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INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA (CASE NO. 31)

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

WRITTEN STATEMENT OF THE REPUBLIC OF DJIBOUTI

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I. INTRODUCTION

1. At the third meeting of the Commission of Small Island States on Climate Change and International Law (the **Commission**), it was decided inter alia, pursuant to article 3(5) of the Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law (the **Agreement**), to request an advisory opinion from the International Tribunal for the Law of the Sea (**ITLOS**) on the following questions:

> What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea ("UNCLOS"), including under Part XII:
>
> (a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?
>
> (b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?[1]

2. By order of 16 December 2022, ITLOS invited the States Parties to UNCLOS and the relevant intergovernmental organizations to present a written statement on the questions submitted to ITLOS before 16 May 2023.[2] By order of 15 February 2023, ITLOS extended the time-limit for the regularization of written statements to 16 June 2023.[3]

3. The Republic of Djibouti takes note of the dossier of documents transmitted by the Commission pursuant to articles 131(2) and 138(3) of the Rules of ITLOS.[4] The dossier includes extracts from reports of the Intergovernmental Panel on Climate Change, in particular the *Sixth Assessment Report – Climate Change 2022: Impacts, Adaptation and Vulnerability*, which states that "*[h]uman-induced climate change, including more frequent and intense extreme events, has caused widespread adverse impacts and related losses and damages to nature and people, beyond natural climate variability.*"[5]

4. The Republic of Djibouti also takes note of the statements made by Member States of the Commission which underline the need to stabilize greenhouse gas emissions and to avert the dangers of climate change.[6]

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1 Request for advisory opinion regularized by the Commission of Small Island States on Climate Change and International Law at the Registry of ITLOS, 12 December 2022, p. 2.

2 Order of the International Tribunal for the Law of the Sea (Order 2022/4), 16 December 2022, p. 2.

3 Order of the International Tribunal for the Law of the Sea (Order 2023/1), 15 February 2023, p. 2.

4 Dossier submitted by the Commission of Small Island States on Climate Change and International Law, available at https://www.itlos.org/en/main/cases/list-of-cases/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/dossier-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law/ (last visited on 9 June 2023).

5 Contribution of Working Group II to the Sixth Assessment Report – Climate Change 2022: Impacts, Adaptation and Vulnerability, Summary for Policymakers, para. B.1.

6 See, for example, Statement by His Excellency Nikenike Vurobaravu, President of the Republic of Vanuatu to UNFCCC COP 27, 8 November 2022, available at

5. The widespread and pervasive impact of climate change and its effects on the environment, including marine ecosystems, are no longer a matter of debate, but a fact that must be confronted by the community of nations.

6. The Republic of Djibouti is particularly affected by the harmful effects of climate change. Situated on the east coast of Africa, it is highly vulnerable to climate change. The Republic of Djibouti has a tropical climate of semi-desert and is regularly hit by natural disasters, including long periods of drought. Arable land and natural resources are very poor and exposed to strong pressure from climate change. With its dry climate, the Republic of Djibouti is facing a climate emergency. It is confronted with extreme drought, excessive temperatures, sea level rise, flash floods and water salinization. More specifically, water resources, agriculture and livestock, coastal zones and the health and tourism sectors are under threat.[7]

7. This is obviously not the concern of the Republic of Djibouti alone. As recently as November 2021, as continued complaints of low seasonal rainfall were made, the famine prevention organization Famine Early Warning Systems Network warned that an unpreceded drought was imminent (from 2022) in the Horn of Africa.[8] In addition, the Intergovernmental Panel on Climate Change reported that, although it is the continent that has contributed the least to greenhouse gas emissions, "*key development sectors have already experienced widespread loss and damage attributable to anthropogenic climate change*".[9] At a global level, climate change has slowed the growth of agriculture, adversely affected physical and mental health of people and created an existential threat, particularly for low-lying, developing small island States, on account of sea level rise.[10]

8. For these reasons, having had an opportunity to examine the written statements of other States participating in the present proceedings, the Republic of Djibouti intends to set out its position. It is through the points of agreement or disagreement between States as part of a dynamic dialogue, a critical examination and ambitious objectives that the principles underlying international law can be clarified and consolidated in the interest of the global community.

9. The Republic of Djibouti has continued to contribute to the international community's efforts to combat climate change. To that end, the Republic of Djibouti ratified the United Nations

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https://www.itlos.org/fileadmin/itlos/documents/cases/31/Dossier_COSIS_20221212/24._COP27.pdf (last visited on 9 June 2023).

