 

Team Number: 21

**2023 China International Law of the Sea Moot Court Competition**

**Case Concerning Climate Change and**

**its Impacts in the South Gentle Ocean**

Tagan

*(Applicant)*

**vs**

Hagatana

*(Respondent)*

**MEMORIAL OF**

**THE COMMONWEALTH OF HAGATANA**

**11 August 2023**

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# STATEMENT OF JURISDICTION

The Federated States of Tagan (Tagan) filed an Application instituting proceeding against the Commonwealth of Hagatana (Hagatana) to the International Tribunal for the Law of the Sea (the Tribunal) on 21 February 2023. Hagatana asserts that the Tribunal does not possess **[Ⅰ]** jurisdiction or **[Ⅱ]** admissibility over the submissions made by Tagan.

# THE TRIBUNAL LACKS JURISDICTION OVER ALL DISPUTES.

A Tribunal must at all times be satisfied that it has jurisdiction to entertain the case submitted to it.[[1]](#footnote-1) In the present case, the Tribunal does not possess jurisdiction over the submissions made by Tagan since **[A]** Tagan has failed to comply with the procedural obligations before submissions under Section 1 of Part XV of United Nations Convention on the Law of the Sea **(**UNCLOS**)**; **[B]** the Tribunal has no jurisdiction over the deleterious effects resulting from climate change, i.e., the first two disputes; **[C]** the Tribunal has no jurisdiction over the archipelagic baselines and maritime limits based on Kapalua, i.e., the last two disputes.

## [Tagan has failed to comply with the procedural obligations before submission](file:///C:\Users\86188\Documents\WeChat%20Files\wxid_my6u7qj13ogj22\FileStorage\MsgAttach\ba6e78447ff01990c37d55f55b0744c7\File\2022-07\7.1%20memorial.docx#_Toc105742463)s under Section 1 of Part XV of UNCLOS.

In accordance with Article 286 of UNCLOS, obligations under Section 1 shall be fulfilled before resourcing to the compulsory procedures under Section 2.[[2]](#footnote-2) Section 1 requires that States Parties are obligated to resolve any disputes arising from the interpretation or application of the Convention through peaceful means.[[3]](#footnote-3) Procedures under UNCLOS can be applied only if the dispute cannot be resolved by peaceful means under Section 1.[[4]](#footnote-4) The inability of a dispute to be resolved by peaceful means needs to be decided by both parties’ consent, which means there is no point in unilaterally assuming that peaceful means have been exhausted.[[5]](#footnote-5)

In the present case, Tagan has not exhausted all peaceful means under Section 1 to settle disputes.

Over the first and second issues concerning the deleterious effects resulting from climate change, the format of bilateral or regional discussions proposed by Tagan is not appropriate. On the one hand, since greenhouse-gases (GHG) remain in the atmosphere chronically and migrate globally,[[6]](#footnote-6) climate change inevitably possesses integrity and fluidity on a global scale.[[7]](#footnote-7) Thus climate change is a global concern[[8]](#footnote-8) and Tagan was also aware of it.[[9]](#footnote-9) On the other hand, single-country emission reductions make little difference to the impact of climate change,[[10]](#footnote-10) thus the global nature of climate change calls for the widest possible international cooperation.[[11]](#footnote-11) This means that multilateral or global forums are more favorable than bilateral or regional forums on climate issues.[[12]](#footnote-12) Therefore, although Hagatana has refused to discuss the issue in a bilateral or regional forum, it only indicates Hagatana does not consider any such forums appropriate and efficient to deal with these issues rather than Hagatana refusing to resolve the issue peacefully.[[13]](#footnote-13) Hagatana itself is willing to engage in global solutions and it has just been seeking a proper forum.[[14]](#footnote-14)

Over the third and fourth issues concerning the archipelagic baselines and maritime limits based on Kapalua, Tagan has not chosen peaceful means under Section 1 to settle the dispute. In effect, there are certain inherent advantages for States Parties in pursuing negotiation when it comes to baselines and maritime limits because they can retain control over a series of important issues through negotiations.[[15]](#footnote-15) However, Tagan ignored such advantages, directly presented a note of protest to the International Seabed Authority (ISA), and never attempted to negotiate with Hagatana on these issues.[[16]](#footnote-16) Since then, Tagan has not exhausted all peaceful means under Section 1 to settle disputes.

In summary, Tagan has not exhausted all peaceful means under Section 1 to settle disputes and failed to comply with the procedural obligations. Thus, the Tribunal does not possess jurisdiction over the case.

## The Tribunal has no jurisdiction over the deleterious effects resulting from climate change, i.e., the first two disputes.

Pursuant to Article 288(1) of UNCLOS, the Tribunal shall have jurisdiction over any dispute concerning the interpretation or application of UNCLOS which is submitted to it.[[17]](#footnote-17) The wording “concerning” under Article 288 demonstrates the existence of a real dispute between the States Parties that reasonably, and not just remotely, relates to the obligations set forth in the treaties whose breach is alleged.[[18]](#footnote-18) In Southern Bluefin Tuna Case, the Tribunal found that it would be artificial to conclude there was a dispute actually arising under UNCLOS which was distinct from the dispute that arose under the CCSBT[[19]](#footnote-19) since both parties of the disputes were parties to the 1993 Convention and the dispute was derived from CCSBT. Though the Tribunal therein concluded that it had jurisdiction over that case, the underlying reason was that the 1993 Convention was not completely alien to UNCLOS the fact that it was assigned to implement the broad principles as set out in UNCLOS.[[20]](#footnote-20)

The situation in the present case, however, is in stark contrast to that in Southern Bluefin Tuna Case. The first and second disputes herein shall be governed by the settlement of dispute under the United Nations Framework Convention on Climate Change (UNFCCC), rather than that in UNCLOS. First, UNFCCC and its subsequent agreements are the only conventions to which both Tagan and Hagatana are parties in this case that governs climate change directly.[[21]](#footnote-21) UNCLOS, despite its regulations concerning the marine environment, has only general provisions that do not directly relate to the dispute. Or in other words, the first two disputes have only a “remote” connection with the interpretation and application of UNCLOS. Second, the relationship between UNFCCC and UNCLOS in the present case shall be distinguished from that between the 1993 Convention and UNCLOS in Southern Bluefin Tuna Case, because UNFCCC is a convention independent from UNCLOS, not assigned to implement the rules of UNCLOS. In this regard, UNCLOS should not be considered as reasonably relating to the dispute at issue.

Moreover, pursuant to Article 288(2) of UNCLOS, the Tribunal’s jurisdiction over disputes concerning other international agreements must be based on the agreements.[[22]](#footnote-22) That means such agreements must contain provisions for submitting the disputes to tribunals referred to Article 287 of UNCLOS.[[23]](#footnote-23) However, UNFCCC does not contain such provisions and disputes concerning the interpretations or application of UNFCCC should not be referred to the Tribunal.[[24]](#footnote-24)

Consequently, the Tribunal has no jurisdiction over the deleterious effects resulting from climate change.

## The Tribunal has no jurisdiction over the archipelagic baselines and maritime limits based on Kapalua, i.e., the last two disputes.

The Tribunal has no jurisdiction over the archipelagic baselines and maritime limits based on Kapalua, i.e., the last two disputes, since **[1]** Tagan has not complied with the procedural obligations of exchanging views over the issue of archipelagic baselines and maritime limits; **[2]** the essence of the claims is about land territory, which does not concern the interpretation or application of UNCLOS.

### Tagan has not complied with the procedural obligations of exchanging views over the issue of archipelagic baselines and maritime limits.

As has been stated before, the compulsory procedures can only be invoked where no settlement has been reached under Section 1 of Part XV of UNCLOS.[[25]](#footnote-25) In Section 1, Article 283 provides the obligation of exchange of views.[[26]](#footnote-26) However, Tagan has not complied with this obligation over the issue of archipelagic baselines and maritime limits since **[a]** Tagan did not fulfill the time requirement for the “exchange of views”; **[b]** Tagan did not fulfill the content requirement for the “exchange of views”.

#### Tagan did not fulfill the time requirement for the “exchange of views”.

In accordance with UNCLOS, the exchange of views shall proceed once the disputes arise.[[27]](#footnote-27) “Dispute” refers to the conflict of legal views or practical interests between the parties involved[[28]](#footnote-28) and it arises when the views of one party are actively opposed by the other party.[[29]](#footnote-29) Meanwhile, to fulfill the obligation of solving disputes within peaceful means, the exchange of views needs to be repeated multiple times in years before a consensus is reached.[[30]](#footnote-30)

In the present case, the dispute arose when Hagatana confirmed that the hydrographic surveying activities were conducted near the mostly submerged Kapalua archipelago while Tagan asserted its rights strongly in the rejoinder.[[31]](#footnote-31) Since then Tagan has not exchanged views with Hagatana even once. Accordingly, Tagan has not complied with the obligation of exchanging views.

