

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



2023

Public sitting

held on Thursday, 14 September 2023, at 3 p.m.,
at the International Tribunal for the Law of the Sea, Hamburg,
President Albert J. Hoffmann presiding

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

(REQUEST FOR ADVISORY OPINION SUBMITTED TO THE TRIBUNAL)

Verbatim Record

Uncorrected

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

List of delegations:

STATES PARTIES

Guatemala

Mr Lesther Antonio Ortega Lemus, Minister Counsellor and Chargé d’Affaires,
Embassy of the Republic of Guatemala in the Kingdom of the Netherlands
Mr Alfredo Crosato Neumann, PhD, Geneva Graduate Institute; Member, Bar of
Lima

India

Mr Luther M. Rangreji, Joint Secretary (L&T), Ministry of External Affairs
Mr P.K. Srivastava, Scientist ‘G’, Ministry of Earth Science
Mr Yumkhaibam Sabir, Deputy Secretary (UNES), Ministry of External Affairs
Mr Shard, Scientist ‘E’, Ministry of Environment, Forest and Climate Change
Ms Soumya Gupta, Consul General, Consulate General of India, Hamburg

Nauru

Ms Anastasia Francilia Adire, Legal Advisor, Permanent Mission of the Republic of
Nauru to the United Nations, New York
Ms Joan Yang, Legal Advisor, Permanent Mission of the Republic of Nauru to the
United Nations, New York
Mr Eirik Borge, Professor of International Law, University of Bristol, United Kingdom

1 **THE PRESIDENT:** Please be seated. Good afternoon. The Tribunal will continue its
2 hearing in a Request for an Advisory Opinion submitted by the Commission of Small
3 Island States on Climate Change and International Law. This afternoon we will hear
4 statements from Guatemala, India and Nauru.

5
6 I now give the floor to the representative of Guatemala, Mr Ortega Lemus, to make
7 his statement. You have the floor, Sir.

8
9 **MR ORTEGA LEMUS:** Mr President, honourable members of the Tribunal, it is my
10 distinct honour to stand before you today and speak within these advisory
11 proceedings on behalf of my country, the Republic of Guatemala.

12
13 From the outset, I would like to state that the Republic of Guatemala holds the
14 highest respect for the Commission of Small Island States on Climate Change and
15 International Law and the visionary people involved in its establishment.
16 Furthermore, Guatemala deeply appreciates the task that COSIS has taken upon
17 itself through its many activities, including this request for the Tribunal to render an
18 advisory opinion. I would also like to pay tribute to the youth-led organizations behind
19 climate litigation for their courage and inspiring work, and, in particular, to the world's
20 youth for climate justice.

21
22 The positions we will put forward with my colleague, whether aligned or slightly
23 divergent from that of COSIS and of other speakers, seek to assist the Tribunal in
24 the discharge of its judicial function and in no way diminishes the said admiration
25 and appreciation, nor do they represent a denial by Guatemala of the climate
26 emergency the world is experiencing.

27
28 Guatemala is aware of the world's dire situation regarding climate change and its
29 deleterious effects on the environment, including the oceans. There is no question
30 about how real climate change is and that the anthropogenic input on top of natural
31 processes is the trigger of that crisis.

32
33 In that regard, we would like to express our gratitude for the work carried out by the
34 International Law Association Committee on International Law and Sea Level Rise,
35 as well as that of the International Law Commission of the United Nations.

36
37 For context, Mr President, members of the Tribunal, Guatemala holds the second
38 largest rainforest in the Americas, only behind the Amazon. From that position, it
39 facilitates carbon sinking in a magnitude significantly superior to its relative size and
40 contribution to global emissions. Guatemala is also a coastal State on the Pacific
41 Ocean and the Caribbean Sea; therefore, it is especially interested in the protection
42 and preservation of the marine environment.

43
44 As a State Party to UNCLOS, the UNFCCC and the Paris Agreement, Guatemala is
45 engaged in fulfilling its obligations under both regimes. It published its NDC, which
46 was updated as recently as 2021, and has committed to significant reductions of
47 greenhouse gases. Guatemala only contributes with 0.08 per cent of global
48 emissions, despite being the largest economy and the most populous country in
49 Central America. At the same time, it is among the most vulnerable countries to the
50 adverse effects of climate change.

1 As a developing country, Guatemala continues to strive in raising the living
2 standards of its citizens. We have a megadiverse biodiversity and abundant natural
3 resources, both renewable and non-renewable, and we must consistently assert our
4 right to development and to the principle of permanent sovereignty over natural
5 resources.

6
7 In light of that, Mr President, Guatemala would like to begin by going beyond what
8 has been said so far regarding UNCLOS, characterizing it as the constitution of the
9 oceans, as Ambassador Tommy Koh of Singapore christened it. We want to touch
10 upon its developmental character.

11
12 As we know, the trigger for the Third United Nations Conference on the Law of the
13 Sea was the famous *Maltese Proposal* spearheaded by Arvid Pardo's seminal
14 presentation at the United Nations General Assembly's First Committee on
15 1 November 1967.¹ He spoke of untold riches that lay on the ocean floor in the form
16 of polymetallic nodules ready to be extracted; riches that, in his view, should not go
17 to the hands of those few countries with the means to exploit them, exacerbating the
18 appalling gap between developed and developing countries. Instead, Pardo
19 proposed that these new, untapped resources should be utilized for the benefit of
20 mankind as a whole. His proposal was firmly grounded within the New International
21 Economic Order.

22
23 That objective found its way into the text of the Convention, and so development was
24 permanently inscribed within its provisions. Right to development, development
25 differences, different capabilities, different needs – all these appear from the very
26 Preamble until its annexes.

27
28 For example, preambular paragraph 4 sets out the goal of achieving the
29 establishment of a legal order for the seas and oceans, which facilitates international
30 communication and promotes peaceful uses of the seas and oceans, the equitable
31 and efficient utilization of their resources, the conservation of their living resources,
32 and the study, protection and preservation of the marine environment.

33
34 Preambular paragraph 5, for its part, affirms that achieving that goal would contribute
35 to the realization of a just and equitable international economic order which takes
36 into account the interests and needs of mankind as a whole, but, in particular, the
37 special interests and needs of developing countries, whether coastal or landlocked.

38
39 Citing the leading UNCLOS commentary, the Proelss Commentary, I quote:

40
41 Preamble 5 differentiates between the needs and interests of mankind as a
42 whole and, "in particular, the special interests and needs of developing
43 countries." ... the distinction between developed and developing countries was
44 considered to be essential for a new international economic order. Taking the
45 different needs and interests in Preamble 5 "into account," the States Parties
46 realized these differences.²

47

¹ A/C.1/PV.1515 https://www.un.org/Depts/los/convention_agreements/texts/pardo_ga1967.pdf

² Proelss, *UNCLOS*, 1st edition 2017 p. 12.

1 To circumscribe ourselves to Part XII, which seems to be the epicentre of COSIS's
2 requests, article 207, *Pollution from land-based sources*, stipulates that when States
3 seek to establish international rules and standards, the economic capacity of
4 developing States and their need for economic development must be taken into
5 account. It must be noted that in the quoted article, it refers not only to the economic
6 capacity of developing States, but also to their need for economic development.

7
8 This is but one example of how UNCLOS was built within the context of the New
9 International Economic Order and, thus, with a focus on achieving development for
10 those countries that need it the most.

11
12 Common but differentiated responsibilities, or CBDR, is the other side of that coin.
13 Just now, I have mentioned capacity and need; but entitlements must bring about
14 responsibilities, too. That is what COSIS has requested the Tribunal to decide on:
15 obligations. Of course, given the cross-cutting developmental focus of UNCLOS,
16 fulfilment of those obligations is not always equal for all States Parties. Guatemala
17 will bring to your attention how CBDR should shape any answer the Tribunal may
18 decide to render.

19
20 But before that, Mr President, members of the Tribunal, and for the sake of
21 completeness of this presentation, I will first address the matter of the Tribunal's
22 jurisdiction to entertain requests for advisory proceedings. I will add some comments
23 on issues of admissibility and propriety in the specific case at hand.

24
25 Thereafter, Dr Alfredo Crosato will take the floor and set out Guatemala's
26 observations on COSIS's request in more detail.

27
28 Mr President, members of the Tribunal, you have surely perused Guatemala's
29 written statement, which focuses mainly on procedural issues and addresses
30 precisely the questions of jurisdiction, admissibility and propriety whilst reserving
31 Guatemala's right to expound on other matters at a later stage.

32
33 Guatemala expected a second round of written statements. It advocated for the
34 usefulness of such a second round for the benefit of the participants, the Tribunal
35 and the expediency of these oral hearings. A second round of written statements, or
36 written comments, would have allowed the parties to refine their arguments and
37 comment on written statements of other participants in the advisory proceeding,
38 providing much more clarity to the Tribunal on the diverse positions at hand.

39
40 With regard to the Tribunal's advisory jurisdiction, we would like to note the following:

41
42 A general statement of jurisdiction to disputes concerning the application or
43 interpretation of the Convention is found in article 288, paragraphs 1 and 2 of
44 UNCLOS, which indicates that the judicial bodies listed in article 287 shall have
45 jurisdiction over any dispute concerning interpretation or application of the
46 Convention, submitted in accordance with Part XV, and that those judicial bodies
47 shall also have jurisdiction over any dispute concerning the interpretation or
48 application of an international agreement related to the purposes of the Convention,
49 which is submitted to any of them in accordance with such agreement.

1 The jurisdiction of the Tribunal is also set out in article 21 of the Statute, which
2 indicates that it comprises all disputes and all applications submitted to it in
3 accordance with the Convention, and all matters expressly provided for in any other
4 agreement which confers jurisdiction to it.

5
6 Concerning advisory proceedings specifically, the Rules of the Tribunal, in article
7 138, provide that the Tribunal may give an advisory opinion on a legal question if an
8 international agreement related to the purposes of the Convention so provides, that
9 such request must be transmitted to the Tribunal by whatever body is authorized or
10 in accordance with the agreement, and, finally, that in advisory proceedings, the
11 Tribunal must apply articles 130 to 137 of said rules *mutatis mutandis*.

12
13 The Tribunal indicated in its Case No. 21 that, based on article 318 of the
14 Convention, annexes form an integral part of the Convention and, therefore, the
15 Statute enjoys the same status as the Convention. Following the Tribunal's
16 reasoning, this results in a non-subordinated relationship between article 21 of the
17 Statute and article 288 of the Convention, whereby article 21 of the Statute, and
18 I quote, "*stands on its own footing and should not be read as being subject to article*
19 *288 of the Convention*".³

20
21 The Tribunal admitted that there is no provision in the Convention or the Statute
22 expressly granting it an advisory jurisdiction. However, it had indicated that
23 article 21, and, more specifically, the phrase, and I quote, "*all matters specifically*
24 *provided for in any other agreement which confers jurisdiction on the Tribunal*", was
25 critical to the issue.

