INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

WRITTEN COMMENTS OF

ANTIGUA AND BARBUDA

13 AUGUST 2024

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I. INTRODUCTION

1. The historical and systemic importance of these advisory proceedings, for States, their present and future populations, and the environment, is confirmed by the unprecedented number of Written Statements (91 in total, and a further 10 from international organisations).

2. Of those 101 Written Statements, not one disputes the unequivocal factual conclusion drawn by the IPCC that anthropogenic greenhouse gas ("GHG") emissions have led to climate change, causing profound harm to the world's ecosystems, biodiversity, and human populations, with a disproportionate impact on Small Island Developing States ("SIDS").[1] As just one illustration of these disproportionate harms, sea level rise alone threatens to wipe out up to 50 percent of Caribbean islands.[2] This is the grave factual situation in which it falls to the Court to elucidate the relevant principles and declare States' legal obligations in respect of climate change.

3. Antigua and Barbuda's Written Statement set out obligations that arise under international law in these circumstances:

4. *First,* in terms of primary obligations (Question (a) to the Court), States must (among others) do their utmost, using all means at their disposal, to achieve rapid, deep and sustained emissions reductions sufficient to prevent further significant environmental harm, in a manner consistent with fairness, equity, and the principle of common but differentiated responsibilities and respective capabilities, including in the light of different national circumstances ("**CBDR-RC**").[3]

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[1] *See,* Written Statement of Antigua and Barbuda, Section II, paras. 20-120 for a full accounting of the key drivers of harm resulting from climate change, and the disproportionate impact on SIDS. *See also,* (non-exhaustive selection): Written Statement of COSIS, Section II, paras. 13-63; Written Statement of Barbados, Section IV, paras. 37-126; Written Statement of the Bahamas, Section II, paras. 12-57; Written Statement of Palau, Section II, paras. 6-11; Written Statement of Saint Lucia, Section III, paras. 18-35; Written Statement of Saint Vincent and the Grenadines, Sections III and IV, paras. 29-53; Written Statement of Tuvalu, Section II, paras. 14-70; and Written Statement of Vanuatu, Section II, paras. 67-129

[2] Written Statement of Antigua and Barbuda, paras. 66-68, citing to the IPCC, 2019, Special Report on the Ocean and Crysophere in a Changing Climate, Technical Summary, available here), p. 55; and to the Caribbean Climate Science Report, March 2024 (Annex 1 to the Written Statement), p. 4. *See also,* the Written Statements of other SIDS on the severe impact of sea level rise on their territories (non-exhaustive selection): Written Statement of Barbados, para. 315; Written Statement of Belize, paras. 8-p; Written Statement of the Cook Islands, paras. 44-48; Written Statement of Grenada, para. 16; Written Statement of Mauritius, paras. 25-29.

[3] *See,* Written Statement of Antigua and Barbuda, Section III. Many fellow SIDS have echoed the crucial importance of the principle of CBDR-RC in the context of climate change. *See,* Written Statement of COSIS,

5. *Second*, in terms of secondary rules (Question (b) to the Court), Antigua and Barbuda set out how the customary rules of State responsibility apply in the context of climate change, identifying the legal consequences that flow from violation of the primary obligations identified in response to the first question before the Court.[4]

6. Some States – typically major emitters – take different positions. These States argue, variously, as follows.

   (a) Regarding the primary obligations (Question (a)), the UNFCCC and the Paris Agreement (hereafter the "**climate treaties**") impose narrower, or less demanding obligations than those found in other rules of international law; and, that these instruments constitute *lex specialis* to those other rules of international law, rendering them of limited relevance to the climate crisis.

   (b) Regarding the legal consequences (Question (b)), the climate treaties also constitute *lex specialis* to the customary rules of State responsibility, effectively leaving injured States with no meaningful remedy.

7. Thus, for these States, the practical effect of concluding the climate treaties was to contract out of any and all sources of international law that would have otherwise operated, concurrently and collectively, to adequately protect the environment and human populations from the effects of anthropogenic GHG emissions. Or, put differently: a world without the climate treaties would be *more* protective of the environment than a world with those treaties in place.

8. Following this approach would lead to an absurd result, rendering international law manifestly inadequate to address the "existential threat" posed by climate change. It

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paras. 142-145; Written Statement of Barbados, paras. 207, 217a, 281 and 289; Written Statement of the Bahamas, paras. 88 and 138-140; Written Statement of Saint Lucia, paras. 58-65; Written Statement of Saint Vincent and the Grenadines, para. 97; Written Statement of Tuvalu, paras. 109; and Written Statement of Vanuatu, paras. 312 and 415(b). *See also,* a (non-exhaustive) selection of the wide array of other States expressing support for the principle of CBDR-RC in the climate context: Written Statement of Australia, paras. 52-53; Written Statement of the Democratic Republic of the Congo, para. 195; Written Statement of El Salvador, para. 41; Written Statement of Indonesia, paras. 65-71; Written Statement of Romania, paras. 61-76; Written Statement of Timor Leste, para. 136; Written Statement of the United Arab Emirates, para. 145.

[4] *See,* Written Statement of Antigua and Barbuda, Section IV. As with the primary obligations, many fellow SIDS have adopted a similar position under the customary rules of state responsibility; *see,* (non-exhaustive selection): Written Statement of Barbados, Section VII; Written Statement of the Dominican Republic, Section III; Written Statement of Palau, Section IV; Written Statement of Saint Vincent and the Grenadines, Section VI.F; Written Statement of the Kingdom of Tonga, Section X.

would be a regressive step away from the manner in which international law ordinarily develops: to meet the challenges to, and requirements of, international life. Moreover, similar arguments – that the climate treaties constitute *lex specialis* to other parts of international law – have been roundly rejected by the International Tribunal for the Law of the Sea ("**ITLOS**"). It found that the "Paris Agreement [does not] modif[y] or limit the obligation [article 194 of] the [UNCLOS]", because "the Paris Agreement is not *lex specialis* to the [UNCLOS]".[5]

9. In the interests of brevity, Antigua and Barbuda has been selective in the issues addressed in this submission, focusing on those that it believes are of most relevance to the Court, in light of recent developments, and the arguments made by other States in their Written Statements. Antigua and Barbuda's Written Comments, therefore, proceed as follows.

10. **Section II** summarises certain important developments in international law since the submission of the Written Statements, namely: (1) a judgment of the European Court of Human Rights ("**ECtHR**") of 9 April 2024, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* ("*KlimaSeniorinnen v. Switzerland*"); and (2) the request for an advisory opinion, submitted by the Commission of Small Island States on Climate Change and International Law ("COSIS"), to the ITLOS ("ITLOS Climate Advisory Opinion").

11. On the science, relying on the uncontested work of the IPCC, these decisions find that human activity has unequivocally led to climate change, which "represents an existential threat" to humankind; and, they identify specific obligations for States in responding to this threat.[6] Importantly, on the law, both decisions reject the argument that the climate treaties stand in isolation as *lex specialis* to other rules of international law, finding instead that different parts of international law apply concurrently to climate change.

12. Further, both tribunals identified specific obligations, for States under the relevant international law, to address climate change, most significantly by adopting and

[5] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law,* (hereinafter "ITLOS Climate Advisory Opinion"), at para. 224.

[6] ITLOS Climate Advisory Opinion, para. 66.

effectively implementing emissions reductions pathways that the IPCC has identified are needed to keep temperatures below 1.5°C. Both decisions also find that the obligations of States regarding climate change are differentiated to account for their different means and capacities to tackle the problem; as well as the inequities resulting from the negligible contribution that developing countries have made to historic emissions, coupled with the disproportionate burden they face from climate change.

13. **Section III** addresses issues raised under Question (a), namely certain States' arguments in these proceedings that the climate treaties operate as *lex specialis* to other primary obligations arising under international law. This Section also addresses the various arguments put forward by various States which, in sum, assert that climate change is simply too "complex" to be dealt with through any other primary obligation *other than* the dedicated climate treaties.

14. **Section IV** addresses issues raised under Question (b), namely certain States' arguments that there is *also* a *lex specialis* basis to exclude the application of the customary rules of State responsibility, in the context of climate change. Section IV also addresses arguments (similar to those arising under Question (a)) that climate change is simply too "complex" to be addressed under the customary secondary rules.

II. KEY DEVELOPMENTS IN INTERNATIONAL LAW RELEVANT TO CLIMATE CHANGE

15. Since States submitted their Written Statements in March 2024, there have been significant developments in international jurisprudence addressing climate change. Two cases in particular bear emphasis: *first*, *KlimaSeniorinnen v. Switzerland* before the European Court of Human Rights ("**ECtHR**"); and *second*, the Advisory Opinion on climate change and international law, before the ITLOS.

16. Both decisions address issues that go directly to the questions before the Court in these proceedings; and fully confirm the position put forward by Antigua and Barbuda in its Written Statement. Antigua and Barbuda, further, notes this Court's prior recognition of the need to accord "great weight" to bodies tasked with interpreting and applying specific treaties.[7] This is the case for bodies such as ITLOS, "established specifically"[8]

[7] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*, *Compensation*, *Judgment*, *I.C.J. Reports 2012 (I)* (hereinafter "*Diallo (Compensation)*"), pp. 333-344, para. 66.

[8] *Diallo (Compensation)*, para. 66.

to supervise the application of the UNCLOS. It is also the case with the ECtHR's interpretation of the European Convention on Human Rights, provisions of which the Court has further recognised are "close in substance" to those found in the International Covenant on Civil and Political Rights.[9] The questions currently before the Court call upon the Court to interpret and apply both these instruments.

17. To this end, Antigua and Barbuda agrees that according weight to the decisions of other international bodies contributes to "the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled."[10]

18. Antigua and Barbuda therefore begins its written comments by briefly recapping core findings of the ECtHR and the ITLOS in these two cases. Antigua and Barbuda, first, summarises the relevant findings of facts in both cases in an integrated fashion (Section II.A); second, it summarises separately the findings of law made in each decision (Sections II.B); and, finally, it identifies key cross-cutting points in the findings made in the two decisions (Section II.C).

A. Key findings of fact in the ECtHR and ITLOS decisions

19. In its Written Statement, Antigua and Barbuda presented information on the science relating to climate change.[11] In so doing, Antigua and Barbuda relied on the large body of scientific work prepared by the Intergovernmental Panel on Climate Change ("IPCC"), presenting the key elements of that body of work.

20. The ITLOS and the ECtHR both began their decisions by making factual findings on the science relating to climate change. Both the Tribunal and Court base their respective findings on the IPCC's work. Further, the respective factual findings echo

[9] *Diallo (Compensation)*, para. 68.

[10] *Diallo (Compensation)*, para. 66.

