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The Adoption of the New Legally Binding Instrument on Marine Biodiversity Conservation and Sustainable Use in Areas Beyond National Jurisdiction

On Saturday 4 March 2023, in New York, the President of the Intergovernmental Conference, Rena Lee, announced, to the applause of the delegates, that the ship had finally 'reached the shore'. After more than 15 years of discussions, an agreement has been reached on the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction (ABNJ). This achievement has unanimously and rightfully been described as 'historic' by commentators.

States began to consider the need to supplement the provisions of UNCLOS (United Nations Convention on the Law of the Sea) in the UN General Assembly in the early 2000s, in a context where massive biodiversity loss was already being denounced. The following question was raised: is the inadequate protection of biodiversity on the high seas solely the result of insufficient implementation of their obligations by states, or are there 'gaps' that can be filled by international law? An Informal Working Group, established in 2004 to consider the various options available to states, issued its conclusions in 2015, calling for the adoption of a new implementing agreement for UNCLOS. The process accelerated when the idea of adopting a 'legally binding instrument' was endorsed by the General Assembly. The General Assembly therefore convened a Preparatory Committee, which met between 2016 and 2018 to prepare for the Intergovernmental Conference, a formal negotiating forum between states, which met four times between 2019 and 2021. However, the coronavirus pandemic delayed the process somewhat and an additional final session was necessary because the fourth session failed to reach consensus.

At the fifth session of the International Governmental Conference, held in August 2022, many points of disagreement remained between states, in particular concerning the status and modalities of the exploitation of marine genetic resources and digital sequences information on marine genetic resources (MGR), which was one of the thorniest issues. At the end of the August 2022 session, the IGC President took the initiative not to close the session but to adjourn it, thus facilitating the resumption of discussions in February and paving the way for their eventual success. In March, during the final days of negotiation, states finally agreed on this very complex issue. The new treaty will finally make it possible to regulate access to these resources and associated digital sequence information (notification system) and to ensure that any benefits (monetary and non-monetary) derived from their exploitation are equitably shared with developing countries, which should also benefit from capacity building and the transfer of marine technologies. The fact that the states finally agreed on this point is remarkable (or even miraculous) given that their initial positions were radically opposed.

The treaty also focuses on two particular conservation tools: marine protected areas (MPAs) and environmental impact assessments (EIAs). With regard to MPAs, it establishes a global mechanism that will allow states to propose, individually or collectively, their designation and make them enforceable against all states parties - in line with the 30×30 target established in December at the COP15 on biodiversity. The text specifies the details of the content of the proposals,

the associated conservation measures and the monitoring of their implementation in the framework of the Conference of the Parties to the treaty. States are invited to consult and collaborate with all relevant stakeholders, including civil society and indigenous peoples. However, an 'opt-out' possibility has been included in the process, meaning that states (and especially coastal states) can refuse, in extremis, to be linked to the conservation measures of the protected area – but only in very specific conditions. Secondly, the treaty sets out the modalities for the implementation of the EIA requirement for activities that take place in, or are likely to cause harm to, international maritime spaces. Indications are given as to the threshold above which they are required to be carried out, the obligation to publish them, their content and the notification and stakeholder consultation process. The state initiating the project must take account of the outcome of the assessment, but remains ultimately competent to decide whether or not to carry it out.

The preamble recalls that states already have a general obligation under UNCLOS to protect and preserve the marine environment and that they must be held accountable for any breach of their obligations in this regard. It also refers to the impacts of climate change on marine biodiversity and allows for a systemic interpretation of the agreement, with the overall objective of working to limit the erosion of biodiversity in these areas for the benefit of future generations.