26
27 The Tribunal explained that the word "*matters*" necessarily has a distinct meaning
28 from the words "*disputes*" and "*applications*" and that "[c]onsequently, it [*matters*]
29 *must mean something more than only 'disputes'. That something more must include*
30 *advisory opinions if specifically provided for in 'any other agreement which confers*
31 *jurisdiction on the Tribunal*."⁴

32
33 The Tribunal went on to state that the expression "*all matters specifically provided for*
34 *in any other agreement which confers jurisdiction on the Tribunal*" did not in itself
35 establish the advisory jurisdiction; rather, it is the "*other agreement*" which could
36 confer such jurisdiction:

37
38 When the "other agreement" confers advisory jurisdiction on the Tribunal, the
39 Tribunal then is rendered competent to exercise such jurisdiction with regards
40 to 'all matters' specifically provided for in the "other agreement". Article 21 and
41 the "other agreement" conferring jurisdiction on the Tribunal are
42 interconnected and constitute the substantive legal basis of the advisory
43 jurisdiction of the Tribunal.⁵

³ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 20, para. 52.*

⁴ *Ibid.*, p. 21, para. 56. See also *MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 106, para. 51.*

⁵ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 22, para. 58.*

1 Regarding article 138 of the Rules of the Tribunal, the same Advisory Opinion
2 indicates that it “*does not establish the advisory jurisdiction of the Tribunal*” as it only
3 “*furnishes the prerequisites that need to be satisfied before the Tribunal can exercise*
4 *its advisory jurisdiction.*”⁶

5
6 Having established the above, the Tribunal determined that said prerequisites for the
7 exercise of its advisory jurisdiction are the following:

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

12 (b) The request must be transmitted to the Tribunal by a body authorised by or in
13 accordance with the said agreement; and

14 (c) Such an opinion may be given on a “legal question”.⁷

15
16 The request for an advisory opinion submitted by COSIS appears, *prima facie*, to
17 fulfil these prerequisites that article 138 of the Rules of the Tribunal and the *Sub-*
18 *Regional Fisheries Commission Advisory Opinion* demand, namely:

19
20 (a) The Agreement for the Establishment of the Commission appears, in principle, to
21 be related to the purposes of the Convention, and its article 2(2) incorporates an
22 express authorization for the Commission to request advisory opinions from the
23 Tribunal “on any legal question within the scope of” UNCLOS;

24 (b) The request for an advisory opinion was transmitted to the Tribunal by the Co-
25 Chairs of the Commission in accordance with article 3 of the Agreement;

26 (c) The two questions transmitted to the Tribunal are framed in legal terms and are of
27 a legal nature.

28
29 As stated by a top-tier international practitioner, after the Tribunal’s decision in Case
30 No. 21, it would require a brave advocate to try to persuade the Tribunal to change
31 its mind with regards to finding it has an advisory jurisdiction.⁸ And Mr President,
32 members of the Court, despite holding a relatively strong personal conviction against
33 the existence of an advisory jurisdiction for the Tribunal in full, since I speak on
34 behalf of Guatemala, and at least today, I will not be that advocate.

35
36 Therefore, following the Tribunal’s reasoning concerning its advisory jurisdiction as
37 per Case No. 21, it would appear that the Tribunal has jurisdiction to entertain the
38 present request for an advisory opinion.

39
40 Notwithstanding this concession, Guatemala contends that Case No. 31 is an
41 opportunity for the Tribunal to clarify and cement its advisory jurisdiction. Our
42 invitation is to consider filling any gap left by the decision of Case No. 21 and provide
43 States with unequivocal guidance for advisory proceedings before this honourable
44 Tribunal.

45

⁶ *Ibid.*, p. 22, para. 59.

⁷ *Ibid.*, p. 22, para. 60.

⁸ Wood, p. 218 in *The Contribution of the International Tribunal for the Law of the Sea to the Rule of Law: 1996-2016*

1 A further invitation in the same line concerns procedure. Guatemala believes the
2 Tribunal should consider standardizing the steps to follow and clarifying the scope of
3 the applicable rules without nullifying the flexibility necessary to adapt to each matter
4 brought before it.

5
6 Specifically, the Tribunal may want to consider articles 138, paragraph 2, and 130,
7 paragraph 1, with regards to the rules related to contentious cases which may be
8 applied *mutatis mutandis* to advisory proceedings, with an emphasis on facilitating
9 equality among the participants and ensuring fairness, in matters such as the ones
10 regulated by articles 80, 78 and, in relation to those, article 72, of the Rules of the
11 Tribunal, among others.

12
13 If the Tribunal indeed finds that it has jurisdiction to entertain this request for an
14 advisory opinion, we contend that no reasons for the inadmissibility of the request
15 will be found either, nor will the Tribunal find “compelling reasons” to exercise its
16 discretion and not answer the request.

17
18 Guatemala reiterates the following contentions as words of caution for how the
19 Tribunal ought to proceed.

20
21 Firstly, the Tribunal must bear in mind that the requesting entity is an organization
22 comprised of a discreet number of States, and its membership is limited to the
23 members of the Alliance of Small Island States. In other words, the Commission
24 does not enjoy the universality or quasi-universality that the organs and
25 organizations authorized to request advisory opinions usually enjoy, together with
26 the ensuing procedure that brings about the request for an advisory opinion.

27
28 Some speakers that preceded us have cited ITLOS and the ICJ regarding the
29 consent of third parties, not members of the requesting body, being irrelevant to the
30 admissibility of a request for an advisory opinion. However, the question here is not
31 of consent. It, rather, relates to the fact that within a treaty arrangement of 169
32 States Parties, two form an organization and empower it with a prerogative to
33 request advisory opinions from the Tribunal in any legal question regarding the treaty
34 that concerns all 167 and invite only another restrictive set of States to become
35 parties to that organization with no avenues for other interested parties to that treaty
36 to participate in the said organization nor in the formulation of the questions included
37 in the request for an advisory opinion. To us, Mr President, honourable members of
38 the Tribunal, that very much brings back echoes of paragraphs 6 to 11 of Judge
39 Cot’s Declaration in Case No. 21.⁹

40
41 To be clear, Mr President, members of the Tribunal, by the above, Guatemala does
42 not argue for the inadmissibility of COSIS’s request for an advisory opinion. In turn,
43 what it is doing is urging the Tribunal to proceed cautiously.

44
45 Care must be shown in protecting the rights of third States who were not consulted
46 when the questions were drafted or submitted to the Tribunal. This necessity is
47 especially acute, as concerns have been expressed about how the advisory

⁹ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 73-76 Declaration Judge Jean-Pierre Cot.*

1 jurisdiction of the Tribunal has been triggered in this case – by virtue of an
2 international agreement arguably concluded for the sole purpose of submitting the
3 request for an advisory opinion at hand – and its potential effect in encouraging
4 further similar requests which may distort the object and purpose for which the
5 Tribunal was established.

6
7 Secondly, Guatemala trusts the Tribunal will zealously protect its judicial function
8 and use its inherent power to determine the actual scope and meaning of the
9 questions object of the request. I quote, “if it is to remain faithful to the requirements
10 of its judicial character in the exercise of its advisory jurisdiction, [the Tribunal] must
11 ascertain what are the legal questions really in issue in questions formulated in a
12 request.”¹⁰

13
14 Thirdly, if the Tribunal decides to furnish an opinion, the answers to the questions
15 must remain within the remit of *lex lata* and avoid the temptations of diverting
16 towards the realm of *lex ferenda*. It is Guatemala’s understanding that an advisory
17 opinion ought to be a statement of the law and not a legislative exercise. So far, the
18 majority of parties in these proceedings, including counsel for COSIS, have stated
19 similar messages, and we are convinced that the Tribunal has taken note of it.

20
21 Separately, and this is a substantive reflection: I kindly request that the Tribunal take
22 due consideration of the work that States have done with regards to greenhouse gas
23 emissions from vessels through cooperation within the International Maritime
24 Organization, in particular MARPOL Annex VI, and no less than two decades of
25 efforts to achieve the decarbonization of the shipping industry. These efforts appear
26 to align with the fulfilment of the obligations set out in UNCLOS articles 211 and 212
27 with regards to greenhouse gas emissions from ships.

28
29 For reasons I trust the Tribunal will fully understand, I am obliged to make a
30 statement before closing my remarks. Mr President, in its written statement, Belize
31 claims territory that – as it acknowledges in a footnote therein – is the subject of
32 ongoing proceedings before the International Court of Justice. Guatemala reserves
33 its position on what Belize writes or says in the present proceedings, which can have
34 no effects on its claims before the International Court of Justice.

35
36 With that, I have come to the end of my speech, Mr President. I would like to thank
37 you and all members of the Tribunal for your consideration to this presentation and,
38 as well, for the support received by the Registrar and her staff.

39
40 I now yield the floor and respectfully ask you, Mr President, to call Dr Crosato to the
41 lectern. Many thanks.

42
43 **THE PRESIDENT:** Thank you, Mr Ortega Lemus. I now give the floor to Mr Crosato
44 Neumann to make his statement.

45
46 You have the floor, Sir.

47

¹⁰ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, p. 88, para. 35.*

1 **MR CROSATO NEUMANN:** Mr President, distinguished members of the Tribunal, it
2 is an honour to appear before you on behalf of the Republic of Guatemala. As
3 Mr Ortega indicated, I shall present Guatemala's observations on the request
4 submitted by COSIS, so as to assist the Tribunal in these important proceedings.
5

6 The two questions before you are broad and raise complex legal issues. COSIS had
7 the opportunity to address them for 12 hours this week. Since our time is more
8 limited, this presentation will focus on key aspects of the request to which Guatemala
9 attaches particular importance. Guatemala agrees with much of what has been said
10 already, but silence on a particular point should not be necessarily understood as
11 agreement.
12

13 My presentation will be divided in two parts. First, I will address the Tribunal's
14 jurisdiction *ratione materiae*, the applicable law, and the relationship between
15 UNCLOS and other rules of international law, in particular the UN Framework
16 Convention on Climate Change and the Paris Agreement.
17

18 Second, I will set out Guatemala's observations on questions (a) and (b), with
19 emphasis on two issues: the due diligence obligations in Part XII of the Convention
20 and the principle of common but differentiated responsibilities, or "CBDR".
21

22 Mr President, I turn first to the Tribunal's jurisdiction and the law to be applied by the
23 Tribunal, and the relationship between the Convention and other rules of
24 international law. The broad formulation of the questions submitted by COSIS and
25 the numerous references in these proceedings to rules of international law external
26 to the Convention, call for a proper analysis of these matters.
27

28 It is also important to keep in mind that the International Court of Justice will render
29 an advisory opinion on States' obligations in relation to climate change. The
30 questions put to the Court by the General Assembly are no doubt wider in scope.
31 They include, but are not limited to, obligations arising under UNCLOS. As some
32 participants have noted, your advisory opinion will be examined with great care by
33 those involved in the ICJ proceedings.
34

35 It is therefore essential, in Guatemala's view, for the Tribunal to articulate the
36 relationship between the Convention and other instruments in a clear manner.
37

38 The Tribunal's jurisdiction is governed by article 288 of the Convention, as well as by
39 article 21 of the Statute. Under paragraph 1 of article 288, the jurisdiction covers
40 "any dispute concerning the interpretation or application of [the] Convention".
41 Paragraph 2 provides that jurisdiction may extend to disputes concerning the
42 interpretation and application of other agreements "related to the purposes of the
43 Convention", if those agreements confer such jurisdiction on the Tribunal.
44

45 The law to be applied by the Tribunal is, in turn, governed by article 293. It provides
46 that the Tribunal must apply the "Convention and other rules of international law not
47 incompatible with [it]."
48

49 Articles 237 and 311 are also relevant in this context, as they further specify the
50 relationship between the Convention and other instruments. Paragraph 2 of

1 article 311 provides that the Convention “shall not alter the rights and obligations of
2 States Parties which arise from other agreements compatible with [the] Convention
3 and which do not affect the enjoyment by other States Parties of their rights or
4 performance of their obligations”

5
6 Article 237 addresses more specifically States’ obligations under other treaties on
7 the protection and preservation of the marine environment. It indicates that the
8 provisions of Part XII “are without prejudice to ... agreements which may be
9 concluded in furtherance of the general principles set forth” in the Convention. It also
10 provides that such other agreements “should be carried out in a manner consistent
11 with the general principles and objectives” of the Convention.

12
13 The provisions I have just referred to call for some observations.

