

## *Draft*

### *The South China Sea Arbitral Award: A Triumph for Part XII of UNCLOS and the Protection and Preservation of the Marine Environment\**

#### *Introduction*

Rare has a decision been so anticipated as that of the arbitral award handed down by the Permanent Court of Arbitration (PCA) on 12 July 2016 in “*In the Matter of the South China Sea Arbitration*” between the Republic of the Philippines and the People’s Republic of China.<sup>1</sup> Both China and the Philippines are parties to the United Nations Law of the Sea Convention (UNCLOS)<sup>2</sup> and subject to its compulsory dispute provisions under Part XV. The Philippines filed arbitral proceedings against China under Annex VII of UNCLOS on 22 January 2013 with the Permanent Court of Arbitration in The Hague. The Philippines put forth a host of issues concerning Chinese claims and actions in the South China Sea, including environmental claims. China refused to acknowledge jurisdiction of the proceedings and did not make any appearance or direct submissions to the Tribunal. The final award was unanimously written.<sup>3</sup> The arbitral award is a significant addition to a chain of international cases addressing environmental issues, including protection of the marine environment.

Without doubt, one of the key contributions of UNCLOS was Part XII on the protection of the marine environment. The 1958 Geneva Convention on the High Seas<sup>4</sup> had also included provisions on pollution-prevention but the scope of these provisions were limited. Additionally, the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas<sup>5</sup>

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<sup>1</sup> *In re* Arbitration Between the Republic of the Philippines and the People’s Republic of China, PCA Case No. 2013-19, Award (Aug. 12, 2016), at <http://www.pca-cpa.org> [hereinafter Award]. For overview of the Award see Lucy Reed and K. Wong, “Marine Entitlements in the South China Sea: In Re *Arbitration Between the Republic of the Philippine and the Republic of China*”, 110 AJIL (Oct. 2016)

<sup>2</sup> United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 UNTS 397, available at <http://www.un.org/depts/los/> [hereinafter UNCLOS].

<sup>3</sup> The members of the Tribunal were Judges Thomas A. Mensah (President), Jean-Pierre Cot, Stanislaw Pawlak, Alfred H. Soons, and Rüdiger Wolfrum

<sup>4</sup> Convention on the High Seas, 29 Apr. 1958, 450 UNTS. 11; Convention on the Continental Shelf, 29 Apr. 1958, 499 U.N.T.S. 311; Convention on Fishing and Conservation of the Living Resources of the High Seas, 29 Apr. 1958, 559 U.N.T.S. 285.

<sup>5</sup> Convention on Fishing and Conservation of the Living Resources of the High Seas, 29 Apr. 1958, 559 U.N.T.S. 285.

introduced a number of progressive provisions on the conservation of living resources including a duty on all States to adopt measures for the conservation of the living resources of the high seas either individually or in cooperation with other States (Article 1.2). However, it was under Part XII of UNCLOS that for the first time an integrated and holistic framework for the protection of the marine environment was established that included a general obligation to protect and preserve the marine environment under Article 192, as well as more specific activities-based obligations.<sup>6</sup> However, similar to the 1958 Geneva Conventions, conservation of marine living resources was addressed separately, in Part V on the exclusive economic zone and Part VI on the continental shelf. Despite its expansive approach to the protection of the marine environment, UNCLOS was principally pollution-oriented. Furthermore, UNCLOS was adopted before the 1992 United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro, where new principles such as the precautionary approach and ecosystem based management, and concepts as biological diversity were introduced. Consequently, when UNCLOS entered into force in 1994, it risked being outdated. The challenge facing this historic achievement for international law comprised of 320 articles negotiated over a period of nine years, was to be able to maintain its relevance in a quickly developing arena of international environmental law. The role of international adjudicative bodies consequently is of significance for the interpretation and application of UNCLOS, the “Constitution of the oceans.”

The arbitral award is precedent-setting on a number of fronts, including the Tribunal’s clear pronouncements on the nature of the obligation of States to protect and preserve the marine environment under Part XII. Moreover, the award has affirmed the dynamic nature of UNCLOS as well as the indispensable role of international courts and tribunals to ensure the dynamism, adaptability and longevity of the “Constitution of the Oceans”. The recent South China Seas Award has allowed for judicial interpretation to fill gaps and make the necessary linkages that allows UNCLOS to respond to marine environmental issues.

### **Factual summary**

Measuring 3.2 million km<sup>2</sup> the South China Sea is bordered by China, Indonesia, Malaysia, Vietnam, the Philippines and Taiwan. It lies at the crossroads of one of the most important

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<sup>6</sup> Edward L. Miles, “The Concept of Ocean Governance: Evolution Toward the 21st Century and the Principle of Sustainable Ocean Use,” 27 *Coastal Management* (1999) 1–30.

maritime routes for international commerce and is also a sea known for its high level of biodiversity.<sup>7</sup> As explained by the Philippines, this area which is known as the “rainforest of the seas” holds some 7% of the world’s coral reefs, which provide critical habitat for many species. The Southern Sector, in particular, is reputed for having the “highest diversity of reef-building corals in the world.”<sup>8</sup> The South China Sea, which is categorized by UNEP as Large Marine Ecosystem (LME) is important for fisheries, which includes flying fish, tuna, billfish, mackerel, shark, shrimp, reef fish, herring, sardine and anchovy.<sup>9</sup> The high demand for fish has resulted in the full exploitation of fish stocks<sup>10</sup>, which according to the U.S. National Oceanic and Atmospheric Administration has made the area at risk of “severe overexploitation”.<sup>11</sup> In addition, to the information provided in the Philippine’s submissions, other oceanic migratory pelagic species such as tuna, sharks and billfish have also been identified as being overexploited.<sup>12</sup> Based on UNEP studies of the South China Sea, the lack of bycatch exclusion devices has resulted in a very high level of bycatch. Furthermore, there has been extensive capture of rare, threatened or endangered species such as sea turtles and dugong.<sup>13</sup>

