



INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

Case No. 31

**RESPONSIBILITIES AND OBLIGATIONS OF STATES WITH RESPECT
TO CLIMATE CHANGE AND INTERNATIONAL LAW**

**REQUEST FOR ADVISORY OPINION
SUBMITTED TO THE TRIBUNAL BY THE COMMISSION OF SMALL ISLAND
STATES**

**PETITION TO BE GRANTED *AMICUS CURIAE* STATUS FROM
OUR CHILDREN'S TRUST AND OXFAM INTERNATIONAL**

16 JUNE 2023

PETITION TO BE GRANTED *AMICUS CURIAE* STATUS FROM OUR CHILDREN’S TRUST AND OXFAM INTERNATIONAL

Table of Contents

I. Introduction2

II. Our Children’s Trust and Oxfam Have Both the Interest and the Expert Qualifications to Submit an *Amicus Curiae* Submission to the Tribunal on Behalf of Young People Regarding the Best Available Climate Science3

III. The Tribunal Has Legal Authority to Grant This Petition6

 A. Pursuant to the text of the Convention itself as well as to the Rules and the Statute, OCT and Oxfam International should be granted permission to present the accompanying *amicus curiae* submission in the advisory opinion proceeding7

 B. In the alternative, OCT and Oxfam’s *amicus curiae* submission should be distributed by the Tribunal to the State Parties in the case as well as all other participating organizations based on established Tribunal practices..... 10

IV. Granting This Request for *Amicus Curiae* Status Is Beneficial to the Tribunal11

V. Conclusion16

I. Introduction

Pursuant to Article 169(1) of the United Nations Convention on the Law of the Sea (“Convention”)—in conjunction with Article 82 of the Rules of the International Tribunal for the Law of the Sea (“Rules”) and Article 20(2) of the Statute of the International Tribunal for the Law of the Sea (“Statute”)—Our Children’s Trust (“OCT”) and Oxfam International (“Oxfam”) request leave to file an *amicus curiae* submission with the International Tribunal on the Law of the Sea (“Tribunal”) on behalf of young people around the world and particularly those young people signed onto the corresponding joint written submission in relation to Case No. 31. OCT and Oxfam have significant expertise in the questions of enormous concern raised by the Commission of Small Islands States on Climate Change and International Law (“Commission”) in its formal request for an advisory opinion in Case No. 31 regarding the prevention of harm to the marine environment from the deleterious effects of climate change, which disproportionately affect young people. OCT and Oxfam are well-positioned to beneficially inform the Tribunal’s deliberation of these questions through the corresponding *amicus curiae* submission and, as such, respectfully ask the Tribunal to do the following:

- (a) Admit the jointly filed *amicus curiae* submission accompanying this petition into the advisory opinion proceeding and both: (i) communicate the joint written statement to State Parties and to organizations making written statements; and (ii) make it accessible to the public pursuant to Rules 133(3) and 134; and to

- (b) Authorize a joint oral presentation from OCT and Oxfam on behalf of young people that supports the arguments made in the accompanying joint written submission during the hearing for this advisory opinion proceeding pursuant to Rule 133(4).

The remainder of this petition is organized as follows. Section II focuses specifically on the joint interests of OCT and Oxfam in requesting to submit an *amicus curiae* submission on behalf of young people and why granting that request will be both beneficial and important in informing the Tribunal’s deliberations in the advisory opinion proceeding. Section III outlines the Tribunal’s authority to grant the two requests presented in this petition, and Section IV highlights the desirability of granting the two requests.

II. Our Children’s Trust and Oxfam Have Both the Interest and the Expert Qualifications to Submit an *Amicus Curiae* Submission to the Tribunal on Behalf of Young People Regarding the Best Available Climate Science

Given that *amicus curiae* submissions require the Tribunal to devote additional time for review and that “any engagement with civil society has an ‘opportunity cost’, the [judicial] process is strengthened only if the added value of participation exceeds the cost.”¹ This section of the petition demonstrates that any investment in time incurred in the Tribunal’s review of the submission from OCT and Oxfam on behalf of young people will vastly enhance the fair administration of justice and allow disproportionately impacted youth populations to be given a voice in this tremendously consequential advisory opinion proceeding.

OCT is an international law firm based in the United States and Europe with specialized expertise in conveying climate science to courts and tribunals as part of legal efforts to protect the fundamental human rights of youth imperiled by climate change. OCT represents and supports young people around the world in legal efforts against governments to establish scientifically informed, binding, and enforceable legal standards that ensure their human rights to a healthy atmosphere and a stable climate as well as the innumerable rights that depend on climate stability. OCT’s legal expertise aims to ensure systemic and science-based remedies that protect children across numerous legal venues by relying on its extensive experience with relevant climate science across numerous academic disciplines as well as with the human rights, constitutional, and climate laws of various countries and jurisdictions. OCT’s trial-bound flagship case, *Juliana v. U.S.*, 947 F.3d 1159 (9th Cir. 2020) is a vanguard for youth-led, rights-based climate litigation. More broadly, OCT developed and is currently litigating the Canadian climate case *La Rose v. Her Majesty the Queen*, T-1750-19 (2020 FC 1008) as well as ongoing cases in Mexico (*Jóvenes v. Gobierno de México* No. 1854 (2019)), India (*Pandey v. India*, National Green Tribunal, Case 187 (2017)), Uganda (*Mbabazi and Others v. Attorney General and National Environmental Management Authority*, High Court at Kampala Civil Suit No. 283 (2012)), and several U.S. states (e.g., *Navahine v. State of Hawai’i*, No. 1CCVV-22-0000631, Haw. 1st Cir. Ct. (2023); *Layla H. v. The Commonwealth of Virginia*, No. CL22000632-00 (2022); and *Held v. State of Montana*, No. CDV-2020-307 (Mont. 1st Dist. Ct. 2023), (where full

¹ Emanuele Rebasti & Luisa Vierucci, *A Legal Status for NGOs in Contemporary International Law? (Workshop Report)*, European Univ. Inst. Florence 1, 5 (2002), <https://esil-sedi.eu/wp-content/uploads/2018/04/VierucciRebasti-1.pdf>.