14
15 First, it is clear that the jurisdiction *ratione materiae* of the Tribunal is limited to
16 UNCLOS. Your jurisdiction may extend to other agreements but only if they provide
17 for this. This means that, in a contentious case, the Tribunal may, in principle, only
18 find breaches of the Convention. Similarly, the focus of an advisory opinion should
19 be, first and foremost, on the Convention.

20
21 The provisions of Part XII of UNCLOS, and in particular articles 192 and 194, are
22 most relevant in these proceedings. Indeed, COSIS’s request largely mirrors the
23 language of these two articles.

24
25 Second, the Tribunal may interpret Part XII of the Convention in light of other rules of
26 international law. Or, as some participants have put it, such other rules may inform
27 Part XII. These other rules may be found in other treaties, in customary international
28 law or in general principles of law within the meaning of article 38(1)(c) of the ICJ
29 Statute.

30
31 This is not only justified by article 293, but also by the principle of systemic
32 integration reflected in article 31(3)(c) of the Vienna Convention of the Law of
33 Treaties.

34
35 In addition, certain provisions of the Convention, including in Part XII, expressly refer
36 to internationally recognized rules or standards for purposes of their interpretation
37 and application. The precise legal effect of these so-called “rules of reference” must
38 be determined on a case-by-case basis, considering the formulation of each relevant
39 provision.¹¹

40
41 Guatemala considers that, in this case, the Framework Convention and the Paris
42 Agreement are among the most relevant instruments for purposes of interpreting and
43 applying Part XII of UNCLOS. The principle of prevention, which forms part of
44 customary international law,¹² can also provide guidance. The same is true for the

¹¹ See, for example, articles 207(1), 211(2), and 212(1) of UNCLOS.

¹² *Trail Smelter Case (United States, Canada)*, Award, 11 March 1941, UNRIAA, p. 1965; 1972 Stockholm Declaration on the United Nations Conference on the Human Environment, Principle 21; 1992 Rio Declaration on Environment and Development, Principle 2 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, pp. 241-242, para. 29; *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, pp. 55-56, para. 101.

1 principle of common but differentiated responsibilities, to which Guatemala attaches
2 great importance.

3
4 Applicable law should not be confused with jurisdiction. As the Tribunal stated in the
5 *Norstar* case, “article 293 of the Convention on applicable law may not be used to
6 extend the jurisdiction of the Tribunal”.¹³ So your jurisdiction must, in all cases,
7 remain within the confines of the Convention. The Framework Convention and the
8 Paris Agreement have their own dispute settlement clauses. They do not envisage
9 the submission of disputes concerning their interpretation or application to this
10 Tribunal.

11
12 Third, whatever the Tribunal may decide in relation to the precise content of the
13 obligations under Part XII, these obligations ought to be, following articles 237
14 and 311, “without prejudice” to the specific obligations under the Framework
15 Convention and the Paris Agreement. The Tribunal may rely on these treaties to
16 interpret UNCLOS, but it should not be suggested that UNCLOS may somehow alter
17 or modify them.

18
19 This does not mean that the Tribunal cannot interpret the Framework Convention or
20 the Paris Agreement, as some participants appear to suggest.¹⁴ The Tribunal can
21 obviously do this if it is to meaningfully determine the content of States’ obligations
22 under UNCLOS where reference to these treaties is necessary.

23
24 This also does not exclude that the Convention, through article 197, may impose on
25 States an obligation to cooperate to conclude agreements that go beyond what is
26 required by the Framework Convention and the Paris Agreement, if this is necessary
27 for States to be able to meet their obligations under Part XII.

28
29 These, Mr President, are some of the basic principles which, in Guatemala’s view,
30 should guide the Tribunal in answering to COSIS’s request. But before moving on to
31 the specific questions, some additional remarks are in place.

32
33 You have heard a few times this week that, in rendering its advisory opinion, the
34 Tribunal will apply the existing law; it will not create new law. Guatemala naturally
35 agrees, as Mr Ortega just indicated, that the Tribunal’s function is to state the law as
36 it stands at present – the *lex lata*. The Tribunal is not a legislative body.

37
38 This is not to say, however, that the obligations under UNCLOS relating to climate
39 change have always existed. Indeed, as some participants have indicated, including
40 this morning, the Convention must be interpreted in an evolutive manner, in light of
41 the best available science, so that it may cover the problems posed by climate
42 change.¹⁵ Climate change is a “moving target”, as Professor Lowe put it on
43 Tuesday.¹⁶

¹³ *M/V “Norstar” (Panama v. Italy), Judgment, ITLOS Reports 2018-2019*, p. 47, para. 136.

¹⁴ See, for example, written statement of Brazil, para. 20.

¹⁵ See, for example, written statement of Chile, para. 66; written statement of COSIS, paras. 185, 410; written statement of the Democratic Republic of the Congo, para. 127; written statement of the European Union, para. 91; written statement of France, para. 74; written statement of Mozambique, para. 51; written statement of Portugal, para. 91.

¹⁶ ITLOS/PV.23/C31/4, 12 September 2023 (Lowe), p. 30.

1 It would be useful, in Guatemala's view, if the Tribunal could indicate when the
2 obligations under the Convention relating to climate change came into being, and
3 how additional or different obligations may arise in the future. This will be relevant
4 when assessing whether a State has complied with its obligations.

5

6 It is also clear, Mr President, that the precise normative relationship between
7 UNCLOS, the Framework Convention and the Paris Agreement will be at the centre
8 stage of the Tribunal's advisory opinion.

9

10 Is it a relationship of *lex specialis* or is it a relationship of complementarity and
11 mutual supportiveness? Does UNCLOS impose obligations that go beyond the
12 obligations under the climate change regime? Or is it sufficient for States to comply
13 with their obligations under the Framework Convention and the Paris Agreement to
14 fulfil their obligations under Part XII of UNCLOS?

15

16 Guatemala agrees with other participants that the relationship between these treaty
17 regimes is one of complementarity. There is no discernible normative conflict
18 between the relevant treaties, as Professor Mbengue explained in some detail on
19 Monday.¹⁷ They all deal with anthropogenic greenhouse gas emissions and their
20 adverse effects on the environment, including the marine environment.

21

22 But it is important for the Tribunal to clarify what this complementarity means exactly.

23

24 Its most basic consequence is that the Convention should be interpreted in the light
25 of the Framework Convention and the Paris Agreement, as I noted some moments
26 ago.

27

28 This may mean, for example, that a State Party is obliged to adopt all measures
29 necessary to prevent, reduce and control marine pollution through greenhouse gas
30 emissions by joining the efforts to hold the increase in the global average
31 temperature to well below 2°C above pre-industrial levels, and pursuing efforts to
32 limit the temperature increase to 1.5°C.¹⁸

33

34 States' obligations under UNCLOS would also need to be interpreted in the light of
35 the principle of common but differentiated responsibilities, which permeates the
36 entire climate change regime. I will address this in more detail shortly.

37

38 Unlike some other participants, Guatemala takes no issue with the suggestion that
39 UNCLOS may impose obligations that go beyond those contained in the Framework
40 Convention and the Paris Agreement. This is a perfectly acceptable legal proposition
41 insofar as States do not have conflicting obligations under these different treaties.
42 Again, no discernible conflict has been shown to exist. There is no incompatibility.

43

44 If the policies and obligations agreed under the climate change regime to date do not
45 suffice to meet UNCLOS obligations, then States may need to go beyond this regime
46 or redouble their efforts within the existing regime. States may, for example, have to

¹⁷ ITLOS/PV.23/C31/2, 11 September 2023 (Mbengue), pp. 30-39.

¹⁸ Paris Agreement, article 2(1)(a).

1 submit more ambitious, nationally determined contributions. Or they may have to
2 cooperate for the conclusion of new agreements, as appropriate.

3
4 In the end, the text of Part XII of the Convention is sufficiently clear. It imposes
5 certain obligations on States – obligations which may be relevant in the context of
6 climate change. Just like the Tribunal cannot create new law, it cannot disregard
7 existing law.

8
9 Mr President, members of the Tribunal, I now turn to the two questions submitted by
10 COSIS. A lot has already been said about this, and there is much to agree with. We
11 do not want to tire you with repetition, so let me start by stating, briefly, the points
12 which Guatemala does not find controversial.

13
14 One: The definition of “pollution of the marine environment” in article 1(1)(4) of the
15 Convention covers greenhouse gas emissions. The provision is evidently broad, and
16 the scientific evidence is not contested; so, it can be safely said that the obligations
17 under Part XII may apply to anthropogenic greenhouse gas emissions from all
18 sources which result, or are likely to result, in deleterious effects on the marine
19 environment.

20
21 Two: Article 194 of the Convention imposes an obligation on States to take,
22 individually or jointly, all measures that are necessary to prevent, reduce and control
23 anthropogenic greenhouse gas emissions. This article reflects the customary
24 principle of prevention, recognized also in the Framework Convention on Climate
25 Change.¹⁹

26
27 This is a due diligence obligation. An obligation of conduct, not of result. The
28 obligation has to be implemented by using “the best practicable means” at the
29 disposal of each State, and taking into account its own “capabilities”.

30
31 Three: Article 192 of the Convention imposes a broad, independent due diligence
32 obligation. It can be interpreted as an obligation to protect and preserve the marine
33 environment from the adverse impacts of climate change. It may require, for
34 example, that States adopt measures for mitigation and adaptation, and to increase
35 the resilience of the marine environment.

36
37 Four: Part XII of UNCLOS encompasses obligations of cooperation that are
38 instrumental to fulfil the obligations under articles 192 and 194. Cooperation through
39 international organizations, as required by article 197, is particularly important in the
40 context of climate change, given that a proper response to climate change may be
41 achieved not only through the action of individual States, but also by means of a
42 coordinated global approach.

43
44 Mr President, members of the Tribunal, these are, from Guatemala’s point of view,
45 uncontroversial points that can be reasonably and confidently upheld by the Tribunal.

46
47 However, some important nuances need to be made. On Tuesday, counsel for
48 COSIS presented an extensive catalogue of obligations which, in their submissions,

¹⁹ UNFCCC, eighth preambular paragraph.

1 are contained in UNCLOS. We cannot comment on each of them in the limited time
2 we have. But we are obliged to stress that the burdens and costs that those
3 obligations would entail cannot fall upon all States equally.

4
5 This is for two main reasons.

6
7 First, the core duties under Part XII of UNCLOS are due diligence obligations, which
8 must consider the particular position of each State.

9
10 Second, the principle of common but differentiated responsibilities also has an
11 important role to play. This principle, as you know well, is one of the cornerstones of
12 the climate change regime. And if this regime is complementary to UNCLOS, the
13 principle must be taken into account when interpreting and applying UNCLOS
14 obligations relating to climate change.

15
16 COSIS acknowledges the principle of common but differentiated responsibilities, but
17 the principle does not seem to play a significant role in its pleadings. On Monday,
18 Professor Akhavan said that “given how close we are to the brink of disaster, that
19 differential burden cannot become a pretext for developing States not to do their fair
20 share to protect the marine environment”.²⁰ For Guatemala, as surely for many other
21 developing States with marginal historical emissions, it is crucial to determine what
22 that “fair share” is.

23
24 Part XII of UNCLOS itself makes clear that States’ obligations do not apply across
25 the board in a sweeping manner; rather, the special situation of developing States is
26 expressly recognized.

27
28 Article 194, paragraph 1, as I mentioned, provides that the obligation to take
29 measures to prevent, reduce and control pollution must be applied using the best
30 practicable means at the disposal of each State, and taking into account its own
31 capabilities. What those capabilities are, and which practicable means are available,
32 certainly requires a case-by-case analysis.