[11] Antigua and Barbuda explained (i) how anthropogenic GHG emissions cause climate change; (ii) the harmful impact of anthropogenic GHG emissions on the environment and human populations; and, (iii) States' current efforts are insufficient to address climate change, even though concrete policy options are available for States to effectively address climate change. *See* Written Statement of Antigua and Barbuda, Section II.

very closely the submissions made in these proceedings by Antigua and Barbuda. In particular, the key findings are as follows:

(a) Work by the IPCC represents "*the best available science*" and "*authoritative assessments*" on climate change;[12]

(b) Anthropogenic GHG emissions have "*unequivocally caused global warming*";[13]

(c) Climate change represents "*an existential threat and raises human rights concerns*", [14] and poses "*a serious current and future threat to the enjoyment of human rights*";[15]

(d) Climate change creates "*an inequitable situation*"[16], with "[v]ulnerable communities who have historically contributed the least to current climate change [being] disproportionately affected";[17]

(e) The adverse risks and impacts of climate "*escalate with every increment of global warming*", and "are higher for global warming of 1.5°C than at present,

[12] ITLOS Climate Advisory Opinion, para. 208. ITLOS explained that, "[w]ith regard to climate change and ocean acidification, the *best available science* is found in the works of the IPCC which reflects the *scientific consensus*", and that "the assessments of the IPCC relating to climate-related risks and climate change mitigation deserve *particular consideration*." Explaining that "IPCC reports are subject to review and endorsement by the IPCC member countries", ITLOS observed that most participants in the proceedings recognised them "as *authoritative assessments* of the scientific knowledge on climate change, and that none of the participants challenged the authoritative value of these reports".[12] Likewise, the ECtHR strongly relied on works of the IPCC in its findings. *See, Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, ECtHR App. No. 53600/20, 9 May 2024 (hereinafter "*KlimaSeniorinnen v. Switzerland* "), paras. 107-120.

[13] ITLOS Climate Advisory Opinion, para. 54 (citing the works of the IPCC). Similarly, the ECtHR noted the "unequivocal" conclusion of the IPCC, that "anthropogenic climate change has produced various effects for humans and nature and created risks for further such effects in the future". *See, KlimaSeniorinnen v. Switzerland*, para. 110.

[14] ITLOS Climate Advisory Opinion, para. 66. ITLOS also noted the IPCC's findings that "climate change is a threat to human well-being and planetary health".

[15] *KlimaSeniorinnen v. Switzerland*, para. 436. The ECtHR concluded that there are sufficiently reliable indicators that "anthropogenic climate change … poses a serious current and future threat to the enjoyment of human rights".

[16] ITLOS Climate Advisory Opinion, para. 327. ITLOS identifies "an inequitable situation": [a]lthough [developing States that are particularly vulnerable to the adverse effects of climate change] contribute less to anthropogenic GHG emissions, such States suffer more severely from their effects on the marine environment."

[17] ITLOS Climate Advisory Opinion, para. 66 (citing IPCC findings). ITLOS also explained that "[h]uman communities in close connection with coastal environments … are particularly exposed to ocean and cryosphere change".

but lower than at 2°C".[18] Specifically, "there is a *high risk of a much worse outcome* if temperature increases exceed 1.5°C above pre-industrial levels".[19]

(f) "[C]urrent global mitigation efforts are *not sufficient* to meet the [1.5°] target";[20] instead "limiting global warming to 1.5°C requires *rapid, deep and sustained* reductions in global greenhouse gas emissions of *43 per cent by 2030*" and "*reaching net zero CO2 emissions globally around 2050*". [21]

(g) "[T]he IPCC stressed *the importance of carbon budgets* and *policies for net zero emissions*", and that "[p]rojected CO2 emissions from existing fossil fuel infrastructure without additional abatement would exceed the remaining carbon budget for 1.5°C."[22] The remaining carbon budget ("**RCB**") for 1.5°C refers to how much carbon can still be emitted while keeping global warming below 1.5°C.[23]

(h) States are "capable of taking measures to effectively address [climate change]", with "regulatory and economic instruments [that] could support deep emissions reductions … if scaled up and applied widely".[24]

[18] ITLOS Climate Advisory Opinion, para. 62 (citing IPCC). *See also*, para. 241.

[19] ITLOS Climate Advisory Opinion, para. 209 (citing IPCC).

[20] *KlimaSeniorinnen v. Switzerland*, para. 436. The ECtHR explained that, "[a]s regards mitigation pathways, the IPCC noted that all global modelled pathways that limited warming to 1.5oC (>50%) with no or limited overshoot, and those that limited warming to 2oC (>67%), involved rapid and deep and, in most cases, immediate GHG emissions reductions in all sectors this decade." *See, KlimaSeniorinnen v. Switzerland*, para. 116.

[21] ITLOS Climate Advisory Opinion, paras. 77, 63. ITLOS relied on IPCC findings that "[d]eep, rapid, and sustained GHG emissions reductions, reaching net zero CO2 emissions and including strong emissions reductions of other GHGs, in particular CH4, are necessary to limit warming to 1.5°C … or less than 2°C … by the end of century"; and that "[l]imiting warming to 1.5°C implies reaching net zero CO2 emissions globally around 2050 and concurrent deep reductions in emissions of non-CO2 forcers, particularly methane (*high confidence*)".[21] ITLOS further cited COP decisions, in which it "[*r*]*ecognizes* that limiting global warming to 1.5°C requires rapid, deep and sustained reductions in global greenhouse gas emissions of 43 per cent by 2030", and "[*a*]*lso recognizes* that this requires accelerated action".[21]

[22] *KlimaSeniorinnen v. Switzerland*, para. 116.

[23] *See,* Written Statement of Antigua and Barbuda, paras. 43-48.

[24] *KlimaSeniorinnen v. Switzerland*, paras. 103-120.

B. Key findings of law in the ECtHR and ITLOS decisions

1. ECtHR decision in *KlimaSeniorinnen v. Switzerland* (2024)

21. In *KlimaSeniorinnen v. Siwtzerland*, the ECtHR found that Switzerland had not taken sufficient action to protect its citizens against the adverse effects of climate change, in violation of Article 8 of the European Convention on Human Rights ("ECHR").[25]

22. The findings by the ECtHR provide a powerful endorsement of Antigua and Barbuda's arguments on the human rights obligations of States in the context of climate change.[26]

23. At the outset, while recognising complexities relating to causation, the ECtHR found that each State must "do its part" and that "a respondent State should not evade its responsibility by pointing to the responsibility of other States".[27] The Court specifically rejected the "drop in the ocean" argument,[28] noting that the responsibility of one State does not depend on the conduct of other States. As the Court noted, this position is consistent with the ECtHR's previous jurisprudence on concurrent responsibility, and with principles of international law relating to the plurality of responsible States, under Article 47 of the Articles on State Responsibility.[29] The position is also consistent with domestic human rights jurisprudence.[30]

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[25] *KlimaSeniorinnen v. Switzerland*, paras. 555-574. The ECtHR also found a violation of Article 6 of the ECHR "to the extent that the applicant association's claims fell within the scope of Article 6 § 1, its right of access to a court was restricted in such a way and to such an extent that the very essence of the right was impaired." The ECtHR noted that "the domestic courts did not engage seriously or at all with the action brought by the applicant association…" and that the applicants "had raised their complaints before various expert and specialised administrative bodies and agencies, but none of them dealt with the substance of their complaints". *See, KlimaSeniorinnen v. Switzerland*, paras. 634-640.

[26] In its Written Statement, Antigua and Barbuda explained that, to respect its human rights obligations, a State must adopt effective mitigation measures: (1) reflecting its highest possible ambition and the precautionary principle; (2) based on the best available science; and (3) based on fairness, equity and CBDR-RC. In light of these considerations, Antigua and Barbuda explained that, based on the IPCC's work and most recent scientific evidence on the remaining carbon budget, States must take diligent action to formulate and implement an emissions reduction plan that makes a sufficient national contribution to reducing collective emissions in order to limit global warming, at a minimum, to 1.5°C, and reflecting the different capabilities and responsibilities of States.

[27] *KlimaSeniorinnen v. Switzerland*, paras. 545, 441.

[28] The "drop in the ocean" argument posits that a single State's emissions reduction measures could only constitute a "drop in the ocean" compared to global emissions *writ large*; and thus, a single State's emissions reduction measures, assessed alone, could not make a meaningful difference to the crisis. *See, KlimaSeniorinnen v. Switzerland*, para. 444.

[29] *KlimaSeniorinnen v. Switzerland* para. 443. *See also,* Written Statement of Antigua and Barbuda, paras. 572-578.

[30] *See,* Written Statement of Antigua and Barbuda, paras. 367-371.

24. The ECtHR then proceeded to interpret the relevant provision of the Convention (Article 8)[31] and apply it to Switzerland's conduct in the context of climate change. Drawing on the work of the IPCC, and the climate treaties, the ECtHR described the content of the positive obligation under the Convention as follows:

> [E]ffective respect for the rights protected by Article 8 of the Convention requires that each Contracting State must undertake measures for the substantial and progressive reduction of their respective GHG emission levels, with a view to reaching net neutrality within, in principle, the next three decades…
>
> Moreover, for this to be genuinely feasible, and to avoid a disproportionate burden on future generations, immediate action needs to be taken and adequate reduction goals must be set for the period leading to net neutrality…
>
> The relevant targets and timelines must form an integral part of the domestic regulatory framework, as a basis for general and sectoral mitigation measures.[32]

25. The ECtHR explained that the positive obligation to reduce emissions differs between States, in light of CBDR-RC. The ECtHR noted that "the global climate regime established under the UNFCCC *rests on the principle* of [CBDR-RC] and that [t]his principle has been reaffirmed in the Paris Agreement".[33] According to the Court, CBDR-RC "*requires* the States to act on the basis of equity and in accordance with their own respective capabilities".[34] It follows, according to the Court, that "each State has *its own share of responsibilities* to take measures to tackle climate change and that the taking of those measures is determined by *the State's own capabilities*".[35]

26. The Court also noted "that the IPCC has stressed the *importance of carbon budgets* and policies for net-zero emissions."[36] The Court agreed with the IPCC on the importance of a carbon budget in setting a nationally determined emissions reduction target to limit

[31] ECHR Article 8.1 reads: "Everyone has the right to respect for his private and family life, his home and his correspondence".

[32] *KlimaSeniorinnen v. Switzerland*, paras. 548-549.

[33] *ECtHR KlimaSeniorinnen v. Switzerland*, paras. 441-442. The ECtHR also noted the endorsement of the principle of CBDR-RC in the Glasgow Climate Pact as well as in the Sharm el-Sheikh Implementation Plan.

[34] *KlimaSeniorinnen v. Switzerland*, para. 571.

[35] *KlimaSeniorinnen v. Switzerland*, para. 442.