#### Tagan did not fulfill the content requirement for the “exchange of views”.

The exchange of views refers to exchanging views regarding means of dispute settlement.[[32]](#footnote-32) Meanwhile, the exchange of views should be guided by the goal of bringing the dispute to an end, implying that they should avoid actions likely to inflame it or make it more difficult to resolve.[[33]](#footnote-33)

In the present case, Tagan did not exchange views with Hagatana over the means of dispute settlement.[[34]](#footnote-34) In contrast, it directly presents a note of protest to ISA, which neither has substantive suggestions for dispute settlement means[[35]](#footnote-35) nor coincides with the goal of an exchange of views.[[36]](#footnote-36) Thus, it cannot be regarded as a form of exchanging views.

In summary, the behavior of Tagan indicates that it did not fulfill its obligation to exchange views. Thus, the Tribunal has no jurisdiction.

### The essence of the claims is about land territory, which does not concern the interpretation or application of UNCLOS.

Article 286 of UNCLOS provides that the disputes submitted to the Tribunal should concern the interpretation or application of UNCLOS.[[37]](#footnote-37) It is essential for the Tribunal to identify the real dispute in a case[[38]](#footnote-38) and the purpose of the claim,[[39]](#footnote-39) and then clarify whether the dispute concerns the interpretation or application of UNCLOS.[[40]](#footnote-40)

Based on the “land dominates the sea” principle,[[41]](#footnote-41) there will be no right to maritime zones without land territory.[[42]](#footnote-42) It is thus the terrestrial situation that must be taken as a starting point for the determination of the maritime rights of a coastal State.[[43]](#footnote-43) In practice, the issue of territorial sovereignty does not concern the interpretation or application of UNCLOS.[[44]](#footnote-44) That means UNCLOS does not provide a framework for resolving territorial disputes, and consequently, if the submitted dispute pertains to matters of sovereignty or other rights over continental or insular land territory, it falls outside the scope of UNCLOS regarding the interpretation or application of its provisions.[[45]](#footnote-45)

In the present case, Tagan claimed rights to the archipelagic baselines and maritime limits based on Kapalua.[[46]](#footnote-46) However, as a mostly submerged maritime feature, whether Kapalua can still be claimed as land territory and given corresponding maritime rights is essentially a dispute of territorial sovereignty and it is exactly the real dispute over the third issue and the fourth issue.[[47]](#footnote-47) Tagan has artificially camouflaged the real issue concerning the territory of Kapalua as two seemingly separate claims concerning maritime rights or maritime activities in an attempt to bring them within the jurisdiction of the Tribunal.[[48]](#footnote-48) This approach is clearly undesirable because the Tribunal’s decisions on the archipelagic baselines and maritime limits will inevitably affect the real dispute viz. the territorial status of Kapalua.[[49]](#footnote-49)

Since disputes concerning sovereignty over land territory are outside the scope of the Tribunal’s jurisdiction, the Tribunal does not possess jurisdiction over this case.

# EVEN IF THE TRIBUNAL HAS JURISDICTION OVER THE DISPUTES, IT DID NOT SATISFY THE ADMISSIBILITY.

Different from jurisdiction, admissibility is regarded as a general framework for deciding upon the propriety of exercising jurisdiction.[[50]](#footnote-50) In this case, even if the Tribunal has jurisdiction over the disputes, it did not satisfy the admissibility since the disputes are political rather than legal.

The International Court of Justice (ICJ) has stated that the admissibility of a tribunal may be excluded if the dispute is a political rather than a legal one.[[51]](#footnote-51) “Political dispute” means a disputed issue which is considered by the parties involved to be a matter of vital interest.[[52]](#footnote-52) It is therefore legally non-jurisdictional, which means that it cannot have recourse to international jurisdiction but is at most subject to a political solution or a diplomatic solution.[[53]](#footnote-53)

Climate change is a matter of vital national interest as it requires balancing the interests of environmental protection and national economic development.[[54]](#footnote-54) Political ideology is a factor that permeates this process of confronting climate change.[[55]](#footnote-55) UNFCCC has also shown that consideration of the adverse effects of climate change is based on political purposes.[[56]](#footnote-56) Moreover, since the maritime boundary and territorial sovereignty affect the coastal State’s jurisdiction concerning various uses of the sea, they are politically sensitive and certainly among the vital interests of States.[[57]](#footnote-57)

In the present case, the first two issues relate to the impacts of climate change and the last two are associated with the territorial disputes of islands.[[58]](#footnote-58) Accordingly, all issues concern the vital interest of the State and constitute political disputes, which renders the Tribunal has no admissibility over the issues submitted to the Tribunal.

# QUESTIONS PRESENTED

1. Whether Hagatana takes responsibility for the deleterious effects that result from climate change, including through ocean warming, sea-level rise, and ocean acidification in the South Gentle Ocean, which are caused by GHG emissions into the atmosphere.
2. Whether Hagatana has breached its international commitments under the UNCLOS to protect and preserve the marine environment in relation to the impacts of climate change, including ocean warming, sea-level rise, and ocean acidification in the South Gentle Ocean.
3. Whether Hagatana has breached its obligations under the UNCLOS by undertaking data-collection activities in the EEZ and on the continental shelf of Tagan.
4. Whether Hagatana should withdraw its sponsorship of the HHM Geological Survey because the plan of work covers part of the continental shelf of Tagan.

# STATEMENT OF FACTS

# BACKGROUND

The Federated States of Tagan is a developing archipelagic state with a land area of 1,500 km². It consists of three main archipelagos, which are Kapalua, Niutao, and Suva. The country has essentially two main sources of revenue: tourism and fishery. The Commonwealth of Hagatana is a developed state that consists essentially of one big island surrounded by several maritime features, which are mostly uninhabited. Nearly 75 percent of the population of Hagatana lives in the eastern part of the big island, which also concentrates by far most of the country’s economic life and industrial production, including the more polluting industries and the main coal-based power plants.

# UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

Tagan ratified the UNCLOS on 15 September 1991 while Hagatana did so on 21 October 1994. Both of them made their declaration for the settlement of disputes concerning the interpretation or application of the Convention pursuant to Article 287 of the UNCLOS.

# OTHER TREATIES RATIFIED BY TAGAN AND HAGATANA

Tagan and Hagatana are also parties to the following treaties: The 1969 Vienna Convention on the Law of Treaties (VCLT); the 1992 United Nations Framework Convention on Climate Change (UNFCCC); the 1994 Agreement Relating to the Implementation of Part XI of the UNCLOS of 10 December 1982; the 1995 Agreement for the Implementation of the Provisions of the UNCLOS of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA); the 1997 Kyoto Protocol to the UNFCCC; the 2015 Paris Agreement.

# CORAL BLEACHING

Since the early 1990s, Taganian and foreign scientists as well as other environmentalists have been directing international attention to coral bleaching in the Four Queens Coral Reefs. However, the problem of coral bleaching has progressively worsened since 1995. Since 2010, these recurring events have become more intense, leading to extreme bleaching and mortality throughout the region. Consequently, Tagan has suffered from a significant decline in visiting international tourists per year.

When it comes to the causes, international scientists and environmentalists hold the view that mass-coral-bleaching events should be primarily attributed to ocean warming and increased ocean acidification.

# YELLOWFIN TUNA

Yellowfin tuna is a highly pelagic species that spawns in the South Gentle Ocean. Ocean acidification has detrimental effects on key organs in the larvae of yellowfin tuna and slows the development of embryos and larvae, which is correlated with decreased growth and survival of the species. As a result, yellowfin tuna exports from Tagan decreased by 80 percent between 2000 and 2022.

# SEA-LEVEL RISE

Since the mid-2000s, the rise of the sea level has caused many problems for the Taganian population, particularly for the inhabitants of the Kapalua archipelago. Especially over the last ten years, living conditions in Kapalua have become increasingly challenging due to the rise of the sea level. Traditional economic activities in the archipelago have become increasingly impracticable as well.

On 2 January 2017, without economic resources to tackle the consequences of sea-level rise in the Kapalua archipelago, the Taganian government approved the relocation of the remaining population in the archipelago to Niutao and Suva. The government has declared that the Kapalua archipelago is no longer inhabitable and has forbidden any attempt to return to or settle on the archipelago.