[7] World Bank, *Climate Risk Profile: Djibouti*, 2021, available at https://climateknowledgeportal.worldbank.org/sites/default/files/2021-04/15722-WB_Djibouti%20Country%20Profile-WEB.pdf (last visited on 9 June 2023).

[8] Famine Early Warning System Network, *Over 20 million people in need of urgent food aid in the Horn of Africa amid severe drought and conflict*, 29 December 2021, available at https://fews.net/sites/default/files/documents/reports/east-africa-alert-20211229-final_0.pdf (last visited on 9 June 2023).

[9] IPCC, *Working Group II, Sixth Assessment Report: Chapter 9: Africa*, 1 October 2021, available at https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_FinalDraft_Chapter09.pdf (last visited on 9 June 2023).

[10] IPCC, *Working Group II, Sixth Assessment Report: Climate Change 2022: Impacts, Adaptation and Vulnerability*, 2022, available at https://report.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf (last visited on 9 June 2023).

Framework Convention on Climate Change (**UNFCCC**) in 1995, the Kyoto Protocol in 2002 and the Paris Agreement in 2016. In addition, in 2016 the Republic of Djibouti submitted to the UNFCCC its Intended Nationally Determined Contribution, in which the Republic of Djibouti committed to reducing its greenhouse gas emissions by 40% by 2030.[11] For the reasons set out above, the Republic of Djibouti is especially committed to the global effort to mitigate and prevent climate change.

10. This statement concerns both preliminary issues and substantive issues. We will first address, in Part II, the issue of the jurisdiction of ITLOS and the admissibility of the request submitted by the Commission. In Part III, we will set out the responses of the Republic of Djibouti to the questions asked to ITLOS in these proceedings, referring back, in particular, to the obligations of States Parties under UNCLOS and under customary international law. Lastly, in Part IV, we will present the conclusions of the Republic of Djibouti.

[11] Republic of Djibouti, *Intended Nationally Determined Contribution of the Republic of Djibouti*, available at https://www4.unfccc.int/sites/submissions/INDC/Published%20Documents/Djibouti/1/INDC-Djibouti_ENG.pdf (last visited on 9 June 2023).

II. JURISDICTION AND ADMISSIBILITY

11. The Republic of Djibouti considers it necessary briefly to address issues of jurisdiction (Section 1) and admissibility (Section 2) in relation to the request submitted by the Commission.

1. Jurisdiction of ITLOS

12. Article 21 of the Statute of ITLOS provides that "*[t]he jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with [UNCLOS] and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal*." In the absence of a specific provision which confers advisory jurisdiction on ITLOS, some States might be inclined to claim that it does not have jurisdiction to respond to the request submitted by the Commission.

13. However, as ITLOS noted in its *SRFC Advisory Opinion*, article 21 of the Statute "*stands on its own footing*" and "*should not be considered as subordinate to article 288 of [UNCLOS]*", which refers only to the contentious jurisdiction of ITLOS.[12] The reference to "*all matters*" in article 21 is not confined to contentious cases, as is the situation with the use of the terms "*all cases*" in article 36(1) of the Statute of the International Court of Justice or "*all cases*" in article 36 of the Statute of the Permanent Court of International Justice.[13] Article 21 of the Statute of ITLOS, by contrast, confers on ITLOS a wide jurisdiction over all contentious and non-contentious cases, provided only that an "*other agreement*" confers such jurisdiction on it.[14] As is explained below, such an "*other agreement*" does exist in this case.

14. Any request submitted under that "*other agreement*" must also satisfy the following prerequisites laid down in article 138 of the Rules of ITLOS:[15] (i) that "*other agreement*" must be related to the purposes of UNCLOS and specifically provide for the submission to ITLOS of a request for an advisory opinion; (ii) the request must be transmitted to ITLOS by a body authorized by the agreement; and (iii) such an advisory opinion may be given only on "*a legal question*".

15. These prerequisites are satisfied in the present case.

16. *First*, on the basis of article 2(2) of the Agreement, the Agreement may be regarded as an "*other agreement which confers jurisdiction on the Tribunal*" within the meaning of article 21 of the Statute of ITLOS.

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12 *Request for advisory opinion submitted by the Sub-Regional Fisheries Commission (Case No. 21)*, Advisory Opinion of 2 April 2015, para. 52.