Moreover, as revealed during the course of the case before the Arbitral Tribunal, the destruction of coral reefs in the South China Sea by Chinese fishing vessels for giant clam extraction in particular, and also by China in its land reclamation and island building activities is at unprecedented levels. The use of boat -propellers to break the coral to extract giant clams in the Spratly Islands caused “near-complete destruction of the affected reef areas”.<sup>14</sup> Additional destruction to the reefs resulted from massive land reclamation and island building activities as China began to use heavy ‘cutter-suction dredge’ equipment and created more than *12.8 million m<sup>2</sup>* of new land in less than three years.

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<sup>7</sup> S. Heilman, VIII-15 South China Sea: LME #36 - Large Marine Ecosystems, available at [http://lme.edc.uri.edu/images/Content/LME\\_Briefs/lme\\_36.pdf](http://lme.edc.uri.edu/images/Content/LME_Briefs/lme_36.pdf)

<sup>8</sup> Memorial para. 2.16

<sup>9</sup> Memorial, para. 2.15

<sup>10</sup> Id. (Citing Liana Talaue-McManus, Transboundary Diagnostic Analysis for the South China Sea, EAS/RCU Technical Report Series No. 14, United Nations Environment Programme (2000), p. 40. MP, Vol. VIII, Annex 266; U.N. Food and Agriculture Organization, Fisheries and Aquaculture Department, The State of World Fisheries and Aquaculture 2012 (2012), p. 59. MP, Vol. IX, Annex 302)

<sup>11</sup> Id. (Citing S. Heileman, “South China Sea”, Large Marine Ecosystems of the World, Brief No. 36 (2009), p. 5. MP, Vol. IX, Annex 286.)

<sup>12</sup> S. Heileman, “South China Sea”, Large Marine Ecosystems of the World, Brief No. 36 (2009), p. 7. Available at [http://lme.edc.uri.edu/images/Content/LME\\_Briefs/lme\\_36.pdf](http://lme.edc.uri.edu/images/Content/LME_Briefs/lme_36.pdf)

<sup>13</sup> Id.

<sup>14</sup> Expert report of Dr. rer. nat. Sebastian C.A. Ferse, Professor Peter Mumby, PhD and Dr. Selina Ward, PhD, “Assessment of the potential environmental consequences of construction activities on seven reefs in the Spratly Islands in the South China Sea” p. 9

## **Sovereignty and maritime claims**

The South China Sea is home to a region of competing maritime claims among China, Taiwan, Vietnam, Malaysia, and the Philippines. China refused to participate directly in the proceedings. China set forth its position through indirect means, notably in Position Paper 7 asserting that the Tribunal lacked jurisdiction over the entire case based on two reasons: first that subject matter of the arbitration entailed sovereignty issues that fell outside the scope of UNCLOS and second, even if the matter did fall within the purview of UNCLOS it fell within the declaration filed by China excluding maritime delimitation from the compulsory dispute provisions of the Convention.<sup>15</sup>

The Philippines countered that the obligation to protect the marine environment was not dependent on deciding questions of sovereignty over the features in question and that the issue instead was whether China exercised “jurisdiction or control over the harmful fishing practices, the land creation and the construction activities which threaten the marine environment at those locations and elsewhere in the South China Sea.”<sup>16</sup> The Tribunal agreed with the Philippines stating that environmental obligations in Part XII apply to states *irrespective of where the alleged harmful activities take place* and was not contingent upon a determination of questions of sovereignty over any particular feature, or determination of the status of any maritime feature, on the existence of an entitlement by China or the Philippines to an exclusive economic zone in the area, or on the prior delimitation of any overlapping entitlement.<sup>17</sup> In other words, obligation to protect the environment is an independent obligation that rests on its own legal footing. The Tribunal further rejected any claim of exclusion from compulsory dispute resolution due to law enforcement activities for fishing activities around Scarborough Shoal and Second Thomas Shoal under Article 298(1)(b),<sup>18</sup> and military activities exception for island-construction activities.<sup>19</sup>

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<sup>15</sup> Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, 2014/12/07. Available at [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1217147.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml).

<sup>16</sup> Para. 892

<sup>17</sup> Para. 927

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<https://www.asil.org/sites/default/files/Oral%20%20E2%80%9CRocks%E2%80%9D%20or%20E2%80%9CIslands%E2%80%9D.pdf>

<sup>19</sup> Para. 938. The Tribunal noted that China had repeatedly claimed its activities to be for civilian purposes.