# THE CONTINENTAL SHELF AND EEZ OF KAPALUA ARCHIPELAGO

On 25 July 2011, in parallel to its relatively basic efforts to mitigate the detrimental effects of sea-level rise, Tagan submitted to the Commission on the Limits of the Continental Shelf (CLCS), in accordance with Article 76, paragraph 8, of the UNCLOS, information on the limits of the continental shelf beyond 200 nautical miles. The Taganian submission for an outer continental shelf is exclusively in regard to the northeastern side of the Kapalua archipelago, in a region known as the Lau Ridge. On 20 March 2015, the CLCS approved without a vote its recommendations with regard to the Taganian submission for an outer continental shelf.

On 17 December 2015, Tagan deposited with the Secretary General of the United Nations, pursuant to Article 76, paragraph 9, of the UNCLOS. Conversely, Tagan has not deposited the respective charts or lists with the Secretary General of the International Seabed Authority (ISA) pursuant to Article 84, paragraph 2, of the UNCLOS.

On 30 July 2016, Tagan transmitted for deposit with the Secretary General of the United Nations, in compliance with Article 16 of the UNCLOS and Law no. 2,390 on Maritime Spaces (of 2 June 2016), a complete set of corresponding charts and list of geographical coordinates of points showing the maritime limits and baselines of Tagan.

On 2 January 2017, the Taganian government approved a relocation of the remaining population in the archipelago to Niutao and Suva. Additionally, it has declared that the Kapalua archipelago is no longer inhabitable and has forbidden any attempt to return to or settle on the archipelago.

On 8 January 2017, the Government of Hagatana expresses legal doubts and potential inconsistences of the Taganian declaration with the UNCLOS.

# THE HYDROGRAPHIC SURVEYING ACTIVITIES OF HAGATANA

Throughout 2021 and 2022, Taganian fishermen have noticed the presence of Hagatanian flagged vessels near the Kapalua archipelago, i.e., within the EEZ of Tagan. The fishermen have reported to Tagan’s Navy authorities that the Hagatanian flagged vessels were not fishing in the area but seemed to be carefully collecting data. The MFA of Tagan sent a note of protest and requested detailed explanations on the nature and objectives of the activities performed by Hagatanian vessels in the EEZ of Tagan.

Hagatana confirmed that several hydrographic surveying activities were conducted in 2021 and 2022 in the South Gentle Ocean, including in its EEZ and on its continental shelf, in the high seas/Area between Hagatana and Tagan, and “in the former EEZ or on the former continental shelf of Tagan, that is, near the once called Kapalua archipelago, which is now mostly submerged”.

# THE WORK PLAN OF HHM GEOLOGICAL SURVEY

On 6 February 2023, the Hagatana government sponsored the HHM Geological Survey – a state-owned company – in its application before the ISA to undertake activities in the South Gentle Ocean. The plan of work proposed by the HHM Geological Survey was according to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, adopted by the ISA. The plan of work includes part of the area, which is within the continental shelf of the Kapalua archipelago.

On 8 February 2023, the permanent representative of Tagan to the ISA presented a formal note of protest to the Secretary General of the ISA, claiming that the work plan of HHM Geological Survey has to be rejected outright since it includes part of the EEZ and continental shelf of Tagan.

# SUMMARY OF PLEADINGS

## PLEADING Ⅰ

Hagatana is not responsible for climate change because Hagatana’s conduct does not satisfy the elements of an internationally wrongful act.

Firstly, the act of emitting GHG cannot be considered an act of the State. Since the GHG in Hagatana’s territory were emitted by domestic enterprises, and there is no evidence of Hagatana’s approval or endorsement of this act, it cannot be considered as an act of Hagatana.

Secondly, Hagatana’s conduct is lack wrongfulness since there is no breach of its international obligations. Hagatana did not violate its international obligations, including the general obligation to protect the climate system, the prevention obligation and the obligation of cooperating.

Thirdly, there is no evidence to demonstrate a direct causal relationship between Hagatana’s behavior and climate change since the claim that Hagatana’s behavior caused climate damage lacks scientific basis and the climate change could be affected by many other factors besides Hagatana’s behavior.

## PLEADING Ⅱ

Hagatana has not breached its obligations under UNCLOS to protect the marine environment.

Firstly, Hagatana did not violate the “obligation to prevent, reduce and control pollution of the marine environment” under Article 194 since Hagatana was entitled to adopt policies corresponding to its capacity to protect the marine environment and the emission of carbon dioxide could not be judged as “the release of toxic, harmful or noxious substances” under Article 194(3). Additionally, Hagatana has not violated the obligation to prevent transboundary harm under Article 194(2) of UNCLOS. However, it was Tagan that should take overall responsibility for not fulfilling the obligation under Article 194(5) to protect the living marine environment.

Secondly, Hagatana has not breached the “duty not to transfer damage or hazards or transform one type of pollution into another” under Article 195 because Hagatana did not transfer damage from one area to another and Hagatana did not transform one kind of pollution into another.

Thirdly, Hagatana did not violate the obligation under Article 207 of UNCLOS since it did not pollute the Southern Gentle Ocean by discharging sewage through land-based structures.

Moreover, Hagatana did not breach the obligation under Article 212 of UNCLOS since Hagatana has not discharged pollution into the atmosphere by aircraft or ships.

## PLEADING Ⅲ

Hagatana did not breach its obligations under the UNCLOS by undertaking data-collection activities in the EEZ and on the continental shelf of Tagan.

Firstly, Tagan did not own sovereign rights over the EEZ and continental shelf of Kapalua archipelago. Considering Article 121(3) under UNCLOS and the adoption of ambulatory baselines, Tagan could not claim EEZ and continental shelf over the remaining insular features of Kapalua archipelago. Moreover, the outer continental shelf of Tagan was not established with validity due to the absence of necessary procedural preconditions under the UNCLOS.

Secondly, Hagatana’s data-collection activities were consistent with UNCLOS because they occurred on the high seas and fell within the scope of the freedom of the high seas. Even if Hagatana’s activities took place within the EEZ and continental shelf of Tagan, Hagatana did not violate the obligations under UNCLOS since its activities fulfilled other internationally lawful uses of the sea.

## PLEADING Ⅳ

Hagatana did not need to withdraw its sponsorship of the HHM Geological Survey.

Firstly, since the continental shelf of Kapalua has become part of the Area and HHM Geological Survey is eligible to be the subject of the application, HHM Geological Survey has the right to explore and exploit the former continental shelf of Tagan.

Secondly, Tagan has no right to demand Hagatana withdraw its sponsorship because the activities of HHM Geological Survey could not be attributed to Hagatana. Even if the activities were attributed to Hagatana, Tagan still has no right to interfere with Hagatana’s lawful actions according to the principle of sovereign equality of States in international law. Alternatively, even if the proposed work plan was unlawful, Tagan has no right to request Hagatana to withdraw its sponsorship before the plan is implemented.

# PLEADINGS

# HAGATANA IS NOT RESPONSIBLE FOR CLIMATE CHANGE CAUSED BY GHG EMISSIONS INTO THE ATMOSPHERE.

Hagatana is not responsible for climate change because Hagatana’s conduct does not satisfy the elements of an internationally wrongful act. Hagatana’s conduct failed to meet the requirements of an internationally wrongful act because **[A]** emissions of GHG cannot be attributed to Hagatana; **[B]** Hagatana’s conduct is lack wrongfulness, i.e., there is no breach of its international obligations; **[C]** there is no substantiated evidence of a direct causal relationship between Hagatana’s behavior and climate change.

## Emissions of GHG cannot be attributed to Hagatana.

According to Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), acts under the direction or control of the State, as well as acts confirmed by the State, may be considered acts of the State.[[59]](#footnote-59) Private conduct is not as such attributable to the State.[[60]](#footnote-60) Attributability of private behavior to the State is subject to consideration of effective control.[[61]](#footnote-61) In former practice, manifestations that could be regarded as acts of the State included “ratification”, “approval” and “existence of an official seal”.[[62]](#footnote-62) The mere existence of facts confirmed by the State cannot be regarded as an act of the State.[[63]](#footnote-63) The establishment of State responsibility presupposes the existence of State conduct.[[64]](#footnote-64)

In the present case, the GHG in Hagatana’s territory were emitted by domestic enterprises, and there is no evidence of Hagatana’s approval or endorsement of this act, which cannot be considered as an act of Hagatana. Therefore, the act of emitting GHG cannot be considered an act of the State.

## Hagatana’s conduct is lack wrongfulness, i.e., there is no breach of its international obligations.

According to ARSIWA,[[65]](#footnote-65) the assumption of State responsibility is premised on the existence of an internationally wrongful act, and the criterion for determining an internationally wrongful act is whether a State violates relevant international obligations.[[66]](#footnote-66)

Hagatana did not violate its international obligations, including **[1]** the general obligation to protect the climate system; **[2]** the prevention obligation under Article 3(3) of the UNFCCC; **[3]** the obligation of cooperating.