trial, including the presentation of scientific evidence by experts, took place 12-23 June 2023). OCT has also represented children and presented extensive legal and scientific analyses regarding the impact of climate change on human rights to international tribunals and bodies, including the Committee on the Rights of the Child, the U.N. Special Rapporteur for Human Rights and the Environment, and the U.N. Special Rapporteur in the Field of Cultural Rights. More than 50 prominent scientists, including Nobel Prize Laureates and our in-house scientific expert on climate change, contribute to and support OCT's scientific analyses. These scientists are the leading experts in a broad range of topics, including the effect of concentrations of atmospheric carbon dioxide on Earth's current energy imbalance; the cascading global climate harms the world is facing and will continue to face with respect to oceanic systems, sea-level rise, ocean acidification, mass migration, food and water supplies, disease, human health, energy security, national security, economic stability, and armed conflict; and the technical ability of States to immediately reduce emissions and appreciably avert the impending threats and impacts. OCT currently represents dozens of children around the world who are experiencing a multitude of climate change impacts. The unique combination of scientific and legal expertise across multiple disciplines and the conveying of the essential voices of numerous young people that OCT can provide has contributed to the fair administration of justice in courts and legal systems worldwide.

Oxfam works around the globe to end poverty by addressing the root causes of inequality and marginalization and by providing emergency humanitarian aid to those fleeing natural disasters and armed conflict. Climate change has emerged as one of poverty's greatest drivers across the globe, exacerbating factors like social instability and food insecurity. Because of that link, Oxfam has been fighting for decades to protect the rights and livelihoods of the people most affected by the climate crisis, provide support when climate disasters strike, advocate for governments to proactively protect their populations from the adverse impacts of climate change, and ensure that the people and corporations who harm the planet are held accountable. Globally, Oxfam supports communities recovering from disasters caused and exacerbated by climate change and supports coastal communities who rely upon the marine environments for their subsistence. This includes working with local partners to provide clean water, food, cash, and information critical to recovery efforts. Oxfam also helps local responders break their dependence on aid by investing in their efforts to develop adaptation and resilience strategies. Finally, Oxfam fights to hold powerful corporate interests that are driving the climate crisis, particularly the fossil fuel industry, accountable. Oxfam has organized public campaigns to push wealthy polluters to reduce their emissions, pay their fair share of damages, and support a fair transition from fossil fuels to clean energy.

Notably, OCT and Oxfam have extensive experience submitting *amicus curiae* together before tribunals around the world, including recently in three cases before the European Court of Human Rights: *KlimaSeniorinnen v. Switzerland*, ECtHR, No. A-2992/2017 (2016), *Carême v. France*, ECtHR No. 71891/21 (2021) and *Duarte Agostinho and Others v. Portugal and Others*, ECtHR No 39371/20 (2020). We also submitted an *amicus curiae* jointly with other partners in the Mexican youth-led climate change case *Jóvenes v. Gobierno de México*. These *amicus curiae* submissions (and a substantial part of OCT and Oxfam's other work) focus on the rights of youth to have access to justice and on the importance of incorporating the best available climate science into judicial proceedings related to climate change (or both).

The combined legal and scientific expertise of OCT and Oxfam is particularly important to share with the Tribunal because State Parties and other contributors to the legal proceedings are unlikely to submit the best available science necessary for the Tribunal to correctly interpret State obligations under the Convention with regard to climate change. Although many legal and political advocates endorse (and are likely to submit) the temperature targets outlined in the Paris Agreement of limiting average global surface temperature increase to 1.5°C or 2.0°C above pre-industrial times, scientists agree that these targets fundamentally fail to protect the marine ecosystems of the world from the ravages of climate change. As outlined in the accompanying submission, to truly protect and preserve the oceans and marine environment, the Tribunal must reckon with the need to reduce atmospheric carbon dioxide concentrations down to 350 parts per million in order to bring Earth’s energy system back into balance, thereby stabilizing Earth’s oceans systems.

Most fundamentally, OCT and Oxfam’s submission should be admitted by the Tribunal because the young people whom these organizations represent deserve to have their voices heard in the advisory opinion proceeding. The 1992 Rio Declaration on Environment and Development emphasizes, “the youth of the world should be mobilized to forge a global partnership in order to achieve sustainable development and ensure a better future for all[,]”² in part, by providing them with “[e]ffective access to judicial and administrative proceedings[.]” related to environmental matters.³ Advisory opinion proceedings such as the case currently before the Tribunal will significantly impact many parties not formally taking part in the case, particularly youth.⁴ Given that children and youth constitute a uniquely vulnerable group to the harms of climate change’s impacts on the world’s oceans, their voice is particularly important for the Tribunal to take into account. Growing scientific consensus indicates that children are more susceptible than the average adult to negative physical health outcomes resulting from climate change induced effects.⁵ Children are also disproportionately exposed to climate change harm. In particular, 400 million children (almost 1 in 6 worldwide) are at high risk from tropical cyclones, which are

² Rio Declaration on Environment and Development, A/CONF.151/26 (Vol. I), Principle 21 (1992), https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf [hereinafter Rio Declaration].

³ Rio Declaration, *supra* note 2, at Principle 10.

⁴ See generally Shai Farber, *The Amicus Curiae Phenomenon – Theory, Causes and Meanings*, 29 *Transnat’l L. & Contemp. Probs.* 1, 35 (2019), <https://tlcp.law.uiowa.edu/sites/tlcp.law.uiowa.edu/files/29.1.5.pdf> (noting that, when courts decide cases related to “broad social issues[,]” their decisions impact “third parties not taking part in the litigation”).