The Tribunal emphasized the applicability of Part XV for disputes on the protection of the marine environment under Article 298(1)(c).<sup>20</sup>

The Tribunal's surgical separation of disputed questions of maritime entitlement from environmental questions is significant in and of itself. The Tribunal did not specify the legal foundation of the environmental claim. For example, Second Thomas Shoal and Mischief Reef were deemed to be low-tide elevations in an area formed part of the Philippine's exclusive economic zone. The Tribunal, on the other hand, concluded that Scarborough Shoal, Cuarteron Reef, Fiery Cross Reef, Johnson Reef, McKennan Reef, and Gaven Reef (North) were high-tide features and characterized them as "rocks" under Article 121(3) of UNCLOS. As rocks they would be subject to appropriation and also entitled to a territorial sea of up to 12-nm under UNCLOS

If environmental claims under UNCLOS are independent of territorial connection, does this mean that the obligations under Part XII addressed by the award are obligations *erga omnes*? Can any party to UNCLOS or any party in a disputed maritime area assert a violation of provisions of Part XII of UNCLOS? This is question that remains unclear and will be discussed further on.

### **Environmental Claims**

The Philippines claimed that China had breached its obligations to protect the marine environment under Part XII of UNCLOS. The Philippines claim included 15 submissions of which submissions 11 and 12 related to China's failure to protect the marine environment. In Submission No. 11 the Philippines alleged that China had tolerated and even encouraged harmful fishing practices and harvesting of endangered species, such as giant clams and sea turtles by Chinese vessels in Scarborough Shoal and Second Thomas Shoal. The Philippines alleged that Chinese fishing vessels used cyanide to kill fish, and also used dynamite to blast rare corals to extract giant clams. Shortly before the hearing on the merits commenced the Tribunal allowed the Philippines to amend Submission 11 based on newly available evidence of island building activities on Scarborough Shoal, Second Thomas Shoal, Cuarteron Reef, Fiery Cross Reef, Johnson Reef, Hughes Reef, Gaven Reef and Subi Reef. The Philippines alleged that these activities were in violation of Articles 123, 192, 194, 197, 205, and 206 of UNCLOS.

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<sup>20</sup> Para. 930.

Submission No. 12 related China's construction activities on Mischief Reef as constituting violations of China's duties to protect and preserve the marine environment. Mischief Reef is located in the EEZ of Philippines.

The Philippines outlined the history of Chinese activities in the South China Sea dating back to the 1990s listing a series of specific events of evidence of harmful fishing activities, giant clam extraction and harvesting of endangered species, as well land construction and land reclamation activities. However, it was made clear that the scope and intensity of Chinese activities in the South China Sea had increasing progressively over the period, and quite significantly after 2013.

The Philippines linked UNCLOS and Part XII to obligations derived from key international conventions for the conservation of biological diversity. The Philippines clarified that it was not alleging China had violated the CBD but that Article 192 and 194(5) were guided by multilateral instruments such as the Convention on Biological Diversity (CBD)<sup>21</sup> and the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES).<sup>22</sup> One of the issues the Tribunal examined was whether the jurisdiction of the Tribunal was preempted by other environmental instruments under Article 281 of UNCLOS, such as the CBD under Article 27.<sup>23</sup>

In regard to CBD the Tribunal noted that although there is overlap between the environmental provisions of UNCLOS and the CBD, "this [did] not mean that a dispute concerning one instrument is necessarily a dispute concerning the other or that the environmental claims brought by the Philippines should instead be considered under the framework of the CBD". Specifically and significantly, in the Award on Jurisdiction, the Tribunal made a most important acknowledgment on the scope of Article 192:

"The Tribunal acknowledges some overlap in the subject matter of Part XII of the Convention and the subject matter of the CBD. For example, there is a "General Obligation" under Article 192 of the Convention to protect and preserve the marine environment, which may be broadly enough worded to include the obligation to protect

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<sup>21</sup> Award on Jurisdiction and Admissibility Para. 282. 5 June 1992. 31 ILM 841(1992)

<sup>22</sup> Id. 993 UNTS 243

<sup>23</sup> Award on Jurisdiction and Admissibility Para. 284. The other instruments that were considered under Article 281 were the 2002 China-ASEAN Declaration on the Conduct of Parties in the South China Sea (the "DOC"); a series of joint statements issued by the Philippines and China referring to the resolution of disputes through negotiations; and the Treaty of Amity and Cooperation in Southeast Asia.

and preserve marine *biodiversity*. Similarly, obligations under Article 194 of the Convention may include the protection and preservation of the biological diversity represented by coral reefs. “(emphasis added).”<sup>24</sup>

In explaining why CBD did not preempt jurisdiction on the Philippines environmental claims, the Tribunal found that the CBD applied to biodiversity “in general” concluding that “[t]he CBD is therefore aimed at protecting biological diversity in general—beyond that found in the marine environment. The objective of the CBD potentially overlaps with, but also goes well beyond, the scope of Articles 192 and 194 of the Convention.”<sup>25</sup> The Tribunal decided that UNCLOS applied to the case stating that “a clear exclusion of Part XV procedures is required in order for Article 281 to present an obstacle for the Tribunal’s jurisdiction.”<sup>26</sup> The Tribunal’s decision is in contrast to the ill-fated *Southern Bluefin Tuna* arbitration (merits)<sup>27</sup> and *Mox Plant* case,<sup>28</sup> where in each case the compulsory dispute provisions of UNCLOS was subsumed by other instruments.

The Philippines further argued that there were five specific obligations under Part XII of UNCLOS applicable the South China Sea:

1. The duty to protect and preserve marine ecosystems. The Philippines pointed to the destruction of fragile coral reefs by island construction activities.

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<sup>24</sup> Award on Jurisdiction and Admissibility Para. 284.

<sup>25</sup> Id. Para 285.

<sup>26</sup> Id., para 286.