[36] *KlimaSeniorinnen v. Switzerland*, para. 571.

global warming to 1.5°C. Specifically, as part of a State's obligations to reduce its emissions, the Court found that it must set its emission reduction targets based on a national share of the remaining global carbon budget that is equitably apportioned among States in light of the principle of CBDR-RC.[37]

27. The Court summarised the specific actions that a State must take to respect its human rights obligations as follows:

(a) "[A]dopt general measures specifying a target timeline for achieving ***carbon neutrality*** and the overall ***remaining carbon budget*** for the same time frame, or another equivalent method of quantification of future GHG emissions, in line with the overarching goal for national and/or global climate-change mitigation commitments";

(b) "[S]et out ***intermediate GHG emissions reduction targets and pathways*** (by sector or other relevant methodologies) that are deemed capable, in principle, of meeting the overall national GHG reduction goals within the relevant time frames undertaken in national policies";

(c) "[P]rovide ***evidence*** showing whether they have duly complied, or are in the process of complying, with the relevant GHG reduction targets" (see subparagraphs (i)-(ii) above);

(d) "[K]eep the relevant GHG reduction targets ***updated*** with due diligence, and based on the best available evidence"; and,

(e) "[A]ct ***in good time and in an appropriate and consistent manner*** when devising and implementing the relevant legislation and measures."[38]

28. In determining whether Switzerland had satisfied its human rights obligations, the Court found "critical lacunae in the Swiss authorities' process of putting in place the relevant domestic regulatory framework, *including a failure by them to quantify, through a carbon budget or otherwise, national GHG emissions limitations*".[39] The Court also found that Switzerland had failed to meet is past emission targets, and failed

[37] *KlimaSeniorinnen v. Switzerland*, paras. 571-572.

[38] *KlimaSeniorinnen v. Switzerland*, para. 550 (emphasis added).

[39] *KlimaSeniorinnen v. Switzerland*, para. 573.

"to act in good time and in an appropriate and consistent manner regarding the devising, development and implementation of the relevant legislative and administrative framework".[40] On this basis, the Court found that Switzerland violated Article 8 of the ECHR. This decision adds to a line of recent jurisprudence in which developed States are found to violate their human rights obligations as a result of inadequate mitigation action to address climate change.[41]

2. ITLOS Climate Advisory Opinion (2024)

29. In its Advisory Opinion on climate change and international law, the ITLOS set out the "specific obligations" for States arising under Articles 192 and 194 of the UNCLOS. Antigua and Barbuda highlights certain key aspects of the ITLOS' findings.

30. Of significant relevance to these proceedings, the ITLOS addressed the question of the relationship between the UNCLOS and the climate treaties. Like in the present proceedings, several States argued before the ITLOS that the climate treaties constituted *lex specialis* to the UNCLOS. The ITLOS rejected these arguments; its reasoning is explained further in Section III.A below.

31. Additionally, the ITLOS also set out an interpretation, in the context of climate change, of Article 194(1) of the UNCLOS (establishing an obligation to, in sum, prevent, reduce and control pollution of the marine environment); and Article 192 of the UNCLOS (establishing a more general obligation to protect and preserve the marine environment).[42] The ITLOS also identified obligations of cooperation and technical assistance arising out of Part XII of the UNCLOS. The core findings are summarised below.

a. Article 194(1) of the UNCLOS

i. "Prevent, reduce and control pollution of the marine environment"

32. The ITLOS found, as a preliminary matter, that anthropogenic GHG emissions into the atmosphere constitute pollution of the marine environment", within the definition of

[40] *KlimaSeniorinnen v. Switzerland*, para. 573.

[41] *See,* Written Statement of Antigua and Barbuda, paras. 367-371.

[42] The ITLOS also considered a number of other provisions of the UNCLOS. However, Antigua and Barbuda focuses in this section on those findings of the ITLOS which are most relevant for the present proceedings.

Article 1(1)(4) of the UNCLOS, triggering the application of the obligation in Article 194(1).[43]

33. The ITLOS found that while the obligation to "prevent" pollution applies in respect of pollution that has not yet occurred (*i.e.*, future pollution), the obligation to "control" and "reduce" pollution applies in respect of pollution that already exists.[44] Thus, the three verbs in Article 194(1) require "preventing future or potential pollution and reducing and controlling existing pollution".[45]

34. In the climate change context, ITLOS found that the obligation requires States to "take all necessary measures with a view to reducing and controlling existing marine pollution from [GHG] emissions and eventually preventing such pollution from occurring at all".[46]

ii. "Necessary" measures

35. The ITLOS further noted that Article 194(1) contemplated necessary actions being taken individually or jointly by States, as appropriate.[47] However, the obligation is not "discharged exclusively through participation in the global efforts", and "States are required to take all necessary measures, including individual actions as appropriate".[48]

36. The ITLOS found that "necessary measures include not only measures which are indispensable to prevent, reduce and control marine pollution but also other measures which make it possible to achieve that objective".[49] In the climate change context, the ITLOS found that "necessary" measures include "those measures commonly known as 'mitigation measures'".[50]

37. Further, the ITLOS found that while Article 194(1) leaves it to each State to determine what measures are "necessary" to achieve its aims, "this does not mean that such

[43] ITLOS Climate Advisory Opinion, para. 179.

[44] ITLOS Climate Advisory Opinion, para. 198.

[45] ITLOS Climate Advisory Opinion, para. 198.

[46] ITLOS Climate Advisory Opinion, para. 199.

[47] ITLOS Climate Advisory Opinion, para. 201.

[48] ITLOS Climate Advisory Opinion, para. 202.

[49] ITLOS Climate Advisory Opinion, para. 203.

[50] ITLOS Climate Advisory Opinion, para. 205.

measures are whatever measures States deem necessary to that end".[51] Instead, "necessary" measures should be determined objectively", based on the following factors: (i) science, (ii) international rules and standards, and (iii) available means and capabilities.[52]

38. According to the ITLOS, in determining what measures are "necessary" under Article 194(1), "the science undoubtedly plays a crucial role".[53] However, "scientific certainty is not required", and States must adopt a precautionary approach in the face of scientific uncertainty.[54]

39. As for the international rules and standards, the ITLOS identified various climate related treaties and instruments – including the Paris Agreement, UNFCCC, Annex VI to MARPOL, and Volumes III and IV of Annex 16 to the Chicago Convention – as potential sources of such rules and standards.[55] However, the ITLOS rejected the view that these instruments excluded, modified or limited the application of the UNCLOS to issues related to climate change.[56]

40. The ITLOS also recognised that "the scope and content of necessary measures may vary depending on the means available to States and their capabilities, such as their scientific, technical, economic and financial capabilities".[57] According to the ITLOS, Article 194(1) contained "a certain degree of flexibility" to "accommodate the needs and interests of States with limited means and capabilities", and to "lessen the excessive burden" of obligations on them.[58] The ITLOS emphasised, in this regard, that climate change creates "*an inequitable situation*"[59], with "[v]ulnerable communities who have

[51] ITLOS Climate Advisory Opinion, para. 206.

[52] ITLOS Climate Advisory Opinion, paras. 206-207.

[53] ITLOS Climate Advisory Opinion, para. 212.

[54] ITLOS Climate Advisory Opinion, para. 213.

[55] ITLOS Climate Advisory Opinion, para. 214 (referring to the Paris Agreement, UNFCCC, Annex VI to MARPOL, and Volumes III and IV of Annex 16 to the Chicago Convention).

[56] *See,* Section III.A below for a further discussion of this issue.

[57] ITLOS Climate Advisory Opinion, para. 225.

[58] ITLOS Climate Advisory Opinion, para. 226.

[59] ITLOS Climate Advisory Opinion, para. 327. ITLOS identifies "an inequitable situation": [a]lthough [developing States that are particularly vulnerable to the adverse effects of climate change] contribute less to anthropogenic GHG emissions, such States suffer more severely from their effects on the marine environment."

historically contributed the least to current climate change [being] disproportionately affected";[60]

41. Noting the recognition of the principle of CBDR-RC in various climate-related instruments, the ITLOS found that "States with greater means and capabilities must do more to reduce such emissions than States with less means and capabilities".[61] The ITLOS also made important findings on technical assistance, which are discussed below.

iii. Due diligence nature of the obligation

42. The ITLOS recognised that Article 194(1) imposed an "obligation of conduct", not one "of result"; *i.e.*, the obligation is one of due diligence.[62] According to the ITLOS, the obligation is "to deploy adequate means, to exercise best possible efforts, to do the utmost to obtain the intended result".[63] The ITLOS found that the obligation of due diligence requires States to put in place a national system of regulation for the relevant activities, and to enforce such regulation vigilantly.[64]

43. The ITLOS recognised that due diligence is a "variable concept".[65] The level of diligence required in a particular circumstance varies according to "scientific and technological information, relevant international rules and standards, the risk of harm and the urgency involved".[66] The ITLOS also recognised that "[t]he standard of due diligence may change over time", as these factors evolve.[67] Further, the ITLOS found that "[t]he standard of due diligence has to be more severe for the riskier activities".[68] In this context, the ITLOS clarified that "[t]he notion of risk in this regard should be

[60] ITLOS Climate Advisory Opinion, para. 66 (citing IPCC findings). ITLOS also explained that "[h]uman communities in close connection with coastal environments … are particularly exposed to ocean and cryosphere change".

[61] ITLOS Climate Advisory Opinion, para. 227.

[62] ITLOS Climate Advisory Opinion, para. 233.

[63] ITLOS Climate Advisory Opinion, para. 233.

[64] ITLOS Climate Advisory Opinion, para. 235 (citing *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010 (I)*, (hereinafter "***Pulp Mills***"), at p. 79, para. 197).

[65] ITLOS Climate Advisory Opinion, para. 239 (citing *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, at p. 43, para. 117).

[66] ITLOS Climate Advisory Opinion, para. 239.

[67] ITLOS Climate Advisory Opinion, para. 239.

[68] ITLOS Climate Advisory Opinion, para. 239.

appreciated in terms of both the probability or foreseeability of the occurrence of harm and its severity or magnitude".[69]

44. Applying these considerations in the context of climate change, the ITLOS found "the standard of due diligence States must exercise in relation to marine pollution from anthropogenic GHG emissions needs to be stringent".[70] However, the ITLOS also emphasised that the implementation of this due diligence obligation "may vary according to States' capabilities and available resources" and that "[s]uch implementation requires a State with greater capabilities and sufficient resources to do more than a State not so well placed".[71]

b. Article 192 of the UNCLOS

45. To recall, Article 192 requires States to "protect and preserve the marine environment". The second question presented to the ITLOS concerned this obligation.

46. The ITLOS found that the obligation to protect the marine environment entails a "duty to prevent, or at least mitigate, environmental harm".[72] The obligation to preserve the marine environment "entails maintaining ecosystem health and the natural balance of the marine environment",[73] including by restoration where harm has already occurred.[74] In the climate change context, the ITLOS found that the obligation in Article 192 required States to adopt both mitigation measures and adaptation measures.[75]

47. The ITLOS recognised that the obligation in Article 192 is one of due diligence. The level of diligence required of States in the climate change context is stringent.[76] In particular, the ITLOS emphasised that States are "required to take measures as far-

[69] ITLOS Climate Advisory Opinion, para. 239.