13 *MOX Plant (Ireland* v. *United Kingdom), Provisional Measures*, Order of 3 December 2001, para. 51.

14 *Request for advisory opinion submitted by the Sub-Regional Fisheries Commission (Case No. 21)*, Advisory Opinion of 2 April 2015, para. 58.

15 *Request for advisory opinion submitted by the Sub-Regional Fisheries Commission (Case No. 21)*, Advisory Opinion of 2 April 2015, para. 59.

17. *Second*, there can be no doubt that the Agreement is related to the purposes of UNCLOS. The Vienna Convention on the Law of Treaties provides (i) that a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose; and (ii) that the context comprises inter alia, in addition to the text, its preambles and annexes.[16]

18. In this regard, the preamble of the Agreement specifically and expressly recognizes UNCLOS and the "*rights and entitlements*" that flow from it.[17] The Agreement also has regard to the obligations of States under the UNFCCC and UNCLOS, and other principles of international law applicable to the protection and preservation of the climate system and marine environment.[18] In addition, the mandate of the Commission under the Agreement includes the promotion and contribution to principles of international law concerning climate change.[19]

19. These purposes are also reflected in UNCLOS. In its preamble UNCLOS provides for "*the equitable and efficient utilization of* [the] *resources* [of States], *the conservation of their living resources, and the study, protection and preservation of the marine environment*".[20] UNCLOS also devotes an entire part, namely Part XII, to "*[p]rotection and preservation of the marine environment*", containing provisions on measures to prevent, reduce and control pollution from any source.[21] In addition, UNCLOS establishes specific obligations in combatting pollution from land-based sources,[22] pollution by dumping,[23] pollution by vessels[24] and pollution from or through the atmosphere.[25] Lastly, Part XII of UNCLOS includes several references to other rules of international law.[26]

20. *Third*, the request is submitted by the Commission, which is the body authorized to request an advisory opinion under the Agreement. Specifically, the Agreement provides that "*[h]aving regard to the fundamental importance of oceans as sinks and reservoirs of greenhouse gases and the direct relevance of the marine environment to the adverse effects of climate change on Small Island States, the Commission shall be authorized to request advisory opinions from [ITLOS] …*".[27]

21. *Fourth*, the questions posed are undoubtedly of a legal nature. The questions raised in this case relate expressly to the "*obligations*" of States Parties to UNCLOS in relation to prevention of

16 Vienna Convention on the Law of Treaties, article 31(1) and (2).
17 Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law, preamble.
18 Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law, preamble.
19 Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law, article 1(3).
20 United Nations Convention on the Law of the Sea, preamble.
21 United Nations Convention on the Law of the Sea, article 194.
22 United Nations Convention on the Law of the Sea, article 207.
23 United Nations Convention on the Law of the Sea, article 210.
24 United Nations Convention on the Law of the Sea, article 211.
25 United Nations Convention on the Law of the Sea, article 212.
26 See, for example, United Nations Convention on the Law of the Sea, articles 208, 210 and 211.
27 Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law, article 2(2).

marine pollution and protection of the marine environment and are therefore clearly legal in nature. In this regard, the International Court of Justice has held that a legal question is framed in terms of law and raises problems of international law.[28] According to the International Court of Justice, such questions are "*by their very nature susceptible of a reply based on law*" and "*they appear … to be questions of a legal character.*"[29] The Seabed Disputes Chamber explicitly recognized that questions relating to the legal responsibilities and obligations of States Parties to UNCLOS were of a legal nature.[30]

22. It could be argued that the questions raised by the Commission are of a political nature. This would not, however, have any bearing on the conclusion. It is well established in international law that the fact that a question has a political dimension does not deprive it of its legal character.[31] The International Court of Justice has thus noted that "*the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion.*"[32] This position is consistent with that adopted by ITLOS in one of its earlier advisory opinions.[33]

23. ITLOS does therefore have jurisdiction in the request submitted by the Commission.

2. Admissibility of the request submitted by the Commission

24. As regards the admissibility of the request submitted by the Commission, ITLOS has full discretion to deliver an advisory opinion. This is confirmed by article 138 of the Rules of ITLOS, which provides that "*[t]he Tribunal **may** give an advisory opinion*".[34]

25. The Republic of Djibouti will nevertheless examine below possible objections to admissibility which States might raise against the request submitted by the Commission.