⁵ See, e.g., Zhiwei Xu, et al., *Climate Change and Children’s Health—A Call for Research on What Works to Protect Children*, 9 *Int’l J. Env’t Res. Public Health* 3298, 3298-302 (2012) (“Children are particularly vulnerable to the impact of climate change. . . . As a result, children experience greater risk of mental disorders, malnutrition, infectious diseases, allergic diseases and respiratory diseases. . . . Children, together with elderly, represent subpopulations particularly sensitive to the negative health effects of air pollution[. . . .] Children, especially very young children, are particularly vulnerable to heat waves[.]”); Marina Romanello et al., *The 2022 Report of the Lancet Countdown on Health and Climate Change: Health at the Mercy of Fossil Fuels*, 400 *Lancet* 1619, 1628 (2022), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(22\)01540-9/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(22)01540-9/fulltext) (“[Y]oung people have been shown to be more prone to anxiety, phobias, depression, stress-related conditions, substance abuse, sleep disorders, reduced capacity to regulate emotions, and increased cognitive deficits.[.] The increasingly visible effects of the climate crisis have given rise to emerging concepts, such as climate change anxiety, solastalgia, eco-anxiety, and ecological grief.”).

increasing in intensity and frequency due to climate change, and 240 million children (1 in 10 worldwide) have high exposure to climate change-induced coastal flooding.⁶ Furthermore, a global survey of 10,000 children living in 10 different countries found that children are experiencing severe emotional distress and anxiety due to climate change. Over 75.5% of respondents indicated that the future is frightening due to climate change and 64.9% declared that they feel government is failing young people across the world in relation to climate change.⁷

Many of the undersigned young people for this petition are below voting age in their respective jurisdictions meaning they are politically powerless to directly influence their State representation. In addition, while several of the young people who have signed this petition are from a State Party to the Convention (Canada), many of the others are citizens of the United States. Importantly, the United States is not a signatory to the Convention, yet these young U.S. citizens are also already being affected by the ravages of climate change on Earth's oceans and marine environments. They can attest to the fact that "neither the environment nor its degradation knows state boundaries[.]"⁸ Because these U.S. youth are already being harmed by climate change and thus will be substantially affected by the decision of the Tribunal in this case (as well as its subsequent reverberations throughout international environmental law), permission to contribute to the proceedings by way of the accompanying submission is the only way their concerns can be considered.

III. The Tribunal Has Legal Authority to Grant This Petition

This section outlines the legal basis upon which the Tribunal can and should grant OCT and Oxfam permission to submit the accompanying *amicus curiae* submission brought on behalf of the youth signatories. In particular, Article 82 of the Rules gives the Tribunal authority to arrange for expert report submissions, such as the accompanying *amicus curiae* submission, which OCT and Oxfam submit in their capacity as experts in climate science and the protection of human rights, particularly as it relates to international climate litigation. Oxfam in particular is certified as a member of the Economic and Social Council of the United Nations to provide reports to the International Seabed Authority (a body closely affiliated with the Tribunal) "on subjects in which they have special competence[.]" under Article 169(3) of the Convention. Additionally, Article 20(2) of the Statute arguably grants the Tribunal permission to accept submissions from non-state, third-party entities such as OCT and Oxfam. Even further and notably, Article 133 of the Rules leaves the door open for non-state party *amicus curiae* submissions in advisory opinion proceedings. In the alternative, at the very least, the Tribunal's standard practice indicates that the accompanying *amicus curiae* submission should be distributed and displayed by the Tribunal as was done for the *amicus curiae* submission submitted by World Wildlife Fund and Greenpeace International in Case No. 17 (as decided by

⁶ U.N. Children's Fund (UNICEF), *Climate Crisis is a Child Rights Crisis: Introducing the Children's Climate Risk Index*, UNICEF 10 (2021), <https://www.unicef.org/reports/climate-crisis-child-rights-crisis>.

⁷ Caroline Hickman et al., *Climate Anxiety in Children and Young People and Their Beliefs About Government and Responses to Climate Change: A Global Survey*, 5 *Lancet Planet Health* e863, e868-e869 (2021).

⁸ Neil A.F. Popovic, *The Right to Participate in Decisions That Affect the Environment*, 10 *Pace Envtl L. Rev.* 683, 708 (1993)

<https://digitalcommons.pace.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1572&context=pehr>.

the Seabed Dispute Chamber of the Tribunal) as well as the *amicus curiae* submission by World Wildlife Fund International in Case No. 21.

- A. Pursuant to the text of the Convention itself as well as to the Rules and the Statute, OCT and Oxfam International should be granted permission to present the accompanying *amicus curiae* submission in the advisory opinion proceeding

Article 82 of the Rules, Article 169 of the Convention, and Article 20(2) of the Statute all coalesce to support this request for OCT and Oxfam to file an *amicus curiae* submission in front of the Tribunal in the current advisory opinion proceeding.

The Tribunal should grant OCT and Oxfam permission to participate in the advisory opinion proceeding pursuant to Article 82(1) of the Rules, which gives the Tribunal broad discretion “to arrange for an inquiry or an expert opinion[.]”⁹ Although Article 82 does not say so explicitly, such an inquiry or expert opinion could be submitted, in principle, by a non-governmental organization (“NGO”) acting as an *amicus curiae*. In fact, such NGO assistance above and beyond *amicus curiae* submissions from State parties and intergovernmental organizations could be incredibly beneficial in the current proceeding which involves large, diverse, and politically sensitive issues.¹⁰ OCT and Oxfam are well-positioned to provide the Tribunal with such expert assistance in the proceeding because of their collective experience representing young people and presenting scientific evidence in climate litigation before courts and tribunals around the world as detailed in Section II of this letter.

Specifically in the case of Oxfam, permission to partake in the proceedings is supplemented by Article 169(1) of the Convention, which indicates that the Secretary-General of the International Seabed Authority (“Authority”) established pursuant to the Convention shall consult and cooperate “with international and non-governmental organizations recognized by the Economic and Social Council of the United Nations.”¹¹ As an NGO officially recognized by the Economic and Social Council of the United Nations, Oxfam is authorized to consult with the Secretary-General¹² as well as other UN bodies, such as the Human Rights Council, which “allows NGOs with consultative status with the Economic and Social Council to . . . submit written statements, make oral interventions[,]” and more.¹³ Similarly, Article 169(3) of the Convention further specifies that “[t]he Secretary-General may distribute to States Parties written reports submitted by the non-governmental organizations . . . on subjects in which they have special competence and which are related to the work of the [International Seabed] Authority.”¹⁴ Although the

⁹ International Tribunal on the Law of the Sea, Rules of the Tribunal, Art. 82(1); *see also*, Lance Bartholomeusz, *The Amicus Curiae before International Courts and Tribunals*, 5 *Non-State Actors & Int’l L.* 209, 232 (2005), <https://library.oapen.org/handle/20.500.12657/43984> [hereinafter Rules].