33
34 In addition, article 202 addresses scientific and technical assistance to developing
35 States. It includes, for example, an obligation to provide appropriate assistance for
36 the minimization of the effects of major incidents which may cause serious pollution
37 and also to provide assistance concerning the preparation of environmental
38 assessments.

39
40 Importantly, article 203 provides that developing States shall, for the purpose of
41 prevention, reduction and control of pollution, be granted preference by international
42 organizations in the allocation of funds and technical assistance.

43
44 Mr President, members of the Tribunal, you have heard this week that the
45 obligations under articles 192 and 194 are due diligence obligations. Guatemala
46 agrees. This means that they require certain conduct, but not a particular result. As
47 the Seabed Disputes Chamber indicated in the *Area Advisory Opinion*, this is not an
48 obligation “to achieve, in each and every case” a result, but “to deploy adequate

²⁰ ITLOS/PV.23/C31/1/Corr.1, 11 September 2023 (Akhavan), p. 25.

1 means, to exercise best possible efforts, to do the utmost”, to obtain the desired
2 result.²¹

3
4 Due diligence also requires States to exercise a level of vigilance in enforcement and
5 administrative control, so as to ensure that the measures they adopt to meet their
6 obligations are effectively implemented. This has been reaffirmed by the
7 International Court of Justice, this Tribunal and the tribunal in the *South China Sea*
8 arbitration.²²

9
10 So, it is clear, Mr President, that when it comes to due diligence obligations, the
11 same conduct cannot be expected from all States. The situation of each State must
12 be assessed separately. The same standard cannot be applied to all.

13
14 This may have an impact on the degree of detail in which you may respond to the
15 questions submitted by COSIS. As the Seabed Disputes Chamber indicated, “the
16 content of ‘due diligence’ obligations may not easily be described in precise terms”.²³
17 Due diligence, in the words of the Chamber, is “a variable concept. It may change
18 over time as measures considered sufficiently diligent at a certain moment may
19 become not diligent enough in light, for instance, of new scientific or technological
20 knowledge”, or in light of the “risks involved”.²⁴

21
22 Mr President, Guatemala’s last observation concerns the principle of common but
23 differentiated responsibilities. As I mentioned earlier, Guatemala attaches particular
24 importance to this fundamental principle of climate change law. It should, without
25 doubt, inform States’ obligations under UNCLOS relating to climate change.

26
27 CBDR is well established in the climate change regime. It was first laid down in the
28 1992 Rio Declaration. Principle 7 established that “[i]n view of the different
29 contributions to global environmental degradation, States have common but
30 differentiated responsibilities.”

31
32 Article 3(1) of the Framework Convention expressly refers to this principle. It reads,
33 and I quote:

34
35 The Parties should protect the climate system for the benefit of present and
36 future generations of humankind, on the basis of equity and in accordance with
37 their common but differentiated responsibilities and respective capabilities.
38 Accordingly, the developed country Parties should take the lead in combatting
39 climate change and the adverse effects thereof.
40

²¹ *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 41, para. 110.*

²² *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, pp. 79-80; Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 41, para. 131, para. 197; South China Sea Arbitration, Award, 12 July 2016, RIAA, p. 521, para. 944.*

²³ *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 43, para. 117,*

²⁴ *Ibid.*

1 Article 2(2) of the Paris Agreement also indicates that the agreement “will be
2 implemented to reflect equity and the principle of common but differentiated
3 responsibilities and capabilities, in the light of different national circumstances.”

4
5 UNCLOS does not expressly mention CBDR. But, as we have explained, UNCLOS
6 and the climate change regime are mutually supportive; so, the principle must be
7 considered in the context of the Convention and its obligations in relation to climate
8 change.

9
10 Various provisions of the Convention, as I mentioned some moments ago, take into
11 account States’ respective capabilities and their need for assistance to developing
12 countries. The preamble of the Convention also refers to the “realization of a just and
13 equitable international economic order”, which takes into account, in particular, “the
14 special interests and needs of developing countries”. Article 193 of the Convention,
15 while recalling States’ duty to protect and preserve the marine environment, also
16 reaffirms their “sovereign right to exploit their natural resources.”

17
18 Mr President, members of the Tribunal, the rationale and immense importance of the
19 principle of common but differentiated responsibilities is self-evident. Not all States
20 have contributed equally to the degradation of the climate system. Most greenhouse
21 gas emissions have originated from developed, industrialized countries. The
22 historical contributions of most developing countries, in contrast, are much less
23 significant, often even marginal, as is the case of Guatemala. At the same time, and
24 paradoxically, it is developing countries which are most vulnerable to the adverse
25 effects of climate change, as the representative for Djibouti recalled this morning.
26 Such a situation is not just. It is not equitable.

27
28 This is not to say that developing countries must not join the efforts to combat
29 climate change. Clearly, they must. They have obligations under international law as
30 well. But the fulfilment of those obligations has to take place against the background
31 of their different situations, their right to develop and their need to eradicate poverty.
32 Developing countries cannot be expected to assume the costs of the degradation of
33 the climate system caused by others. CBDR, as an equitable principle, serves to
34 strike a proper balance between these different legitimate interests.

35
36 In short, Mr President, to the extent that UNCLOS contains obligations in relation to
37 climate change, these obligations must be interpreted in the light of the principle of
38 common but differentiated responsibilities enshrined in the Framework Convention
39 and the Paris Agreement.

40
41 The due diligence obligations under Part XII should therefore take into account not
42 only the best available means and the capabilities of individual States. The historical
43 contributions of a State to climate degradation are also a factor to be considered,
44 and Guatemala would urge the Tribunal, respectfully, to recognize the role of equity
45 in this context.

46
47 Mr President, members of the Tribunal, this concludes my presentation, and the
48 observations of the Republic of Guatemala. I thank you for your kind attention.
49

1 **THE PRESIDENT:** Thank you, Mr Crosato Neumann. I now give the floor to the
2 representative of India, Mr Rangreji.

3
4 You have the floor, Sir.

5
6 **MR RANGREJI:** Mr President, distinguished members of the Tribunal, it is a singular
7 honour for me to appear before this Tribunal representing the Republic of India.
8 India, with its longstanding association and support to the UN Convention on the Law
9 of the Sea, attaches significant importance to the work of the Tribunal.

10
11 With your permission, Mr President, I present the comments of India on the *Request*
12 *for an Advisory Opinion submitted by the Commission of Small Island States on*
13 *Climate Change and International Law*.

14
15 I would like to present my comments in three parts: (i) jurisdictional issues;
16 (ii) protection and preservation of the marine environment under Part XII of the
17 Convention; and, lastly, (iii) the existing climate change treaty regime.

18
19 Mr President, advisory opinions of courts and tribunals afford an excellent
20 opportunity to expound the application and interpretation of international law.
21 However, in the present request, India believes that the Tribunal should consider:
22 (a) whether it has jurisdiction to render an advisory opinion; and (b) if so, whether the
23 Tribunal should exercise its discretion in giving the opinion.

24
25 Mr President, the Tribunal derives its jurisdictional authority primarily from article 288
26 of the Convention and article 21 of the Statute of the Tribunal. Both of these
27 provisions provide for contentious jurisdiction of the Tribunal in clear and express
28 terms. However, neither the Convention nor the Statute provides for advisory
29 jurisdiction of the full Tribunal. In fact, article 159, paragraph 10, and article 191 of
30 the Convention provide that the Tribunal, through its Seabed Disputes Chamber, can
31 give advisory opinions to organs of the International Seabed Authority. If it was the
32 intention of the drafters that a similar competence had to be conferred on the full
33 Tribunal, it would have been expressly provided for in the Convention.

34
35 Furthermore, Mr President, while article 138 of the Rules of the Tribunal provides
36 competence to render an advisory opinion, it is humbly submitted that the Rules by
37 themselves cannot confer a new jurisdiction when the Convention or the Statute are
38 silent on the matter. Be that as it may, India believes that the Tribunal should
39 carefully examine the legal basis and its scope, and exercise discretion while
40 rendering an advisory opinion in the current request.

41
42 In addition, India also believes that the two questions put to the Tribunal are rather
43 general in nature. The questions seek opinion of the Tribunal on specific obligations
44 of Parties to UNCLOS, relating to newer aspects of the protection of marine
45 environment; namely, ocean warming, sea-level rise, ocean acidification and
46 anthropogenic greenhouse gas emissions into the atmosphere and climate change
47 impacts, all of which have not been provided in Part XII of the Convention.

48
49 Mr President, the Tribunal should desist from rendering an opinion, wherein there
50 exists a standalone treaty regime addressing issues of climate change. On the issue

1 of admissibility, we believe there are sufficient “compelling reasons”, as was held by
2 the ICJ in the *Wall* and the *Western Sahara* cases, to exercise discretion and decline
3 the request.

4
5 Mr President, the second part of India’s comments deal with the protection and
6 preservation of the marine environment. The United Nations Convention on the Law
7 of the Sea establishes the most comprehensive legal order for the protection of the
8 marine environment. In fact, UNCLOS touches upon all activities related to oceans
9 and the sea. In article 192, States have an obligation to protect and preserve the
10 marine environment. This obligation, as has been widely recognized, involves an
11 obligation of conduct as opposed to an obligation of result. It is a due diligence/best
12 endeavour obligation cast upon all States to protect and preserve the marine
13 environment.

14
15 Complementing this obligation, article 194 provides measures to prevent, reduce and
16 control pollution of the marine environment. These measures are to be taken based
17 on the “best practicable means at their disposal and also in accordance with their
18 capabilities”. Thus, there is no fixed standard to controlling pollution. The abilities of
19 developing countries to protect and preserve the marine environment is without
20 detriment to their sovereign right to exploit their natural resources, as has been
21 provided in article 193 of the Convention.

22
23 Mr President, distinguished members of the Tribunal, from the above, it is evident
24 that the Convention places due diligence obligations upon States depending upon
25 their technical capabilities and economic development. Here, UNCLOS provides
26 some rudimentary insights of the principle for common but differentiated
27 responsibilities and respective capabilities, also called in an abbreviated form as
28 CBDR-RC, the fundamental, guiding principle of the climate change treaty regime.

29
30 Mr President, it may thus be stated that there is nothing in the Convention to prevent,
31 reduce and control pollution that results, or is likely to result, from climate change,
32 nor does the Convention provide a mandate to protect and preserve the marine
33 environment in relation to climate change impacts. The UN Framework Convention
34 on Climate Change, along with its Kyoto Protocol and Paris Agreement, constitutes
35 the existing multilateral legal framework regulating climate change. In accordance
36 with the principle of *generalia specialibus non derogant*, when two legal systems are
37 being considered to address a particular situation, the special law, the *lex specialis*,
38 takes precedence over general law.

39
40 Mr President, coming to article 1(1)(4) of the Convention, it provides a definition of
41 “pollution of the marine environment”. Herein, the words “... *introduction by man*
42 *directly or indirectly, of substances or energy into the marine environment ... which*
43 *results or is likely to result in such deleterious effects*” should not involve an
44 interpretation to include greenhouse gas emissions within the ambit of “pollution of
45 the marine environment”. It is humbly submitted that this would be tantamount to the
46 Tribunal exercising legislative functions, which is the exclusive domain of States
47 Parties. In this process, there is a likelihood that the obligations of States Parties
48 under Part XII will be expanded through interpretation for which the States Parties
49 have never consented to.

1 Mr President, a similar case has also been filed before the International Court of
2 Justice on 29 March 2023. The cases before the ICJ and ITLOS are on the same
3 subject, albeit with slightly different questions. The substantive briefs by interested
4 parties in both of these proceedings are likely to be similar. A deliberate pursuit of
5 parallel proceedings may lead to the inevitable risk of conflicting opinions and
6 findings.