26. In general, an international court or tribunal may not refuse a request for an advisory opinion except for "*compelling reasons*".[35] In the present case there are no compelling reasons to refuse the request submitted by the Commission; moreover, there are compelling reasons to agree to give the requested opinion, as will be further explained below.

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28 *Western Sahara*, Advisory Opinion of the International Court of Justice of 16 October 1975, para. 15.
29 *Western Sahara*, Advisory Opinion of the International Court of Justice of 16 October 1975, para. 15.
30 *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Advisory Opinion of the Seabed Disputes Chamber of 1 February 2011, para. 39.
31 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of the International Court of Justice of 9 July 2004, para. 155.
32 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of the International Court of Justice of 8 July 1996.
33 *Request for advisory opinion submitted by the Sub-Regional Fisheries Commission (Case No. 21)*, Advisory Opinion of 2 April 2015, para. 59.
34 Rules of the International Tribunal for the Law of the Sea, article 138 (emphasis added).
35 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of the International Court of Justice of 8 July 1996, para. 14.

27. However, some might argue that the questions asked by the Commission effectively confer a legislative role on ITLOS by answering questions *de lege ferenda*.

28. It should be noted in this regard that the questions posed do not call for ITLOS to legislate on rules but to confirm the legal nature of *lex lata* rules. This is a power conferred on courts and tribunals by virtue of their advisory jurisdiction.[36] Furthermore, in accordance with the principle of "*compétence de la compétence*", ITLOS may determine the extent of its jurisdiction in the exercise of its advisory jurisdiction.[37] Consequently, if ITLOS considers that the questions submitted to it oblige it to render judgment *sub specie legis ferendae*, it may opt not to give judgment.[38]

29. It could also be claimed by States that the effect of the advisory opinion (if delivered) could determine the extent of rights and obligations of third States (non-members of the Commission) without their consent.

30. Such an objection would be similar in nature to the objection relied on for the first time in *Monetary Gold Removed from Rome in 1943*.[39] However, that objection should not be able to hold in non-contentious advisory proceedings. Advisory opinions have no binding force. By their nature, they cannot determine the extent of the rights of States. In this respect, the consent of third States likely to be affected by decisions of ITLOS is not required by international law.[40]

31. For these reasons, the Republic of Djibouti asserts that the request submitted by the Commission is admissible before ITLOS.

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36 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of the International Court of Justice, 1996, para. 73.

37 United Nations Convention on the Law of the Sea, article 288(4).

38 *Fisheries Jurisdiction*, International Court of Justice, 1974, para. 53.

39 *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom of Great Britain and Northern Ireland and United States of America), Preliminary Question*, Judgment of the International Court of Justice, 1954, p. 17.

40 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First phase*, Advisory Opinion of the International Court of Justice of 30 March 1950, p. 71; *Request for advisory opinion submitted by the Sub-Regional Fisheries Commission (Case No. 21)*, Advisory Opinion of 2 April 2015, para. 76.

III. RESPONSES TO THE QUESTIONS

32. Having examined the issues of jurisdiction and admissibility, Part III sets out the position of the Republic of Djibouti on the substantive issues raised by the request submitted by the Commission.

33. In Part III:

(a) Section 1 details the rules governing these advisory proceedings;

(b) Section 2 concerns the obligations of States Parties to UNCLOS; and

(c) Section 3 describes the obligations of States under customary international law.

1. Normative framework for the proceedings

34. Article 138 of the Rules of ITLOS provides that ITLOS is to apply *mutatis mutandis* articles 130 to 137 of the Rules (which relate to the advisory jurisdiction of the Seabed Disputes Chamber) in the exercise of its advisory jurisdiction on the basis of an "*other agreement*".

35. Article 130(1) of the Rules of ITLOS provides that, in the exercise of its advisory jurisdiction, the Seabed Disputes Chamber "*shall apply this section and be guided, to the extent to which it recognizes them to be applicable, by the provisions of the Statute and of these Rules applicable in contentious cases*."

36. Furthermore, article 23 of the Statute of ITLOS, read in conjunction with article 293 of UNCLOS, provides that ITLOS is to decide "*all disputes and applications*" in accordance with UNCLOS and other rules of international law not incompatible with UNCLOS.

37. Consequently, ITLOS must answer the questions submitted to it in accordance with UNCLOS and other rules of international law not incompatible with UNCLOS.