¹⁰ Bartholomeusz, *supra* note 9.

¹¹ Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, Art. 169(1) [hereinafter Convention].

¹² United Nations, *Oxfam International*, NGO Branch: United Nations Department of Economic and Social Affairs, <https://esango.un.org/civilsociety/consultativeStatusSummary.do?profileCode=2109>.

¹³ U.N. High Commissioner for Human Rights, *Civil Society Space: Engagement with International and Regional Organizations*, A/HRC/44/25, ¶25 (2020), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/096/43/PDF/G2009643.pdf?OpenElement> [hereinafter *Civil Society Space*].

¹⁴ Convention, *supra* note 11 at Art. 169(3).

International Seabed Authority is a separate entity to the Tribunal, both were established pursuant to the Convention. The fact that Oxfam is officially authorized to consult, cooperate with, and have its written submissions be distributed by other legal entities, including those incorporated under the Convention, adds credence to its request to partake in the proceedings of the Tribunal.

Furthermore, a reasonable and defensible interpretation of the Statute permits non-state parties such as OCT and Oxfam to participate in advisory opinion proceedings before the Tribunal. According to Article 20(2) of the Statute, “[t]he Tribunal shall be open to entities other than States Parties . . . in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case.”¹⁵ Article 20, and particularly Article 20(2), is notably ambiguous and could be interpreted in numerous ways. In particular, nothing in Article 20 defines “[a]ccess to the [T]ribunal” as being solely conferred upon official *parties* bringing a claim in a particular case; this access can be interpreted as applying to *participants* in a proceeding, such as *amici*. Although some legal scholars have disagreed with this interpretation,¹⁶ it is supported by the fact that the Statute does not address *amici* filings in any other provision,¹⁷ whereas both the Rules and the Convention itself have provisions addressing the filing of third-party *amicus curiae* submissions or expert reports.¹⁸ Rather than simply remaining silent on the topic of *amicus curiae* filings that are authorized by the Rules and the Convention, it is likely that the Statute implicitly incorporates the possibility of *amicus curiae* filings through Article 20(2).

This interpretation of ITLOS Statute Article 20 is supported by the context of Case No. 31. The current advisory opinion proceeding before the Tribunal in Case No. 31 was initiated by the Commission of Small Island States pursuant to the Agreement for the Establishment of the Commission (“Agreement”), and that Agreement confers jurisdiction on the Tribunal in keeping with the plain language of Article 20(2) of the Statute. Specifically, Article 2(2) of the Agreement indicates, “[T]he Commission shall be authorized to request advisory opinions from the International Tribunal for the Law of the Sea (‘ITLOS’) on any legal question within the scope of the 1982 United Nations Convention on the Law of the Sea, consistent with Article 21

¹⁵ Statute of the International Tribunal for the Law of the Sea, Article 20(2) [hereinafter Statute].

¹⁶ See, Armando Rocha, *Amicus Curiae before the International Tribunal for the Law of the Sea: The Prospect of an Advisory Opinion on Climate Change and the Law of the Sea*, VI *Católica L. Rev.* 87, 96 (2022) <https://revistas.ucp.pt/index.php/catolicalawreview/article/view/11408/11218> (“Intervention mentioned in Articles . . . 20 and 37 of the ITLOS Statute relates only to the possibility of being a party in the proceedings, not to the right of intervention as *amicus curiae*.”).

¹⁷ See Anna Dolidze, *Advisory Opinion on Responsibility and Liability for International Seabed Mining (ITLOS Case No. 17) and the Future of NGO Participation in the International Legal Process*, 19 *J. Int’l & Comp. L.* 379, 402 (2013) <https://nsuworks.nova.edu/ilsajournal/vol19/iss2/9/> (“The possibility of *amicus* intervention is not mentioned in the ITLOS statute.”). Note, ITLOS Statute Article 31 does address the filing of intervention requests, but these are distinct from *amicus* submission filings. See Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 *Am. J. Int’l L.* 611, 611-12 (1994) <https://www.jstor.org/stable/2204133> (“[T]he interest required for *amicus* status is less than that required for intervention. An intervenor must have a direct, personal interest in the *res* of the suit, an interest that will entail a gain or loss by the direct legal operation of the judgment. In contrast, courts usually permit an *amicus* to participate on the basis of a general interest, including the desire to prevent a collusive suit, to protect unrepresented persons or the public interest, or to point out error to the court.”); Rocha, *supra* note 16, at 96-97.

¹⁸ See, e.g., Rules, *supra* note 9, at Art. 133(2)-(3); Convention, *supra* note 11, at Art. 169.

of the ITLOS Statute . . . [.]”¹⁹ This authorization under the Agreement confers jurisdiction on the Tribunal to initiate advisory opinion proceedings when requested to do so by the Commission. Because the Commission’s advisory opinion request in the current case was made pursuant to the Agreement, the plain text within Article 20(2) of the Statute authorizes non-State parties such as OCT and Oxfam to partake in the proceedings. Although open to alternative interpretation, the antecedent for the Article 20(2) phrase “which is accepted by all the parties to that case” most logically seems to be the “agreement conferring jurisdiction.” If that interpretation is to be accepted, it provides further support that “[t]he Tribunal shall be open” to OCT and Oxfam in the current proceeding under Article 20(2) because (1) the case was submitted pursuant to the Agreement, which conveys jurisdiction on the Tribunal and (2) the Agreement has been accepted by all parties to the submitted case, namely the member States of the Commission.