7
8 Mr President and members of the Tribunal, coming to the third part of India's
9 statement, the UNFCCC treaty regime has put in place a sound legal framework for
10 combating climate change. Climate change and its impacts are the foremost
11 challenges facing our world today. It is a complex global phenomenon which calls for
12 global responsibility and cooperation, bearing in mind the historic responsibility of
13 developed countries to take the lead. The UNFCCC preamble very presciently notes,
14 and I quote, "the largest share of historical and current global emissions of
15 greenhouse gases has originated in developed countries, that per capita emissions
16 in developing countries are still relatively low and that the share of global emissions
17 originating in developing countries will grow to meet their social and development
18 needs".

19
20 Reports of the Intergovernmental Panel on Climate Change (IPCC) have noted that,
21 from the net historical, cumulative anthropogenic emissions between 1850 and 2019,
22 North America and Europe alone have contributed almost 10 times more to the
23 global cumulative emissions in this period, though they have only about 13 per cent
24 of the global population. On the other hand, the contribution of the entire South Asian
25 region is only about 4 per cent, even though the region includes almost 24 per cent
26 of the global population.

27
28 The UNFCCC and its Paris Agreement provides an elaborate framework, wherein
29 the Conference of Parties and subsidiary bodies meet annually and adopt decisions
30 on obligations of States with respect to climate change in a manner that maintains
31 the delicate balance of different workstreams taken together, which include
32 mitigation, adaptation, means of implementation and support in terms of climate
33 finance, development and transfer of technology and capacity-building.

34
35 Mr President, as regards impact of climate change on oceans, recent COPs (that is,
36 the Conference of Parties) have held discussions, and the outcome documents
37 include references to oceans and the marine environment. COP25 mandated the
38 first Ocean and Climate Change Dialogue, and COP26 mandated to hold the
39 Dialogue annually. Now, there exists a workstream to strengthen ocean-based
40 actions and to deep-dive into specific solutions that strategically support and
41 strengthen ocean-climate action at the national and international levels under the
42 UNFCCC. As the Ocean Dialogue, the IPCC and other workstreams of the UNFCCC
43 and subsidiary bodies are undertaking a comprehensive review of the Dialogue
44 between climate change and oceans, it would be premature for the Tribunal to
45 provide an advisory opinion on the effects of greenhouse gases on oceans.

46
47 Mr President, it may also be improper to conflate environmental pollution and climate
48 change. While there is an overlap in some areas, the science is clear on the
49 differences between the two, both at the temporal and the spatial levels. The best
50 available science has not qualified "heat" and "carbon dioxide" as environment

1 pollutants. The current understanding of science indicates that absorption of carbon
2 dioxide by oceans, and the resultant heat, are an integral part of the carbon cycle,
3 which is important for sustenance of life on Earth. The IPCC reports, being referred
4 to by participants in the current proceedings, have presented their findings on the
5 impacts of climate change, including those on coastal and marine ecosystems.
6 However, it is important to understand that none of the IPCC reports have termed
7 the impacts of carbon dioxide on various sectors as “environmental pollution”.

8
9 The Tribunal may also wish to note that some Parties to the UNFCCC have raised
10 pertinent concerns that the IPCC assessment and scenarios, which are based on
11 current literature, contravene the principles of the UNFCCC regime, particularly
12 equity and CBDR-RC. They also completely ignore the fact that developed countries
13 have not met their obligations and the world has already warmed by 1.1°C from the
14 pre-industrial levels.

15
16 India also believes that addressing the question of impact of climate change on the
17 marine environment, and whether effects of climate change are responsible for the
18 deleterious effects, goes beyond the legal interpretation of the provisions of the
19 Convention. Hence, the Tribunal, in the exercise of its judicial function, may consider
20 refraining from rendering an opinion on the direct linkages between climate change
21 and pollution of the marine environment.

22
23 Mr President, members of the Tribunal, another important aspect the Tribunal should
24 factor is that obligations of States with respect to the impacts of climate change are
25 not uniform; rather, States have common but differentiated responsibilities. The
26 UNFCCC states that the global nature of climate change calls for the widest possible
27 cooperation by all countries and their participation in an effective and appropriate
28 international response, in accordance with their common but differentiated
29 responsibilities and respective capabilities and their social and economic conditions.

30
31 Mr President, developing countries have been demanding an equitable carbon space
32 in climate change negotiations and also in various other fora. In the pursuit of global
33 net zero emissions by 2050, a current discourse under the UNFCCC, the principles
34 of equity, climate justice and CBDR-RC of the UNFCCC, require that developing
35 countries have a fair share of the global carbon budget. Article 4 of the Paris
36 Agreement emphasizes the importance of achieving, and I quote, “a balance
37 between anthropogenic emissions by sources and removals by sinks of greenhouse
38 gases in the second half of this century on the basis of equity and in the context of
39 sustainable development and efforts to eradicate poverty”. The legitimate needs of
40 developing countries for equitable carbon and development space are also provided
41 for in the UNFCCC and the Paris Agreement.

42
43 Mr President, the ability of the developing countries to meet their obligations related
44 to climate change are interlinked with, and are dependent upon, the developed
45 countries fulfilling their obligations on providing the means of implementation such as
46 climate finance, transfer of technology and capacity-building. The same is
47 unambiguously spelled out in several articles of the UNFCCC and Paris Agreement.

48
49 Article 4, paragraph 7, of the UNFCCC states:
50

1 The extent to which developing countries will effectively implement their
2 commitments under the Convention will depend on the effective
3 implementation by developed countries' Parties of their commitments under
4 the Convention related to provide financial resources and transfer of
5 technology and will take fully into account that economic and social
6 development and poverty eradication are the first and overriding priorities of
7 the developing country Parties.
8

9 Mr President, for combating climate change, the foremost need of the hour is global
10 cooperation to enable States to meet their climate goals. In fact, "international
11 cooperation" is a fundamental principle and obligation for the effective
12 implementation of the climate regime and also protection of the marine environment
13 as provided under Part XII of the Convention. For developing countries and lesser
14 developed countries facing huge challenges of eradication of poverty and livelihood
15 issues, climate goals can only be realized with support in terms of finance, low-
16 carbon technology transfer and capacity-building. These obligations, it is submitted,
17 must be undertaken in good faith based on the principle of *pacta sunt servanda*.
18

19 Developing countries cannot deploy low-carbon climate technologies at a significant
20 scale unless a facilitative global technology transfer regime is in place, and the
21 incremental and associated costs of these technologies are met by grant-based and
22 concessional public-sources finance provided by developed countries. A
23 collaborative international mechanism needs to ensure that barriers, such as
24 intellectual property rights, are lowered by developed countries to facilitate
25 technology transfer from developed countries to developing countries.
26

27 Mr President, India has contributed little to global warming historically, and its current
28 per capita greenhouse gas emissions is about a third of the global average. Despite
29 this, India has actively contributed to the global fight against climate change and its
30 impacts. India has consistently made ambitious commitments under the UNFCCC
31 framework and has led by example with ambitious domestic actions to meet its
32 climate change commitments.
33

34 India has also pioneered, along with partner countries, some important global
35 initiatives that includes:
36

37 the International Solar Alliance (ISA), a global alliance of around 100 member
38 countries working together for increased deployment of solar energy technologies;
39

40 the Coalition for Disaster Resilient Infrastructure (also called the CDRI) a coalition of
41 international agencies and over 30 member countries working towards promoting the
42 resilience of infrastructure systems to climate and disaster risks in support of
43 sustainable development;
44

45 the Infrastructure for Resilient Island States (called as IRIS), an initiative dedicated to
46 promote resilient, sustainable and inclusive infrastructure development in Small
47 Island Developing States; and
48

49 the Leadership Group on Industry Transition (called LeadIT), to foster collaboration
50 among decision-makers in public and private sectors towards accelerating industry
51 transition.

1 To bring individual behavioral changes at the forefront of the global climate action
2 narrative, India has also launched the Mission LiFE, the Lifestyle for Environment,
3 which envisions replacing the prevalent use-and-dispose economy with a circular
4 economy.

5
6 Through various initiatives, Mr President, India has been assisting developing
7 countries in scaling up the use of renewable energy, capacity-building and disaster
8 risk reduction, including through sharing of climate information and early warning.

9
10 Mr President, even as the request by COSIS affords an opportunity to the Tribunal to
11 examine the obligations of States to protect and preserve the marine environment,
12 bringing in newer aspects such as ocean warming, sea-level rise, ocean acidification
13 caused by greenhouse gases and climate change impacts, it is submitted that the
14 Tribunal should be mindful that we live in an unequal world where capacities of
15 developing countries to combat climate change are limited. Developed countries
16 must lead by example and fulfil their obligations under the UNFCCC and the Paris
17 Agreement in good faith.

18
19 Finally, Mr President, distinguished members of the Tribunal, even as the Tribunal
20 has been called upon to clarify and provide guidance with respect to obligations of
21 States to protect and preserve the marine environment, India submits that the
22 Tribunal should be mindful that the UNFCCC and the Paris Agreement is the
23 specialized multilateral legal regime to address climate change and its impacts,
24 including on the marine environment.

25
26 Mr President, India concludes its oral statement, and I thank you for your attention.

27
28 **THE PRESIDENT:** Thank you, Mr Rangreji.

29
30 We have now reached 4:15. At this stage, the Tribunal will withdraw for a break of
31 30 minutes. We will continue the hearing at 4:45.

32
33 **THE CLERK OF THE TRIBUNAL:** All rise.

34
35 *(Short break)*

36
37 **THE PRESIDENT:** Please be seated.

38
39 I now give the floor to the representative of Nauru, Ms Adire, to make her statement.

40
41 You have the floor, please.

42
43 **MS ADIRE:** Mr President, distinguished members of the Tribunal, my name is
44 Anastasia Francilia Adire, and, together with the other members of our delegation,
45 Professor Eirik Bjorge and Ms Joan Yang, I represent the Republic of Nauru in these
46 proceedings. I will begin by opening Nauru's oral statement. I will then be followed by
47 Professor Bjorge, who will deal with certain technical interpretations of international
48 law. After his presentation, I will conclude Nauru's oral submissions.

49

1 It is an honour for me to appear in this capacity before the Tribunal. The highest
2 respect in which Nauru holds this Tribunal needs no further demonstration. It is
3 attested by Nauru's participation in the important advisory proceedings in
4 *Responsibilities and Obligations of States sponsoring persons and entities with*
5 *respect to activities in the Area.*²⁵
6

7 Nauru welcomes the initiative and leadership of the Commission of Small Island
8 States on Climate Change and International Law in these vital proceedings. It also
9 welcomes the Commission's positive engagement with Small Island Developing
10 States and the solidarity it has shown to member and non-member alike.
11

12 Nauru is a Small Island Developing State, one of the world's smallest. One reason
13 the present proceeding is so important to Nauru is that the population of our island is
14 a people of the ocean. Our lives are inextricably linked to the Pacific Ocean
15 specifically.
16

17 For all of these reasons, Nauru is among the States most affected by climate
18 change. We face significant challenges caused by climate change and its deleterious
19 effects.²⁶ The effects of climate change have the potential to impact our coastal
20 infrastructure, food and water security, public health and safety, and local
21 ecosystems.²⁷ But climate change is *already* undermining and threatening Nauru's
22 ability to cater to the basic needs of its population.²⁸
23

24 We are dependent for our subsistence and economic development on marine
25 resources and the marine environment. Against this background, the deleterious
26 effects of climate change constitutes nothing short of an existential threat to the
27 population of Nauru. Climate change is having catastrophic repercussions for the
28 livelihood and economic well-being of the population of our island. Professor Bjorge
29 will, in due course, address these questions as a matter of the law of the sea.
30

31 As you will know, Mr President, members of the Tribunal, there is a reason why the
32 initiative to these proceedings originated with Small Island Developing States. It has
33 long since been evident to Small Island Developing States not only that the global
34 climate must be protected, but also that there is a pivotal connection between
35 climate change and the oceans.
36

37 It was through the foresight of one such State, Malta, that in 1988 the General
38 Assembly adopted its resolution 43/53, entitled *Protection of climate change for*
39 *present and future generations of mankind*. This resolution, the first of its kind to
40 address climate change, identified that "certain human activities could change global
41 climate patterns, threatening present and future generations with potentially severe
42 economic and social consequences".²⁹ But it also pointed to the connection between

²⁵ *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10.*

²⁶ Statement delivered by H.E. Margo Deiye, Permanent Representative of the Republic of Nauru to the United Nations, 2nd United Nations Ocean Conference, Plenary Session, 30 June 2022.