<sup>27</sup> *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan) (Provisional Measures)* (1999) 38 ILM 1624 (“SBT Order”); *Southern Bluefin Tuna Case (Australia & New Zealand v Japan) (Jurisdiction and Admissibility)* (2000) 39 ILM 1359 (“SBT Award”). The Annex VII arbitral tribunal in a rare instance ruled against its own jurisdiction for deciding the merits of the case.<sup>27</sup> The Tribunal found that the 1993 Convention on the Southern Bluefin Tuna, concluded among the Parties, included a provision that legally overrode Part XV of the LOS Convention, even though the provision made no reference to Part XV. Barbara Kwiatkowska, “The Australia and New Zealand v Japan Southern Bluefin Tuna Jurisdiction and Admissibility) Award of the First Law of the Sea Convention Annex VII Arbitral Tribunal,” 16 IJMC 239 (2001).

<sup>28</sup> *The MOX Plant Case (Ireland v. United Kingdom), Provisional Measures*, ITLOS, (2001); Ireland v. United Kingdom (“MOX Plant Case”), Permanent Court of Arbitration, The Hague (2003). ITLOS decided it had jurisdiction for purposes of deciding the provisional orders request by Ireland. However, in the case on the merits the Permanent Court of Arbitration in the Hague, in face of the potential exclusive competence of the European Community and the pre-emptory jurisdiction of the European Court of Justice the Tribunal decided to suspend proceedings on the case.[Statement of the President (2003), available at <http://www.pca-cpa.org/upload/files/STATEMENT%20BY%20THE%20PRESIDENT.pdf>]. The European Court of Justice was seized of the case and rendered a judgment against Ireland ruling that that by bringing the case before ITLOS and the Arbitral VII Tribunal Ireland had violated the provisions for the exclusive jurisdiction of the EC. In turn the European Commission instituted proceedings against Ireland before the European Court of Justice on the grounds that Ireland had failed to fulfill its obligations under Articles 10 EC and 292 EC and Articles 192 EA and 193 EA by instituting dispute settlement proceedings before the ITLOS and the PCJ. The European Court of Justice found that Ireland had violated its obligations as claimed by the European Commission. *Commission of the European Communities v. Ireland*, 30 May 2006, Case C-459/03.

2. The duty to ensure sustainable use of biological resources. The Philippines claimed this was a long-recognized duty to conserve living resources, and that activities such as blast fishing and use of cyanide for fishing were unsustainable practices in violation of Articles 192 and 194.

3. The duty to protect and preserve endangered species. The Philippines argued this duty was implicit in Article 194(5) of UNCLOS for protection of rare or fragile ecosystems. In this case the Philippines alleged that China's harvesting of giant clams was a violation of Articles 192 and 194.

4. The duty to apply a precautionary approach in all of these respects. While alleging this obligation the Philippines refrained from detailing its claim stating that the harm was so obvious there was no need to apply the precautionary approach.

5. The duty to consult and cooperate with the relevant coastal States. The Philippines pointed to Articles 197 and 123 of UNCLOS, the latter including "regional characteristics"

These five obligations that the Philippines listed as falling within the scope of Part XII of UNCLOS include duties that are not expressly provided for in UNCLOS. The concept of "sustainable use of biological resources" is not language included as part of the obligation to conserve marine living resources under UNCLOS. UNCLOS applies the standard of maximum sustainable yield (MSY) for the conservation of living resources. Moreover, MSY is found in Part Article 61 of Part V on the exclusive economic zone and not Part XII. However, the Philippine's position is consistent with the interpretation provided by ITLOS in the *Southern Bluefin Tuna* case where it stated that "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment",<sup>29</sup> as reiterated by ITLOS in the *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC Advisory Opinion)*.<sup>30</sup>

The Philippine's also included as one of their five obligations under UNCLOS the application of the precautionary approach. However, no legal context was provided for this claim and the Philippines effectively stopped the Tribunal from directly tackling this claim stating only that given the harm was so obvious and there no uncertainty and thus no need to apply the

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<sup>29</sup> *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures*, para. 70 . Research Handbook on International Marine Environmental Law, Rosemary Rayfuse ed., Robin Churchill, "The LOSC regime for the protection of the marine environment-fit for the 21<sup>st</sup> Century? (Edward Elgar 2015) 3.

<sup>30</sup> Advisory Opinion of Apr. 2, 2015, ITLOS, para.216.

precautionary approach. As stated earlier, adopted before the adoption of Principle 15 of the Rio Declaration, one of the gaps in UNCLOS was its lack of reference to the precautionary approach. In the *Southern Bluefin Tuna* case,<sup>31</sup> ITLOS made its well-known allusion to the precautionary approach, however, declined to name it as such, a point that was raised by Judge Tullio Treves in his separate opinion.<sup>32</sup> Unfortunately, the International Court of Justice in the *Pulp Mills case*, while giving acknowledgment to the precautionary approach gave a disappointing interpretation that “while a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute, it does not follow that it operates as a reversal of the burden of proof.”<sup>33</sup>

Indeed, international cases have thus far shied away from addressing directly the precautionary approach despite its widespread use in many international instruments and domestic law. The *South China Sea Case* may have provided such an opportunity for an international tribunal to have shed more light on its place in UNCLOS and for the protection of the marine environment. Unfortunately, the Philippines chose not to pursue this issue.

