37 This agreement emphasizes the importance of a strong, progressive response based
38 on the best available science and presents an array of international obligations to
39 achieve this goal. It further highlights the importance of conserving and enhancing
40 greenhouse gas sinks in article 5(1). This aligns with the scientific reality that the
41 ocean acts as a vital sink and reservoir and further reflects the necessity of
42 ecosystem integrity and the protection of biodiversity.

43
44 More importantly, article 2(1) of the Paris Agreement sets out its core obligations. On
45 the one hand, the obligation to keep the global temperature increase well below 2°C
46 above pre-industrial levels; on the other hand, States Parties must make every effort
47 to limit the increase even further to 1.5°C. Both obligations have a due process
48 character. They are an obligation of means. States Parties are not required to
49 achieve a specific result, but only to take all necessary measures to achieve the set
50 thresholds. They enjoy discretion in determining policies and measures to this end.

1
2 These obligations are collective in nature, binding the international community as a
3 whole and reflecting a shared responsibility to combat climate change. The
4 normative structure of these obligations constitutes a legal novelty. However, these
5 legal complexities should not deter us from pursuing legal accuracy, particularly with
6 what is required from States Parties to UNCLOS.
7

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

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

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

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

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

43 But all these provisions outline specific legal regimes that revolve around the
44 common theme of pollution. Accordingly, an adequate and shared understanding of
45 the term “pollution of the marine environment” is imperative. Article 1(4) of UNCLOS
46 provides the definition and clarifies that the term encompasses the introduction of
47 substances or energy by humans into the marine environment resulting in adverse
48 effects such as harm to marine life, hazards to human health, hindrance to maritime
49 activities, degradation of water quality and a decline in amenities.
50

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

5
6 The discharge of each of these obligations by States Parties to UNCLOS has not
7 been the same since the Paris Agreement. And this is because the discretion that
8 States Parties currently enjoy under articles 194, 207 and 212 of UNCLOS is also
9 narrower and more demanding in light of the measurable targets enshrined in
10 article 2(1) of the Paris Agreement.

11
12 The global goal of limiting temperature increase undeniably shapes today the
13 obligations concerning the issue of pollution of the marine environment and thus its
14 preservation and protection.

15
16 This is, in our view, a fundamental takeaway resulting from the comprehensive
17 interpretation of Part XII of UNCLOS in light of the climate change legal instruments,
18 namely, the UNFCCC and the Paris Agreement.

19
20 And States have already recognized this in the Declaration adopted in the Lisbon
21 Oceans Conference in 2022 entitled “Our Ocean, Our Future, Our Responsibility”,
22 and I quote:

23
24 We emphasize the particular importance of implementing the Paris
25 Agreement adopted under the United Nations Framework Convention on
26 Climate Change, including the goal to limit the temperature increase to well
27 below 2°C above pre-industrial levels and to pursue efforts to limit the
28 temperature increase to 1.5°C, recognizing that this would significantly
29 reduce the risks and impacts of climate change and help to ensure the
30 health, productivity, sustainable use and resilience of the ocean and thus
31 our future.

32
33 It is now high time to implement these commitments fully and as a matter of urgency.

34
35 Mr President, distinguished members of the Tribunal, let me close this statement on
36 behalf of the Portuguese Republic by making the following final five remarks:

37
38 One, unlike at the time of the UNCLOS negotiations, the nexus between the ocean
39 and climate is now well established from a scientific point of view. On the one hand,
40 the fight against climate change is inextricably linked to preserving the well-being of
41 the ocean. On the other hand, all efforts to combat global warming will be ineffective
42 if the effects of climate change on the oceans and their influence on climate change
43 are neglected.

44
45 Two, as a living instrument, UNCLOS is subject to evolutionary interpretation. This is
46 fundamental for the purposes of having a comprehensive and up-to-date legal
47 regime for the oceans. Therefore, the interpretation of UNCLOS must also consider
48 other international legal instruments and regimes, particularly international
49 environmental and climate change law. And to this end, the UNFCCC, the Paris
50 Agreement and the OSPAR Convention are three of the most relevant international
51 instruments.

1
2 This is part three. Part XII of UNCLOS addresses the protection and preservation of
3 the marine environment. The answers to the questions posed in these advisory
4 proceedings are closely linked to the obligations arising from the provisions of this
5 Part. The structure of Part XII of UNCLOS resembles an inverted pyramid. On the
6 lowest level, article 192 of UNCLOS establishes the overarching and general
7 obligation that informs the entirety of Part XII.