²⁷ Republic of Nauru, Updated Nationally Determined Contribution, 14 October 2021, p. 12.

²⁸ Statement delivered by H.E. Margo Deiye, Permanent Representative of the Republic of Nauru to the United Nations, 2nd United Nations Ocean Conference, Plenary Session, 30 June 2022.

²⁹ GA res. 43/54 (1988), preambular para. 3

1 “the continued growth in atmospheric concentration of ‘greenhouse’ gases” and the
2 effects of climate change on the sea, such as “rise in sea levels”.³⁰ Already in the
3 1980s was there a clearly crystallized understanding that there was a vital nexus
4 between climate change and the marine environment. You will hear from Professor
5 Bjorge as to the interpretation of UNCLOS in this regard.

6
7 In 2009, in resolution 63/281, entitled *Climate change and its possible security*
8 *implications*, the General Assembly expressed its deep concern “that the adverse
9 impacts of climate change, including sea-level rise, could have possible security
10 implications”.³¹

11
12 One of the problems Nauru faces today in relation to sea-level rise, and climate
13 change more generally, was well described in 2016 by the United Nations Special
14 Rapporteur on the issue of human rights obligations relating to the enjoyment of a
15 safe, clean, healthy and sustainable environment, and I quote that passage:

16
17 Climate change threatens the very existence of some small island States.
18 Global warming expands ocean waters and melts land-based ice, causing sea
19 levels to rise. ... If the residents of small island States are forced to evacuate
20 and find other homes, the effects on their human rights, including their rights
21 to self-determination ... will be devastating.³²

22
23 “Devastating” is, sadly, right. Whilst of course Nauru will continue to exist, and its
24 baselines and existing maritime entitlements will remain unaltered,³³ climate change
25 poses an *existential threat* to Nauru’s population and to its vital needs. It represents
26 serious security risks to the livelihoods and to the subsistence of our island
27 population. These are among the types of concerns to which the General Assembly
28 gave expression in its resolution 63/281.

29
30 I shall briefly touch on two of the ways in which the effects of climate change pose
31 such a threat to Nauru, namely, sea-level rise and ocean acidification.

32
33 First, climate change poses an existential threat to the population of Nauru,
34 Mr President, members of the Tribunal, in connection with rising sea levels. The
35 devastating effects of sea-level rise caused by the emission of anthropogenic
36 greenhouse gases could almost make one doubt the wisdom of the Preacher in
37 Ecclesiastes who said that “all the rivers run into the sea; yet the sea is not full”.³⁴

38
39 Nauru has lived for some time with the realities of rising seas caused by climate
40 change. One of the initiatives that have already become necessary in Nauru is the
41 Higher Ground Initiative. This entails the planned and managed migration of Nauru’s
42 population to the higher elevations of the island. It is an attempt, in a situation that is
43 growing perfectly desperate, to adapt to the threat of sea-level rise, all the while

³⁰ *Ibidem*.

³¹ GA res. A/RES/63/281 (2009), preambular para. 9.

³² Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 1 February 2016, A/HRC/31/52, para. 29; see also written statement of Chile, para. 70.

³³ *Maritime Delimitation in the Area between Greenland and Jan Mayen, I.C.J. Reports 1993*, p. 74, para. 80; ILC, Sea-level rise in relation to international law, A/CN.4/761, 13 February 2023, para. 154

³⁴ Ecclesiastes 1:7.

1 seeking, so far as possible, to safeguard national security and the vital needs of our
2 population as the Earth is disappearing under our feet.³⁵

3
4 It seems, Mr President, members of the Tribunal, that even the words of the
5 Preacher to the effect that “the Earth abideth for ever”³⁶ are cast into doubt in the
6 face of the destruction of human-made climate change.

7
8 Secondly, ocean acidification is of great concern to Nauru. Reefs and marine life are
9 being eroded owing to ocean acidification. Fisheries are vital for the subsistence of
10 our population and a major source of funds, one of the very few, for our national
11 treasury. As is well documented, ocean warming has decreased sustainable yields of
12 certain fish populations.³⁷ This effect is especially pronounced in the Pacific
13 Ocean.³⁸ The Intergovernmental Panel on Climate Change estimates that a 20 per
14 cent decline in fish production from coral reefs by 2050 could threaten nutritional
15 security.³⁹

16
17 I come to the end of my presentation. The International Court of Justice observed in
18 its Advisory Opinion in *Nuclear Weapons* that “the environment is under daily
19 threat”.⁴⁰ It also recognized that “the environment is not an abstraction but
20 represents the living space, the quality of life and the very health of human beings”.⁴¹

21
22 The same can be said for the *marine* environment. And the marine environment is
23 not an abstraction either. For Nauru, the marine environment represents – it *is* – our
24 living space, our quality of life, and the very health of the human beings that make up
25 our island population. And the marine environment, in all of these aspects, is indeed
26 under daily threat.

27
28 *Mwa tubwa kor*, Mr President, members of the Tribunal, I thank you. And I now ask
29 that you give the floor to Professor Bjorge.

30
31 **THE PRESIDENT:** Thank you, Ms Adire. I now give the floor to Mr Bjorge to make
32 his statement.

33
34 You have the floor, Sir.

35
36 **MR BJORGE:** Mr President, distinguished members of the Tribunal, it is a privilege
37 for me to appear before you and an honour to have been entrusted with the
38 presentation of this part of Nauru’s oral statement.

39
40 I shall deal with three points: first, that the law of the sea has, given the nature of the
41 sea as a hub for interconnection and communication, always been at the cutting

³⁵ See also the written statement of the Pacific Community (SPC), paras. 31–32.

³⁶ Ecclesiastes 1:4.

³⁷ IPCC, Working Group II, Chapter 3: Oceans and Coastal Ecosystems and Their Services, Sixth Assessment Report: Impacts, Adaptation and Vulnerability (2022), Technical Summary, p. 48 (TS.B 3.1).

³⁸ See the written statement of the Pacific Community (SPC), paras. 14–15.

³⁹ IPCC, Working Group II, Chapter 15: Small Islands, p. 2065.

⁴⁰ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 241-42, para. 29.

⁴¹ *Ibidem*.

1 edge of international law; secondly, I shall come to one aspect of the interpretation of
2 UNCLOS; and, thirdly and finally, I shall turn to an aspect of the applicable law in
3 these proceedings.

4
5 I come then to my first point. The sea, as prominent authors have put it, is “a meeting
6 place and a site of encounter, where the third parties affected by the acts or events
7 to which the sea is subject are particularly numerous”.⁴²

8
9 The insight that what one State does in the context of ocean space affects a large
10 number of third parties was not lost on the Third United Nations Conference on the
11 Law of the Sea. The whole Convention, the whole of UNCLOS, is instinct with this
12 fundamental understanding. As has already been pointed out in these proceedings, it
13 is reflected already in the Preamble of UNCLOS, which provides that “the problems
14 of ocean space are closely [inter]related”; they must therefore, it continues, “be
15 considered as a whole”.⁴³ And, as the International Court of Justice recently
16 observed, this understanding was so evident to the negotiators that the very “method
17 of negotiation at the Conference was designed against this background”, the
18 outcome of which, of course, was a Convention that was, said the Court, “a
19 comprehensive and integrated text”.⁴⁴

20
21 Now, that is a sensible reflection of the fact that in scarcely *any* other field of activity
22 will the acts of one State, or a group of States, affect other States more than in the
23 context of ocean space. The manner in which a State draws baselines around its
24 coasts, or otherwise purports to delimit its maritime zones, inevitably affects other
25 States, as well as their populations and potentially the latter’s means of subsistence.
26 Similarly, when a State fails to comply with its obligations to protect and preserve the
27 marine environment, that, too, affects other States, their populations and the latter’s
28 means of subsistence.

29
30 It is implicit in the logic of the maxim *ubi societas, ibi jus* that a high level of
31 interrelated and interdependent activity is likely to lead to an ample and sophisticated
32 production of legal norms. No doubt this is why, whether one looks to questions such
33 as the identification of customary international law,⁴⁵ the development of concepts
34 such as notification, acquiescence or protest,⁴⁶ or general principles of law such as

⁴² L. Lucchini & M. Voëckel, *Droit de la mer Tome I* (Pedone 1990) 53 (“[l]a mer étant un espace de liaison, de communication, les tiers concernés par les actes ou les faits dont elle est l’objet sont particulièrement nombreux”).

⁴³ Third preambular recital, UNCLOS.

⁴⁴ *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Judgment of 13 July 2023, para. 48.

⁴⁵ *SS Lotus, Judgment of 7 September 1927, P.C.I.J. Series A, No. 10*, 28; *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 44, para. 77; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Judgment of 13 July 2023, para. 77.

⁴⁶ *Fisheries (United Kingdom v. Norway)*, *I.C.J. Reports 1951*, p. 116; *Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984*, p. 246; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, *I.C.J. Reports 1992*, p. 350; L Lucchini & M Voëckel, *Droit de la mer Tome I* (Pedone 1990) 53–54.

1 “elementary considerations of humanity”,⁴⁷ the law of the sea has, since at least the
2 beginning of the 20th century, been perhaps *the* most productive branch of
3 international law as regards confronting new phenomena and new situations as they
4 arise in international life.

5
6 For is it not true to say that the law of the sea has tended to be the area of law where
7 international law developments have crystallized the first? And where they have
8 been judicially identified the first? Of course it is.

9
10 As one authority, Professor Laurent Lucchini, put it, the law of the sea has always
11 served as a research laboratory for international law more generally.⁴⁸ And, in the
12 work of this sophisticated “*laboratoire d’essai*”, the trials have, over time, come to
13 focus on what already the Permanent Court of International Justice, in a case
14 between France and Turkey, referred to as principles of law established by
15 independent States in order to regulate their “co-existence” or, said the Court, “with a
16 view to the achievement of common aims”.⁴⁹ It is exactly such principles of law, and
17 the fundamental values of co-existence and the achievement of common aims, that
18 the Tribunal is invited to advise on in the present proceedings.

19
20 Given the background I have just set out, it is hardly surprising that the questions
21 with which we are concerned in these proceedings should come to a head in the
22 present context of the law of the sea, and it is this vital and time-honoured tradition of
23 the law of the sea, one that charts a course for international law more generally, that
24 you, the Tribunal, are being invited to uphold and to continue in these proceedings.

25
26 I come then, Mr President, members of the Tribunal, to my second point. The
27 contention has been made in certain quarters, indeed here before the Tribunal today,
28 that during the time of the Third Conference on the Law of the Sea, climate change
29 was not part of the law of the sea agenda, and that the Convention therefore does
30 not apply to the issue of climate change. It has also been contended that the
31 question of the impact of climate change on the marine environment goes beyond
32 the legal interpretation of the provisions of UNCLOS.