Even further, authorization provided to non-state parties under Article 20(2) of the Statute is not contradicted by Article 133(3) of the Rules. The first sentence of Article 133(3) specifically mandates that “the organizations referred to in paragraph 2” (i.e., intergovernmental organizations which are likely to be able to furnish information on the question) be identified and “invited to present written statements” in advisory opinion proceedings.²⁰ It does not, however, indicate that those invited organizations are the *only* non-parties that can partake in the proceedings. Indeed, the second sentence of Article 133(3) states, “Such statements shall be communicated to States Parties and organizations which have made written statements.”²¹ The fact that this sentence refers broadly to “organizations” rather than particularly to “the organizations referred to in paragraph 2” suggests that other organizations are able to partake in the proceedings beyond those that are specifically invited to do so. As such, although OCT and Oxfam are not intergovernmental organizations, they are not precluded from participating in advisory opinion proceedings by Article 133 of the Rules, as similarly argued by Greenpeace International and the World Wildlife Fund in their joint 2010 petition to participate in Case No. 17 before the Seabed Disputes Chamber of the Tribunal:

Article 133 is not an exhaustive list of the entities whose views the [Tribunal] may take into consideration in formulating its opinion. There is nothing in the wording of Article 133, or indeed any other provision of the Convention, Statute, or Rules, which would bar the [Tribunal] from accepting, on a discretionary basis, the submissions of additional third parties — such as States not yet party to [the Convention], intergovernmental organizations not invited by the [Tribunal], regional governments, NGOs, . . . or other interested persons — if the [Tribunal] deems their submissions relevant and helpful in fulfilling its advisory functions.²²

¹⁹ Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law, Art. 2(2), (2021).

²⁰ Rules, *supra* note 9, at Art. 133(3).

²¹ *Id.*

²² Jon M. Van Dyke, Duncan E.J. Currie, & Daniel Simons, *Petition of Stichting Greenpeace Council (Greenpeace International) and the World Wide Fund for Nature to Be Granted Amicus Curiae Status*, Greenpeace International, Greenpeace and World Wildlife Fund 4 (2010); *see* Rules, *supra* note 9, at Art. 138(3) (“The Tribunal shall apply *mutatis mutandis* articles 130 to 137.”).

The World Trade Organization (“WTO”) dispute settlement panel emphasized this point in its 1998 Shrimp/Turtle case decision:

[A]uthority to *seek* information is not properly equated with *prohibition* on accepting information which has been submitted without having been requested by a panel. A panel has a discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not*.²³

Shortly thereafter, a WTO appellate body’s determination in the United States’ appeal of the panel report *United States — Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* further reinforced this determination when it stated, “[A]s long as we act consistently with the provisions of the [body’s applicable procedural rules] . . . we have the legal authority under [those rules] to accept and consider *amicus curiae* briefs in an appeal in which we find it pertinent and useful to do so.”²⁴

- B. In the alternative, OCT and Oxfam’s *amicus curiae* submission should be distributed by the Tribunal to the State Parties in the case as well as all other participating organizations based on established Tribunal practices

The Tribunal should grant OCT and Oxfam permission to intervene in this proceeding pursuant to the Statute and the Rules. However, if for any reason this Tribunal concludes otherwise, the submission provided by OCT and Oxfam should at least be distributed and posted in keeping with the Tribunal’s past decisions in similar circumstances. For example, in Case No. 17 as decided by the Seabed Dispute Chamber of the Tribunal, two non-governmental organizations, Greenpeace International and World Wildlife Fund, petitioned the Seabed Disputes Chamber with a request to produce an *amicus curiae* submission. (A quote from that petition is included in the previous subsection of this letter.) The Tribunal ultimately declined the petition and denied the request to enter the accompanying submission into the official case file; however, the Tribunal did distribute the submission to the State Parties in the case, the Seabed Authority, and the organizations that had submitted statements in the case.²⁵ In addition, “the Tribunal used its discretion favorably towards the NGO petition[.]”²⁶ displaying the *amicus curiae* submission on its website so that it could be more widely disseminated.²⁷ The Tribunal made the same decision in Case No. 21. That case was initiated by the Sub-Regional Fisheries Commission when it filed a request for an advisory opinion regarding legal questions related to illegal fishing practices in Member States Exclusive Economic Zones. In response to an *amicus curiae* submission request filed by World Wildlife Fund International in Case No. 21, the Tribunal once again posted the

²³ World Trade Organization Case No. WT/DS58/AB/R, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, AB-1998-4 ¶108 (1998) https://www.wto.org/english/tratop_e/dispu_e/58abr.pdf.

²⁴ World Trade Organization Case No. WT/DS138/AB/R, *United States-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, AB-2000-1 ¶¶39, 42 (2000) <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/138ABR.pdf&Open=True>.

²⁵ Dolidze, *supra* note 17, at 414-15.

²⁶ *Id.* at 381.

²⁷ *Id.* at 415, 417.

submission on its website and distributed it to the State Parties in the case. We request the Tribunal, at the very least, do the same for this *amicus curiae* submission filed by OCT and Oxfam in Case No. 31.

Note that, although the Tribunal rejected a similar civil society request to act as *amicus curiae* in Case No. 22, that was a contentious case rather than an advisory opinion proceeding and the request was filed by an organization whose own vessel and crew members were involved in the relevant inter-State dispute. That situation is easily distinguished from this non-contentious advisory opinion proceeding in which the submitters are deeply interested but not directly involved in the final decision of the Tribunal. Case No. 22 thus has little precedential value in the current proceeding before the court. Based on its established practice, the Tribunal should at the very least take the same steps to distribute and display the *amicus curiae* submission filed by OCT and Oxfam on behalf of the undersigned young people in Case No. 31 even if it is unwilling to officially incorporate the accompanying submission into the case file for the current advisory opinion proceeding.