The main objective of the treaty is to promote cooperation and coordination in the context of marine biodiversity conservation. An important challenge will therefore be to ensure that the new treaty does not undermine existing global and regional frameworks with a biodiversity mandate, in order to preserve the coherence of rules applicable to these areas and for the sake of legal certainty and efficiency. This issue was a topical point of the negotiations. For example, the articulation between the new treaty, and deep-sea exploration and exploitation or fishing activities, both of which are already regulated by other international frameworks, may not be obvious in practice because the competent organizations and frameworks bring together different parties, have different objectives and competences (spatially as well as in terms of substance) and do not work usually with a high degree of coordination. To this end, the COP will have to consult and make recommendations with the relevant institutions, and the parties will at the same time promote the conservation and sustainable use of biodiversity in international areas when participating in other decision-making processes. The COP will therefore have the crucial role of determining whether the processes carried out in other forums are coherent and compatible with the new framework, whether in terms of MPAs or impact studies.

In any case, the new treaty still needs to be ratified by states in order to enter into force (in principle 120 days after the deposit of the 60th instrument of ratification). Since its opening for signature, on 21 September 2023, 83 states have signed the text but they have not yet ratified it. Its provisions can then be refined by the Conference of the Parties established, while its implementation will depend mainly on the goodwill of states. A mechanism for the settlement of disputes, inspired by the one UNCLOS, with specific dispositions regarding the possibility for the COP to request an advisory opinion from the International Tribunal for the Law of the Sea, is also provided by the treaty. The creation of a secretariat, a scientific and technical body and a compliance committee should contribute to organize and ensure, as well, the effective implementation of the new agreement.

Despite all the remaining uncertainties, the step that has just been taken is decisive and constitutes a new starting point for biodiversity conservation.

Pascale RICARD and Samira BEN ALI

COP15 and the Kunming-Montreal Global Biodiversity Framework

On 19 December 2022, during the 15th Conference of the Parties (COP) of the Convention on Biological Diversity (CBD), the 196 members of the Convention[1] adopted the Kunming-Montreal Global Biodiversity Framework[2] to try to 'halt and reserve' biodiversity losses[3]. Indeed, with six out of nine planetary limits having been exceeded and with more than 42,000 known species 'threatened with extinction' according to the IUCN Red List[4], the world is said to be facing its sixth global mass extinction, an extinction that has the particularity of being anthropogenic. The new Global Biodiversity Framework outlines a total of four general goals and twenty-three action-oriented targets to try to respond to this global biodiversity crisis by 2030[5]. They are rooted in the 'theory of change', which calls for an urgent political action at all levels when it comes to biodiversity losses. One of the most emblematic measures of the framework, also known by NGOs as the 30x30 target, calls for the creation of a network of protected areas on 30% of the land and 30% of the sea by 2030 (Target n°3). Other targets intend to stop the extinction of known species, reduce the negative impacts of pollution from all sources, substantially the risks linked to the use of pesticides as well as harmful subsidies. The underlying goal here is to try to achieve what the 2011-2020 Aichi Biodiversity Framework was not able to do.

The agreement is deeply rooted in science: it relies on and responds to the IPBES 2019 *Global Assessment Report on Biodiversity and Ecosystem Services*[6]. Indeed, the five most important direct threats to biodiversity listed by the report - namely land and sea use change, direct exploitation of organisms, climate change, pollution and invasion of alien species - are the rationale for the 'global action-oriented targets': among others, Targets 2, 3 and 12 address the protection of land and sea areas, ecosystem restoration, and green and blue space connectivity; Target 5 addresses biodiversity uses, harvesting and trade; Target 6 invasive alien species; Target 7 pollution risks from all sources; and Target 8 focuses on the link between biodiversity and climate change. The new framework also puts inclusivity at the forefront of its strategy. For example, the text mentions several times the importance of indigenous communities when it comes to the protection and restoration of ecosystems. As is usually the case during COPs, all types of stakeholders were able to interact and to influence the outcome

1 Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993)1760 U.N.T.S. 79.