### Hagatana was not in breach of the general obligation about protecting the climate system under UNFCCC.

Article 2 of UNFCCC states that the Convention’s ultimate objective is “to achieve, in accordance with the relevant provisions of the Convention, stabilization of GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic originating in human activity interference with the climate system”.[[67]](#footnote-67) Article 3 requires that States Parties should protect the climate system.[[68]](#footnote-68) However, its word of “should” does not contain a legal obligation, but an encouraging one.[[69]](#footnote-69)

In this case, Hagatana’s failure to fulfill its GHG emission reduction target does not represent a breach of the general obligation under Article 3 of the UNFCCC, because the UNFCCC does not specify the emission reduction targets of the Parties, but only requires that global GHG concentrations be maintained at the normal levels.[[70]](#footnote-70)

Furthermore, Hagatana’s accession to climate treaties such as the UNFCCC, the 1997 Kyoto Protocol, and the 2015 Paris Agreement[[71]](#footnote-71) serves as a tangible manifestation of its dedication to safeguarding the climate system. Consequently, it is unfounded to assert that Hagatana has violated its overarching obligation, as stipulated in the Convention, to preserve and protect the climate system.

### Hagatana did not violate the obligation of precautionary under Article 3(3) of the UNFCCC.

Article 3 of the UNFCCC not only mandates Parties to anticipate, prevent, or minimize the factors contributing to climate change but also emphasizes the need for cost-effective policies and measures that yield global benefits at the lowest feasible cost.[[72]](#footnote-72) The UNFCCC handbook further highlights the importance of avoiding undue burdens on economic development while implementing measures in accordance with the Convention.[[73]](#footnote-73)

In the present case, Hagatana recognized the potential for its emission practices to contribute to climate change. However, considering the significant cost of containment measures and the prevailing global trend of climate change, any action taken is likely to have a minimal global impact while significantly affecting domestic economic development.[[74]](#footnote-74) This consideration should not be misconstrued as Hagatana’s non-compliance with the precautionary principle outlined in Article 3(3) of the UNFCCC.

### Hagatana was not in breach of the obligation to cooperate under UNFCCC, the Paris Agreement and other relevant international conventions.

The obligation to cooperate is mentioned in international climate conventions such as the UNFCCC,[[75]](#footnote-75) the Paris Agreement[[76]](#footnote-76) and the Kyoto Protocol.[[77]](#footnote-77) The global nature of climate change calls for the widest possible international cooperation aimed at accelerating the reduction of global GHG emissions and addressing adaptation to the adverse impacts of climate change.[[78]](#footnote-78) However, as climate change is a global problem, it is caused by a combination of global carbon emissions, human activities and natural factors. Consequently, climate change is not the responsibility of a single country.

Therefore, Hagatana’s rejection of Tagan’s request for bilateral or regional discussions is not a failure to fulfill its duty to cooperate,[[79]](#footnote-79) but rather an argument for cooperation on a global scale. Hagatana’s support for the discussion of climate issues in multilateral forums across the world reflects the fulfillment of its duty to cooperate. On this basis, Tagan’s claim that Hagatana was in breach of its duty to cooperate is unfounded.

## There is no substantiated evidence of a direct causal relationship between Hagatana’s behavior and climate change.

According to Article 31(2) of ARSIWA,[[80]](#footnote-80) causation is necessary for a claim of compensation. However, there is no evidence to prove that causation between Hagatana and the damage caused by climate change exists. This is because that **[1]** the industrialization in Hagatana and coral bleaching occurred at different times; **[2]** the claim that Hagatana’s behavior caused climate damage lacks scientific basis; **[3]** even without Hagatana’s activities, climate deterioration will occur in Tagan by other causes.

### The industrialization in Hagatana and coral bleaching occurred at different times.

The industrial sector of Hagatana dates back to the era of the industrial revolution and has developed rapidly in the last 70 years.[[81]](#footnote-81) However, Tagan’s coral bleaching and acidification occurred in the 1990s,[[82]](#footnote-82) while Hagatana’s industrial development remained stable at the same time, with no significant change. According to academics[[83]](#footnote-83) and IPCC reports,[[84]](#footnote-84) the range of changes in GHG between 1750 and 1998 was too small to cause damage to the global climate or even to the world’s oceans. Therefore, the ocean warming, sea level rise and acidification in Tagan in the 1990s were not related to the industrialization of Hagatana.

### The claim that Hagatana’s behavior caused climate damage lacks scientific basis.

The ARSIWA addresses the question of a causal link between the internationally wrongful act and the injury.[[85]](#footnote-85) The difficulty in detecting and identifying climate change loss and damage to a single country makes the problem of causality more complex. Both extreme events and slow-onset events are constrained and influenced by many factors, including social, economic, demographic and environmental changes.[[86]](#footnote-86) These combined complexities contribute to the considerable difficulty in accurately assessing and assigning responsibility for loss and damage caused by climate change.[[87]](#footnote-87)

In this case, there is no evidence that Hagatana’s activities were the most significant factor affecting Tagan’s climate change, and there is no scientific basis to suggest that the climate change experienced by Tagan was affected by any factor. Therefore, Tagan’s claim that there is a causal link between Hagatana’s activities and the climatic deterioration is difficult to prove.

### Even without Hagatana’s activities, climate deterioration will occur in Tagan by other causes.

There is a consensus that the climate is changing but there has not been an agreement as to the causes.[[88]](#footnote-88) Both natural events and human activities are believed to be contributing to an increase in average global temperatures.[[89]](#footnote-89) The increase in global carbon emissions is an indisputable fact[[90]](#footnote-90) and cannot be separated from the contribution of carbon emissions from other countries around the world.

Hagatana is neither the only carbon emitter nor the largest carbon emitter and Tagan has also recognized that warming and acidification of the oceans is a widespread phenomenon around the world.[[91]](#footnote-91) Furthermore, the global climate and the global ocean have integrity and fluidity.[[92]](#footnote-92) The exchange of gases in the atmosphere and the exchange of seawater under the action of ocean currents make it impossible to determine whether the climate change and acidification of seawater in the South Gentle Ocean are caused by Hagatana. Therefore, even in the absence of Hagatana’s behavior, it can be surmised that the climate of Tagan would have deteriorated as a result of the global warming trend.

# HAGATANA DID NOT BREACH ITS OBLIGATIONS UNDER UNCLOS TO PROTECT THE MARINE ENVIRONMENT.

Hagatana did not breach its obligations under UNCLOS to protect the marine environment because **[A]** Hagatana did not violate the “obligation to prevent, reduce and control pollution of the marine environment” under Article 194; **[B]** Hagatana did not breach “duty not to transfer damage or hazards or transform one type of pollution into another” under Article 195; **[C]** Hagatana did not violate the obligation to prevent, reduce and control pollution of the marine environment from land-based sources under Article 207 of UNCLOS; **[D]** Hagatana did not breach the obligation to prevent, reduce and control pollution of the marine environment from or through the atmosphere under Article 212 of UNCLOS.

## Hagatana did not violate the “obligation to prevent, reduce and control pollution of the marine environment” under Article 194.

Hagatana does not violate the obligation under Article 194 because **[1]** Article 194(1) requires States to coordinate their policies to protect the marine environment in accordance with their capabilities; **[2]** the emission of carbon dioxide is not “the release of toxic, harmful or noxious substances” under Article 194(3); **[3]** Hagatana did not violate the obligation to prevent transboundary harm under Article 194(2) of UNCLOS; **[4]** Tagan should take overall responsibility for not fulfilling the obligation under Article 194(5) to protect the living marine environment.

### Article 194 (1) requires States to coordinate their policies to protect the marine environment in accordance with their capabilities.

The ambitious technical scope of Article 194 (1) is balanced by the insertion of the clauses “means at their disposal” and “in accordance with their capabilities”.[[93]](#footnote-93) The prospective nature of Article 194 requires countries only to do their best and to adjust environmental policies appropriately according to their own capacity development needs.[[94]](#footnote-94) This requires the State to use its best endeavors to minimize the risk of harm but does not guarantee the complete avoidance of harm.[[95]](#footnote-95)

Despite being classified as a developed country, Hagatana’s economic development is still constrained by its geographical location as an island nation. Additionally, its economy, which is based on industry and coal-based power generation,[[96]](#footnote-96) has not yet undergone an industrial transformation. This also restricted Hagatana’s development severely. Therefore, in fulfilling its obligations to protect the marine environment, it is justified that Hagatana made appropriate adjustments to its environmental protection policies, considering its economic development needs and capacity. The assessment of environmental issues [[97]](#footnote-97)and the attitude to accede to international treaties on environmental protection[[98]](#footnote-98) demonstrated that Hagatana has fulfilled its obligations under UNCLOS within its capacity. Therefore, Hagatana was entitled to adopt policies corresponding to its capacity and cannot be considered to be in breach of its obligations under Article 194 even if the degradation of the marine environment took place.