33
34 But, even leaving aside the question of the historical record, such an approach to the
35 interpretation of the Convention, and its articles 1(1)(4), 192 and 194, would be quite
36 defective and unsatisfactory as a matter of the law of treaties. In the words of the
37 Permanent Court of International Justice in its Advisory Opinion in *Employment of*

⁴⁷ *Corfu Channel (United Kingdom v. Albania)*, ICJ Reports 1949, p. 22; *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, ITLOS Reports 1999, p. 10, 62; *M/V “Virginia G” (Panama/Guinea-Bissau)*, ITLOS Reports 2014, p. 101, para. 359; *The “Enrica Lexie” (Italy v. India), Provisional Measures, Order of 24 August 2015*, ITLOS Reports 2015, p. 204, para. 133; R.E. Fife, ‘The Duty to Render Assistance at Sea: Some Reflections after Tampa’ in *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Brill 2003) 470, 482.

⁴⁸ L. Lucchini, “L’État insulaire” (2000) 285 *Hague Recueil* p. 261 (“*Le droit de la mer — branche à part entière du droit international — sert fréquemment de laboratoire d’essai à celui-ci.*”).

⁴⁹ *SS Lotus, Judgment of 7 September 1927, P.C.I.J. Series A, No. 10*, 18 (French original: “*la co-existence de ces communautés indépendantes*” and “*en vue de la poursuite de buts communs*”); A Pellet, “*Lotus que de sottises on profère en ton nom! Remarques sur le concept de souveraineté dans la jurisprudence de la Cour mondiale*” in *Mélanges en l’honneur de Jean-Pierre Puissochet: l’État souverain dans le monde d’aujourd’hui* (Pedone 2008) 215, 222.

1 *Women during the Night*, where the Court was interpreting the 1919 Washington
2 Convention on Night Work for Women.⁵⁰

3
4 “The mere fact [said the Court] that at the time when the Convention ... was
5 concluded, certain facts or situations, which the terms of the Convention in their
6 ordinary meaning are wide enough to cover, were not thought of, does not justify
7 interpreting those of its provisions which are general in scope otherwise than in
8 accordance with their terms.”⁵¹

9
10 In the context of the law of the sea, this statement of principle was relied on by the
11 arbitral tribunal in the dispute concerning *Filleting within the Gulf of St Lawrence*
12 between Canada and France.⁵² And it applies in the present proceedings too. The
13 general terms used in the provisions of UNCLOS are, in their ordinary meaning, wide
14 enough to cover climate change. They do so whether climate change was
15 specifically thought of during the Conference or not.⁵³

16
17 But there is, Mr President, a more fundamental point. As the Supreme Court of the
18 United Kingdom put it in the case of *Basfar v Wong*, the process of treaty
19 interpretation, and of identifying the common intention of the parties, “is not one of
20 trying,” said the Court, “to divine what was inside the minds of the parties’
21 representatives when they negotiated or signed the treaty, let alone what would then
22 have been inside their minds if they would have been confronted with a question
23 they did not in fact consider. It is simply a process of applying articles 31 to 33”⁵⁴ of
24 the Vienna Convention on the Law of Treaties,⁵⁵ observed the Court, and no doubt
25 that is what the Tribunal will do.

26
27 In doing so, the Tribunal could do worse than to follow the approach set out by the
28 eminent arbitral tribunal in the *Rhine Chlorides (Netherlands/France)* case.⁵⁶ The
29 arbitral tribunal in that proceeding summarized the process in articles 31 to 33 of the
30 Vienna Convention in the following way:

31
32 The ordinary meaning of the terms must be determined in good faith, in the
33 light of the context, as well as the object and purpose of the treaty. The
34 importance of one element in relation to the others of course will depend on
35 the case ... international law “does not sanction any absolute and rigid
36 method of interpretation”.⁵⁷

37
38 I come, then, to my third point: the question of applicable law. Article 293 provides
39 that: “A court or tribunal having jurisdiction under this section shall apply this

⁵⁰ 28 November 1919, ILO Convention No 4.

⁵¹ *Employment of Women during the Night, 1932, P.C.I.J., Series A/B, No. 50, 377*; see H. Lauterpacht, “Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties” (1949) 26 B.Y.I.L. 48, 79.

⁵² *Filleting within the Gulf of St Lawrence (Canada/France, 1986), I.L.R., Vol. 82, p. 653, para. 60.*

⁵³ A. Boyle, “Protecting the Marine Environment from Climate Change: the LOSC Part XII Regime” in E. Johansen, S. Veierund Busch, and I.U. Jakobsen (eds), *The Law of the Sea and Climate Change: Solutions and Constraints* (CUP 2020) 81, 83–84.

⁵⁴ *Basfar v Wong* [2022] UKSC 20; [2022] 3 W.L.R. 208, 229, para. 69 (Lord Briggs and Lord Leggatt).

⁵⁵ 22 May 1969, 1155 U.N.T.S. 331.

⁵⁶ *Rhine Chlorides (Netherlands/France, 2004), I.L.R., Vol. 144, p. 294, paras. 62–65* (Professor Skubiszewski, *President*; Judges Kooijmans and Guillaume, *Members*).

⁵⁷ *Ibid.* p. 294, para. 64, citing *Lake Lanoux (France v. Spain, 1957), I.L.R., Vol. 24, p. 121.*

1 Convention and other rules of international law not incompatible with this
2 Convention.”

3
4 The applicable law in the present proceeding, therefore, is constituted by the
5 Convention itself and other relevant rules of international law not incompatible with it.
6 In this connection, Nauru agrees with what the Tribunal observed in *Norstar*:
7 article 293 may not be used to extend the *primary jurisdiction* of the Tribunal.⁵⁸

8
9 But, as the arbitral tribunal observed in *Chagos*, the Tribunal's jurisdiction also
10 extends to making “such ... ancillary determinations of law as are necessary” in
11 order for the Tribunal to discharge its task of interpreting and applying the
12 Convention.⁵⁹ The logic of this general principle has been applied by international
13 courts and tribunals in *advisory* proceedings just as naturally as it has been applied
14 in *contentious* proceedings,⁶⁰ and we set this out in our written statement. This
15 means that, contrary to what some seem to have argued,⁶¹ if it is incidental to a point
16 in regard to which the Tribunal has primary jurisdiction, then the Tribunal can identify
17 obligations, as well as rights, for that matter, that are not contained in UNCLOS.

18
19 Furthermore, whilst a regularly seized tribunal must not exceed the jurisdiction
20 conferred upon it, it must, as the International Court observed in *Libya/Malta*, “also
21 exercise that jurisdiction to its full extent”.⁶² Nauru is confident that the Tribunal *will*
22 exercise its powers to the full extent of its jurisdiction: no more, but certainly no less.

23
24 As regards a provision such as article 192, the dynamic I have just set out is further
25 reinforced by the fact that, by its nature, the provision *itself* is “informed by the other
26 provisions of Part XII and other applicable rules of international law”.⁶³ That is in
27 keeping with the proposition that the problems of ocean space are closely

⁵⁸ *M/V “Norstar” (Panama v. Italy)*, Judgment, ITLOS Reports 2018–2019, p. 10, 47, para. 136.

⁵⁹ *Chagos Islands (Mauritius v. United Kingdom, 2015)*, I.L.R., Vol. 162, p. 157, para. 220. See also *Enrica Lexie (Italy v. India)*, Award, 21 May 2020, para. 809; *Arctic Sunrise (The Netherlands v. Russian Federation, 2015)* I.L.R., Vol. 171, p. 82, para. 197; *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, P.C.I.J. 1925, Ser. A, No. 6, p. 18. See also *Guano (Chili/France, 1901)*, U.N.R.I.A.A., Vol. 15, p. 100; *Kunkel (1925)*, Rec. T.A.M., Vol. 6, p. 977; *Gold Looted by Germany from Rome 1943 (1953)*, U.N.R.I.A.A., Vol. 12, p. 35.

⁶⁰ *Effect of Awards of Compensation Made by the UN Administrative Tribunal, Advisory Opinion*, I.C.J. Reports 1954, p. 56; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 45, para. 89 *et seq*; *Prosecutor v. Tadic (1995)*, I.L.R., Vol. 105, p. 462, para. 21.

⁶¹ Written statement of France, para. 18.

⁶² *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, I.C.J. Reports 1985, p. 23, para. 19; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, I.C.J. Reports 2012, p. 671, para. 136; Separate Opinion of Judge Nolte, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Judgment of 13 July 2023, para. 12.

⁶³ *South China Sea (Philippines v. People's Republic of China, 2015)*, I.L.R., Vol. 170, p. 564, para. 941; also *Arctic Sunrise (The Netherlands v. Russian Federation)*, I.L.R., Vol. 171, p. 79–80, para. 191.

1 interrelated and must be considered as a whole.⁶⁴ It is, furthermore, in keeping with
2 the “comprehensive and integrated”⁶⁵ nature of the Convention.

3
4 This means, on the one hand, that, as we have heard, “[t]he corpus of international
5 law relating to the environment ... informs the content of the general obligation in
6 article 192”.⁶⁶ And several participants, especially Chile and Portugal, have skilfully
7 addressed this point earlier today. You have Nauru’s written submissions in this
8 regard.⁶⁷ We affirm and rely on them.

9
10 On the other hand, it also means that the corpus of international law *relating to*
11 *human rights* similarly informs the content of the general obligation in article 192. In
12 previous cases where it has been interpreting and applying UNCLOS, this Tribunal
13 has had occasion to stress that “[c]onsiderations of humanity must apply in the law of
14 the sea, as they do in other areas of international law”.⁶⁸

15
16 Of course, like any international court or tribunal exercising its advisory jurisdiction,
17 the Tribunal must make a determination in these proceedings as to what is, as the
18 International Court observed in *Nuclear Weapons*, “the most directly relevant
19 applicable law governing the question” of which it has been seized.⁶⁹

20
21 And it is Nauru’s contention that, in this regard, the most directly relevant
22 consideration of humanity is to be found in the principle codified in Common
23 Article 1, paragraph 2, of the International Covenant on Civil and Political Rights⁷⁰
24 and the International Covenant on Economic, Social and Cultural Rights.⁷¹ That is
25 the principle – part and parcel of the fundamental human right of self-determination
26 of peoples⁷² – that: “In no case may a people be deprived of its own means of
27 subsistence.”

28
29 Other participants have touched on this, too, and have argued that the Tribunal must
30 take into account human rights obligations such as the right to self-determination.⁷³
31 Indeed, we heard about this this morning from Chile. Nauru is of the same view.
32

⁶⁴ Third preambular recital, UNCLOS.

⁶⁵ *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Judgment of 13 July 2023, para. 48.

⁶⁶ *South China Sea (Philippines v. People’s Republic of China, 2015)*, I.L.R., Vol. 170, p. 564, para. 941.

⁶⁷ written statement of Nauru, paras. 45–50 and 53–56.

⁶⁸ *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, ITLOS Reports 1999, p. 62, para. 155 (citing *Corfu Channel (United Kingdom v. Albania)*, I.C.J. Reports 1949, p. 22); *M/V “Virginia G” (Panama/Guinea-Bissau)*, ITLOS Reports 2014, p. 101, para. 359; *The “Enrica Lexie” (Italy v. India)*, Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015, p. 204, para. 133.

⁶⁹ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 243, para. 34.

⁷⁰ 16 December 1966, 999 U.N.T.S. 171.

⁷¹ 16 December 1966, 993 U.N.T.S. 3.

⁷² See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, I.C.J. Reports 2019, p. 133, para. 154.

⁷³ Written statement of Chile, para. 70; written statement of the Federated States of Micronesia, para. 64.