[70] ITLOS Climate Advisory Opinion, para. 241.

[71] ITLOS Climate Advisory Opinion, para. 241.

[72] ITLOS Climate Advisory Opinion, para. 385.

[73] ITLOS Climate Advisory Opinion, para. 385.

[74] ITLOS Climate Advisory Opinion, para. 386.

[75] ITLOS Climate Advisory Opinion, para. 391.

[76] ITLOS Climate Advisory Opinion, para. 399.

reaching and efficacious as possible to prevent or reduce the deleterious effects of climate change and ocean acidification on the marine environment".[77]

c. Obligation of cooperation

48. The ITLOS placed heavy emphasis on the need for international cooperation. It recalled that the duty to cooperate "is a fundamental principle" "reflected in and permeat[ing] the entirety of Part XII of the [UNCLOS]",[78] and "an integral part" of the obligations under articles 194 and 192.[79] Articles 197, 200 and 201 set out specific obligations of cooperation.[80] The ITLOS also found that the climate treaties "contemplate and variously give substance" to this obligation.[81]

49. The ITLOS found that States are obligated to "cooperate, directly or through competent international organizations, continuously, meaningfully and in good faith in order to prevent, reduce and control marine pollution from anthropogenic GHG emissions".[82] States are required to cooperate: (i) in formulating and elaborating rules, standards and recommended practices and procedures; (ii) to promote studies, undertake scientific research, and encourage the exchange of information and data; (iii) by establishing appropriate scientific criteria on the basis of which rules, standards and recommended practices and procedures are to be formulated and elaborated.[83]

d. Technical assistance

50. The ITLOS identified obligations concerning technical assistance in Articles 202 and 203 of the UNCLOS. The ITLOS noted the consensus among a majority of participants that such assistance is "indispensable" in combating marine pollution in the climate

[77] ITLOS Climate Advisory Opinion, para. 399.

[78] ITLOS Climate Advisory Opinion, para. 296.

[79] ITLOS Climate Advisory Opinion, para. 299.

[80] ITLOS Climate Advisory Opinion, para. 299.

[81] ITLOS Climate Advisory Opinion, para. 298.

[82] ITLOS Climate Advisory Opinion, para. 321.

[83] ITLOS Climate Advisory Opinion, para. 321.

context.[84] The ITLOS found that the obligation in Articles 202 and 203 "has some elements underlying [the] principle [of CBDR-RC]".[85]

51. The ITLOS characterised "scientific, technical, educational and other assistance to developing States that are particularly vulnerable to the adverse effects of climate change" as "a means of addressing an inequitable situation".[86] The "inequitable situation" is that such States suffer, in particular, the adverse effects of climate change, whereas they have made a minimal contribution to the problem.[87]

52. In this regard, the ITLOS referred to the UNFCCC and the Paris Agreement which take into account the "specific needs and special circumstances" of vulnerable developing countries.[88] The ITLOS also found that Article 203 of the UNCLOS "reinforces" the support to developing States, "by granting them preferential treatment in funding, technical assistance and pertinent specialised services from international organizations".[89]

C. Key cross-cutting elements from both decisions

53. In light of the preceding summary, Antigua and Barbuda now summarises five key cross-cutting points from the decisions that echo closely key elements of its own submissions in these proceedings.

54. *First*, the Tribunal and the Court ("tribunals") both make factual findings on the **science relating to climate change**, based on the IPCC's work.[90] In these findings, the tribunals conclude that anthropogenic GHG emissions have unquestionably caused climate change; climate change has had, and will continue to have, adverse and inequitable impacts on the environment and people, including prejudicing human rights; these adverse effects are worse with each increment of warming and at 1.5°C as

[84] ITLOS Climate Advisory Opinion, para. 325.

[85] ITLOS Climate Advisory Opinion, para. 326.

[86] ITLOS Climate Advisory Opinion, para. 327.

[87] ITLOS Climate Advisory Opinion, para. 327.

[88] ITLOS Climate Advisory Opinion, para. 327.

[89] ITLOS Climate Advisory Opinion, para. 339.

[90] As in these proceedings, Antigua and Barbuda made submissions before the ITLOS, setting out the disproportionate harms suffered by SIDS, and by Antigua and Barbuda specifically. *See,* Written Statement of the Commission of Small Island States on Climate Change and International Law (COSIS), pp. 1-2, 38-39.

compared with 2.0°C; and that certain States, namely SIDS, suffer a disproportionate impact.

55. *Second*, both tribunals find that States must plan and take **urgent action to reduce emissions** from activities within their territory and jurisdictional control, taking into account the best available science and the objective of limiting global warming to 1.5°C. The tribunals agreed that these actions must involve effective legislative, administrative, and enforcement actions, with regular monitoring and vigilance of effectiveness.

56. *Third*, both tribunals concluded that the climate change regime "rests on the principle" **of CBDR-RC.**[91] In line with this principle, both tribunals agreed that States' obligations to take action to reduce emissions (and adapt to climate change) are differentiated according to their respective responsibilities and means and capabilities in order to address the inequities of climate change.

57. *Fourth*, the ECtHR adverted to the important role of the **remaining carbon budget ("RCB")**, with this Court finding that a State must set a national carbon budget based on a fair allocation to the State of the RCB in line with the principle of CBDR-RC.

58. *Fifth*, the ITLOS found that States obligations to tackle climate change entail a **due diligence** obligation. However, the Tribunal underscored that this obligation does not leave Staters with a free hand to do as they wish; rather, the obligation is "*stringent*" in light of the severity of harms and risks from climate change; and its specific content is informed by objective factors, including, once more, the best available science, the goal of limiting global warming to 1.5°C, and States' respective means and capabilities.

III. ISSUES RAISED UNDER QUESTION (A)

A. The climate treaties are not *lex specialis*

1. States' *lex specialis* arguments

59. Some States argue that the climate treaties operate as *lex specialis* to other rules of international law, in the sense that they constitute a "specific" or "specialised" set of

[91] *See, KlimaSeniorinnen v. Switzerland*, para. 441 and ITLOS Climate Advisory Opinion, para. 326.

rules, in contrast to the "general" rules arising under custom or treaty-based instruments such as UNCLOS or human rights treaties.[92]

60. States differ in their understanding of precisely how such specialised rules impact the continued application of more general rules. Broadly, there appear to be two approaches. On the one hand, States such as Kuwait, for example, consider that *lex specialis* rules operate entirely to displace the operation of more general rules that are otherwise applicable:

> The UNFCCC, the Kyoto Protocol, and the Paris Agreement contain a set of ***lex specialis*** rules and obligations under international law which regulate GHG emissions in order to reduce their impact on climate change. The effect of these **special** rules and obligations is that they **prevail over** more **general** international law rules and obligations **that may otherwise have applied** to GHG emissions.[93]

61. On the other hand, States such as the United States and Australia appear to be of the view that both general and specific rules continue to operate concurrently, but that compliance or breach with the more specific rules will be determinative of compliance or breach of the more general rules. The United States, for example, argues:

> To the extent other sources of international law, such as customary international law, might establish obligations in respect of climate change, these obligations would be, at most quite **general**. Any such obligations **would be satisfied** in the climate change context by States' implementation of their obligations under the climate change-specific treaties they have negotiated and joined, which embody the clearest, most **specific**, and most recent expression of their consent to be bound by international law in respect of climate change.[94]

62. Australia, for its part, contends that:

> The international community of States has responded to this enormous challenge through the negotiation and agreement of a **specialised** climate change treaty regime, identifying concrete objectives and goals, and imposing **specific obligations** on States … other international treaties or customary rules, which

[92] *See,* e.g., Written Statement of Kuwait, para. 137(7); *see also*, Written Statement of South Africa, paras. 14-18; Written Statement of Timor Leste, paras. 88-93.

[93] Written Statement of Kuwait, para. 8 (emphasis added).

[94] Written Statement of the USA, para. 4.1.

> were not negotiated or did not develop in order to address the threat posed by climate change, **should not be interpreted as operating inconsistently with, or as going beyond**, the UNFCCC and Paris Agreement.[95]

63. In both approaches, the characterisation of the climate treaties as *lex specialis* has significant consequences for the Court's treatment of other rules of international law. On Kuwait's view, the general rules have no application whatsoever. The implication of the United States' and Australia's view, on the other hand, is that the Court either should not concern itself with the proper interpretation of the scope and content of the general rules (because those matters are determined by the content and scope of the obligations in the climate treaties), or perhaps even that the Court should *read down* the general rules by reference to the specific rules in the climate treaties.

64. Thus, while the precise arguments vary, the practical effect of both approaches is the same: to severely limit, or exclude the relevance of, in the Court's Advisory Opinion, international rules other than those found in the climate treaties. These arguments are unavailing for the following reasons.

65. First, the principle of *lex specialis* does not operate to render inoperative general rules of international law.[96] As both the ILC and the Court have confirmed, even where priority is given to a more specific rule, the general rule continues to operate, both (i) to fill possible *lacunae* and to aid in the interpretation and implementation of the specific rule, and (ii) as a directly applicable rule, the application of which falls to be determined

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[95] Written Statement of Australia, para. 2.6.2.

[96] *See,* International Law Commission, "Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law", A/CN.4/L.682 and Add.1, 13 April 2006 (available here) (hereinafter: "**ILC Fragmentation Study**") paras 88, 91: "There are two ways in which law may take account of the relationship of a particular rule to general one. A particular rule may be considered an *application* of a general standard in a given circumstance. … Or it may be considered as a *modification*, *overruling* or a *setting aside* of the latter. The first case is sometimes seen as not a situation of normative conflict at all but is taken to involve the simultaneous application of the special and the general standard. Thus, only the latter is thought to involve the application of a genuine *lex specialis*. … [However] in many other cases … [it is] thought the *lex specialis* applicable even in the absence of direct conflict between two provisions and where it might be said that both apply concurrently. This is the proper approach." The ILC goes on to explain that to the extent there is any "setting aside", it is the content of the general rule which is determined by (and in that loose sense "set aside" by) the operation of the more specific rule in the particular situation. *See also,* paras. 93-94: "Sometimes a *lex specialis* relationship has been identified between two norms which, far from being in conflict with each other, point in the same direction while the relation "special"/"general" is associated with that of "means"/"ends"…. The relation of general and particular may often be complex and two-sided so that even as the particular sets aside the general, the latter - as the Court has noted - will continue to provide interpretative direction to the former."

by the specific rule.[97] This is one example of the uncontroversial position that different rules of law can apply concurrently[98] and that a particular act or omission of a State is capable simultaneously of breaching more than one applicable rule of international law. As recognised by the UNCLOS Annex VII arbitral tribunal in the *Southern Bluefin Tuna* case:

> It is commonplace of international law and State practice for more than one treaty to bear upon a particular dispute. There is no reason why a given act of a State may not violate its obligations under more than one treaty. There is frequently a parallelism of treaties … [t]he current range of international legal obligations benefits from a process of accretion and cumulation.[99]

The position of States such as Kuwait – that the general rules do not apply at all – are, therefore, wrong.[100]

66. Second, the approach suggested by the United States and Australia – that the general rules continue to apply, but compliance or breach is determined by reference to only to the specific rules – is also wrong.