38. In the following sections, the Republic of Djibouti will therefore present its arguments regarding the obligations incumbent on States both under UNCLOS and under customary international law.

2. Obligations under UNCLOS

39. As was explained in the introduction, the Commission requests ITLOS to clarify the meaning and scope of the obligations incumbent on States under UNCLOS, first, "*to prevent, reduce and control pollution of the marine environment*" and, second, "*to protect and preserve the marine environment*". In the view of the Republic of Djibouti, those obligations have the following characteristics.

40. The first point to note is that these two obligations actually stem from another more general obligation, which is laid down in article 192 of UNCLOS. Under article 192 of UNCLOS, States have the obligation "*to protect and preserve the marine environment*." As ITLOS observed in the *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean*, although phrased in general terms, that obligation is nevertheless fully binding on States, which are therefore required to comply with it.[41] Accordingly, not only are States obliged to perform that obligation but, moreover, they must cooperate with one another in its implementation on a regional and a global basis.[42]

41. The explanations below are intended to clarify the scope of this obligation, setting out (i) its content; (ii) its interpretation; and (iii) the nature of the obligation in question.

42. With regard, first, to the content of the obligation, article 192 of UNCLOS in fact covers a series of specific obligations which are fleshed out in Part XII of the Convention.[43] In particular, that obligation of protection and preservation includes:

(a) under article 194, an obligation to take "*measures to prevent, reduce and control pollution of the marine environment*",[44] bearing in mind that the marine environment naturally includes "*ecosystems*" in their entirety, as was recalled in the *South China Sea case (Philippines* v. *China);*[45]

(b) under article 204, an obligation "*to observe, measure, evaluate and analyse, by recognized scientific methods, the risks or effects of pollution of the marine environment*" and to "*keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment*";

(c) under article 206, an obligation "*as far as practicable, [to] assess the potential effects of such activities on the marine environment*", when they "*have reasonable grounds for believing that planned activities under their jurisdiction or control may cause*

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41 *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean*, *Provisional Measures*, Order of the International Tribunal for the Law of the Sea of 25 April 2015, para. 69. See also *South China Sea (Philippines* v. *China)*, Arbitral Award on the merits of 12 July 2016, para. 941. The Tribunal hearing the *South China Sea* dispute confirmed that this general obligation extends both to "*protection*" of the marine environment from future damage and to "*preservation*" in the sense of maintaining or improving its present condition (*South China Sea (Philippines* v. *China)*, Arbitral Award on the merits of 12 July 2016, para. 941).

42 United Nations Convention on the Law of the Sea, article 197.

43 As was confirmed in the *South China Sea case (Philippines* v. *China)*, the content of the general obligation under article 192 is "*informed by the other provisions of Part XII and other applicable rules of international law*", including "*the corpus of international law relating to the environment*" (*South China Sea (Philippines* v. *China)*, Arbitral Award on the merits of 12 July 2016, para. 941).

44 United Nations Convention on the Law of the Sea, article 194.

45 *South China Sea (Philippines* v. *China)*, Arbitral Award on the merits of 12 July 2016, para. 945 (the Tribunal stated that the obligation "*is 'not limited to measures aimed strictly at controlling marine pollution'*"); United Nations Convention on the Law of the Sea, article 194(5).

substantial pollution of or significant and harmful changes to the marine environment"; and

(d) obligations to "*prevent, reduce and control*" marine pollution (i) from land-based sources (under article 207); (ii) from seabed activities (subject to their jurisdiction) (under article 208); (iii) more generally, from "*activities in the Area*" (including by vessels, installations, structures and other devices) (under article 209); (iv) caused by dumping (under article 210); (v) caused by vessels (under article 211); or (iv) from or through the atmosphere (under article 212).

43. The obligation to protect and preserve the marine environment nevertheless has its limits. These are defined in article 193 of UNCLOS, which provides that "*States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.*"

44. As regards, second, the interpretation of article 192, it should be noted that the abovementioned provisions must be interpreted consistently with other instruments of international law relating to protection of the environment. Articles 208, 210 and 211 of UNCLOS stipulate that laws, regulations and measures adopted by States in the implementation of their obligation to "*prevent, reduce and control*" marine pollution (i) "*shall be no less effective than international rules, standards and recommended practices and procedures*";[46] (ii) "*shall be no less effective in preventing, reducing and controlling such pollution than the global rules and standards*";[47] and (iii) "*shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference*".[48] Consequently, the obligation to protect and preserve the marine environment under article 192 of UNCLOS (in all its forms) must be interpreted consistently with the Paris Agreement, the Kyoto Protocol and the Convention on Biological Diversity.