IV. Granting This Request for *Amicus Curiae* Status Is Beneficial to the Tribunal

This section highlights how *amicus curiae* submissions provide substantial aid to courts and tribunals around the world in numerous ways, from asserting relevant expertise to providing important perspectives that could otherwise be easily overlooked. Such submissions are especially helpful in cases involving novel, complicated issues such as those related to the environment, and NGOs such as OCT and Oxfam are particularly well-positioned to provide helpful insights on such cases. The inclusion of civil society input through *amicus curiae* submissions is often crucial to ensure the proper administration of justice as well as to maintain court legitimacy. These benefits of *amicus curiae* submissions are widely recognized, especially in international environmental legal regimes, and many international courts and tribunals are increasingly relying on these benefits by facilitating higher rates of *amicus curiae* participation. Notably, not only does the *amicus curiae* submission by OCT, Oxfam, and the undersigned youth in this case provide all of these advantages to the Tribunal but it also avoids the common concerns typically voiced in opposition to *amicus curiae* participation in court proceedings.

One of the main benefits of *amicus curiae* submissions is that they provide relevant expertise that can inform a court's decision and highlight valuable perspectives on how the court's decision may impact the public interest. Indeed, "civil society organizations have long been recognized as 'partners' of the UN system, especially in environmental negotiations[.]" because of their ability "to provide up-to-date information on critical issues."²⁸ Civil society assistance is especially potent and useful in the courtroom setting given the "growing realization that in certain areas judges do not decide, and sometimes cannot decide, legal issues based solely on lawful sources, but must involve other fields of knowledge[.]"²⁹ including and especially, scientific expertise. The current advisory proceeding before the Tribunal in Case No. 31 is

²⁸ Barbara Gemmill & Abimbola Bamidele-Izu, *The Role of NGOs and Civil Society in Global Environmental Governance*, in *Global Environmental Governance: Options and Opportunities* 5, 11 (Daniel C. Esty & Maria H. Ivanova, eds. 2002) <http://www.env-net.org/wp-content/uploads/2013/09/gemmill.pdf>.

²⁹ Farber, *supra* note 4, at 25-26.

certainly one such case in which the proficiency of OCT and Oxfam on issues relating to the best available climate science and its impacts on the world’s oceans as well as its disproportionate impacts on young people is of crucial relevance to the Tribunal.

In addition to providing needed expertise, *amicus curiae* submissions can bring illuminating perspectives and considerations to the Tribunal’s attention that otherwise might be neglected. For example, *amicus curiae* submissions typically include detailed analysis of issues and arguments that parties to the case “are unable or willing to make because of political pressure or other tactical considerations.”³⁰ In addition, “[a]mici frequently discuss the broader implications of decisions that the main parties have either purposefully or inadvertently failed to address.”³¹ In this capacity, *amicus curiae* submissions can provide an essential service that could otherwise go unfulfilled given “the lack of a body/entity which may represent collective and public interests in most international courts and tribunals[.]”³² Once again, the *amicus curiae* submission filed by OCT and Oxfam fills this role by providing an opportunity for youth—particularly those who undersigned the accompanying *amicus curiae* submission—to have their voices heard on the crucial issue of climate change, which is disproportionately affecting their lives.

Court cases involving “areas dealing with public, new, complex, or sensitive issues,” such as climate change, are in particular need of civil society assistance both in its capacity to share underrepresented perspectives and to provide relevant subject matter expertise.³³ As cases become more multifaceted, judges’ decisions increasingly “not only include the use of non-legal sources of information, but also include extensive discussion on the implementation of the ruling concerning additional groups, which may be or are affected by the rulings.[.]”³⁴ In such cases, “amici may help to explain complex issues and perhaps deal with the broader implications of a decision, beyond the particular interests of the parties.”³⁵ As such, incorporating information provided by *amicus curiae* submissions “has the potential to cause courts to reach more complete judicial decisions based on all existing materials[.]”³⁶ Legal scholar, Shai Farber, reinforces this conclusion:

[E]ven the broadest education is incapable of providing judges with the profound understanding required in many areas of knowledge in connection with the legal issues they are supposed to address.[.] In order for judges to successfully fulfil and address their modern judicial role with the diverse and complex issues that they are presented, judges require broad and extensive information and the assistance of parties with different perspectives and expertise.³⁷

There are few issues with more “diverse and complex” phenomena in modern society than climate change. For the Tribunal to accurately interpret the full implications of State Parties’

³⁰ Shelton, *supra* note 17, at 618.

³¹ *Id.*

³² Rebasti & Vierucci, *supra* note 1, at 13.

³³ Farber, *supra* note 4, at 26.

³⁴ *Id.*

³⁵ Shelton *supra* note 17, at 618.

³⁶ Farber, *supra* note 4, at 47.

³⁷ Farber, *supra* note 4, at 32.

obligations under the Convention in the context of this advisory opinion proceeding, it will need to robustly consider the state of scientific knowledge on climate change and its impacts, as identified by OCT, Oxfam, and the undersigned youth in the accompanying submission.

It has long been recognized that civil society contributions are especially crucial in environmental cases, both related to climate change and otherwise. Indeed, although “sovereign states remain the creators of international environmental law[,] but . . . [t]he benefits states accrue from NGO participation allow them to regulate ecologically harmful activities with greater efficiency, effectiveness, and legitimacy.”³⁸ In particular, international environmental law regimes established in the late twentieth century — such as those to address ozone depletion, transboundary air pollution, hazardous wastes, and climate change — “have the greatest NGO participation and the most inclusive rules governing participation[.]” likely because they “are more complex and more demanding than [sic] most of the earlier resource regimes[.] . . . requir[ing] greater levels of implementation and adjustment, and address[ing] important, sometimes central, economic and social activities.”³⁹ This participation is most notable and substantial within the United Nations Framework Convention on Climate Change (UNFCCC) where “the wealth of research” produced by 2,400 accredited NGOs fundamentally and crucially informs the negotiation process conducted by State Parties.⁴⁰

NGOs in particular, as a subset of larger civil society, have proven themselves proficient in drawing attention to the perspectives of marginalized communities “who are the most underrepresented and excluded from decision-making”⁴¹ and “in highlighting disparities in who bears environmental burdens and who gets the benefits of environmental investments[.]”⁴² NGOs are “well-suited” to provide *amicus curiae* submissions to courts in so far as they have heightened expertise regarding matters pertinent to a given case as well as representative authority for people likely to be impacted by the outcome of that case.⁴³ The *amicus curiae* submission filed by OCT, Oxfam, and the undersigned youth is no exception in this regard. Not only does it incorporate OCT and Oxfam’s deep expertise in the topic of climate science as well as the relevance of that science to the interpretation of the Convention but it also pushes against the general exclusion of young people from legal and political processes affecting their futures. As such, it is particularly germane to the current advisory opinion proceeding and should be officially accepted by the Tribunal.