8
9 On a second level stands article 194 of UNCLOS, which focuses on the obligation of
10 States Parties to adopt measures to prevent, reduce and control pollution of the
11 marine environment. In this case, the scope of the provisions is broad enough to
12 include any source of pollution of the marine environment, including greenhouse gas
13 emissions. And then at the third level, there are the other provisions that seek to
14 develop the provisions of the previous levels, namely articles 192 and 194.

15
16 Four, all in all, the interpretation of these provisions justifies the conclusion that
17 UNCLOS lays down obligations for States to (i) protect and preserve the marine
18 environment; (ii) to prevent, reduce and control pollution in the marine environment,
19 including in view of the deleterious effects of climate change caused by
20 anthropogenic GHG emissions that constitute a form of pollution of the marine
21 environment.

22
23 For this purpose, the Paris Agreement notably lowers the threshold and the level of
24 discretions that States Parties have under Part XII of UNCLOS, by setting the 1.5°C
25 goal based on the best available science. This is true even if the Paris Agreement
26 does not go beyond imposing a collective obligation of result on the Parties. The
27 Paris Agreement should be considered a minimum standard for compliance with
28 Part XII of UNCLOS as concerns the deleterious effects of climate change.

29
30 And finally, five, moreover, these legal regimes, taken as a whole, require that States
31 Parties – acting individually and in the context of international cooperation –
32 endeavour to do everything in their power, in accordance with the principles of due
33 diligence and common but differentiated responsibilities: first, to address the adverse
34 impacts of climate change; and, second, to preserve and protect the marine
35 environment, particularly taking into account the abovementioned nexus between the
36 ocean and the climate system.

37
38 I thank you for your attention.

39
40 **THE PRESIDENT:** Thank you, Ms Galvão Teles. We have reached 11:25. At this
41 stage the Tribunal will withdraw for a break of 30 minutes.

42
43 We will continue the hearing at 11:55.

44
45 *(Pause)*

46
47 **THE PRESIDENT:** I now give the floor to the representative of Djibouti, Mr Yacin
48 Houssein Doualé, to make his statement. You have the floor, Sir.

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

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

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

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

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

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

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

41 The consequences of climate change on oceans are numerous and manyfold. First
42 of all, climate change brings about sea-level rise. This rise has accelerated over the
43 last decades and the World Meteorological Organization has demonstrated that the
44 sea level worldwide has increased on average by 4.5 millimetres over the 2013-2021
45 period. This increase in sea level constitutes a danger for coastal States and millions
46 of people, as well as animal and plant species living in those coastal regions, given
47 that sea-level rise increases the frequency of coastal floods, wrecking en route
48 infrastructure and ecosystems, and impacting the availability of fresh drinking water.
49

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

4
5 The nationals of these States, such as Djibouti, are thus confronted with the risk of
6 losing their homes and of being displaced. This situation is evidently a source of
7 extreme concern, all the more so given that 680 million people worldwide live in
8 low-lying coastal zones.

9
10 Furthermore, climate change impacts the pH balance of the oceans and thereby
11 harms marine life and ecosystems. According to many surveys, oceans are about
12 30 per cent more acidic than they were during the pre-industrial era. This
13 acidification of seawater is of particular concern. On the one hand, it threatens
14 marine life, which then threatens those people dependent upon that marine life. In
15 other terms, climate change not only has an impact on marine biological diversity but
16 also constitutes a threat to food security, given that fish contributes to the protein
17 intake of about 4 billion people worldwide.

18
19 Acidification weakens the capacity of oceans to absorb greenhouse gases and,
20 thereby, to limit the effects of climate change. In other terms, the more the climate
21 changes, the less the oceans can mitigate the effects – thus clearing the way to an
22 acceleration of climate change as the IPCC indicates.

23
24 Finally, climate change has led to an increase in marine heatwaves, both in terms of
25 frequency and intensity. Sea-level rise has had a supplementary impact on marine
26 life, provoking widespread coral bleaching and reef degradation. The United Nations
27 Environment Programme has estimated that between 25 and 50 per cent of coral
28 reefs on this planet have already been destroyed and that all coral reefs will be dead
29 by the end of the century if greenhouse gas emissions are not drastically reduced.
30 That would be an irreversible loss for humanity.