### The emission of carbon dioxide is not “the release of toxic, harmful or noxious substances” under Article 194(3).

At present, there is no conclusive opinion as to whether carbon dioxide constitutes a pollutant, nor whether it is considered a hazardous substance under UNCLOS.[[99]](#footnote-99) The “release of toxic, harmful or noxious substances, especially those which are persistent”, is emphasized in Article 194(3)(a) as a specific form of pollution.[[100]](#footnote-100) Although UNCLOS does not specify exactly what substances fall into these three categories, carbon dioxide does not, because it poses no health hazard to humans or other species.[[101]](#footnote-101) In other words, carbon dioxide is not considered to be an air pollutant, as it occurs naturally in the air.[[102]](#footnote-102)

In addition, “toxic” must be interpreted contextually to include substances harmful to both humans and other marine life forms.[[103]](#footnote-103) Since the “toxic, harmful or noxious” are juxtaposed, they should all be interpreted as substances that pose a threat or are harmful to the health of humans or other species. Since carbon dioxide does not have toxic or harmful effects, it should not be categorized as “toxic, harmful or noxious substances” under Article 194(3) and Hagatana has not breached its obligation.

### Hagatana did not violate the obligation to prevent transboundary harm under Article 194(2) of UNCLOS.

States are obligated to ensure that activities within their jurisdiction or control do not cause harm to other States in accordance with Article 194 of UNCLOS.[[104]](#footnote-104) To prove transboundary harm, the following cumulative requirements shall be satisfied, which are transboundary movement, significant impact, and causation.[[105]](#footnote-105) Hagatana has not violated the obligation to prevent transboundary harm because **[a]** its action did not cause transboundary movement; **[b]** the impact of Hagatana’s activities was not significant; **[c]** no causation existed between Hagatana’s activities and the alleged harm.

#### Hagatana’s action did not cause transboundary movement.

Transboundary movements stress that acts under the jurisdiction or control of one State cause consequences in the area under the jurisdiction or control of a neighboring State.[[106]](#footnote-106) The high seas are not subject to the jurisdiction or control of any State.[[107]](#footnote-107)

In this case, the industrial production of Hagatana was carried out in its territory. Additionally, the South Gentle Ocean, which was affected by ocean warming, sea level rise and ocean acidification, belongs to the high seas. Hagatana did not cause consequences for areas under the control of other States. Consequently, the actions of Hagatana did not cause the movement of damage.

#### The impact of Hagatana’s activities was not significant.

Established State practices have shown that three elements need to be considered in determining whether an act of a State causes significant effects. They are the degree of effect, the environmental context, and the likelihood.[[108]](#footnote-108) The impacts of Hagatana’s activity were not significant because the criteria of **[i]** environmental context and **[ii]** the degree of effect were not satisfied.

##### The criterion of environmental context was not satisfied.

The criterion of “environmental context” indicates that the activities are located in or close to an area of special environmental sensitivity.[[109]](#footnote-109) Since there is no evidence showing that Hagatana’s activities were conducted in an environmentally sensitive area in the present case, the criterion of environmental context was not satisfied.

##### The criterion of the degree of effect was not satisfied.

The criterion of “effect” refers to the nature of the potential impacts that are likely to result from the actions.[[110]](#footnote-110) The degree of “effects” of transboundary harm shall be at least real and actual.[[111]](#footnote-111) It requires effects can be measured by factual standards and that the claimant should identify precise harm.[[112]](#footnote-112) Or in other words, effects must be proved by reliable scientific evidence.[[113]](#footnote-113)

In this case, there is no scientific evidence suggesting that the deterioration of climate in Tagan was influenced by Hagatana’s activities. Additionally, there is no statistical data to support a relationship between the sinking of Kapalua and Hagatana’s behavior.[[114]](#footnote-114) As a result, the criterion of the degree of effect was not satisfied.

#### No causation existed between Hagatana’s activities and the alleged harm.

Causation requires clear and convincing evidence to establish a link between the alleged harm and the questioned activity.[[115]](#footnote-115) The burden of proof lies on the claimant States.

In this case, Tagan has claimed that Hagatana’s actions caused ocean warming, sea level rise and ocean acidification. However, Tagan only made an inadequate analysis and it was not sufficient to prove that the ocean warming, sea level rise and ocean acidification were caused by the emission activities of Hagatana rather than other countries or global greenhouse-gasses. Therefore, there is no reason to infer that causation existed between Hagatana’s activities and the alleged harm.

### Tagan should take overall responsibility for not fulfilling the obligation under Article 194(5) to protect the living marine environment.

According to Article 194(5),[[116]](#footnote-116) measures taken by States should protect ecosystems and the habitat of marine life. Moreover, States should fulfill their obligations in good faith and not abuse their rights.[[117]](#footnote-117) The Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA) establishes obligations for coastal States to maintain the sustainability of fish stocks, protect marine biodiversity and provide for effective monitoring, control and surveillance to implement and enforce conservation measures.[[118]](#footnote-118)

In this case, coral and yellowfin tuna, as living organisms in the waters of Tagan, are protected as part of Tagan’s obligations under UNCLOS. As a result of the degradation of the marine environment, the deaths of yellowfin tuna and the bleaching of coral demonstrate Tagan’s failure to take effective measures to protect rare and fragile ecosystems and marine environments. However, Tagan imposes its obligations on Hagatana and, by doing so, accuses Hagatana of violating its commitments under UNCLOS and of breaching the requirement to fulfill its obligations in good faith. Therefore, Tagan’s claim that Hagatana was liable for breaching its UNCLOS commitments was unfounded.

## Hagatana did not breach the “duty not to transfer damage or hazards or transform one type of pollution into another” under Article 195.

Hagatana has not breached the obligation under Article 195, because **[1]** Hagatana did not transfer damage from one area to another; **[2]** Hagatana did not transform one kind of pollution into another.

### Hagatana did not transfer damage from one area to another.

The purpose of the “not to transfer damage from one area to another”[[119]](#footnote-119) stipulated in UNCLOS is to prevent the transfer of national pollution to other countries’ sovereign areas or high seas, etc.[[120]](#footnote-120) To formulate this duty in a positive way, the acting State shall contain the pollution within the affected area, as far as possible.[[121]](#footnote-121)

In this particular case, Hagatana’s industrial activities were exclusively conducted within its national territory, and its conduct did not extend the repercussions of its industrial production to the high seas or the sovereign areas of Tagan.[[122]](#footnote-122) Regrettably, Tagan has failed to provide adequate clarifications on this matter.

### Hagatana did not transform one kind of pollution into another.

“Transform” refers to the change in composition or structure of the substance(s) that is causing the respective marine pollution.[[123]](#footnote-123) The transformation into “another type” of pollution does not only mean the transformation of a substance in energy (or vice versa) but also the transformation from a liquid into a solid state and/or any physical or chemical change that does not eliminate or strongly reduce the polluting character of the substance.[[124]](#footnote-124)

Based on the preceding discussion, it is evident that no evidence exists to substantiate a causal link between Hagatana’s actions and the ocean pollution experienced by Tagan. Consequently, there is a lack of evidence to support the notion that Hagatana’s emission of GHG directly translates into a specific form of pollution in the ocean.

## Hagatana did not violate the obligation to prevent, reduce and control pollution of the marine environment from land-based sources under Article 207 of UNCLOS.

According to UNCLOS, States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources.[[125]](#footnote-125) As for the term “land-based sources”, it means “point and diffuse sources on land from which substances or energy reach the maritime area by water, through the air, or directly from the coast”[[126]](#footnote-126). The “land-based sources” include sources associated with any deliberate disposal under the sea bed made accessible from land by tunnel, pipeline or other means and sources associated with man-made structures placed, in the maritime area under the jurisdiction of a Contracting Party, other than for the purpose of offshore activities.[[127]](#footnote-127) The composition of land-based pollution typically encompasses various sources such as rivers, estuaries, pipelines, or outfall structures.[[128]](#footnote-128)

In this case, however, there is no evidence that Hagatana caused pollution in the South Gentle Ocean through land-based structures. Therefore, Hagatana cannot be considered to have violated its obligations under Article 207.