### **Independent experts and evidence**

In the *South China Sea* case experts played a central role in informing the Tribunal and determining the outcome. In addition to the experts used by the Philippines, the Tribunal, in a rare example, appointed its own experts<sup>34</sup> marking an important and welcomed departure of practice from past cases. The Tribunal explained its decision to appoint independent coral reef ecology experts (Dr. Sebastian Ferse, Professor Peter Mumby and Dr. Selina Ward- collectively

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<sup>31</sup> The Court stated that “...although the Tribunal cannot conclusively assess the scientific evidence presented by the parties, it finds that measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the southern Bluefin tuna stock;” *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures, para 80*.

<sup>32</sup> In his separate opinion Judge Tullio Treves expressed his regret that the Order was not more explicit on the application of the precautionary approach in relation to the question of “urgency” in this case. Separate Opinion of Judge Treves at para. 8.

<sup>33</sup> *Pulp Mills on the River Uruguay, Argentina v Uruguay, Order, 2006, ICJ Rep 113, para. 164, p. 51*. See Judge Cañado Trindade’s Separate Opinion explaining why he considered the precautionary principle to be a ‘general principle of international environmental law’; *Pulp Mills case, Separate Opinion of Judge Cañado Trindade, paras. 62-96 and 103-113*.

<sup>34</sup> Dr. Sebastian C.A. Ferse of the Leibniz Center for Tropical Marine Ecology in Bremen, Dr. Peter J. Mumby, a Professor of coral reef ecology at the School of Biological Sciences at the University of Queensland, Australia, and his colleague, Dr. Selina Ward].

“the Ferse Report”) was due to China’s non-participation.<sup>35</sup> Previous international tribunals and courts in addressing environmental issues have relied upon experts provided by the Parties and have not appointed their own *ex curia* experts. For example, cases, such as the *Whaling Case*<sup>36</sup> and the *Pulp Mills Case*<sup>37</sup> generated criticism of the International Court of Justice for not making use of Article 50 of the ICJ Statute and its reliance on Party experts.<sup>38</sup>

In addition, the *South China Sea* Tribunal developed its own procedure for use of experts by incorporating Rule 24 into the Rules of Procedure, which as one observer commented, demonstrated that “there is room for procedural law-making and innovation with respect to the use of scientific experts in the system of international courts and tribunals.”<sup>39</sup> The Tribunal applied a rigorous procedure for experts that included *intra-dialogue* between the Tribunal’s appointed experts and the Parties’ experts as well as *inter-dialogue* between the Tribunal and the *ex parte* experts. As further observed by one author, “[m]ost important, the Tribunal gives scientific expertise a new function by making it a central tool for the sound administration of international justice and for ensuring equality between the parties to a dispute.”<sup>40</sup>

The Award has established a new and much needed standard for the use of experts in environmental cases where scientific information and assessment forms the core of the matter. The Tribunal must be able to make a well-informed and objective decision that is based on “hard facts”.<sup>41</sup> The use of experts *ex curia* and the Tribunal’s critical approach in questioning the data, strengthened the foundation of the Award in light of China’s lack of participation.

In addition to scientific expert reports, the Tribunal examined a rich source of evidence that included satellite and aerial images, photographs, contemporaneous reports from Philippines navy, coast guard, police, diplomatic notes, statements by Chinese officials, Chinese laws and regulations and scientific reports. The Tribunal demonstrated its dedication to impartiality and

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<sup>35</sup> Award on Jurisdiction, Para. 136.

<sup>36</sup> *Whaling in the Antarctic* case (*Australia v Japan; New Zealand intervening*) (Judgment), 31 March 2014

<sup>37</sup> *Pulp Mills on the River Uruguay* (*Argentina v Uruguay*) (Judgment of 20 April 2010).

<sup>38</sup> Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993, Article 50 [‘ICJ Statute’].

Tullio Scovazzi, “Between law and science: Some considerations inspired by the Whaling in the Antarctic judgment,” 14 QIL 14 (2015), 13-30 available at [http://www.qil-qdi.org/between-law-and-science-some-considerations-inspired-by-the-whaling-in-the-antarctic-judgment-2/#\\_ftn2](http://www.qil-qdi.org/between-law-and-science-some-considerations-inspired-by-the-whaling-in-the-antarctic-judgment-2/#_ftn2); Makane Mbengue, “Between law and science: A commentary on the Whaling in the Antarctic case,” 4 QIL 14 (2015), 3-12

<sup>39</sup> Makane Moise Mbengue, “The South China Sea Arbitration: Innovation in the Marine Environmental Fact-Finding And Due Diligence Obligations,” *AJIL Unbound*.... 287/

<sup>40</sup> *Id.* At 288

<sup>41</sup> Makane Moise Mbengue, “Between law and science: A commentary on the Whaling in the Antarctic case,” 4 QIL 14, *Id.*

objectivity in its use of different sources of evidence that also went beyond the factual evidence provided by the Philippines. For example, the Tribunal used its own experts to search for and collect additional documents involving China's assessment of the environmental impacts of its activities.<sup>42</sup> The Tribunal also made direct requests from China for information, which not surprisingly were unheeded. The Tribunal's impartiality and objectiveness was demonstrated in its finding of insufficient evidence that China had failed to take measures against the use of cyanide and use of explosives for fishing activities in the South China Sea.<sup>43</sup>

On the other hand, the Tribunal found the evidence satisfactory showing Chinese fishing vessels had harvested giant clams by the use of boat propellers to break coral reefs. (para. 953).