67. As a principle that gives priority to a specific rule over a general rule, *lex specialis* only plays the role advocated by the US and Australia where the specific rule entirely encompasses, and is a particular application of, the general rule. As the ILC explained:

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[97] *See,* ILC Fragmentation Study, paras. 98-104; *see also Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I) (hereinafter "**Nuclear Weapons Advisory Opinion**"),* paras. 24-25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (hereinafter "**Wall Advisory Opinion**")*, paras 105-106; *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, p. 161.

[98] *See*, e.g., Written Statement of Nicaragua, para. 179: "It will ... be clear that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content.".

[99] *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, decision of 4 August 2000 (jurisdiction and admissibility), UNRIAA, vol. XXIII (Sales No. E/F.04.V.15),* para. 52.

[100] Such a total displacement of the general rules is possible only through other mechanisms of international law. This would include States being free to modify *inter se* by treaty their obligations under other rules of international law, but this is subject to limitations including that: (i) it is not possible to contract out of peremptory norms, as they are non-derogable (VCLT, Article 53); (ii) it is not possible to contract out entirely of *erga omnes* obligations as they are owed to the international community as a whole and not only to the individual States with whom the treaty is concluded (and the parties to the climate treaties are not all members of the international community); and in any event (iii) in the present context, it is clear from the face of the climate treaties that they are plainly not intended to be an attempt to contract out of other general rules of international law, such as those in UNCLOS, human rights treaties and customary international law. *See,* further, Section IV.A below.

"the norm of application is more specific because it contains the general rule itself as one element in the definition of its scope of application."[101]

68. However, if the general rule requires *different* conduct, such that it requires *different* conduct from a State in order to comply with it as compared to the specific rule, then the principle of *lex specialis* cannot be used to narrow or read down the content of the general obligation – contrary to the implication suggested by States such as the United States and Australia. It is not sufficient for States to say that, in the climate change context, concurrently applicable obligations have the same general protective goal, and so *only* those contained in climate treaties will dictate whether all other currently applicable obligations — concerning different subject-matter areas and taking into account similar but distinct interests and considerations — will be satisfied. This is exactly what the ITLOS held in its recent Advisory Opinion, as set out above. It is therefore important for the Court to examine the scope and content of the general rules, and their relationship to the climate treaties, in the course of arriving at its opinion.

69. In light of the importance of States' concurrent and cumulative obligations under different rules of international law, the fact that the climate treaties are not *lex specialis* to particular general rules warrants further elaboration, to which Antigua and Barbuda now turn.

2. The climate treaties are not *lex specialis* in respect of primary obligations

70. States that characterise the climate treaties as *lex specialis* do so in respect of at least two sets of so-called "general" rules: (1) the customary obligation of prevention;[102] and (2) the treaty-based obligations to (among others) protect and preserve the marine environment, under UNCLOS.[103] There is no basis to displace or disregard an

[101] ILC Fragmentation Study, para 91.

[102] For example, Kuwait argues that Article 4.2 of the Paris Agreement represents the full "extent to which the prevention principle applies in the context of *lex specialis* rules and obligations established by the UNFCCC and Paris agreement" (para. 75). The United States argues that "any customary obligation of due diligence that the Court might find applies to anthropogenic GHG emissions should be considered fulfilled by a State's implementation of its obligations under the Paris Agreement" (para. 4.28).

[103] For example, the United States argues that "with respect to anthropogenic GHG emissions, the content of the article 194 obligation would need to be evaluated with reference to international rules, standards, and recommended practices and procedures that apply to such emissions" (para. 4.32). Australia argues that "Part XII of UNCLOS should not be interpreted as imposing obligations with respect to anthropogenic greenhouse

examination of either set of rules on grounds that the climate treaties constitute *lex specialis*. Antigua and Barbuda addresses each in turn.

a. The climate treaties are not lex specialis *to the UNCLOS*

71. The UNCLOS and the climate treaties constitute separate instruments, with separate sets of obligations, which are cumulatively layered onto the respective sets of Parties.

72. Indeed, the precise question of the relationship between the UNCLOS, on the one hand, and the climate treaties, on the other, was addressed directly in the recent Advisory Opinion issued by the ITLOS. In those proceedings, States made largely identical arguments to those now presented before the Court. As the Tribunal summarised:

> It was contended in this regard that compliance with the UNFCCC and the Paris Agreement satisfies the specific obligation under article 194 of the Convention to take measures to prevent, reduce and control pollution of the marine environment from anthropogenic emissions. It was also argued that Part XII of the Convention should not be interpreted as imposing obligation with respect to such emissions that are inconsistent with, or that go beyond, those agreed by the international community in the specific context of the UNFCCC and the Paris Agreement. According to this view, the UNFCCC and the Paris Agreement are *lex specialis* in respect of the obligations of States Parties under the more general provisions of the Convention.[104]

73. The Tribunal rejected these arguments. The Tribunal agreed that the UNFCCC and the Paris Agreement are indeed the "primary legal instruments addressing the global problem of climate change"; and, that such instruments were "relevant in interpreting and applying the Convention with respect to maritime pollution from anthropogenic GHG emissions", in particular through the 1.5°C temperature goal and associated emissions reduction pathways.[105]

74. However, the Tribunal also emphasised that "the [UNCLOS] and the Paris agreement are separate agreements, with separate sets of obligations".[106] The Paris Agreement

gas emissions that are inconsistent with, or that go beyond, those agreed by the international community in the specific context of the UNFCCC and the Paris Agreement" (para. 3.5).

[104] ITLOS Climate Advisory Opinion, para. 220.

[105] ITLOS Climate Advisory Opinion, para. 222.

[106] ITLOS Climate Advisory Opinion, para. 223.

"complements" the UNCLOS, but does not "modif[y] or limit the obligation under the Convention", and "is not *lex specialis* to the Convention".[107] Indeed, the Tribunal found the principle of *lex specialis* had, in the circumstances, "no place in the interpretation of the Convention".[108] In the Tribunal's view, the obligation in Article 194 – to take all measures necessary to prevent, reduce and control pollution of the marine environment – "would [not] be satisfied simply by complying with obligations and commitments under the Paris Agreement".[109]

75. Antigua and Barbuda considers that the Tribunal's conclusion flows from a straightforward application of well-accepted principles of treaty interpretation.

b. The climate treaties are not lex specialis *to the customary obligation of prevention*

76. The customary obligation of prevention requires States to "ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond their national control".[110] The obligation is also not displaced by the climate treaties; nor should an investigation of its scope and content be disregarded by the Court (as some States advocate).

77. In addition to its customary status, it is common for the obligation of prevention also to be expressed and codified in multilateral environmental treaties.[111] The expression of the customary obligation in a treaty does not displace the customary obligation.[112] Where the content of the treaty and customary rules are identical, conduct which breaches one will necessarily breach the other. Where, however, the treaty articulates

[107] ITLOS Climate Advisory Opinion, para. 224.

[108] ITLOS Climate Advisory Opinion, para. 224.

[109] *See,* ITLOS Climate Advisory Opinion, para. 223: "The Tribunal does not consider that the obligation under Article 194, paragraph 1 of the Convention would be satisfied simply by complying with the obligations and commitments under the Paris Agreement."

[110] *Nuclear Weapons*, pp. 241-242, para. 29. *See also*, *Gabčikovo-Nagymaros Project (Hungary v. Slovakia)*, *Judgment*, *I.C.J. Reports 1997* (hereinafter "***Gabčikovo-Nagymaros***"), pp. 77-78, para. 140; *Pulp Mills,* pp. 55-56, paras. 101-102; pp. 75-77, paras. 181-189; pp. 82-83, para. 204; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *I.C.J. Reports 2015 (II)* (hereinafter "***Certain Activities (Merits)***"), p. 706, para. 104; pp. 711-712, para. 118.

[111] *See,* e.g.*,* the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972), Articles 1 and 2; Vienna Convention on the Protection of the Ozone Layer (1985) Article 2.2(b); Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Article 2.1.

[112] *See, Certain Activities (Merits)*, p. 706, para. 104; pp. 711-712, para. 118.

the obligation of prevention in a way that is narrower, or less demanding than the customary obligation (*quod non*), performance of the treaty obligation will plainly not satisfy the concurrently applicable customary obligation.

78. Many States appear to consider that the climate treaties give expression to a narrower, or less demanding obligation of prevention than exists at customary international law.[113] That is not correct.[114]

79. As Antigua and Barbuda's Written Statement explained, the objective of the UNFCCC "picks up a core principle from customary international law, namely: the need to **prevent significant ('dangerous') environmental harm** (interference with the climate system) resulting from anthropogenic GHG emissions" and imposes obligations towards that end.[115] Similarly, the *preamble* to the UNFCCC reiterates the continued relevance of the obligation of prevention, in no uncertain terms: "recalling also that States have, in accordance with the Charter of the United Nations and the principles of international law … the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond national jurisdiction". This statement "recalls" the (continued) existence of the obligation of prevention, using language that deliberately echoes this Court's own formulation. It is not logical to conclude that a treaty regime which expressly "recalls" the existence of a core customary obligation was, at the same time, intended to displace or narrow that obligation.

80. Thus, like other multilateral environmental treaties, the climate treaties confirm the bedrock prevention obligation for the specific context at hand, and layer on additional obligations. More specifically, the UNFCCC and, most recently, the Paris Agreement, give expression to the customary obligation of prevention, including through establishing a due diligence obligation on Parties to adopt rapid, deep and sustained

[113] *See, e.g.,* Written Statement of Australia, paras. 2.23 and 2.61; Written Statement of Indonesia, paras. 52-54; Written Statement of the USA, paras. 3.16-3.17

[114] As the Written Statement of Antigua and Barbuda set out at para. 228ff, both the Paris Agreement and the customary obligation of prevention require States to do their utmost, using all means at their disposal, to achieve rapid, deep and sustained GHG emission reductions sufficient to prevent significant environmental harm, in a manner consistent with CBDR-RC. This obligation arises independently under both sources of law (as well as under the UNCLOS and human rights law.

[115] Written Statement of Antigua and Barbuda, para. 152.

emissions reduction measures; and layer on additional transparency, reporting and support obligations, among others.[116]

81. Understood this way, the climate treaties are consistent with the customary obligation. However, even if the Court found that the climate treaties do impose a lower standard, the customary obligation would not be displaced, narrowed, or otherwise limited, but would rather impose a separate and independent due diligence obligation on States to adopt rapid, deep and sustained emissions reduction measures.