2 Conference of the Parties to the Convention on Biological Diversity, (18 December 2022) U.N. Doc. CBD/COP/15/L.25, Kunming-Montreal Global Biodiversity Framework, Draft Decision Submitted by the President.

3 Because of the COVID-19 pandemic, the COP15 had to be postponed by two years. The additional time allowed the negotiators to work on a text that has finally been adopted by consensus, despite last-minute opposition from the Democratic Republic of Congo.

4 This number includes, 69% of cycads, 41% of amphibians, 37% of sharks and rays, 36% of coral reefs, 34% of conifers, 27% of mammals, and much more. All information is detailed on the IUCN Red List website <www.iucnredlist.org/> accessed 09 November 2023.

5 CBD, Nations Adopt Four Goals, 23 Targets for 2030 in Landmark UN Biodiversity Agreement, CBD Press Release (Dec. 19, 2022).

6 IPBES (2019): Global Assessment Report on Biodiversity and Ecosystem Services. E. S. Brondizio, J. Settele, S. Díaz, and H. T. Ngo (editors). IPBES secretariat, Bonn. 1,148 pages.

of the agreement[7]. This particular point has raised some concerns and NGOs have questioned the impact of a text where parties driven by economic interests were able to participate.

One of the main weaknesses of the previous Aichi Framework was that it had not been accompanied by a precisely costed financing plan (the Global Environment Facility was merely expected to provide 'predictable [a]nd timely' assistance). Therefore, the question of the mobilization of financial resources led to difficult negotiations, as countries with less revenues and less historical impacts when it comes to the loss of biodiversity were asking for financial assistance and calling for equity — which is directly related to the principle of common but differentiated responsibility. A compromise was reached that pledged to dedicate 200 billion US dollars per year by 2030 from all sources (private and public) to biodiversity[8]. It also pledged that developed countries must contribute 20 billion dollars per year to the biodiversity efforts of less developed countries by 2025 and 30 billion per year by 2030. A large part of this money will be put into a trust fund, under the protection of the Global Environment Facility (GEF), that will be in charge of supporting the implementation process.

To ensure the effectiveness and efficiency of the framework, monitoring processes and indicators have also been put in place. The lack of monitoring and following up mechanisms was indeed part of the weaknesses of the Aichi Framework. For now, each country will have to submit national targets inspired by the framework as well as revising their National Biodiversity Strategy and Action Plan by 2024 (for COP16 in Turkey)[9]. During COP16, those national targets will be evaluated to assess their impacts with regards to the global biodiversity goals. From then on, each country will have to periodically submit national reports on the effects of the implementation of these targets in their respective countries. Those reports – as well as independent analysis – will then be used to conduct global reviews of the state of biodiversity[10].

While the framework is a definite and ambitious step in the direction of improved biodiversity protection, rooted in the rights-based approach (with a recognition of the human right to a clean and healthy environment and the rights of indigenous people), it still leaves room for improvement. Indeed, the monitoring systems, which are key points for the success of this global project, leave little room for the notion of uncertainty; they are also not designed to take into account the complexity that comes with dealing with biodiversity. Additionally, one cannot help but take note of the cautious nature of the language used to define the targets, and the non-legally binding nature of the text. This ultimately raises questions on its effectiveness. The next COPs will be decisive for the precision and implementation of the framework, particularly with regard to some subjects who were voluntarily set aside for the success of COP15: the monitoring framework must be refined, with important work still to be done on indicators, the timetable for the revision of national biodiversity strategies and action plans (NBSAPs) must be set, and several decisions still need to be taken, notably concerning the equitable sharing of benefits arising from information on the digital sequences of genetic resources.

7 Gibson Dunn, Adoption of a new global biodiversity framework - key takeaways for global organizations and financial firms, 2023.

8 Conference of the Parties to the Convention on Biological Diversity (n 2).

9 Conf. of the Parties to the Convention on Biological Diversity (18 December 2022) U.N. Doc. CBD/COP/15/L.26, Monitoring framework for the Kunming-Montreal global biodiversity framework, Draft Decision Submitted by the President.