31
32 Even though the existence of climate change and its deleterious effects have been
33 well known for at least two decades, the necessary measures haven't been taken,
34 with the result being that harm caused to the oceans have attained a critical point. It
35 is urgent to act to protect and restore this essential resource before it is too late.

36
37 With these advisory proceedings, the Tribunal can contribute to safeguarding a
38 livable and sustainable future. As the main guardian of the judicial order of the
39 oceans, this Tribunal is particularly well placed to contribute to the protection and the
40 conservation of these oceans. Furthermore, it has the duty to do so, as Mr Yusuf will
41 explain shortly.

42
43 If you will allow me now to address the second point of my presentation, which is the
44 impact of climate change on the Republic of Djibouti. While climate change is a
45 threat for everyone, the Republic of Djibouti seems to be one of the States with the
46 most immediate exposure.

47
48 Located in the Horn of Africa, the Republic of Djibouti has very little arable land on
49 account of the aridity of its territory. On account of its geographical situation, Djibouti
50 has always been exposed to natural disasters such as drought and floods. With

1 climate change, natural disasters impacting Djibouti are increasingly severe. For
2 example, in 2018, Tropical Cyclone Sagar caused unprecedented flooding in Djibouti
3 and engendered incomparable destruction of infrastructures and houses. Some
4 50 per cent of the city of Djibouti – home to about half the population of the entire
5 Republic of Djibouti – was affected.

6
7 Djibouti is also highly vulnerable to the consequences of climate change because it
8 is a coastal State. The economy of the Republic of Djibouti depends to a great extent
9 on service activities in the maritime transport sector; 76 per cent of GDP and
10 53 per cent of total employment of the Republic of Djibouti are directly linked to
11 economic activities located in coastal zones and other low-lying areas. Turning to
12 demographics now, 80 per cent of the population live on the coast and principally in
13 the major residential areas of Djibouti City, Obock and Tadjoura.

14
15 Climate change and sea-level rise will have devastating consequences for Djibouti if
16 no measures are taken. According to the International Monetary Fund, absent
17 appropriate measures, sea-level rise will flood the coastal areas and impact up to
18 half of our population and economic activities and a third of extant capital stock. The
19 macroeconomic implications will be extremely serious: the Republic of Djibouti will
20 have to confront excessive costs in order to adapt and to limit the effects of climate
21 change. Overall cost will far exceed the resources currently available for our country.

22
23 For these reasons, the Republic of Djibouti has been ranked as the seventh most
24 vulnerable State to climate change among the small developing States. The situation
25 is all the more alarming given that the Republic of Djibouti is only one example
26 among many other States confronting the immediate dangers of climate change. Its
27 situation is not unique; it illustrates the urgency of the challenge weighing on the
28 world through climate change. Despite the situation and its status as a developing
29 economy, Djibouti has shown great determination and strong resilience by adopting
30 – under the regime of the President of the Republic of Djibouti, His Excellency Ismaïl
31 Omar Guelleh – Vision 2035, which advocates, *inter alia*, for the development of
32 renewable energies, thus playing its part in the world's combat against climate
33 change.

34
35 In particular, Djibouti has established an electrical interconnection with Ethiopia in
36 the framework of regional cooperation, rather than building a new thermal power
37 plant that would only add additional greenhouse gases. It has also undertaken to
38 develop a number of geothermal energy projects, in particular in Fialé and Gale Le
39 Koma. It has signed a memorandum of understanding to develop a 25-megawatt
40 solar power plant in Grand Bara and completed the construction of a 60-megawatt
41 wind park in Ghoubet, which was inaugurated on 10 September 2023 and is now
42 operational. In 2022, Djibouti also set up a Regional Observatory for Environmental
43 and Climate Research (ORREC), whose mandate is to monitor the effects of climate
44 change in the region.

45
46 All of these projects will prevent very large quantities of carbon dioxide from being
47 emitted into the atmosphere.

48
49 In the same vein, as His Excellency, the President of the Republic of Djibouti, Ismaïl
50 Omar Guelleh, recalled in his allocution at the last summit of Climat Afrique in

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

10
11 Similarly, Djibouti ratified the 1995 UNFCCC, the 2001 Kyoto Protocol, the 2014
12 Doha amendment to the Kyoto Protocol and the 2016 Paris Agreement.