B. Climate change is not too "complex" to be dealt with under primary obligations other than the climate treaties

82. A common theme running through certain States' Written Statements is that climate change is simply too "complex" to be addressed under primary rules outside of the climate treaties.

83. For example, in arguing that climate change cannot be addressed under the customary obligation of prevention, the US asserts that, "in past proceedings, the link between the complained-of activity was relatively direct in time and space"; by contrast, "the link between GHG emissions and harms to human health and the environment is very long and complex".[117] Australia, making the same argument as regards the obligation of prevention, asserts that "the environmental consequences of anthropogenic greenhouse gas emissions result from a much more complex and diffuse causal chain", which suggests that "the complex situation of climate change is materially distinct from the situation of an ordinary case of transboundary harm".[118] China argues that "international human rights law has limitations in addressing climate change", because "it is difficult to establish a clear link between anthropogenic GHG emissions of specific States and the adverse impacts on human rights".[119]

84. These arguments conveniently understate the capacity of the primary rules to deal with the crisis. In Antigua and Barbuda's view, the full range of relevant primary rules can

[116] *See,* Written Statement of Antigua and Barbuda, paras. 236ff.

[117] Written Statement of the USA, para. 4.19.

[118] Written Statement of Australia, para. 4.10.

[119] Written Statement of China, para. 125.

be applied in a relatively straightforward manner to the facts of climate change; and, indeed, have recently been applied in just this way by the ECtHR, as outlined above.

85. As a preliminary matter, the Court is called upon, in these proceedings, to clarify the law. It is not called upon to apply the law to any particular factual circumstances, in the present proceedings. The factual complexities of applying the law to any particular situation must be left to the adjudicators to whom those circumstances are presented in the appropriate case. It suffices to note at the present stage that factual complexity is no reason for international law to cease applying to a particular circumstance. International adjudicators (including this Court) often apply existing law to novel circumstances, and are well-equipped to address factual complexities as and when they arise. To the extent factual complexities warrant a modification of the existing rules, it falls to States, not to the Court, to make such modifications. A fear of factual complexity – let alone a fear of factual complexities in future proceedings – cannot be the basis for judicial legislation in the form of a finding that well-established norms of international law cease to apply simply on account of such complexities.

86. Put differently: climate change is not a scenario where there is a lacuna in international law, such that States are effectively free to act as they please in the absence of any concrete rules providing otherwise. There are, instead, concrete and well-accepted obligations, *i.e.,* to respect human rights, to protect and preserve the marine environment, and to prevent significant harm to the territory of other States. Antigua and Barbuda (along with many other States) has argued that, as a result, States are under a due diligence obligation to adopt adequate mitigation measures. It is not disputed that a due diligence obligation is capable of being violated if, based on an assessment of the facts at hand – including the level of risk and each State's respective capabilities – a State has *not* done the utmost possible to prevent harm. Once again, this very point has been made in the recent decisions of the ECtHR and the ITLOS.[120]

87. The attempt by States such as the US, Australia, and China, quoted above, to introduce a concern about causal complexity, is unavailing. Causation is not a question that concerns the existence and application of primary obligations in a given situation. The

[120] *See,* ITLOS Climate Advisory Opinion, paras. 238, 243, 272 and 441; *see also*, *KlimaSeniorinnen v. Switzerland*, paras. 334, 538(a)-(b) and 559.

application of primary rules is, in general, not concerned with the causation of injury/harm, as this is not a condition of breach.[121] Certain obligations, such as obligations to prevent a given event from occurring (such as preventing significant harm to the climate system), may require the occurrence of the event in order for there to be a breach of the obligation,[122] but that is not a question of causation.[123]

88. To illustrate: in *Bosnia Genocide*, the Court stated repeatedly in respect of the obligation to prevent genocide that "it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that *even if* it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide".[124] This was because the obligation to prevent placed "a State under a duty to act which is *not dependent on* the certainty that the action to be taken will succeed in preventing the commission of acts of genocide, or even on the likelihood of that outcome".[125] This is a clear rejection of causation at the level of the application of the primary obligation for obligations to prevent. The relationship between the failure of due diligence (the conduct) and the event (the harm) was not one of causation: they simply both have to exist. For the existence of a breach (and, consequently, for responsibility to arise automatically) it suffices if the State fails in its due diligence obligation, and the event independently occurs. As such, there is no factual complexity in the application of the primary rules raised by causation, contrary to what is suggested by States such as the US, Australia and China.

89. Moreover, the position that climate change is simply too complex to be adequately addressed under other primary obligations is contradicted by the growing list of cases where courts – domestic and international – have been well able to conclude breaches of primary obligations in relation to climate change through a straightforward

[121] In this respect the application of the primary rules is the other side of the same coin to the conclusion that there is a breach. The issue therefore straddles the primary and secondary rule divide. On the lack of a requirement for damage in establishing breach, *see* Articles on State Responsibility, Art 2, commentary para 9.

[122] At least according to the ILC (Articles on State Responsibility, Article 14(3)) and the ICJ in a ruling limited specifically to the genocide convention. *see*, *e.g.*, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Judgment*, *I.C.J. Reports 2007* (hereinafter "***Bosnia Genocide***"), paras. 430-431.

[123] As noted in the Written Statement of Antigua and Barbuda, fn 572.

[124] *Bosnia Genocide*, para. 430 (emphasis added).

[125] *Bosnia Genocide*, para. 461 (emphasis added).

application of the rules, assessed against the factual record before them, including details of what specific measures the State has taken to address the climate crisis.[126]

90. Similar considerations to those discussed in this section arise regarding the customary rules of State responsibility; this is addressed at Section IV.B below.

IV. ISSUES RAISED UNDER QUESTION (B)

91. Question (b) concerns the law of State responsibility.[127] The arguments raised by participants under Question (b), to which Antigua and Barbuda responds in this section, echo those raised under Question (a): that the climate treaties are "*lex specialis*", precluding altogether the application of the customary rules of State responsibility; and that the climate crisis is simply too complex to be adequately addressed under the customary rules of State responsibility. These arguments are wrong. Each is addressed in turn.

A. The climate treaties ae not "*lex specialis*" in respect of the customary rules of State responsibility

92. A number of Written Statements contend that the climate treaties exclude the operation of the customary international law rules on State responsibility codified in the ILC's Articles on State Responsibility. This argument is illustrated by the EU's Written Statement: "the climate change regime of the UNFCCC and the Paris Agreement … [contain] a set of specific rules addressing, in a different way the harm caused by climate change, which render the inconsistent mechanisms of [Articles on State Responsibility] without object and inapplicable."[128]

[126] In addition to the ECtHR in *KlimaSeniorinnen v Switzerland*, *see also,* the cases discussed in the Written Statement of Antigua and Barbuda, paras. 367-371.

[127] States such as the United Kingdom and Japan that construe Question (b) as relating to primary obligations, rather than the customary rules of State responsibility, engage in unconvincing technical sophistry in a transparent attempt to invite the Court to avoid dealing with a fundamental part of the UNGA's request and one which is of central important to all States. High-emitting States that would prefer to avoid their secondary obligations would, in fact, benefit the most from the clarification that the advisory opinion can offer on this part of the request.

[128] Written Statement of the European Union, para. 354. *See also* Written Statement of Canada, paras. 11, 23; Written Statement of China, paras. 139-142; and Written Statement of the OPEC, paras. 103, 119.

93. Some participants frame this argument in terms of "*lex specialis*", including by reference to Article 55 of the Articles on State Responsibility,[129] which is titled "*Lex specialis*" and provides that the ILC's Articles "do not apply" where and to the extent that the consequences of breach are governed by more specific rules of international law.[130] Article 55 accommodates the possibility that in certain instances, more specific responsibility rules may oust the customary rules by agreement between States,[131] including through the creation of "self-contained regimes".[132] Some Written Statements consider that the climate treaties constitute a "self-contained regime" for responsibility arising from their breach.[133] These arguments are demonstrably wrong for the reasons that follow, and high emitting States must not be permitted to use such arguments to avoid responsibility under the general rules of international law.

94. *First*, the Court should not lightly presume the displacement of important customary rules absent an unambiguous expression of intent in the relevant treaties. As a Chamber of the ICJ recognised in *ELSI*, the Court must not "accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so."[134] No such expression can be found in the climate treaties. To the contrary, when acceding to the UNFCCC,[135] a number of States made declarations expressly *confirming* the continued application of the general secondary rules of State responsibility. For example, upon becoming

[129] *See, e.g.,* Written Statement of the European Union, paras. 353-354. *See also,* Written Statement of the OPEC, paras. 103, 119.

[130] It was doubted in subsequent work of the ILC whether this was a correct use of the term "*lex specialis*" in that it purported to exclude altogether the application of general rules (as explained above). ILC Fragmentation Study, para. 89.

[131] Save in respect of peremptory norms, which the ILC recognised; *see,* Articles on State Responsibility, Article 55, commentary, para. 2.

[132] Articles on State Responsibility, Article 55, commentary, para. 5

[133] Written Statement of South Africa, para. 131; Written Statement of the OPEC, paras. 103, 119.

[134] *Elettronica Sicula S.P.A. (ELSI) (United States of America v. Italy), Judgment, I.C.J. Reports 1989*, para. 50. *See also* Articles on State Responsibility, Article 55, commentary para. 4 ("actual inconsistency between them, or else a discernible intention that one provision is to exclude the other").

[135] *See,* International Law Commission, "Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries", A/73/10 (available here), Conclusion 4, commentary para. 3 ("The phrase 'in connection with the conclusion of the treaty' should be understood as including agreements and instruments that are made in a close temporal and contextual relation with the conclusion of the treaty. If they are made after this period, then such 'agreements' and agreed upon 'instruments' constitute 'subsequent agreements' or subsequent practice under article 31, paragraph 3.").

party to the UNFCCC, the governments of Kiribati, Papua New Guinea, Fiji and Nauru declared that doing so:

> shall in no way constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change and that no provisions in the Convention can be interpreted as derogating from the principles of general international law.[136]

95. These declarations are clear, and they confirm the absence of any intention to displace the customary rules on State responsibility. No other State objected to these declarations or made any declaration to the contrary. Plainly, there was no intention of the Parties for the UNFCCC and associated treaties to displace the customary rules of State responsibility.

96. *Second*, as Antigua and Barbuda set out in its Written Statement,[137], there are no "special rules of international law"[138] that govern the consequences of a breach of primary obligations in the climate treaties.