### **Protection of the Marine Environment**

The terse language of Article 192 of the UNCLOS expresses what may be the most powerful legal provision for the protection of the marine environment that "States have the obligation to protect and preserve the marine environment". Lacking any qualification it is simple and clear. The Award has strengthened only it. According to the Award the content of Article 192 is to be informed by other provisions of Part XII of the Convention as well as other applicable rules of international law. By referencing to "other applicable rules of international law" the Tribunal has cast a broad international normative net that is not restricted only to international conventions or treaties. Moreover, it allows Article 192 to remain receptive to changes in environmental law developed under binding instruments as well as other means, that would include decisions or international courts and tribunals.

In addition, the Tribunal deconstructs the simple language of Article 192 and shows the existence of four distinct different obligations: first the obligation to protect against *future* damage; second the obligation to *maintain* or *improve* the existing condition of the marine environment; third the obligation to take *active* measures for each case; and fourth the obligation to not degrade the marine environment.<sup>44</sup> In other words, not only does Article 192 entail the obligation of prevention but also to actively improve the marine environment, presumably where it is degraded.

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<sup>42</sup> Award, para. 916

<sup>43</sup> Award, para., 975.

<sup>44</sup> Para. 941

In the South China Sea Case, finding sufficient evidence to conclude that Chinese fishing vessels had been involved in harvesting threatened or endangered species in the waters of Scarborough Shoal and Second Thomas Shoal that included species listed in CITES Appendix I and II, the Tribunal interpreted Articles 192 and 194(5) to include the duty to prevent the harvest of endangered species.

The South China Sea Award marks an important continuation and reaffirmation of the application of the obligation of due diligence by States in fulfilling their environmental obligations. In the *Pulp Mills* case the ICJ determined that the obligation to protect the [aquatic] environment was an obligation of conduct and required the state to exercise due diligence. The Court explained the scope of the duty of due diligence and as “*an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party.*”

The obligation of due diligence was adopted subsequently in the Advisory Opinion of the Seabed Chambers [ITLOS] on *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*,<sup>45</sup> and by the full bench of ITLOS in the *Request for an advisory opinion by the Subregional Fisheries Commission* on illegal, unregulated and unreported fishing.<sup>46</sup>

The Tribunal applied the now well established due diligence obligation “to take those measures *necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.*” Consequently, the failure of China to take measures to prevent the harvesting of endangered species, including corals, according to the Tribunal, was a breach of Article 192 and 194(5). Furthermore, according to the Tribunal, the due diligence obligation is triggered when a State is “aware that vessels flying its flag are engaged in the harvest of species internationally as being threatened with extinction or are inflicting significant damage on *rare or fragile ecosystems or the habitat of*

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<sup>45</sup> Advisory Opinion 1 February 2011, available at [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_17/17\\_adv\\_op\\_010211\\_en.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/17_adv_op_010211_en.pdf)

<sup>46</sup> Advisory Opinion 2 April 2015, available at [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.21/advisory\\_opinion/C21\\_AdvOp\\_02.04.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion/C21_AdvOp_02.04.pdf)

*depleted, threatened or endangered species*”. The State must adopt rules and measures to prevent such acts and maintain a level of vigilance in enforcing them.<sup>47</sup>

There was ample evidence demonstrating that China knew of the activities of its fishing vessels and in some cases there was evidence of Chinese governmental vessels actually escorting the Chinese fishing vessels that were engaged in illegal fishing and harvesting activities. In addition, the Tribunal noted that the destructive practice of boat-propeller chopping of coral reefs to extract giant clams was done in areas under the control of Chinese authorities and thus such activities took place within the control and jurisdiction of China. The Tribunal concluded that China had breached its obligation to protect and preserve the marine environment by tolerating the harvesting of giant clams by boat-propeller chopping method.<sup>48</sup>

Perhaps the harshest words from the Tribunal were directed to the artificial island-building activities of China describing the damage to the marine environment as “devastating and long-lasting.” These construction activities violated Article 192 and moreover the dredging activities polluted the marine environment with sediment in violation of Article 194(1) according to the Tribunal.<sup>49</sup>

Specifically, the Tribunal’s clear articulation that there is a due diligence obligation by State to prevent harm to endangered species and habitats has strengthened the position of UNCLOS as the principle international convention for protection of the marine environment. Moreover, the linkage of international environmental agreements to UNCLOS is important and will provide the integrated and holistic approach that is reflected in the Preamble of UNCLOS.

### **Environmental Impact Assessments**

The Philippines argued that before undertaking construction activities in the South China Sea China was required to carry out an environmental impact assessment within the meaning of Article 206 of the Convention and to communicate its findings as required under Article 205. At a minimum, the Philippines argued that an environment impact assessment should have assessed the possible effects on the marine ecosystem of the South China Sea, the coral reefs at issue, the biodiversity and sustainability of living resources there and endangered species. Article 206 of

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<sup>47</sup> Paras. 960-61.

<sup>48</sup> Para. 966

<sup>49</sup> Para. 984

UNCLOS forms part of Section 4 on *Monitoring and Environmental Assessment* of Part XII of UNCLOS.