13
14 Pursuant to its obligations under the Paris Agreement, the Republic of Djibouti has
15 submitted its Nationally Determined Contribution in 2016. Despite its very marginal
16 contribution to global warming, the Republic of Djibouti has voluntarily committed to
17 reducing its greenhouse gas emissions by 20 per cent by 2030, unconditionally, and
18 by 40 per cent by 2030, subject to technical or financial assistance from the
19 international community.

20
21 But despite these efforts, it is evident that the development of renewable energies in
22 a State such as Djibouti requires adequate technology transfer and substantial
23 financial support from the international community.

24
25 It seems imperative to recall two essential points.

26
27 First, climate change doesn't affect all States the same way. In this respect, the
28 African Union quite rightly recalled in its written statement that the African continent
29 is particularly vulnerable to all the adverse consequences of climate change and that
30 the environmental risks confronting African States will compound in the coming
31 decades.

32
33 Secondly, the States most affected are those which contribute the least to climate
34 change. For example, the World Bank Group confirms that, in 2020, the Republic of
35 Djibouti emitted 1,395 kilotonnes of greenhouse gases, which represents
36 0.003 per cent of the world's greenhouse gas emissions.

37
38 The Republic of Djibouti is presenting these facts not to reveal its powerlessness
39 with respect to climate change, but to show that States can and must strengthen its
40 commitment to combating climate change.

41
42 The Republic of Djibouti invites the Tribunal to take the urgent measures which are
43 required to combat climate change and to help those who live in the world's coastal
44 States to survive and to prosper.

45
46 I think it would be useful at this point to refer to the purpose of the instant
47 proceedings.

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** (*Interpretation from French*): Thank you. Mr President, distinguished
40 members of the Tribunal, it is an honour for me to take the floor after his Excellency,
41 Mr Yacin Houssein Doualé.

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

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

1 Secondly, I shall briefly go into the reasons why the questions put by the
2 Commission are indeed admissible.

3
4 Thirdly, I shall enunciate the position of the Republic of Djibouti concerning the
5 questions put to the Tribunal.

6
7 I will begin, therefore, with the first of these points: the Tribunal's jurisdiction.

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

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

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

27
28 Under article 138 of the Rules of the Tribunal, the Tribunal may give an advisory
29 opinion when the following three cumulative conditions are met:

30
31 There must be an international agreement related to the purposes of the Convention
32 specifically providing for the submission to the Tribunal for the request for such an
33 opinion;

34
35 the request must be submitted by a body authorized by article 21 of the Statute or in
36 accordance with an agreement within the meaning of that article; and

37
38 thirdly, the opinion sought must relate to a legal question.

39
40 In this instance, all three conditions are met.

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

1 preservation of the climate system and the marine environment”. The remainder of
2 the provisions of the Agreement are also in line with the purposes of Convention.¹

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

10
11 The first condition for the exercise of the Tribunal’s advisory jurisdiction is thus met.

12
13 As for the other two conditions, they are also met.

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

19
20 In addition, the questions put by the Commission are indeed of a legal nature. As
21 has been confirmed by this Tribunal and by the Seabed Disputes Chamber in two
22 past cases (*SRFC Advisory Opinion* and the *Advisory Opinion in the Responsibilities*
23 *and Obligations of States in the context of activities carried out in the Area*), a
24 question is deemed to be of a “legal” nature when it is “framed in terms of law”, and
25 where the Tribunal can respond to it by interpreting the provisions of UNCLOS and
26 by identifying “other relevant rules of international law”.²

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

31
32 The possible political dimension of a question in no way eradicates its legal
33 character. To cite the terms of the International Court of Justice in its *Advisory*
34 *Opinion on the Legality of the Threat or Use of Nuclear Weapons*, the political aspect
35 of a question “does not suffice to deprive it of its character as a ‘legal question’”.

36
37 In other words, the three conditions for the Tribunal to exercise its advisory
38 jurisdiction are met in this instance. There is nothing to prevent the Tribunal from

¹ 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 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.

² In the same vein, in the *Western Sahara* case, the [Court] suggested that the questions are of a “legal” nature if they are “by their very nature susceptible of a reply based on law” [*Western Sahara*, *Advisory Opinion* of 16 October 1975, *I.C.J. Reports* 1975, para. 15].

1 responding to the request of the Commission. On the contrary, the fact that the
2 environmental situation is so deteriorated, as we know, invites the Tribunal to deal
3 with the questions that the Commission has put to it.