97. Some States have suggested that efforts taken under the framework of the UNFCCC and Paris Agreement to address loss and damage caused by climate change constitute such "special rules".[139] This is incorrect on a number of levels:

(a) First, in order for customary rules of State responsibility to be inapplicable in the present circumstances, they must be displaced *by treaty*. Yet, the climate treaties do no such thing. The UNFCCC does not even mention loss and damage. The only provision of the Paris Agreement that addresses loss and damage is Article 8, by which the States Parties simply (i) "*recognize the importance of* averting, minimizing and addressing loss and damage associated with the adverse effects of climate change"; (ii) note that the "Warsaw International Mechanism for Loss and Damage [a body of experts tasked with

[136] UNFCCC, Declarations by Parties (available here). Similar statements were made by the Cook Islands, Niue, Kiribati and Nauru upon signing up to the Kyoto Protocol. *See,* Kyoto Protocol: Status of Ratifications, pp. 8-10 (available here).

[137] Written Statement of Antigua and Barbuda, para. 533.

[138] Articles on State Responsibility, Article 55.

[139] *See*, e.g., Written Statements of the European Union, paras. 330-334, 350-351; South Africa, para. 131; Canada, para. 11; China, paras. 92-96; OPEC, paras. 62-63; Australia, paras. 2.61-2.62.

enhancing knowledge of risk management and strengthening cooperation] … *may be enhanced and strengthened*"; and (iii) accept that they "*should enhance understanding, action and support*, including through the Warsaw International Mechanism, as appropriate, on a cooperative and facilitative basis with respect to loss and damage associated with the adverse effects of climate change."[140] This does not establish any rules on responsibility, let alone specialised rules that displace the customary rules of State responsibility.

(b) Second, the COP Decision adopting the Paris Agreement clearly confirms the first point made immediately above: it states that Article 8 "does not involve or provide a basis for any liability or compensation".[141] Thus, the Parties expressly excluded the possibility of there being a specialised or self-contained regime concerning loss and damage that was intended to address the legal consequences of a breach of primary obligations. Article 8 cannot, therefore, operate as a set of special secondary rules that displace the customary rules of State responsibility. Still less does it evidence that States have excluded State liability for emissions-related harm *altogether*, without replacing it with any more specialised regime, which appears to be the (somewhat incredible) submission by OPEC.[142]

(c) Third, and more specifically, the efforts to address loss and damage taking place under the general framework of the climate treaties are not finalised: there are no operationalised rules or regime that provides a functioning alternative to the customary rules of State responsibility. An incomplete set of rules that depend on further arrangements and agreements among States evidently cannot constitute a set of "special rules" that manifest a clear intention displace the general rules on State responsibility.

(d) Fourth, recent efforts to operationalise the loss and damage fund, such as the 2023 COP decision adopting its Governing Instrument, expressly states that the "funding arrangements, including a fund, for responding to loss and damage are

[140] Paris Agreement, Article 8 (emphasis added).

[141] Antigua and Barbuda considers COP Decision 1/CP.21, "Adoption of the Paris Agreement", to be relevant in interpreting the Paris Agreement, as an "agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty", under Article 31(2)(a) of the VCLT.

[142] Written Statement of the OPEC, para. 99.

based on cooperation and facilitation and *do not involve liability or compensation*", and that the fund will "provide *complementary and additional support* and improve the speed and adequacy of access to finance for responding to loss and damage" associated with the adverse effects of climate change.[143] This is unquestionably far from an expression of a clear intention to displace the general rules on State responsibility by providing an alternative set of consequences in the case of breach.

(e) Fifth, it is also significant that financial contributions to the loss and damage fund will be voluntary, and the specific amounts to be donated discretionary. Such discretionary funding will not be related to the consequences of any breach of international law by the contributing State. The criteria relating to disbursements are also not designed to compensate for harm resulting from a violation of primary obligations of international law. The funding mechanism is, therefore, not conceived as a set of "special rules" to address breaches of international law. Indeed, treating the loss and damage fund (or any similar mechanism) as a "special rule" puts the amount of "compensation" within the gift of high emitting States, *i.e.*, those most likely to be liable for a potential breach (and projected funding already falls woefully short of the cost of climate-change related harm[144]). That is manifestly not an alternative regime for dealing with the consequences of breach that the overwhelming majority of States would have accepted, nor is any such acceptance evident from the arrangements made in relation to the loss and damage fund to date.

98. A number of States also point to the Implementation and Compliance Committee set up under the Paris Agreement ("**PAICC**")[145] and the dispute resolution clause providing for resolving disputes on the interpretation and application of the climate

[143] UNFCCC COP, Decision 1/CP.28, "Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4", preamble para 5 and Annex I, para. 7 (emphasis added) (2023) (available here). *See also*, UNFCCC COP, Decision 12/CP.27, "Report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts" (2022) (available here), establishing the loss and damage fund, the purpose of which is "assisting developing countries … in responding to loss and damage" (para. 2 and see para 3). This is not based on responsibility.

[144] The costs are projected to reach a global total of USD 290 to 580 billion by 2030, projected funding currently stands at a mere USD 700 million. *See,* "Expectations mount as loss and damage fund staggers to its feet", *Climate Home News*, 25 March 2024 (available here).

[145] Paris Agreement, Article 15.

treaties, including by referral to the ICJ,[146] as evidence that the climate treaties contain a specialised regime that displaces the customary rules of State responsibility.[147] That is incorrect.

(a) As to the PAICC, Article 15 of the Paris Agreement provides that the PAICC is a "mechanism *to facilitate implementation of and promote compliance* with the provisions of this Agreement".[148] Nothing in the text of Article 15, or in the Modalities and procedures[149] or the rules of procedure[150] adopted for the PAICC, suggest it is intended to displace the customary rules of State responsibility by providing an exclusive alternative procedure for dealing with the consequences of breach. The fact that it is "non-adversarial and non-punitive"[151] and so is in that sense different from the customary rules of State responsibility does not prove that the two systems are in such obvious conflict that the PAICC must have been clearly intended entirely to displace the rules codified in the Articles on State Responsibility. The PAICC is plainly an *additional* mechanism designed simply to *assist* States and facilitate their compliance with the Paris Agreement. Similar mechanisms exist in other fields, such as the Universal Periodic Review procedure implemented by the UN Human Rights Council for example, which reviews States' compliance with UN human rights treaties. There is no suggestion that this mechanism displaces customary rules of State responsibility for violations of human rights treaties. The same is the case for the climate treaties.

(b) As to the dispute resolution clauses, it cannot credibly be suggested that a standard dispute settlement clause, including one which operates as an ICJ compromissory clause, excludes the application of the customary rules of State responsibility. If that were the case, there would be a live question in all cases

[146] UNFCCC, Article 14; Paris Agreement, Article 24.

[147] *See,* Written Statements of Canada, paras. 33-35; European Union, paras. 327, 333; Australia, paras. 2.54-2.60; Kuwait, paras. 96-106.

[148] Paris Agreement, Article 15.1 (emphasis added).

[149] UNFCCC COP, Decision 20/CMA.1, "Annex : Modalities and procedures for the effective operation of the committee referred to in Article 15, paragraph 2, of the Paris Agreement" (2018) (available here).

[150] UNFCCC COP, Decision 24/CMA.3, "Rules of procedure of the committee to facilitate implementation and promote compliance referred to in Article 15, paragraph 2, of the Paris Agreement" (2021) (available here).

[151] Paris Agreement, Article 15.2.

to come before the Court on the basis of a compromissory clause as to whether the customary rules of State responsibility applied. The Court undertakes no such enquiry because a clause providing for a dispute settlement *procedure* evidently does not contain the *substantive rules* governing identification of breach and its consequences.

99. *Third*, excluding the general rules of State responsibility undermines the object and purpose of the UNFCCC and the Paris Agreement. The UNFCCC's objectives include stabilising GHG emissions "at a level that would prevent dangerous anthropogenic interference with the climate system"; the Paris Agreement "aims to strengthen the global response to the threat of climate change". Excluding the general rules of State responsibility would exclude *any* remedy for States injured by climate change, without a textual basis to do so. As discussed above, accepting this view would mean that the liability for harm from climate change was more stringent before the adoption of the Paris Agreement and the UNFCCC than after their adoption. That is an absurd result.

100. Clearly, the Paris Agreement and the UNFCCC intended to offer *more*, not *less*, protection against climate change impacts. Displacing the general rules of State responsibility would constitute a step backwards, in terms of the constraints placed on emissions. It would lead to the incredible position where States have a primary obligation with which they must comply (even if, *quod non*, that is merely a procedural obligation to prepare an NDC) but no consequences for failing to do so. This would represent a serious regression in the protection afforded to the environment under international law, and would clearly contradict the object and purpose of the UNFCCC and the Paris Agreement.

101. *Finally*, participants' arguments that climate treaties exclude the customary rules of State responsibility are made only in respect of breaches of the climate treaties; and *not* any other concurrently applicable rules under relevant treaties (for example, the UNCLOS) or customary international law. There is no serious suggestion that the customary rules of State responsibility would be displaced in respect of these other rules.[152]

[152] The European Union also makes a similar argument with respect to the ECtHR's just satisfaction regime under Article 41 of the ECHR, but overlooks the fact that the ECtHR expressly states that it is applying the

B. Climate change is not too "complex" to be addressed under the customary rules of State responsibility

102. Some States that do accept that the customary rules of State responsibility apply, then seek to denude them of any force by reason of claimed causal complexity. The UK, for example, accepts that a State may breach a climate-change related obligation, but that it would have no duty to make reparation because it is too complex to establish causation between the particular conduct of an individual State and the specific climate-related harm that conduct causes.[153] Other States take a similar position, emphasising the complexity in establishing causation or "attributing" harm to particular conduct or States.[154]

103. These positions are wrong. As set out in further detail in Antigua and Barbuda's Written Statement,[155] applying the customary rules of State responsibility step-by-step, as elucidated in the Court's jurisprudence, reveals that they can accommodate the complexities of climate change. It is illustrative to revisit this analysis to demonstrate that causation poses no impediment to the application of the customary rules of State responsibility.

104. To recall, an internationally wrongful act, for which a State will be responsible, consists of an act or omission that is (i) attributable to the State and (ii) constitutes a breach of an international obligation of that State.

105. Attribution is straightforward: the State's own actions and omissions will be attributed to it, including where it fails to sufficiently regulate the conduct of private GHG emitters within its territory or subject to its jurisdiction.[156] Terminological clarity is important here: it is only *conduct* that is attributed to the State as a matter of the law of

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customary rules of State responsibility (*see,* e.g., *Savickis v. Latvia*, Judgment, 9 June 2022, para. 77 (available here)).

[153] Written Statement of the United Kingdom, para. 137.4.3.

[154] *See,* e.g., Written Statements of Russia, p. 17; China, para. 136; Singapore, paras. 4.11, 4.14; United States, paras. 2.20, 5.7-5.10; Australia, para. 5.9.

[155] Written Statement of Antigua and Barbuda, Section IV.D.

[156] Written Statement of Antigua and Barbuda, para. 550, discussing *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Reparations*, *Judgment*, *I.C.J. Reports 2022* (hereinafter "***Armed Activities (Reparations)***"). *See also Pulp Mills*, para. 197. The other bases for attribution are set out in Articles on State Responsibility, Articles 5-6, 8 and 11.