In assessing China's actions, the Tribunal reviewed a number of statements made by Chinese officials to determine what, if any, scientific studies and assessments had been conducted by China before undertaking construction and land-reclamation activities in the South China Sea. These included statements by a spokesperson of the Chinese Foreign Ministry claiming that the construction projects on the islands and reefs had "gone through scientific assessments and rigorous tests."<sup>50</sup> Based on this and similar statements the Tribunal requested further evidence of any scientific environmental assessments. A statement by the Chinese State Oceanic Agency (SOA) entitled "Construction Work at Nansha Will Not Harm Oceanic Ecosystems", was found<sup>51</sup> as well as a report prepared by the SOA dated 10 June 2015. The SOA statement claimed that the construction activities undertaken on the Spratly Island (Nansha) would "rigorously abide by rules of environmental protection", employing methods such as "nature simulation" that included using big cutter section dredges that collected loose coral fragments with sands and used them to build supratidal foundation platforms. What the statement failed to explain was the impact of the big cutter section dredges on the marine environment and where the fragments of loose coral came from. In its conclusion, the statements reported "good results" claiming that environmental impact on the coral reefs was "partial, temporary, controllable, and recoverable."<sup>52</sup>

The SOA Report, in what can be described as an example of Orwellian double-speak, explained the environmental status of the coral reefs, provided the details of "eco-protection measures" implemented during the construction activities, including how sites were selected and how "optimal" construction plans had been selected over those that would have a "bigger impact on the marine environment." Other measures allegedly taken by China included minimizing the extent of the reclamation and dredging areas, regular monitoring of the change in sand sediments in order to maintain the water quality of the coral reefs, monitoring the health of coral reefs in construction areas, and using newer vessels to prevent oil spills, and more. The SOA report went on to conclude that the construction activities did not cause harm because the coral reefs were rated as 'sub-healthy before construction and after construction was completed – "Therefore the

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<sup>50</sup> Para. 417

<sup>51</sup> Para 922

<sup>52</sup> Para. 922

construction activities neither affected the health of...nor harmed the coral reef ecosystems.”<sup>53</sup> The Report provided the optimistic assessment that coral reefs have self-restoration capability and that they could be initially restored in 5-10 years and fully restored in 50-100 years. These finding and pronouncements, not surprisingly were not supported by the Philippine’s or Tribunal’s experts.

In its determination of whether China had fulfilled its obligations to conduct an environmental impact assessment under Article 206, the Tribunal actually went a step further than what the Philippines had requested and also examined Chinese obligations under Article 204, which requires States, “consistent with the rights of other States, [to] endeavor, as far as practicable, directly or through the competent international organizations, to *observe, measure, evaluate and analyze*. By recognized scientific methods, the risks or effects of *pollution* of the marine environment.” (emphasis added). Unlike Article 204 on monitoring, which is limited to marine pollution activities, Article 206 also applies in cases where a State has “reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or *significant and harmful changes to the marine environment...*” (emphasis added). The Tribunal’s approach in applying Article 204 together with Articles 205 and 206 essentially expanded the application of Article 204 and its monitoring requirements to apply beyond cases involving “marine pollution”.

In examining Article 206 the Tribunal referred to the *Seabed Disputes Chamber Advisory Opinion* which interpreted Article 206 requirement to conduct an environmental impact assessment as a “ ‘ *direct* obligation under the Convention and a general obligation under customary international law ‘ “,<sup>54</sup> (emphasis added) and thus a “ ‘ an essential part of a comprehensive environmental management system” and also a “ ‘ a particular application of the obligation on states, enunciated in Article 194(2).’ “<sup>55</sup> On the other hand, the Tribunal also recognized that the obligations under Articles 204 and 206 were qualified with “to endeavor” and “as far as is practicable,” leaving some discretion to the State. However, the duty for the State to communicate reports of the results of assessments under Article 205 was ‘absolute’.

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<sup>53</sup> Para. 923

<sup>54</sup> Para. 948

<sup>55</sup> Citing S Rosenne & A. Yankov (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. IV, para. 206.6(b) (M. Norquist, en. Ed., 2002).

The scope of a State's discretion to decide whether to undertake monitoring and assessments of its activities under Article 206 of UNCLOS appears to be at odds with the decisions by the International Court of Justice in the *Pulp Mills* case,<sup>56</sup> *the Construction of the Road Case*,<sup>57</sup> and ITLOS *Seabed Disputes Chamber Advisory Opinion*<sup>58</sup> all of which recognized the obligation of States to conduct environmental impact assessments for activities that could cause significant harm to shared resource as a rule of customary of international law. There was no mention of discretion.

In applying Article 206 to China's obligation to monitor and assess its construction activities in the South China Sea the Tribunal found that the scale and impact of China's construction activities were such that "China could not reasonably have held any belief other than that the construction ""may cause significant harm to the marine environment" and this was obligated to conduct an environmental impact assessment "as far as practicable" and to report the results. The meaning of "as far as practicable" remains unclear other than it is to be treated separate from the actual obligation to conduct an assessment. In other words, "as far as practicable" indicates more the technical capacity to conduct an assessment and not actually the discretion whether or not to conduct it.

Furthermore, the Tribunal went on to assess China's own laws on environmental impact assessments and made considerable effort to inform itself that included making direct requests for any reports of assessments that had been conducted. In a clever twist, the Tribunal avoided the evidentiary problem as to whether China had or had not conducted an environmental impact assessment, simply finding that in any case China had failed to communicate a copy of it as required. In other words, the Tribunal has indicated that China was required to conduct an environmental assessment but rather than deciding China had failed to do such an assessment limited its finding to a failure to report it. This would also constitute a violation of a direct responsibility of China under Article 206.