## Hagatana did not breach the obligation to prevent, reduce and control pollution of the marine environment from or through the atmosphere under Article 212 of UNCLOS

Although Article 212 requires States to “prevent, reduce and control pollution of the marine environment from or through the atmosphere”[[129]](#footnote-129), the scope of application of this article is limited to “the air space under their sovereignty and to vessels flying their flag or vessels or aircraft of their registry”[[130]](#footnote-130).

In this case, as it has been demonstrated before, GHG, including carbon dioxide, cannot be judged as pollutants under UNCLOS.[[131]](#footnote-131) Additionally, there is no mention of Hagatana emitting pollutants into the atmosphere by ships or aircraft. As a result, Hagatana did not breach its obligations under Article 212.

# HAGATANA DID NOT BREACH ITS OBLIGATIONS UNDER THE UNCLOS BY UNDERTAKING DATA-COLLECTION ACTIVITIES IN THE EEZ AND ON THE CONTINENTAL SHELF OF TAGAN.

Hagatana did not breach its obligations under the UNCLOS by undertaking data-collection activities in the EEZ and on the continental shelf of Tagan because **[A]** Tagan did not own sovereign rights over the EEZ and continental shelf of the Kapalua archipelago; **[B]** Hagatana’s data-collection activities were consistent with UNCLOS.

## Tagan did not own sovereign rights over the EEZ and continental shelf of the Kapalua archipelago.

Tagan did not own sovereign rights over the EEZ and continental shelf of the Kapalua archipelago because **[1]** Tagan could not claim EEZ and continental shelf over the remaining insular features of Kapalua archipelago considering Article 121(3) under the UNCLOS; **[2]** ambulatory baselines should be adopted in this case and this makes Tagan lose the Kapalua archipelago’s EEZ and continental shelf; **[3]** the outer continental shelf of Tagan was not established with validity due to the absence of necessary procedural preconditions under the UNCLOS.

### Tagan could not claim EEZ and continental shelf over the remaining insular features of Kapalua archipelago considering Article 121(3) under the UNCLOS.

According to Article 121(3), rocks which cannot sustain human habitation or economic life of their own shall have no EEZ or continental shelf.[[132]](#footnote-132) The purpose of Article 121 (3), restricting the maritime entitlements of certain rock islands, was to contribute to a more equitable distribution of the resources of the sea.[[133]](#footnote-133) This purpose has been shown in negotiations leading to UNCLOS. During this process, it was determined that claims of coastal States’ jurisdiction over coastal waters made sense with regard to the living and nonliving resources of these coastal waters, because of the need of the coastal peoples for these resources and their likely ability to manage and conserve these resources effectively.[[134]](#footnote-134) As a result, the key factor under which a feature would be granted an EEZ and continental shelf according to Article 121 is whether it can sustain human habitation and economic life of its own or not.[[135]](#footnote-135)

In the present case, the Kapalua archipelago could no longer sustain human habitation or economic life of its own.[[136]](#footnote-136) Considering the key factor of granting an EEZ and continental shelf, though Kapalua archipelago’s remaining insular features above water at high tide could not be considered as the rocks within the meaning of Article 121 of UNCLOS,[[137]](#footnote-137) Tagan could not claim EEZ and continental shelf over the remaining insular features of Kapalua archipelago.

### Ambulatory baselines should be adopted in this case, and this makes Tagan lose the Kapalua archipelago’s EEZ and continental shelf.

Based on divergence on whether baselines will shift due to coastal realignment[[138]](#footnote-138) or not, baselines can be divided into ambulatory and permanent baselines. Though archipelagic baselines have been adopted,[[139]](#footnote-139) ambulatory baselines are supposed to be applied in this case because **[a]** ambulatory baselines should be adopted considering the principle of “land dominates the sea”;**[b]** baselines should be understood as ambulatory in existing provisions of UNCLOS; **[c]** multiple State practices confirmed the ambulatory nature of baselines in UNCLOS; **[d]** ambulatory baselines led to the loss of Kapalua archipelago’s EEZ and continental shelf.

#### Ambulatory baselines should be adopted considering the principle of “land dominates the sea”.

As elaborated by ICJ, the principle of “land dominates the sea” signifies “maritime rights derived from the coastal State’s sovereignty over the land”.[[140]](#footnote-140) It indicates that the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it.[[141]](#footnote-141) So, as the land basis changes, maritime entitlements should change to reflect the new physical reality.[[142]](#footnote-142) Since the baselines constitute the starting point for measuring the breadth of the coastal State’s maritime zones,[[143]](#footnote-143) any change in the coastline would substantially shift baselines.[[144]](#footnote-144) This principle forms the theoretical foundation for ambulatory baselines. As the title of a State to the continental shelf and EEZ is based on the projection of the coasts or the coastal fronts,[[145]](#footnote-145) the continental shelf and EEZ which are drawn from baselines share the same ambulatory quality with baselines.[[146]](#footnote-146)

In addition, the principle of “land dominates the sea” is the fundamental principle followed by the allocation and adjustment of maritime rights of countries in modern international maritime law,[[147]](#footnote-147) which includes UNCLOS.[[148]](#footnote-148) And this principle has now developed into a general principle of international law through customary international law.[[149]](#footnote-149) As a result, the principle of “land dominates the sea” should be considered under UNCLOS.

In the present case, since the Kapalua archipelago is now mostly submerged,[[150]](#footnote-150) Tagan’s coast of territory, which is the decisive factor for maritime rights, has changed significantly. As a result, ambulatory baselines should be adopted in accordance with the coastal change of Tagan, which would result in the change of maritime rights.

#### Baselines should be understood as ambulatory in existing provisions of UNCLOS.

According to Article 5 of UNCLOS, the normal baseline is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.[[151]](#footnote-151) To fully interpret this, ordinary meaning shall be given in a certain context as stipulated in Article 31 of the VCLT.[[152]](#footnote-152) Subject to the original wording of Article 5, it should be interpreted as “the normal baseline is constituted by the low-water line along the coast”[[153]](#footnote-153). As a result, there is no doubt that changes in the shoreline result in changes in the baselines.[[154]](#footnote-154) This shows that normal baselines are ambulatory. Additionally, the International Law Association’s Baselines Committee also affirmed the dominance of the ambulatory theory of baselines in scholarship in its work on the identification of the existing law on the normal baseline.[[155]](#footnote-155)

The other options provided by UNCLOS which are rather exceptions to the normal baseline can only be applied in certain circumstances, whereas the normal baseline is applicable in all circumstances.[[156]](#footnote-156) For example, while the State may choose to apply normal baselines in all circumstances described in Article 7, conversely Article 7 cannot be applied everywhere where normal baseline is applied.[[157]](#footnote-157) As a result, baselines under UNCLOS should be treated as ambulatory baselines considering normal baselines. This also corresponds with the “widely accepted”[[158]](#footnote-158) ambulatory understanding of baselines in the existing law.[[159]](#footnote-159)

In the present case, the baselines of Tagan should be understood as ambulatory considering the regime of baselines under UNCLOS.

#### Multiple State practices confirmed the ambulatory nature of baselines in UNCLOS.

Noting that UNCLOS currently has 169 Parties and 139 of which are coastal States,[[160]](#footnote-160) State practice in respect of baselines and maritime zones is likely to be referred to while understanding the provisions of UNCLOS.[[161]](#footnote-161)

There have been many Parties of UNCLOS expressly taking up the language of the ambulatory baselines developed in scholarly literature.[[162]](#footnote-162) For example, the United Kingdom has stated ambulatory baselines in its domestic legislation.[[163]](#footnote-163) The Netherlands also claims that “the practice of the Kingdom of the Netherlands concerning ambulatory baselines”[[164]](#footnote-164). Since State practices in respect of baselines can be referred to while understanding provisions of UNCLOS, ambulatory baselines in former State practices should be adopted in this case.

#### Ambulatory baselines led to the loss of Kapalua archipelago’s EEZ and continental shelf.

The drawing of archipelagic baselines shall not depart to any appreciable extent from the general configuration of the archipelago.[[165]](#footnote-165) This provision aimed at cutting down on excessive archipelagic baseline claims.[[166]](#footnote-166)

In the present case, the Kapalua archipelago’s remaining insular features above water at high tide can neither be considered to be an island, nor rock within the meaning of Article 121 of UNCLOS.[[167]](#footnote-167) Since ambulatory baselines should be adopted, the baselines of Tagan had to be drawn according to new circumstances. However, if the remaining part of the Kapalua archipelago would be adopted while drawing the new archipelagic baselines, it would depart to an appreciable extent from the general configuration of the archipelago.[[168]](#footnote-168) Moreover, the remaining insular features of Kapalua archipelago itself cannot be granted EEZ and continental shelf under UNCLOS.[[169]](#footnote-169) As a result, Tagan’s newly drawn baselines would lead to its loss of the Kapalua archipelago’s EEZ and continental shelf.