4
5 This position is also consistent with the statement made by President Hoffmann
6 when, during his speech before the General Assembly of the United Nations in
7 December 2022, confirmed that the “Tribunal stands ready to discharge any
8 mandate, including through its advisory function, that States might wish to entrust to
9 it”.

10
11 This brings me now to the second point of my presentation: the admissibility of the
12 questions put to the Tribunal.

13
14 I understand that there are certain Parties that would claim that the Tribunal should
15 not examine the request of the Commission, notwithstanding its having the
16 jurisdiction to do so, if:

17
18 first of all, the Rules of the Tribunal require a “precise statement of the question”,
19 which is not provided by the questions put by the Commission and, furthermore, the
20 Commission’s request would challenge the rights and obligations of States that did
21 not consent to the submission of the Commission’s request to the Tribunal.

22
23 I think that these two concerns – although they might be legitimate in certain
24 contexts – are unwarranted in the case before us.

25
26 First of all, it seems to me that the questions put to the Tribunal are sufficiently clear.
27 They seek to determine the specific obligations arising from certain general
28 obligations of the Convention. The general obligations in question have been
29 precisely identified; there are two of them, and, as I shall explain shortly, they reflect
30 articles 192 and 194 of the Convention.

31
32 Moreover, I understand from the jurisprudence of the Tribunal and of the
33 International Court of Justice that they confirm their general jurisdiction to “give an
34 advisory opinion on any legal question, abstract or otherwise”.

35
36 As regards the implication of third Parties, I agree that, as a matter of principle, no
37 proceedings should affect the rights and obligations of another State without the
38 consent of the latter, but I understand from the jurisprudence of the Tribunal and of
39 the International Court of Justice that this principle does not apply to advisory
40 proceedings on general points of law, as is the case in these proceedings.

41
42 In these circumstances, I see that there is no obstacle to the admissibility of the
43 Commission’s request, which can, indeed, be examined by the Tribunal.

44
45 This brings me now to my third and final point: the questions put to the Tribunal.

46
47 Mr President, members of the Tribunal, as you know, the question that the
48 Commission is inviting you to define the “specific obligations of States Parties to
49 UNCLOS, including under Part XII” and, more precisely, the specific obligations that
50 arise:

1
2 first of all, from the obligation to prevent, reduce and control pollution of the marine
3 environment, as set out in article 194 of the Convention;

4
5 and furthermore, from the obligation to protect and preserve the marine environment,
6 which is contained in article 192 the Convention.

7
8 I shall go over both of these obligations in turn and explain the duties that arise from
9 each.

10
11 First of all, the duty to prevent, reduce and control pollution of the marine
12 environment.

13
14 Pursuant to article 194(1) the Convention, States must take the necessary measures
15 to “prevent, reduce and control” pollution of the marine environment. According to
16 the Republic of Djibouti, these measures, which are not defined by the Convention,
17 contain a number of specific obligations.

18
19 Firstly, these include the obligation to prevent, reduce and control pollution caused
20 by anthropogenic greenhouse gas emissions, which, furthermore, implies that there
21 is an obligation to maintain the global average temperature increase to well below
22 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase
23 to 1.5°C above pre-industrial levels.

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

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

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

48
49 The reference to these texts are warranted. Here, the UNFCCC and the Paris
50 Agreement, in the light of which the Convention can be interpreted, provide that

1 States Parties to these texts have undertaken to combat GHG emissions by
2 maintaining temperature increases.

3
4 Secondly, the Republic of Djibouti considers that the obligation to “prevent, reduce
5 and control” pollution of the marine environment also includes the obligation for
6 States to cooperate in order to prevent, reduce and control pollution of the marine
7 environment.

8
9 Indeed, article 194 of the Convention provides that “States shall take, individually or
10 jointly as appropriate, all measures consistent with the Convention that are
11 necessary to prevent, reduce and control pollution of the marine environment.” By
12 referring to States taking action “jointly”, article 194 clearly implies that there is an
13 obligation for States to cooperate with each other when their joint action is necessary
14 in order to prevent, reduce and control pollution of the marine environment.

15
16 This obligation to cooperate has a number of different ramifications, as explained by
17 the Tribunal in the *MOX Plant* case. It includes, *inter alia*, the obligation for State
18 Parties to “enter into consultations” with a view to exchanging information among
19 themselves; monitoring risks or the effects on the environment of planned activities;
20 and working together on the international standards and rules necessary to combat
21 the marine pollution that can result from greenhouse gas emissions.