45. Lastly, it should be noted that the obligation incumbent on States under article 192 of UNCLOS is an obligation of conduct (and not of result). Under article 194 of UNCLOS, States must "*us[e] for this purpose the best practicable means at their disposal*". Similarly, a number of articles provide that States must "*endeavour*" to adopt certain measures to combat marine pollution.[49]

46. The conduct expected of States in the performance of their obligations to protect and preserve the marine environment is that of a State acting with "due diligence". As ITLOS explained in its *SRFC Advisory Opinion*, obligations "*to ensure*" are obligations to carry out actions with

[46] United Nations Convention on the Law of the Sea, article 208(3).
[47] United Nations Convention on the Law of the Sea, article 210(6).
[48] United Nations Convention on the Law of the Sea, article 211(2).
[49] United Nations Convention on the Law of the Sea, article 207(3), 208(4), 210(4), 212(3).

"*due diligence*".[50] As was highlighted by the Seabed Disputes Chamber, the content of the obligation of "*due diligence*" "*may not easily be described in precise terms*" in so far as it is "*variable concept.*"[51] A number of decisions or opinions nevertheless helpfully clarify its scope. In the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, the International Court of Justice held that the obligation of "*due diligence*" entails "*not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party*".[52] Similarly, the Seabed Disputes Chamber has ruled that the "*due diligence*" obligation requires States to take "*reasonably appropriate*" measures.[53] In any event, States naturally enjoy some discretion in determining the "*appropriate*" or "*best practicable*"[54] rules, measures and means for the prevention and protection of the marine environment.

47. In summary, under UNCLOS, States have an obligation of conduct under which they must protect and preserve the marine environment; that obligation covers all the aspects described above. States are, of course, required to implement that obligation, exercising "due diligence"; otherwise, they would fail to fulfil their obligations under UNCLOS.

3. Obligations under customary international law

48. Although the content of the obligation to protect and preserve the marine environment is defined, first and foremost, by UNCLOS, it is also specified by customary international law.

49. It is well known that in order to determine the existence and the content of customary international law, it must be examined whether there is a general practice of States that is accepted as being law.[55] As far as customary obligations of States to protect and preserve is concerned, there is no need for a detailed analysis of their constituent elements. As the International Court of Justice noted in the *Gulf of Maine* case, customary international law comprises not only rules which "*can be tested by induction*", but also "*a limited set of norms for ensuring the coexistence and vital cooperation of the members of the international*

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50 *Request for advisory opinion submitted by the Sub-Regional Fisheries Commission (Case No. 21)*, Advisory Opinion of 2 April 2015, paras. 128 and 129.

51 *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Advisory Opinion of the Seabed Disputes Chamber of 1 February 2011, para. 117.

52 *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, Judgment of the International Court of Justice, 2010, para. 197.

53 *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Advisory Opinion of 1 February 2011, para. 120.

54 Expression used in article 194 of UNCLOS, which provides that States must use "*the best practicable means at their disposal and [and to act] in accordance with their capabilities*". In the same vein, article 206 of UNCLOS establishes an obligation to assess and report when the State has "*reasonable grounds for believing*" that planned activities may cause substantial damage to the environment.

55 *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, Judgment of the International Court of Justice of 20 February 1969, para. 77. See also, for example, *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*, Judgment of the International Court of Justice, 2012, para. 55; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment of the International Court of Justice, 1985, para. 27.

community".[56] In the case at issue, the existence of a vast corpus of international jurisprudence relating to the environment has given rise to a series of customary obligations.[57]

50. It should be borne in mind that, as the International Court of Justice noted in the *North Sea Continental Shelf* case, a treaty provision could establish an obligation under customary international law if it was "*of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law*".[58] In addition, customary international law may also be reflected in treaties by reason of a "*extensive codification … and the extent of the accession to the resultant treaties, as well as [by reference to] the fact that the denunciation clauses that existed in the codification instruments have never been used*".[59]

51. In this case, the obligation of States to protect and preserve the marine environment encompasses a number of obligations under customary international law.