### The outer continental shelf of Tagan was not established with validity due to the absence of necessary procedural preconditions under the UNCLOS.

Pursuant to Article 84, the outer limits of the continental shelf shall be deposited to the Secretary-General of the Authority to validly establish the continental shelf.[[170]](#footnote-170) Such obligation can be seen as a derivation from the relationship between the outer limits of the continental shelf and the Area under Article 76(9), which is “the limits of the Area are the outer limits of the continental shelf”[[171]](#footnote-171). Specifically, as provided, the limits of the Area are those that are drawn on the charts or specified in the lists of geographical coordinates showing the outer limits of the continental shelf.[[172]](#footnote-172)

In the present case, Tagan has not deposited the respective charts or lists with the Secretary General of the Authority according to UNCLOS.[[173]](#footnote-173) Consequently, the establishment of Tagan’s outer continental shelf should not be considered valid since Tagan did not fulfill its obligation of following the procedure requirements under UNCLOS.

## Hagatana’s data-collection activities were consistent with UNCLOS.

Hagatana’s hydrographic surveying activities were consistent with UNCLOS because **[1]** they occurred on the high seas and fell within the scope of the freedom of the high seas; **[2]** even if they were considered to take place within the EEZ and continental shelf of Tagan, Hagatana did not violate the obligations under UNCLOS since its activities fulfilled other internationally lawful uses of the sea.

### Hagatana’s activities occurred on the high seas and fell within the scope of the freedom of the high seas.

According to Article 87 of UNCLOS, every State has the freedom to navigate and conduct activities on the high seas.[[174]](#footnote-174) This is a persistent and inalienable right paradigm.[[175]](#footnote-175) In this case, Hagatana’s activities took place on the high seas and fell in the scope of the freedom of the high seas, given that **[a]** Hagatana’s activities occurred on the high seas; **[b]** Hagatana’s activities fell within the scope of freedom of the high seas; **[c]** Hagatana complied with the obligation of “due regard” as stipulated in UNCLOS.

#### Hagatana’s activities occurred on the high seas.

UNCLOS has defined the specific boundaries of the high seas, which are extending 200 nautical miles from the baselines.[[176]](#footnote-176) As mentioned earlier, considering the procedural requirements under UNCLOS and the regime of ambulatory baselines,[[177]](#footnote-177) the EEZ and continental shelf of the Kapalua archipelago have already become the high seas and the Area. Consequently, the rights claimed by Tagan concerning the maritime areas in question have been forfeited. Hagatana’s activities were conducted on the high seas in this case.

#### Hagatana’s activities fell within the scope of freedom of the high seas.

Article 87 of UNCLOS provides for extensive freedom of the high seas,[[178]](#footnote-178) which indicates two principal implications, namely, freedom from national jurisdiction and freedom of activities, with the latter guaranteeing the right of every State to enjoy the use of the high seas.[[179]](#footnote-179) Specifically, Article 87(1)(a) of UNCLOS provides that all States shall have the freedom of navigation on the high seas.[[180]](#footnote-180) “Navigation” means “the movement of the ship”.[[181]](#footnote-181) “Freedom of navigation” means “any State that the ships flying its flag sail through the high seas without physical or material interference from any other State”.[[182]](#footnote-182)

In the present case, the vessels conducting hydrographic surveying activities are flagged vessels of Hagatana.[[183]](#footnote-183) Additionally, since hydrographic surveying activities should be defined as “the science of measuring and depicting those parameters necessary to describe the precise nature and configuration of the sea-bed and coastal strip, its geographical relationship to the land mass, and the characteristics and dynamics of the sea”[[184]](#footnote-184), Hagatana would not cause any physical or material interference to Tagan while conducting hydrographic surveys. Consequently, Hagatana’s activities fell within the scope of freedom of the high seas under Article 87 of UNCLOS.

#### Hagatana complied with the obligation of “due regard” as stipulated in UNCLOS.

Article 87(2) of UNCLOS requires that all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under UNCLOS with respect to activities in the Area.[[185]](#footnote-185) The requirement of “due regard” entails that all States take into account the interests of other coastal States and refrain from taking actions that would adversely affect them.[[186]](#footnote-186) Additionally, the common interests of the international community on the high seas should be considered.[[187]](#footnote-187) Besides, it is also important to understand “due regard” according to the purpose and object adopted in the Preamble of UNCLOS,[[188]](#footnote-188) which means such activities must be “peaceful” or for “peaceful purposes”.[[189]](#footnote-189)

As demonstrated above,[[190]](#footnote-190) Hagatana has reasonably exercised its freedom on the high seas without causing any adverse effects on the interests of coastal States and the international community.[[191]](#footnote-191) Additionally, since hydrographic surveys are for survey and navigation purposes,[[192]](#footnote-192) the objects of Hagatana’s activities should be understood as “peaceful”. Therefore, Hagatana has complied with the obligation of “due regard”.

### Even if Hagatana’s activities took place within the EEZ and continental shelf of Tagan, Hagatana did not violate the obligations under UNCLOS since its activities fulfilled other internationally lawful uses of the sea.

All States enjoy the other internationally lawful uses of the sea related to freedoms referred to in Article 87 of navigation and overflight and of the laying of submarine cables and pipelines, such as those associated with the operation of ships, aircraft, submarine cables and pipelines, and compatible with the other provisions of UNCLOS.[[193]](#footnote-193) Hagatana’s activities fulfilled other internationally lawful uses of the sea because Hagatana’s activities were **[a]** not marine scientific research (MSR); **[b]** other internationally lawful uses of the sea, which complies with UNCLOS.

#### Hagatana’s activities were not MSR.

##### Hagatana’s activities were not related to any scientific hypotheses.

Generally, MSR is most often used to describe those activities undertaken in ocean and coastal waters aimed to expand scientific knowledge of the marine environment.[[194]](#footnote-194) Since MSR has a nature of science, there needs to be a scientific hypothesis.[[195]](#footnote-195) However, hydrographic surveys are conducted without a clear scientific hypothesis, which differs from MSR.[[196]](#footnote-196)

In the present case, the Hagatanian flagged vessels just conducted several hydrographic surveying activities for collecting hydrographic data.[[197]](#footnote-197) There were no “scientific hypotheses”.[[198]](#footnote-198) Thus, the hydrographic surveying activities of Hagatana did not constitute MSR under UNCLOS.

##### Hagatana did not disseminate the acquired information as MSR requires.

MSR is carried out for peaceful purposes and for the purpose to increase knowledge of the marine environment for the benefit of all mankind.[[199]](#footnote-199) Inasmuch as the MSR is not an end in itself, but is required to further human knowledge of the seas so as to achieve the aims of UNCLOS,[[200]](#footnote-200) the relevance of dissemination of scientific information and of the knowledge acquired from it is self-evident.[[201]](#footnote-201) The results of MSR are required to be made available by publication and dissemination through appropriate channels.[[202]](#footnote-202) As a result, disclosing acquired information can serve as an important standard to identify whether the activities in question are MSR or not. For example, an important difference between the actual practice of military surveys and the provisions concerning MSR is the publication of survey/research results.[[203]](#footnote-203) The information concerning military surveys is confidential, and the results of such surveys, in general, are not disclosed.[[204]](#footnote-204)

In this case, the results of Hagatana’s data-collection activities were not disclosed as MSR requires under UNCLOS. Consequently, Hagatana’s data-collection activities were not MSR.

#### Hagatana’s activities were other internationally lawful uses of the sea, which complies with UNCLOS.

All States enjoy other internationally lawful uses of the sea related to the freedoms of navigation, provided that they are compatible with the other provisions of UNCLOS.[[205]](#footnote-205) This requires that these uses depend on, or are inseparably linked to, one of those freedoms under Article 87 of UNCLOS.[[206]](#footnote-206) In this respect, a sufficiently close relationship shall be invoked between the activity concerned and the freedom of navigation in the present case.

A hydrographic survey is the collection of information in coastal or relatively shallow areas for the purpose of making nautical charts and similar products,[[207]](#footnote-207) aiming at providing data about the present state of the sea and supporting the safety of navigation.[[208]](#footnote-208) The navigation of a vessel inevitably requires the collection of hydrographic data for the purpose of ensuring the safe passage of the vessel itself.[[209]](#footnote-209) Since hydrographic surveys are necessary to be conducted in conjunction with the freedom of navigation, there is no denying that they are closely associated with freedom of navigation.