State responsibility; harm is not "attributed" to a particular State.[157] No question of causal complexity therefore arises as a matter of attribution of conduct.

106. Breach is also straightforward: a State breaches an obligation if it fails to conduct itself in conformity with what is required of it by that obligation. Importantly, the existence of damage is not a general requirement in order to establish a breach of the obligation under the customary rules of State responsibility.[158] Damage only comes into play at the stage of breach where the primary rule requires the occurrence of harm in order for a particular obligation to be breached. Obligations to prevent are one such type of rule which, as explained in detail above, the Court has confirmed *do not require causation* between the State's conduct and the occurrence of the event/harm. There is therefore no causal complexity in respect of establishing breach.

107. A State's responsibility is established automatically upon the occurrence of a breach that is attributed to it. It follows that there is no question of causal complexity that affects the *establishment of responsibility* of a State for breach of climate-change related obligations.

108. As regards the duty to make reparation, the two conditions that trigger the duty to make full reparation are (i) the existence of injury, and (ii) a causal relationship between the wrongful act and the injury sustained.

109. In the context of climate change, the existence of injury is now axiomatic: well-established scientific evidence proves that significant and, in some cases, irreversible harm to the environment is occurring, with equally severe consequences for human populations. It must be emphasised again that SIDS are already bearing the brunt of these harms. As explained in Antigua and Barbuda's Written Statement, where the existence of harm is clear, the Court does not require specific evidence showing the precise extent of material damage suffered. The Court has repeatedly recognised that, if necessary, an assessment of the extent of the damage can be based on "the range of possibilities indicated by the evidence" and on "reasonable estimates".[159] It follows

[157] *See,* in contrast, Written Statement of Singapore, para. 4.11.

[158] Articles on State Responsibility, Article 2, commentary para. 9.

[159] *Armed Activities (Reparations)*, pp. 51-52, para. 106, p. 57, para. 126; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Compensation*, *Judgment*, *I.C.J. Reports 2018* (hereinafter "***Certain Activities (Compensation)***"), pp. 26-27, para. 35. *See also, Armed Activities*

that, to the extent that concerns about causal complexity imply a concern about difficulties in proving the precise extent of harm suffered, that would not preclude a State from being held responsible to make reparation.

110. On causation, the Court has before required a "sufficiently direct and certain causal nexus between the wrongful act … and the injury suffered".[160] A number of States suggest that this will only be satisfied by a 'but for' standard of causation that the injured State must prove,[161] but the Court has never been so categorical. In fact, in *Armed Activities (Reparations)*, the Court recognised that "the causal nexus required may vary depending on the primary rule violated and the nature and extent of the injury"[162] and, in that case, adopted a presumption of causation for an obligation to prevent certain harm. The Court explained that "the status of the district of Ituri as an occupied territory has a direct bearing on questions of proof and the requisite causal nexus".[163] In particular, Uganda was under "a duty of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory" and that "*it is for Uganda*" — i.e. the State alleged to have caused the harm — "to establish, in this phase of the proceedings, that a particular injury alleged by the DRC in Ituri was *not caused* by Uganda's failure to meet its obligations as an occupying Power."[164]

111. That presumption of causation was explicable on the basis that Uganda's occupation of Ituri gave it the same *de facto* monopoly on coercive measures that all States possess with respect to their own territory, such that it was assumed to have been able to prevent the violations of human rights and humanitarian law but failed to do so. This presumption of causation is therefore equally applicable where States fail in their duty of diligence to prevent GHG emissions occurring in their territory or subject to their jurisdiction that causes significant harm to the environment. In such cases, causation is presumed, and it is for the breaching State to prove that a particular injury alleged

(Reparations), p. 56, para. 124, acknowledging that the standard of proof may be lower in the reparations phase than in the establishment of responsibility phase.

[160] *Armed Activities (Reparations)*, p. 48, para. 93 (and cases cited therein).

[161] *See,* e.g., Written Statement of the United States, para. 5.10; and Written Statement of Kuwait, para. 118.

[162] *Armed Activities (Reparations)*, p. 48, para. 93 (and cases cited therein).

[163] *Armed Activities (Reparations)*, p. 44, para. 78.

[164] *Armed Activities (Reparations)*, p. 44, para. 78 (emphasis added); *see also* pp. 48-49, para. 95.

against it was *not caused* by its wrongful conduct. It follows that, in such cases, a State will have a duty to make reparation where the presumption of causation arises and it is not able to displace it. Any causal complexity does not, therefore, present an insurmountable bar to the application of the customary rules of State responsibility by the Court, but rather, only presents challenges *for a breaching State* in seeking to resile from the consequences of its breach.

112. This presumption is firmly supported by the undeniable state of the science on the fact that GHG emissions directly cause climate change-related harms to the environment and people, as set out in detail in Antigua and Barbuda's Written Statement.[165] The IPCC has even established the factual causative link between States' failure to act diligently to prevent significant harm to the global climate system (i.e. its omission) and particular types of harm that have resulted therefrom.[166] It is also significant in this context that both historical and current emissions of each State can be quantified with relative precision.

113. In order to disprove the presumption, a breaching State will have to do more than point to some uncertainty in "climate attribution science", *i.e.*, the science of determining the extent to which extreme weather events are due anthropogenic climate change.[167] As the Court has noted as regards environmental damage, "the state of science regarding the causal link between the wrongful act and the damage may be uncertain" but that will not automatically preclude the existence of a duty to make reparation.[168]

114. To this end, the Court has expressly recognised that damage can (indeed, often does) arise from several concurrent causes, including the conduct of more than one actor or natural causes. A number of Written Statements point out that GHG emissions

[165] Written Statement of Antigua and Barbuda, Section II.

[166] IPCC, Sixth Assessment Report, 2021, The Physical Science Basis (Working Group I), Technical Summary, p. 41 (available here). *See also* Written Statement of Antigua and Barbuda, Sections II.B. and II.C.

[167] *See,* Written Statement of the United States, paras. 2.23-2.26.

[168] *Certain Activities (Compensation)*, p. 26, para. 34; *Armed Activities (Reparations)*, pp. 122-123, para. 349. *See also*, the lack of certainty and reliance on circumstantial evidence in *Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949*, pp. 19 and 22-23. *See also*, *Trail smelter case (United States, Canada), Awards of 16 April 1938 and 11 March 1941, United Nations, Reports of International Arbitral Awards* ("RIAA"), Vol. III, pp. 1905-1982 (hereinafter "***Trail Smelter***"), p. 1925 ("[t]he difference between probable yield in the absence of any fumigation and actual crop yield … is necessarily a somewhat uncertain amount, incapable of absolute proof").

collectively have contributed to current levels of warming and associated harm.[169] However, "the fact that the damage was the result of concurrent causes is *not* sufficient to exempt [a responsible State] from any obligation to make reparation".[170] So long as the State has causally contributed to the harm to whatever degree, it will have a duty to make reparation.[171]

115. The fact of multiple contributing causes therefore goes not to *whether* a State has a duty to make reparation, but to what the content of that duty is, and how it is to be apportioned or allocated between other responsible actors. The principles addressing invocation against multiple responsible State and the allocation of liability between them were set out in Antigua and Barbuda's Written Statement.[172] These principles do not allow States to 'pass the buck' so as to avoid the establishment and invocation of their own responsibility. There is therefore no causal complexity arising in respect of multiple concurrent causes that would operate to preclude the triggering of the duty of a State to make reparations for its breach.

116. The content of the duty to make reparation can take a number of forms, depending on the injury suffered and the nature of the wrongful act. It includes restitution[173] and compensation for damage that cannot be made good by restitution. The Court has confirmed that both environmental damage itself and loss incurred in consequence of such damage is compensable.[174] In quantifying environmental harm for purposes of compensation, the Court has endorsed methodologies that offer "a reasonable basis for valuation", having regard to the "specific circumstances and characteristics of each case".[175] The Court has previously relied on estimates derived from reliable data and

[169] *See,* e.g., Written Statements of United Kingdom, para. 137.4.3; Russia, p. 17; Kuwait, para. 121; Australia, para. 5.9; China, para. 138.

[170] *Armed Activities (Reparations*), p. 49, para. 97 (emphasis added). *See also,* Written Statement of Antigua and Barbuda, para. 548.

[171] *See,* Written Statement of Antigua and Barbuda, para. 549, explaining this as the "existence" not the "extent" of the contribution to the injury.

[172] These principles are addressed in the Written Statement of Antigua and Barbuda, paras. 572-578.

[173] Antigua and Barbuda supports the suggestion of Tuvalu that land reclamation efforts are appropriate forms of restitution for loss of territory. Written Statement of Tuvalu, para. 138.

[174] *See,* Written Statement of Antigua and Barbuda, para. 556.

[175] *Certain Activities (Compensation)*, p. 31, para. 52. *See also*, *Armed Activities (Reparations)*, p. 106, para. 281 ("the Court will draw its conclusions on the basis of the evidence that it finds reliable in order to determine the damage caused by Uganda to Congolese natural resources and the compensation to be awarded").

adopted approaches that have valued various types of environmental harm together in a global manner.[176] Harms resulting from climate change are more significant in scale, but otherwise are no different.

117. It follows from the foregoing that there is no causal complexity that prevents either the *establishment of responsibility* for breach or the *triggering of the duty to make reparations* for a breach of a climate change-related obligation, nor the *invocation* of responsibility against multiple responsible States. The Court should accordingly disregard vague and defeatist references to it being all too difficult and complex to apply the customary rules of State responsibility in the context of significant harm caused to the climate system. These arguments are transparent attempts to have the Court sidestep a crucial part of the UN General Assembly's request, which will not assist the UN General Assembly or States in progressing global cooperative initiatives to address the adverse effects of climate change, the success of would be aided by a common understanding on fundamental legal issues.

118. The straightforward way in which the customary rules of State responsibility can apply in cases of climate change, as outlined here and in Antigua and Barbuda's Written Statement, aligns with an observation made by the tribunal in *Trail Smelter* and quoted approvingly by the Court in *Certain Activities (Compensation)*: that it would be a "perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts" in circumstances where "the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty".[177] Although dealing only with the extent of damage, the quote is equally applicable to other aspects of the customary rules of State responsibility where degrees of uncertainty may arise, and in respect of which the Court has rightly and justly considered the existing law adequate to accommodate.

[176] *Certain Activities (Compensation)*, pp. 37-39, paras. 78-87 (adopting an "overall valuation" approach); *Armed Activities (Reparations)*, p. 127, para. 366 (adopting a global sum for various forms of damage to natural resources, but *see also*, p. 127, para. 365 noting the "exceptional circumstances of the present case").

[177] *Certain Activities (Compensation)*, p. 27, para. 35, quoting *Trail Smelter*, p. 1920.

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