52. In particular, there is an obligation under customary law to mitigate global warming and its effects which stems from another treaty: the UNFCCC. Article 4 of the UNFCCC imposes on States an obligation to mitigate climate change by addressing anthropogenic emissions of greenhouse gases. The obligations contained in articles 4(1)(b) and 4(2)(a) of the UNFCCC have a "*fundamentally norm-creating character*" and lay down obligations with a view to mitigating climate change through "*national and … regional programmes*" and "*by limiting… anthropogenic emissions of greenhouse gases*".[60] Furthermore, the obligations arising from the UNFCCC are reinforced by the almost universal acceptance of the Convention, which currently has 198 parties. Those commitments have also been recognized on several occasions by States advocating the existence of an obligation to take measures to mitigate climate change.[61]

53. This obligation is even stronger where the action or inaction of States results in harm to other States. The principle of sovereign equality of States encompasses the right of every State to survival,[62] the right to territorial integrity[63] and the right to permanent sovereignty over its natural resources.[64] It has long been recognized in international law that "*[t]erritorial sovereignty … has as corollary a duty: the obligation to protect within the territory the rights*

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56 *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment of the International Court of Justice of 12 October 1984, para. 111.

57 Statute of the International Court of Justice, article 38(1)(d).

58 *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, Judgment of the International Court of Justice of 20 February 1969, para. 72.

59 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of the International Court of Justice, 1996, para. 82.

60 *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, Judgment of the International Court of Justice of 20 February 1969; UNFCCC, articles 4(1)(b) and 4(2).

61 See Dossier submitted by the Commission to ITLOS, Evan J. Criddle and Evan Fox-Decent, *Mandatory Multilateralism*, 113 American Journal of International Law 272, 291 (2019).

62 United Nations Charter, article 2; Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, para. 96.

63 United Nations Charter, article 2(4); *Corfu Channel case, I.C.J. Reports 1949*, p. 35.

64 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 168, para. 244.

of other States".[65] Each of the rights associated with sovereignty thus entails a corresponding obligation for States not to violate those same rights where they are enjoyed by other States. This obligation under customary international law is expressed primarily in the principle of *sic utere*, which means that a State may not use its territory in such a way as to harm another State.[66] Moreover, the obligation to prevent transboundary harm protects both each State's own rights and the rights which States have in common.[67]

54. The obligation for States not to cause harm to other States has been confirmed by the jurisprudence in international environmental law. In the *Trail Smelter* arbitration, the Tribunal ruled that "*under the principles of international law … no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and injury established by clear and convincing evidence*".[68]

55. Since then, the International Court of Justice has confirmed that the obligation to prevent transborder environmental harm is part of customary international law. For example, in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, the Court recognized "*the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control*".[69] Similarly, in the *Pulp Mills* case, the Court confirmed that "*the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory*."[70] Lastly, in the *Certain Activities* case, the Court reaffirmed the obligation of each State "*to exercise due diligence in preventing significant transboundary environmental harm*".[71]

56. It should also be noted that the obligation to protect and preserve the marine environment comprises other obligations of customary law, in particular the obligation under the Kyoto Protocol to reduce emissions in the form of an individually assigned carbon budget[72] and the obligation under the Paris Agreement to hold the increase in temperature to below 2ºC above pre-industrial levels[73] (whilst permitting each State to define its own emission reduction commitments and imposing a quantitative ceiling through a collective obligation).[74]

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65 *Island of Palmas (Netherlands* v. *United States of America)*, 2 RIAA 829, 839 (1928).

66 ILC, Draft articles on Prevention of Transboundary Harm from Hazardous Activities, article 3.

67 See Benoit Mayer, *Climate Change Mitigation as an Obligation under Customary International Law*, 48 Yale Journal of International Law 105 (2023).

68 *Trail Smelter case (United States* v. *Canada)*, 16 April 1938 and 11 March 1941, p. 1965.

69 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of the International Court of Justice, 1996, para. 29.

70 *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, Judgment of the International Court of Justice, 2010, para. 101.

71 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)*, Judgment of the International Court of Justice, 2015, para. 104.