In the present case, since Hagatana has confirmed that the activities in question were hydrographic surveying activities,[[210]](#footnote-210) Hagatana’s activities were related to freedom of navigation without any doubts. Additionally, though Article 58 (3) obligates all States to have due regard to the rights and duties of the coastal State when exercising other internationally lawful uses of the sea,[[211]](#footnote-211) Hagatana did not breach this obligation as demonstrated above.[[212]](#footnote-212) Consequently, Hagatana exercised other internationally lawful uses of the sea in consistence with UNCLOS.

# HAGATANA DID NOT NEED TO WITHDRAW ITS SPONSORSHIP OF THE HHM GEOLOGICAL SURVEY.

Hagatana did not need to withdraw its sponsorship of the HHM Geological Survey, because **[A]** HHM Geological Survey has the right to explore and exploit the former continental shelf of Tagan; **[B]** Tagan has no right to demand Hagatana withdraw its sponsorship.

## HHM Geological Survey has the right to explore and exploit the former continental shelf of Tagan.

Under UNCLOS, HHM Geological Survey has the right to explore and exploit the former continental shelf of Tagan because **[1]** the continental shelf of Kapalua has become part of the Area; **[2]** HHM Geological Survey has the right to carry out exploration and exploitation activities in the Area.

### The continental shelf of Kapalua has become part of the Area.

According to UNCLOS, the Area is defined as the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction.[[213]](#footnote-213)

As stated above, the continental shelf of the Kapalua archipelago was not Tagan’s continental shelf anymore.[[214]](#footnote-214) As a result, the continental shelf of the Kapalua should now be recognized as part of the Area consistent with UNCLOS.[[215]](#footnote-215)

### HHM Geological Survey has the right to carry out exploration and exploitation activities in the Area.

As a state enterprise, HHM Geological Survey has the right to carry out exploration and exploitation activities in the Area, as **[a]** the Area and its resources are the common heritage of mankind; **[b]** HHM Geological Survey is eligible to be the subject of the application.

#### The Area and its resources are the common heritage of mankind.

The Area and its resources are the common heritage of mankind,[[216]](#footnote-216) all rights in the resources of the Area are vested in mankind as a whole.[[217]](#footnote-217) States Parties, enterprises, and natural persons may apply as applicants for activities in the Area.[[218]](#footnote-218)

In the case at hand, the continental shelf of Kapalua is now the Area. Thus, HHM Geological Survey, as a state enterprise,[[219]](#footnote-219) is fully entitled to apply as the applicant for activities in the Area.

#### HHM Geological Survey is eligible to be the subject of the application.

Activities in the Area can be carried out by state enterprises if they meet the requirements under UNCLOS.[[220]](#footnote-220) Specifically, exploration and exploitation are conditional upon an approved plan of work and are to be conducted in accordance with it.[[221]](#footnote-221) As for the applications for approval from ISA of work for exploration, when it comes to the state enterprises, each application shall be accompanied by a certificate of sponsorship issued by the State of which it is national.[[222]](#footnote-222)

In the present case, HHM Geological Survey obtained sponsorship from Hagatana,[[223]](#footnote-223) which is a State Party of UNCLOS.[[224]](#footnote-224) This shows that the application from HHM Geological Survey meets the requirements of Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, adopted by the ISA in 2013.[[225]](#footnote-225) Accordingly, HHM Geological Survey is eligible to be the subject of the application under UNCLOS, to carry out exploration and exploitation in the Area.

## Tagan has no right to demand Hagatana withdraw its sponsorship.

Tagan has no right to demand Hagatana withdraw its sponsorship because **[1]** the activities of HHM Geological Survey could not be attributed to Hagatana; **[2]** even if the activities were attributed to Hagatana, Tagan has no right to interfere with Hagatana’s lawful actions according to the principle of sovereign equality of States in international law.

### Tagan has no right to make a request to Hagatana since the activities of HHM Geological Survey could not be attributed to Hagatana.

According to ARSIWA, the conduct of a group shall be considered an act of a State under international law if the group is in fact acting under the direction or control of that State in carrying out the conduct.[[226]](#footnote-226) However, the conducts of corporate entities, which are usually considered separate entities, are not automatically attributed to the State.[[227]](#footnote-227) Even though it is a state-owned company, the fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity.[[228]](#footnote-228) As for the degree of direction or control, ICJ has confirmed that the mere provision of allowances or support is not sufficient to attribute the actions to the State in former cases.[[229]](#footnote-229)

In this case, HHM Geological Survey, as a state-owned company,[[230]](#footnote-230) has a separate legal personality. Furthermore, Hagatana just sponsored the HHM Geological Survey,[[231]](#footnote-231) instead of commanding or controlling it. As a result, activities of the HHM Geological Survey could not be considered acts of Hagatana. They were independent decisions and actions of the company. Therefore, Tagan cannot request Hagatana to withdraw its sponsorship.

### Even if the activities were attributed to Hagatana, Tagan has no right to interfere with Hagatana’s lawful actions according to the principle of sovereign equality of States in international law.

Even if the activities were attributed to Hagatana, Tagan still has no right to interfere with Hagatana’s lawful actions because **[a]** according to the principle of sovereign equality of States in international law, a State has no right to interfere with the lawful acts of another State; **[b]** HHM Geological Survey’s application was internationally lawful; **[c]** even if the proposed work plan was unlawful, Tagan has no right to request Hagatana to withdraw its sponsorship before the plan is implemented.

#### According to the principle of sovereign equality of States in international law, a State has no right to interfere with the lawful acts of another State.

The principle of sovereign equality of States requests that all the States have equal rights and duties, and are equal members of the international community.[[232]](#footnote-232) Sovereign equality includes States are judicially equal.[[233]](#footnote-233) Specifically, it means that sovereign States are not subordinate to any external authority and therefore may act in any way they choose so long as they do not contravene an explicit prohibition of international law.[[234]](#footnote-234) As a result, a State has no right to interfere with the lawful acts of another State.

Since the principle of sovereign equality of States has been recognized as one of the international law principles,[[235]](#footnote-235) it should be applied in this case.

#### HHM Geological Survey’s application was internationally lawful.

According to UNCLOS, the Area, as a common heritage of mankind, is open to all States, and state enterprises have the right to explore and exploit it in a peaceful manner.[[236]](#footnote-236)

In this case, based on the earlier discussion, as the continental shelf of the Kapalua archipelago has become the Area, Tagan has no sovereign rights over its exploration and exploitation, which means Tagan could not interfere with other entities exercising their rights to explore and exploit the Area in accordance with international law. This corresponds with the principle of sovereign equality of States. Moreover, since the application was made in accordance with the requirements under UNCLOS,[[237]](#footnote-237) HHM Geological Survey’s application, which was attributed to Hagatana, was internationally lawful. Tagan could not interfere with this lawful action, which is also based on the principle of sovereign equality of States.

#### Even if the proposed work plan was unlawful, Tagan has no right to request Hagatana to withdraw its sponsorship before the plan is implemented.

According to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, adopted by the ISA in 2013, the Legal and Technical Commission has the authority to review applications submitted by contracting States, and it has the discretion to reject applications that do not comply with the regulations.[[238]](#footnote-238) Article 14 of ARSIWA provides that a State’s breach of an international obligation requiring it to prevent a specific event begins at the moment when the event occurs.[[239]](#footnote-239) The preparatory acts before the unlawful act cannot be equated with the unlawful act itself.[[240]](#footnote-240) The unlawfulness of an act commences when it “occurs”.[[241]](#footnote-241)

In the present case, the work plan is currently at the application stage.[[242]](#footnote-242) Since there is no evidence showing that the application has been approved by ISA, whether the work plan can be implemented or not remains uncertain. The work plan has not occurred yet in fact and the application of HHM Geological Survey should be understood as a preparatory act at most. However, the application was lawful as has been demonstrated above. Therefore, even if the implementation of the plan may be unlawful, Tagan has no right to accuse Hagatana of unlawful conduct that has not occurred yet and prevent the work plan from being implemented by requesting Hagatana to withdraw the sponsorship.

# PRAYER FOR RELIEF

The Commonwealth of Hagatana respectfully requests the Tribunal to adjudge and declare that:

**Ⅰ.** The Tribunal has no jurisdiction or admissibility over this case.

**Ⅱ.** Hagatana does not have any responsibility for the deleterious effects that result from climate change.

**Ⅲ.** Hagatana has not breached its international commitments under the UNCLOS to protect and preserve the marine environment in relation to the impacts of climate change.

**Ⅳ.** Hagatana has not breached its obligations under the UNCLOS by undertaking data collection activities in the EEZ and on the continental shelf of Tagan.

**Ⅴ.** Hagatana does not need to withdraw its sponsorship of the HHM Geological Survey.

Respectfully submitted,

Agents for Respondent

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