22
23 Cooperation between States is all the more important – as His Excellency in his
24 introductory speech recalled – since combat against climate change doesn’t stop at
25 national borders and cannot be undertaken by one country alone. It is necessary for
26 States to take joint action. In the words of the International Court of Justice in *Pulp
27 Mills*, “it is by co-operating that the States will can jointly manage the risks of damage
28 to the environment”.

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

39
40 To conclude on the obligation to “prevent, reduce and control pollution” of the marine
41 environment, Djibouti asserts that this includes the following specific duties:

42
43 first of all, the duty to prevent, reduce and control pollution caused by anthropogenic
44 greenhouse gas emissions, which implies that there is an obligation to keep the
45 global average temperature increase well below 2°C above pre-industrial levels and
46 to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial
47 levels; secondly, the obligation incumbent on States to cooperate with each other in
48 order to prevent, reduce and control pollution of the marine environment.

1 The Republic of Djibouti respectfully asks the Tribunal to confirm this reading the
2 Convention.

3
4 I come now to the second obligation covered by the Commission's request: the
5 obligation to protect and preserve the marine environment, as set out in article 192
6 the Convention.

7
8 According to the Republic of Djibouti, this obligation includes, more specifically, the
9 obligation incumbent upon States to monitor and control activities likely to pollute the
10 marine environment.

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

20
21 This reading of the obligation to protect and preserve the marine environment is
22 consistent with jurisprudence:

23
24 In the *Certain Activities* case, the International Court of Justice held that "a State
25 must, before embarking on an activity having the potential adversely to affect the
26 environment of another State, ascertain if there is a risk of significant transboundary
27 harm, which would trigger the requirement to carry out an environmental impact
28 assessment."

29
30 And, in the *Pulp Mills* case, the Court also confirmed that the obligation to carry out
31 an environmental impact assessment existed under customary international law.
32 This was subsequently confirmed by the Seabed Disputes Chamber in its *Advisory
33 Opinion on Responsibilities and Obligations of States with respect to Activities in the
34 Area*.

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

44
45 To summarize, the Republic of Djibouti respectfully asks the Tribunal to confirm that
46 the obligation to protect and preserve the marine environment includes the specific
47 obligation for States to monitor and control activities likely to pollute that
48 environment.

1 Mr President, members of the Tribunal, the UN Convention on the Law of the Sea is
2 an essential legal framework for the protection of the marine environment and for
3 cooperation between States facing the challenges of climate change and ocean
4 pollution.

5
6 According to the Republic of Djibouti, this text, which imposes on States general
7 obligations to prevent, reduce and control pollution of the marine environment, and to
8 protect and preserve this environment, also implies specific obligations for States to
9 prevent, reduce and control pollution caused by anthropogenic greenhouse gas
10 emissions; cooperate with each other to prevent, reduce and control pollution of the
11 marine environment; and monitor and control activities likely to pollute that
12 environment.

13
14 These specific obligations do not undermine the sovereignty that States have over
15 their natural resources; on the contrary, they are an expression of their responsibility
16 to protect and to preserve the common heritage of humankind, which is the ocean.

17
18 Article 193 of the Convention supports this view, providing that “States have the
19 sovereign right to exploit their natural resources pursuant to their environmental
20 policies and in accordance with their duty to protect and preserve the marine
21 environment.” What is more, States are free to define the means they use in fulfilling
22 these duties – strengthening the legislative and regulatory arsenal, adopting
23 administrative measures or creating monitoring mechanisms.

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

33
34 Mr President, members of the Tribunal, the United Nations Convention on the Law of
35 the Sea is a living and evolving instrument that must adapt to the realities and the
36 requirements of the 21st century. It offers a sound and universal legal framework, but
37 it requires genuine commitment and collective action on the part of all its States
38 Parties.

39
40 The protection of the marine environment and the combat against climate change
41 and pollution of the oceans are ethical, ecological, economic and security
42 imperatives that concern humankind as a whole. His Excellency the Ambassador set
43 out the main challenges and the outlook for the effective implementation of the
44 Convention in the face of the growing threats of global warming, ocean acidification
45 and loss of biodiversity.

46
47 That is why I invite the Tribunal to reaffirm its commitment to UNCLOS by supporting
48 its enforcement and its evolution in order to play an active role in international
49 cooperation to save our common resource: the oceans.

50

1 I would like to thank you for your attention.

2

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

5

6

7

(Lunch break)