72 Protocol to the United Nations Framework Convention on Climate Change, Annex 1.

73 Paris Agreement, articles 2 and 4.

74 It could be argued that this is an example of the rapid development of customary international law that usually occurs at times of major historic change. That is the case, for example, with the rapid growth of the rules of customary international humanitarian law that emerged from the Tribunals for the former Yugoslavia and Rwanda (Michael P. Scharf, *Hugo Grotius and the Concept of Grotian Moments in International Law*, 54 Case Western Reserve Journal of International Law 17 (2022)). Although it is fair to

57. In any event, these obligations are obligations of conduct (and not of result). As was noted by the late Judge James Crawford, such obligations require a State to "*take all reasonable or necessary measures to ensure that the event does not occur*."[75] The African Commission on Human and Peoples' Rights has suggested that States must take "*reasonable and other measures*" to prevent harm to the environment which affects human rights.[76] Like the obligations under UNCLOS, the obligations mentioned above must be implemented with the previously mentioned due diligence, including where the action or inaction of States affects resources shared between several States.[77] The Republic of Djibouti emphasizes in this respect that a fundamental element of a State's obligation of "*due diligence*" is a duty of cooperation. Such an obligation must take account of the principle of "*common but differentiated responsibilities*".[78] This principle is also reflected in UNCLOS, specifically in article 194, which, as was stated above, requires States to use "*the best practicable means at their disposal [and to act] in accordance with their capabilities*". Account must also be taken of the right of States to exploit their natural resources in accordance with article 193 of UNCLOS, which is also expressed in the principle of "*permanent sovereignty over natural resources*".[79]

58. In light of the above considerations, the Republic of Djibouti supports the decision of the Conference of the Parties to the UNFCCC, which asked States to make the "*highest possible mitigation efforts*".[80]

59. In accordance with its Intended Nationally Determined Contribution, the Republic of Djibouti reiterates its extreme vulnerability to climate change, which is all the greater because the Republic of Djibouti is among the "*least developed countries*". In order to achieve its greenhouse gas reduction targets, the Republic of Djibouti would have to invest more than USD 3.8 billion. Its efforts would not be successful, moreover, without support from the international community.

60. In summary, the Republic of Djibouti submits that States have the obligation to prevent pollution of the marine environment and to protect and preserve it not only under UNCLOS but

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say that we find ourselves in a similar moment for international environmental law, the Republic of Djibouti will confine its comments in this statement to the obligations of customary international law as they exist and as they result from the current jurisprudence of international courts and tribunals, which is based on the principles of territorial sovereignty and the prohibition on causing harm to neighbouring States.

75 *Indus Waters Kishenganga (Pakistan/India)*, Partial Award of 18 February 2013, para. 451.

76 Social and Economic Rights Action Center/Nigeria, Communication No. 155/96 (African Commission of Human and Peoples' Rights, October 2001), para. 52.

77 In the *Pulp Mills* case the International Court of Justice applied the obligation of "*due diligence*" to "*a shared resource*" – the River Uruguay (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, Judgment of the International Court of Justice, 2010, para. 103). Similarly, the Seabed Disputes Chamber ruled that the obligation of "*due diligence*" could "*apply to activities with an impact on the environment in an area beyond the limits of national jurisdiction*" (*Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Advisory Opinion of the Seabed Disputes Chamber of 1 February 2011, paras. 147 and 148).

78 United Nations Framework Convention on Climate Change, article 3(1); Kyoto Protocol, article 10.

79 United Nations General Assembly resolution 626 (VII) of 21 December 1952.

80 Decision 1/CP.17, Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action (11 December 2011) FCCC/CP/2011/9/Add.1, p. 2, para. 7.

also under customary international law. That obligation based on customary international law is an obligation of conduct. Pursuant to that obligation, States Parties must act with "*due diligence*" when they undertake activities likely to have an impact on the marine environment and must cooperate with other States to mitigate the effects of climate change.

IV. CONCLUSION

61. The Republic of Djibouti submits that States Parties to UNCLOS have the obligation, stemming both from the treaty and from customary international law, to prevent pollution of the marine environment and to protect it from the effects of climate change. The Republic of Djibouti asserts that the obligations to "*prevent*" and "*preserve*" are encompassed in the obligation of "*due diligence*" laid down by UNCLOS and customary international law.

62. The obligation of "*due diligence*" in relation to the effects of pollution and climate change on the marine environment requires States to adopt reasonable measures in accordance with their capabilities in order to ensure that pollution of the marine environment is avoided and the marine environment is preserved. This obligation is an obligation of conduct but not of result.

63. The content of the obligation of "*due diligence*" can be interpreted in light of the rules of international law, in particular those laid down by almost universally accepted international environmental treaties, including the principles of "*permanent sovereignty over natural resources*" and "*common but differentiated responsibilities*".

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