Allowing civil society to facilitate “[t]he participation of individuals directly affected as *amicus curiae*” in court cases—just as OCT, Oxfam, and the undersigned youth aim to do in their *amicus curiae* submission—“would contribute to the proper administration of international

³⁸ Kal Raustiala, *The “Participatory Revolution” in International Environmental Law*, 21 H. Envtl. L. Rev. 537, 539 (1997), <https://heinonline.org/HOL/LandingPage?handle=hein.journals/helr21&div=15&id=&page=>.

³⁹ *Id.* at 568-69.

⁴⁰ Gemmill & Bamidele-Izu, *supra* note 28, at 13; *see also*, *Civil Society Space*, *supra* note 13, at ¶25; Marianne Dellinger, *Ten Years of the Aarhus Convention: How Procedural Democracy Is Paving the Way for Substantive Change in National and International Environmental Law*, 23 Colo. J. Int’l Envtl. L. & Pol’y 310, 336-37 (2012) https://www.colorado.edu/law/sites/default/files/DELLINGER%20_corrected_%20v2.pdf.

⁴¹ *Civil Society Space*, *supra* note 13 at ¶21.

⁴² Gemmill & Bamidele-Izu, *supra* note 28, at 19.

⁴³ *Id.*

justice” as exemplified by numerous provisions in international environmental agreements.⁴⁴ For example, the 1998 Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (“Aarhus Convention”) requires State Parties (including 43 that are also party to the Convention)⁴⁵ to ensure both public participation during the development of “generally applicable legally binding rules that may have a significant effect on the environment[.]” and meaningful access to justice for, *inter alia*, “nongovernmental organizations promoting environmental protection[.]”⁴⁶ Similarly, the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (“Escazú Agreement”) imposes substantively similar public participation requirements on States Parties (including 15 that are also party to the Convention)⁴⁷ such as a mandate to promote “public participation in international forums and negotiations on environmental matters[.]”⁴⁸ Although the provisions of the Aarhus Convention and the Escazú Agreement are not directly applicable to the Tribunal and this advisory opinion proceeding, the general principles they set forth regarding the importance of civil society participation in the creation of environmental legal norms are arguably entrenched in customary international law. These principles generally endorse the courtroom participation of “groups in society . . . [for whom] cases before the court will influence their lives and their welfare” with regard to significant and widely impactful environmental matters.⁴⁹ The young people represented by OCT, Oxfam, and the youth signatories to the accompanying *amicus curiae* submission certainly qualify as such a “group in society” in the context of the current advisory opinion proceeding given the disproportionate impacts they experience due to climate change. Thus, the proper administration of justice as depicted in international environmental agreements like the Aarhus Convention and the Escazú Agreement would endorse the Tribunal’s acceptance of the accompanying *amicus curiae* submission.

In addition to supporting the proper administration of justice, the inclusion of expertise in court proceedings through *amicus curiae* submissions can help augment the legitimacy of international judicial decisions. Legal scholars have pointed out that “expanding participation to those parties affected by international court decisions, [] may enhance the accountability, legitimacy and transparency of legal institutions.”⁵⁰ Indeed, [t]he activities of international courts are close enough to the conduct of public affairs[] . . . to necessitate some kind of democratic justification[.]” namely that “those whose interests are affected by the decisions of international

⁴⁴ Paula Wojcikiewicz Almeida, *International Procedural Regulation in the Common Interest: The Role of Third-Party Intervention and Amicus Curiae before the ICJ*, 18 L. & Prac. Int’l Cts. & Tribs. 163, 185 (2019) https://brill.com/view/journals/lape/18/2/article-p163_2.xml?language=en.

⁴⁵ All State Parties to the Aarhus Convention are also parties to the Convention on the Law of the Sea except for Kazakhstan, Kyrgyzstan, Tajikistan, and Turkmenistan.

⁴⁶ Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Jun. 25, 1998, 2161 U.N.T.S. 447, Arts. 2(4), 2(5), 8, 9.

⁴⁷ Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement) (2018), Arts. 7, 8.

⁴⁸ *Id.* at Art. 7(12). All State Parties to the Escazú Agreement are also parties to the Convention on the Law of the Sea.

⁴⁹ Farber, *supra* note 4, at 54.

⁵⁰ Rachel A. Cichowski, *The European Court of Human Rights, Amicus Curiae, and Violence against Women*, 50 L. & Soc. Rev. 890, 914 (2016) <https://www.jstor.org/stable/44122548>.

courts should have some ability to participate in their processes.[.]”⁵¹ These assertions also support the Tribunal’s acceptance of the accompanying *amicus curiae* submission so as to fully inform its decision in Case No. 31, thereby making that decision as legitimate as possible.