10 ibid.

The decision on the articulation of climate and biodiversity issues also needs to be rediscussed because the reference to the principle of common but differentiated responsibilities has prevented an agreement from being reached. Some observers also regretted the lack of attention paid to the issue of the impact on biodiversity of the fishing and agricultural industries. As some observers finally and effectively noted, 'the work is really just beginning'.

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Observations on the advisory opinion request submitted by the COSIS to the ITLOS on States' obligations regarding climate change

On 12 December 2022, the Commission of Small Island States on Climate Change and International Law (COSIS), co-chaired by the governments of Antigua and Barbuda and Tuvalu[1], submitted a request for an advisory opinion to the International Tribunal for the Law of the Sea (ITLOS) under Article 21 of the Statute of the Tribunal, Article 138 of the Rules of the Tribunal and Article 2(2) of the Agreement Establishing COSIS[2]. The written phase took place during the first half of 2023 and the hearings were held throughout September of the same year[3]. This is the third request to ITLOS for an advisory opinion, the first having been submitted to the Seabed Disputes Chamber and resulting in the advisory opinion on the responsibilities of States sponsoring activities in the Area[4], and the second to the full Tribunal concerning the advisory opinion requested by the Sub-Regional Fisheries Commission[5].

The request submitted to ITLOS by COSIS is in fact the first in a series of other requests for advisory opinions filed by various groups of States in the space of a few months before other international jurisdictions: the request to the Inter-American Court of Human Rights on 9 January 2023 by the Republic of Colombia and the Republic of Chile[6], as well as the request of 29 March 2023 transmitted to the International Court of Justice by the General Assembly of the United Nations, on the initiative of the State of Vanuatu[7].

These three requests have much in common in that they are part of a process of defragmentation and an integrated approach to public international law. Therefore, according to Christina Voigt, 'we are witnessing a new phenomenon: climate change litigation having reached the international level

1 The Commission was established by the article 1(3) of the Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law (adopted on 31 October 2021), with the objective of contributing 'to the definition, implementation and progressive development of rules and principles of international law relating to climate change, including, but not limited to, the obligations of States to protect and preserve the marine environment and their liability for damage resulting from internationally wrongful acts in breach of those obligations'.

2 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), 12 December 2022.

3 See the ITLOS website <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/> accessed 01 November 2023.

4 ITLOS, Advisory opinion, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), 1st February 2011, case n 17.

5 ITLOS, Advisory opinion, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal)*, 2 April 2025, case n 21.

6 *Request for an advisory opinion on the Climate Emergency and Human Rights* submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile, January 9 2023.

7 United Nations General Assembly, Resolution A/77/276: *Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change*, 29 March 2023.

(international courts and tribunal)'[8]. And this comes from 'the need for legal clarifications and authoritative statements by international courts on international environmental law'[9]. This 'new era' of climate change litigation is thus focusing on non-contentious cases. Without being legally binding, advisory opinions hold a strong moral authority[10]. Moreover, the clarity regarding the legal obligations in relations to climate change could make it possible, afterwards, to lodge contentious cases in front of international jurisdictions. In substance, all three cases reflect a strong need - and a 'golden opportunity'[11] - for the international courts concerned to clarify the obligations of States to protect the climate and combat climate change, in the context of other areas of international law affected by their effects, and also to clarify the links between legal frameworks that have hitherto been approached separately, thereby acting as a genuine 'catalyst for political action'[12]. Before the ICJ, the request is extremely broad, since the clarifications requested must be made:

> 'Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment'[13].

In addition, the legal consequences for States that have caused significant damage to the climate system and other components of the environment are considered in this request not only in relation to States, but also 'to the peoples and individuals of present and future generations affected by the adverse effects of climate change'[14].