1 The principle codified in Common Article 1, paragraph 2, is part of what the tribunal
2 in *Arctic Sunrise* called the “general international law in relation to human rights”.⁷⁴ It
3 is, furthermore, as is evident from the human rights covenants themselves and their
4 structure, a collective right.⁷⁵ As such, it is not subject to the jurisdictional limitations
5 as to extraterritoriality to which the other rights – the individual rights – of the human
6 rights covenants are subject.⁷⁶

7
8 One reason why this principle is part of the most directly relevant applicable law in
9 these proceedings is that it has, in various guises and various formulations, found
10 particular application within the field of the law of the sea.⁷⁷ Now, that is not
11 surprising, you may well think, given the interrelated nature of the problems of ocean
12 space.

13
14 In the *Fisheries* case of 1951, the International Court stressed the importance of
15 what it called “the vital needs of the population” of Norway.⁷⁸ That meant, in the
16 context of that case, that the interpretation and application of the general rule as
17 regards to the drawing of baselines was influenced by the fundamental value of
18 protecting the vital needs of the coastal population, or as Norway had put it some
19 decades previously, the “vital necessity for Norway to be able herself to preserve
20 and maintain for the inhabitants of her long and tempest-worn coasts, whose
21 existence almost everywhere depends on fishery, the exclusive right to certain
22 important fisheries ... with which [the population’s] means of subsistence are so
23 indissolubly connected”.⁷⁹ Who says there is no poetry and no beauty in international
24 law?

25
26 And in a similar vein, the Chamber of the International Court in *Gulf of Maine*
27 emphasized the need to avoid, in the interpretation and application of the general
28 rules of maritime boundary delimitation, a situation that would have, as the Chamber
29 put it, “catastrophic repercussions for the livelihood and economic well-being of the
30 population”.⁸⁰ A similar focus on safeguarding what has been called the “means of
31 subsistence” of coastal populations as well as “vital economic resources in their

⁷⁴ *Arctic Sunrise (The Netherlands v. Russian Federation, 2015)*, I.L.R., Vol. 171, p. 82, para. 197.

⁷⁵ See “Part I”, ICCPR, which consists only of Art. 1.

⁷⁶ See “Part II”, ICCPR, to which the jurisdictional provision in Art. 2(1) applies.

⁷⁷ Written statement of Nauru, para. 64.

⁷⁸ *Fisheries*, I.C.J. Reports 1951, p. 142; also *Eritrea/Yemen (Phase Two: Maritime Delimitation, 2001)*, I.L.R., Vol. 119, p. 436, para. 50; C. de Visscher, *Problèmes de confins en droit international public* (Pedone 1969) 111; A. Pellet and B. Samson, “La délimitation des espaces marins” in M. Forteau and J.M. Thouvenin (eds.) *Traité de droit international de la mer* (Pedone 2017) 565, 589.

⁷⁹ League of Nations Committee of Experts for the Progressive Codification of International Law, C.196.M.70, Annex II, “Norway. Questionnaire No. 2 — Territorial Waters, Letter of 3 March 1927”, 173; G. Gidel, *Le droit international public de la mer Tome III* (Châteauroux 1934) 645 & 648.

⁸⁰ *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, I.C.J. Reports 1984, p. 342, para. 237. See also S. Rosenne, “The Perplexities of Modern International Law: General Course of Public International Law” (2001) 291 *Hague Recueil* p. 328; *Case Concerning Delimitation of Maritime Areas between Canada and the French Republic (St Pierre and Miquelon, 1992)*, I.L.R., Vol. 95, p. 675, para. 84; *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment*, I.C.J. Reports 1993, p. 71–72, para. 75; *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, I.C.J. Reports 2009, p. 126, para. 198; *Territorial and Maritime Dispute (Nicaragua v. Columbia)*, I.C.J. Reports 2012, p. 706, para. 223.

1 seas” can be found in treaty practice, as we have set out, alongside other examples,
2 in our written statement.⁸¹

3
4 Mr President, members of the Tribunal, that brings to an end my part of Nauru’s oral
5 statement. I thank you and ask that you invite Ms Adire to take the floor to conclude
6 Nauru’s oral statement.

7
8 **MR PRESIDENT:** Thank you, Mr Bjorge. I now give the floor once more to Ms Adire
9 to continue her statement.

10
11 You have the floor, Madam.

12
13 **MS ADIRE:** Mr President, members of the Tribunal, it falls on me to conclude
14 Nauru’s oral statement. The upshot of Nauru’s oral submissions can be formulated
15 as two successive propositions.

16
17 First, as Professor Bjorge has set out, the ocean connects. It is a site of encounter
18 between States and their activities. But, as Small Island Developing States know all
19 too well, if the ocean space is a hub of interconnection and communication, that also
20 means that what one State does will almost inevitably affect other States, their
21 populations and potentially the means of subsistence of those populations.

22
23 As you have heard, the intense interaction between States on the sea has always
24 meant that the law of the sea has been at the cutting edge of international law.
25 Learned professors have described the law of the sea as a “research laboratory” for
26 international law.⁸² Those of us who, far from the groves of academe, are law of the
27 sea practitioners in Chancelleries and Diplomatic Missions around the world,
28 however, know that the law of the sea to be an eminently *practical* field of law. The
29 law of the sea and its crowning achievement, UNCLOS, “the Constitution of the
30 Oceans”,⁸³ have always, in our experience, operated to meet the practical
31 challenges facing States in the real world of ocean space.

32
33 If the pressing question of climate change is now before your Tribunal before it has
34 come to a tribunal of general jurisdiction, that is hardly a surprise. It is testament to
35 the confidence that States have in the law of the sea as an instrument to meet the
36 challenges of the day in a practical and equitable manner. It speaks, furthermore, to
37 the very great faith that States, such as Nauru, have in your jurisdiction; faith that
38 you will – as the law of the sea has always been known to – chart a course for
39 general international law.

40
41 Secondly, as you have heard, climate change is already undermining and
42 threatening Nauru’s ability to deliver basic services to its population and to cater to

⁸¹ Consideration 3, Declaration on the Maritime Zone, 18 August 1952, 1006 U.N.T.S. 326; written statement of Nauru, paras. 53–64.

⁸² L. Lucchini, “L’État insulaire” (2000) 285 Hague *Recueil* p. 261.

⁸³ T. Koh, “A Constitution for the Oceans” in *The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea* (United Nations 1983) xxxiii, xxxvii; H. Corell, “Speech Delivered at the Inaugural Session of the Tribunal of the Law of the Sea” (1996–97) 1 ITLOS Yearbook 1, 13.

1 the vital needs of the population.⁸⁴ The population of Nauru depends, for its
2 subsistence and economic developments, on the marine environment. Climate
3 change and the concomitants of rising sea levels pose an existential threat to the
4 population of a Small Island Developing State such as Nauru.

5
6 You have heard that the lower reaches of the island are becoming submerged and
7 uninhabitable. The population, like its government, is having to retreat to higher
8 ground, running to the hills, as if expelled or transferred from their own lands by an
9 external invading enemy. Awn Al-Khasawneh, later Judge and Vice-President of the
10 International Court, made the point in 1997 that, and I quote: “In the context of
11 population transfers, paragraph 2 of Common Article 1 is of particular relevance: ‘...
12 In no case may a people be deprived of its own means of subsistence’.”⁸⁵

13
14 That a population should be deprived of “their land, natural wealth and resources”⁸⁶
15 is among the ills that the principle in Common Article 1, paragraph 2, prohibits. The
16 principle is, as the Human Rights Committee has observed, a right that “entails
17 corresponding duties for all States and the international community”.⁸⁷ In Nauru’s
18 contention, that right and the corresponding duties are nothing if not relevant in the
19 present advisory proceedings.

20
21 You have heard, therefore, that the principle that “in no case may a people be
22 deprived of its own means of subsistence” is part of the most directly applicable law
23 governing the question of which you are seized. It necessarily informs the
24 interpretation of general provisions of Part XII, such as article 192.

25
26 For you to give effect to this principle of human rights law will be no more than a
27 continuation of your general jurisprudence to the effect that “[c]onsiderations of
28 humanity must apply in the law of the sea, as they do in other areas of international
29 law”.⁸⁸ You are not being asked to apply all manner of human rights principles in
30 answering the questions asked of you, but instead a fundamental principle that is
31 expressive of general international law, which has found useful and repeated
32 application specifically in the law of the sea.⁸⁹

33
34 As the *Fisheries* case between the United Kingdom and Norway showed in 1951,⁹⁰
35 the respondent State was right in that case to put its faith and confidence in

⁸⁴ Statement delivered by H.E. Margo Deiye, Permanent Representative of the Republic of Nauru to the United Nations, 2nd United Nations Ocean Conference, Plenary Session, 30 June 2022.

⁸⁵ Human Rights and Population Transfer: Final Report of the Special Rapporteur, Mr. Al-Khasawneh”, E/CN.4/Sub.2/1997/23, 27 June 1997, para. 50.

⁸⁶ *Ibidem*.

⁸⁷ CCPR General Comment No 12: Article 1 (Right to Self-determination), 13 March 1984, para. 5.

⁸⁸ *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v Guinea)*, ITLOS Reports 1999, p. 62, para. 155 (citing *Corfu Channel (United Kingdom v. Albania)*, I.C.J. Reports 1949, p. 22); *M/V “Virginia G” (Panama/Guinea-Bissau)*, ITLOS Reports 2014, p. 101, para. 359; *The “Enrica Lexie” (Italy v. India)*, Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015, p. 204, para. 133.

⁸⁹ *Fisheries*, I.C.J. Reports 1951, p. 142; *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, I.C.J. Reports 1984, p. 342, para. 237; *Eritrea/Yemen (Phase Two: Maritime Delimitation, 2001)*, I.L.R., Vol. 119, p. 436, para. 50; Consideration 3, Declaration on the Maritime Zone, 18 August 1952, 1006 U.N.T.S. 326; Art. 7(5), UNCLOS.

⁹⁰ *Fisheries (United Kingdom v. Norway)*, I.C.J. Reports 1951, p. 116.

1 international law and the belief that the law of the sea will not countenance an
2 outcome that deprived its coastal population of its very means of subsistence.

3
4 Similarly, it is Nauru's contention that the law of the sea, and today UNCLOS, its
5 foremost instrument, cannot possibly countenance an outcome whereby activities by
6 polluting States, which have the effect of threatening the very means of subsistence
7 of the populations of Small Island Developing States, can possibly be legal under the
8 provisions of Part XII of UNCLOS.

9
10 This means that the specific obligations of States Parties to UNCLOS to protect and
11 preserve the marine environments in relation to climate change, including ocean
12 warming and sea-level rise, necessarily operate to avoid depriving any people of its
13 own means of subsistence.

14
15 That is, in keeping with the emphasis laid, in the Preamble of UNCLOS itself, on the
16 maintenance of "justice and progress for all peoples of the world"⁹¹ and, even more
17 to the point, the contribution the States Parties to UNCLOS sought to make "to the
18 realization of a just and equitable economic order, which takes into account the
19 interests and needs of mankind as a whole and, in particular, the special interests of
20 developing countries".⁹²

21
22 Mr President, distinguished Members of the tribunal, that brings to an end Nauru's
23 oral statement in these proceedings. I thank you.

24
25 **THE PRESIDENT:** Thank you, Ms Adire. This brings to an end this afternoon's
26 sitting.

27
28 The Tribunal will sit again tomorrow morning at 10:00 a.m. when it will hear
29 statements made on behalf of Indonesia, Latvia, Mauritius and the Federated States
30 of Micronesia.

31
32 This sitting is now closed.

33 *(The sitting closed.)*

⁹¹ First preambular recital, UNCLOS.

⁹² Fifth preambular recital, UNCLOS.