The immense and numerous benefits of *amicus curiae* briefs to courts and tribunals specified in this section are widely recognized. The U.N. Human Rights Council in particular has acknowledged “the essential contribution that civil society [has] made to regional and international organizations, including through . . . the sharing of expertise and knowledge[.]”⁵² Former U.S. Supreme Court Justice Stephen Breyer has expounded on the importance of *amicus curiae* submissions, which “play an important role in educating the judges on potentially relevant technical matters, helping to make us not experts, but moderately educated lay persons, and that education helps to improve the quality of our decisions.”⁵³

More specifically, numerous judicial bodies, including the Tribunal, have recognized the benefits of *amicus curiae* submissions and have increasingly incorporated them into their case proceedings. Indeed, “in a relatively short span of time, dozens of countries around the world, including developing countries from Latin America, Africa, Asia, and Eastern Europe-and [sic] most international institutions have adopted the *Amicus* practice or have significantly increased its use.[.]”⁵⁴ Many international human rights courts around the world have recognized these benefits by facilitating and accepting increasing volumes of *amicus curiae* submissions in recent years. For example, *amicus curiae* submissions are submitted in approximately 25% of cases that come before the European Court of Human Rights “and their percentage of participation in fundamental cases is increasing.”⁵⁵ In addition, the Inter-American Court of Human Rights has recently made its procedural rules more friendly to *amicus curiae* submission requests allowing for larger civil society participation in its cases.⁵⁶ Numerous international trade organizations also accept *amicus curiae* submissions in judicial disputes, including the World Trade Organization and the North American Free Trade Agreement.⁵⁷ Further, starting in the early 2000s, rules were established to allow *amicus curiae* submissions in international criminal tribunals such as the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court.⁵⁸ The Tribunal itself has accepted numerous *amicus curiae* submissions in the past and would benefit greatly from doing so again for the accompanying *amicus curiae* submission.

⁵¹ Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 Temp. L. Rev. 61, 92 (2013), https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1269&context=all_fac; see also, Gemmill & Bamidele-Izu, *supra* note 28, at 19 (“Indeed, the very legitimacy of international decisionmaking may depend on NGOs as a way to ensure connectedness to the publics around the world and substitute for true popular sovereignty, which international bodies, devoid of elected officials lack.”).

⁵² *Civil Society Space*, *supra* note 13, at ¶8.

⁵³ Farber, *supra* note 4, at 34 (quoting Stephen Breyer, *The Interdependence of Science and Law*, 82 Judicature 24, 26 (1998)).

⁵⁴ *Id.* at 5; see also, Raustiala, *supra* note 38, at 549 (“The trend over time has been towards greater procedural guarantees for NGOs, and in practice NGOs have become much more active.”).

⁵⁵ Farber, *supra* note 4, at 13.

⁵⁶ *Id.* at 14.

⁵⁷ *Id.* at 15-16.

⁵⁸ *Id.* at 15.

The most common concerns related to the inclusion of *amicus curiae* submissions in judicial proceedings are not applicable in the current case before the Tribunal. For example, the concern that the participation of NGOs “as *amici curiae* may negatively affect due process rights of one of the parties in litigation[.]” is alleviated in the current case because it is not a contentious case between combative parties but rather an advisory opinion proceeding seeking a judicial determination on particular questions of law.⁵⁹ Additionally, the concern that an NGO will seek to intervene regarding a topic which extends beyond its “subject- and personal-matter competence” does not apply to this request given that OCT and Oxfam seek to intervene on specific topics for which they have amassed decades of experience and expertise (as demonstrated in the accompanying submission as well as Section II of this letter).⁶⁰ Similarly, OCT, Oxfam, and the undersigned youth on the accompanying *amicus curiae* submission represent the public interest of young people, as indicated not only by the participation of the youth signatories themselves but also by the depth of OCT and Oxfam’s organizational work with thousands of young environmental advocates over the course of many years. Finally, allowing OCT and Oxfam to submit *amicus curiae* in this case is unlikely to “open the floodgates” for *amicus curiae* participation in future cases, thereby threatening the ability for the Tribunal to resolve disputes expediently.⁶¹ Because OCT and Oxfam are filing this submission as content experts in the presentation of critical climate science in judicial proceedings, the request to participate in this judicial proceeding is not widely generalizable but rather specifically tailored to this particular advisory opinion proceeding. Relatedly, the Tribunal has not seen an influx of *amicus curiae* requests in subsequent cases following its decisions to allow for the dissemination of an *amicus curiae* submission in Case No. 17 and Case No. 21 (likely because of the unique particularity of those submission requests). Fundamentally, the Tribunal – in every one of its cases – “retains discretion to deny permission to any or all petitioners[.]”⁶² so even if *amicus curiae* requests increase in the future, the Tribunal has the authority to curate the volume of eventual *amicus curiae* submission submissions in any given case.

V. Conclusion

OCT and Oxfam have the requisite expertise and experience to provide a substantively crucial contribution to the advisory opinion proceeding currently before the Tribunal on behalf of the undersigned youth as well as young people around the globe. Not only is the Tribunal permitted to allow their submission according to its own Rules, but it will substantially benefit from the information and perspectives contained within it. If allowed, OCT and Oxfam’s *amicus curiae* submission before the Tribunal will not only provide the court with important scientific knowledge informing the interpretation of the obligations of States under the Convention with regard to climate change but it will also highlight the perspective and voices of young people who are the most impacted demographic by climate change and who otherwise largely lack representation in the proceeding. For these reasons and the reasons outlined in detail throughout this petition, OCT and Oxfam respectfully request that the Tribunal do the following:

⁵⁹ Rebasti & Vierucci, *supra* note 1, at 12.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Shelton, *supra* note 17, at 624; *see also, id.* at 15.

- (a) Admit the jointly filed *amicus curiae* submission accompanying this petition into the advisory opinion proceeding and both (i) communicate the joint written statement to State Parties and to organizations making written statements and (ii) make it accessible to the public pursuant to Rules 133(3) and 134; and to
- (b) Authorize a joint oral submission from OCT and Oxfam that supports the arguments made in the accompanying joint written submission during the hearing for this advisory opinion proceeding pursuant to Rule 133(4)

Respectfully submitted by,



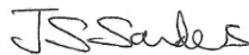
Kelly Matheson
Deputy Director of Global Climate Litigation
Our Children's Trust



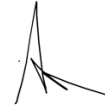
Paul Rink
Global Staff Attorney
Our Children's Trust



Nafkote Dabi
Climate Policy Lead
Oxfam International



Joss Saunders
General Counsel
Oxfam International



Ashfaq Khalfan
Director, Climate Justice
Oxfam America

For Correspondence

Kelly Matheson
Looiersgracht 98, 1016VT, Amsterdam, Netherlands
kelly@ourchildrenstrust.org | +31 6 39.35.65.27