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8 C. Voigt, *Advisory Opinions on Climate Change: initiatives, expectations and possibilities*, IUCN World Commission on Environmental Law, 2023 <www.iucn.org/story/202302/iucn-wcel-hosted-webinar-advisory-opinions-climate-change-initiatives-expectations-and> accessed 01 November 2023. Unlike other climate issues, these are not contentious and are not driven by private actors, who are generally the originators of strategic litigation, but by governments (although sometimes with the impetus of private actors). See Alina Miron, 'COSIS Request for an Advisory Opinion: A Poisoned Apple for the ITLOS?' (2023) The International Journal of Marine and Coastal Law, 249-269, p. 251.

9 ITLOS, Advisory opinion (n 4).

10 See *Dispute concerning the delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)* (Judgment of the 28 January 2021, Preliminary Objections), 203: 'An advisory opinion is not binding because even the requesting entity is not obligated to comply with it in the same way as parties to contentious proceedings are obligated to comply with a judgment. However, judicial determinations made in advisory opinions carry no less weight and authority than those in judgments because they are made with the same rigour and scrutiny by the 'principal judicial organ' of the United Nations with competence in matters of international law'.

11 Nilufer Oral, *Advisory Opinions on Climate Change: initiatives, expectations and possibilities*, IUCN World Commission on Environmental Law, 2023 <www.iucn.org/story/202302/iucn-wcel-hosted-webinar-advisory-opinions-climate-change-initiatives-expectations-and> accessed 01 November 2023.

12 Jorge E. Vinuales, 'Climate change and the advisory function of international courts and tribunals', Green Diplomacy, 7 March 2023.

13 Request transmitted to the Court, Resolution 77/276 (n 7).

14 ibid.

While the request submitted to the Inter-American Court of Human Rights appears more limited, given that the legal framework concerned is solely that of human rights, it is drafted in particularly broad, inclusive and detailed terms. Human rights are considered through twenty-one questions, both in their individual and collective dimensions. The questions cover a range of issues, including due diligence, the right to life, the rights of the child, procedural rights, environmental protection and the principle of common but differentiated responsibilities. It appears that 'all the questions, explicitly and implicitly, seek to clarify how mitigation, adaptation and loss and damage relate to human rights obligations'[15].

Lastly, the request submitted to ITLOS is limited to the field of the law of the sea and is the shortest and most precise of the three sets of questions put to the international courts. It is worded as follow:

> 'What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (the 'UNC LOS'), 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 warm in g 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?'[16].

The three requests overlap to some extent, since the request to the ICJ largely encompasses the other two. Moreover, it is likely that the ICJ will not be able to go into as much detail as the two specialized courts on the questions also addressed to the latter, or even that it will refer directly to the requests for opinions in question - or to the opinions if the latter have already been issued, which will probably be the case for the one addressed to ITLOS. Such an overlap is not without risk: it 'could trigger either a global legal cacophony with accompanying contradictions or a new, complementary and helpful approach'[17],, reinforced by the dialogue between judges. The three requests 'may be seen as pieces of a puzzle, some smaller, some larger, which when put together will hopefully provide an incomplete but much clearer picture of the actionable obligations of States in relation to the conduct that is driving climate change'[18].

The context surrounding each of these requests is in any case specific to them: As some have pointed

15 Juan Auz, Thalia Viveros-Uehara,, 'Another Advisory Opinion on the Climate Emergency? The Added Value of the Inter-American Court of Human Rights', EJIL Talk <www.ejiltalk.org/another-advisory-opinion-on-the-climate-emergency-the-added-value-of-the-inter-american-court-of-human-rights/> accessed 10 September 2023.

16 Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, 12 December 2022 (n 2).

17 Juan Auz, Thalia Viveros-Uehara, Another Advisory Opinion (n 15).

18 Jorge E. Vinuales 'Climate change and the advisory function' (n 12).

out, ITLOS and the IACHR are reputed to have a more progressive approach than the ICJ[19]; others, on the other hand, point to the contrast between the apparent simplicity with which the COSIS request for an advisory opinion was submitted to ITLOS and the complexity of the process that led Vanuatu to obtain a consensus vote within the UN General Assembly - a first for this type of resolution -, a process that could possibly increase the legitimacy and authority of the opinion once it has been delivered[20]. Furthermore, the relative simplicity of the referral to ITLOS should not lead us to relativize certain difficulties that will have to be overcome, both in terms of procedure and substance.

These difficulties do not appear to be insurmountable. Admittedly, some States had pointed out, on the occasion of the request for an opinion submitted by the Sub-Regional Fisheries Commission[21], that the UNCLOS makes no explicit reference to such advisory jurisdiction over the Tribunal in its plenary session. In 2015, the Tribunal finally ruled on its jurisdiction in a laconic and very open manner, contenting itself with a literal interpretation of article 21 of its Statute annexed to the Convention[22]. In the submissions filed as part of the COSIS request procedure, very few States actually contest the advisory jurisdiction of the Tribunal in its plenary formation. This is the case for China, which rejects the Tribunal's advisory jurisdiction en bloc and in great detail, as it did in the 2015 opinion[23], India[24] and Brazil[25]. Of course, it may also refuse to give this opinion for 'decisive reasons'[26], but the conditions appear to be right for it to exercise its advisory jurisdiction in this fundamental case, which will determine the content and scope of the obligations of the parties to the Convention in relation to climate change. As regards the substance, one of the major challenges of this procedure lies in the relationship between the law of the sea and climate law. While the latter body of rules is not the only one to be relevant - international human rights law could also be usefully

19 Juan Auz, Thalia Viveros-Uehara, Another Advisory Opinion (n 15). ; Sandrine Maljean-Dubois, 'À quand un contentieux interétatique sur les changements climatiques?' (2021) Questions of International Law, vol. 85, 17-28, p. 27.

20 Benoit Mayer, 'International advisory proceedings on climate change' (2023) Michigan Journal of International Law, n 44, 41–115. The fact that ITLOS then encourages broad participation by States and organisations in the written and oral proceedings nevertheless ensures that all points of view will be expressed and compensates for the lack of representativeness of the entity making the request, since oral proceedings are not mandatory before ITLOS (Article 133(4) of the Rules). Nevertheless, in the advisory opinion requested by the SRFC, the Tribunal clearly emphasised the relative scope of the opinion, which would be limited ratione personae to the organisation making the request and its Member States. Alina Miron, 'COSIS Request for an Advisory Opinion (n 8), 264-265.

21 *SRFC* (n 5), 40.

22 According to which 'The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal'. See also art 16: 'The Tribunal shall frame rules for carrying out its functions. In particular it shall lay down rules of procedure'.

23 Written observations of the Popular Republic of China, 15 June 2023, 5-25.

24 Written observations of India, 5 ff.

25 Written observations of the Federal Republic of Brazil, 15 June 2023, 5 ff.

26 Art. 138 of the Rules of the Tribunal.

mobilized in view of its recent developments[27] - it remains the main tool at the Tribunal's disposal for interpreting the UNCLOS provisions in the light of climate change. The way in which the Tribunal mobilizes climate instruments and standards will then largely determine the interpretation it makes of the nature, scope and extent of the obligations of the Parties to the Convention concerning the preservation of the marine environment, in a context of climate change.

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27 HRC, *Daniel Billy and others v Australia (Torres Strait Islanders Petition)*, views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019 23 Sept. 2022 (§3.2). The Committee decided, in this case, to have a systemic interpretation of States obligations, declaring interestingly that 'State party's obligations under international climate change treaties constitute part of the overarching system that is relevant to the examination of its violations under the Covenant', referring to Article 31 of the Vienna Convention on the Law of Treaties. See also the written contributions the Democratic Republic of Congo and of Mauritius.