In making its final determination the Tribunal did not assess the contents of the SOA report or statement. Understandably, in this case the Tribunal would hesitate to make any substantive pronouncements without the participation of China. However, if the SOA report and

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<sup>56</sup> ICJ found that there was a duty under by states to conduct EIAs in cases of transboundary industrial activities that could cause significant harm to a shared resource. *Supra* n. 37

<sup>57</sup> *Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica)*, Judgment [Merit] 16 December 2015, available at <http://www.icj-cij.org/docket/files/150/18848.pdf>

<sup>58</sup> *Supra.*, at n. 45.

statements are indicative of China's scientific assessments, the case would have provided an opportunity for the Tribunal to venture into the substance of environmental impact assessments.

### **Duty to Cooperate**

The Tribunal, referring to the *Mox Plant*,<sup>59</sup> reaffirmed the nature of the duty to cooperate as provided for under Article 197. In the *Mox Plant* case ITLOS had declared that the duty to cooperate was a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law. In his separate opinion in the *Mox Plant* case, Judge Rudiger Wolfrum identified the obligation to cooperate with other States as a norm of international customary law for the protection of the environment and an overriding one especially when the interests of neighboring States are at stake. A member of the South China Sea Tribunal, Judge Rudiger did not, however, take the occasion to reiterate this position. Moreover, the Tribunal did not dwell much on the duty to cooperate omitting to make reference to other cases that have applied the duty to cooperate such as the *Case concerning Land Reclamation* a provisional order request was brought to ITLOS by Malaysia against Singapore to stop land reclamation activities in the Jahor Strait. While the Tribunal did not grant the provisional order, the Tribunal applied the duty to cooperate and ordered the parties to cooperate and specified that a group of independent experts be formed on the matter and eventually the parties were able to amicably settle the matter.

The duty to cooperate under Article 123 in enclosed or semi-enclosed seas had also been raised in the *Mox Plant* case but not addressed then by ITLOS. In the South China Sea Award the Tribunal merely cited the provision in its entirety without providing and other interpretative guidance as to its application.<sup>60</sup>

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<sup>59</sup> *Supra.*, at n. 28.

<sup>60</sup> Para. 946

## ***State Responsibility and Liability***

According to *the Draft International Law Commission Articles on State Responsibility*,<sup>61</sup> which are considered to represent customary international law, the breach of an international obligation by a State by conduct that is attributable to that State constitutes an internationally wrongful act that entails State responsibility.<sup>62</sup> The breach of obligation can be a direct obligation or breach of the obligation of state to exercise due diligence.<sup>63</sup> In addition, Article 31 of the *Draft Articles on State Responsibility for Internationally Wrongful Acts* provides that the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act, which can be in the form of restitution, compensation or satisfaction.<sup>64</sup> Restitution requires the re-establishment of the situation that existed before the wrongful act was committed<sup>65</sup>. If restitution is not possible the responsible State is under an obligation to give compensation for financially assessable damage including loss of profits that can be established<sup>66</sup>. In the case where restitution or compensation is not possible then the State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused that can take the form of an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate way so long as it does not humiliate the responsible State.<sup>67</sup> As stated in the *Factory at Chorzów* case “that the breach of an engagement involves an obligation to make reparation in an adequate form” and further that “that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”<sup>68</sup>

Article 48 of the Draft Articles on State Responsibility provides that a State is entitled as an “injured State” to invoke the responsibility of another State if the obligation breached is owed to (a) that State individually or (b) “a group of States including that State, or the international

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<sup>61</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001, Vol. II (Part Two), p. 26.

<sup>62</sup> Article 31

<sup>63</sup> SRFC Advisory Opinion, para. 146 where the Tribunal stated that the” liability of the flag State arises from its failure to comply with its “due diligence” obligations concerning IUU fishing activities conducted by vessels flying its flag in the exclusive economic zones of the SRFC Member States.”

<sup>64</sup> (Art. 34). See *M/V Saiga* Case (No. 2) (St. Vincent & the Grenadines v. Guinea), para 171 (July 1, 1999) citing Article 42(1) of the pre-2001 Draft Articles of the International Law Commission on State Responsibility) PLEASE CONFIRM THIS CITE

<sup>65</sup> Art. 35 Draft Articles of the International Law Commission on State Responsibility

<sup>66</sup> Art. 36 Draft Articles of the International Law Commission on State Responsibility

<sup>67</sup> Art. 37 Draft Articles of the International Law Commission on State Responsibility).

<sup>68</sup> *Factory at Chorzów case, Jurisdiction, 1927, PCIJ, Series A No.9, p.21*

community as a whole and the breach of the obligation (i) specially affects that State; or (ii) is of such a character as radically to change the position of all other States to which the obligation is owed with respect to the further performance of the obligation.”

The Seabed Disputes Chamber addressed the rights of the international community when it described States’ obligations to preserve the environment of the high seas when they sponsor deep seabed mining in the Area as having an *erga omnes* character, in its 2011 Advisory Opinion referring to Article 48 of the *Draft Articles of State Responsibility*. In its Opinion the Seabed Disputes Chambers noted the lack of any express provision in the Convention allowing the International Seabed Authority to bring a claim for compensation for damage to the marine environment of the Area. However, the Chambers noted that arguably such entitlement to claim damages was implicit in Article 137 (2) of UNCLOS which stipulated that the “Authority shall act “on behalf” of mankind of all humanity.” Of particular interest is that the Chambers went further, and referring to Article 48 of the ILC Draft Articles on State Responsibility, stated that “Each State Party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area”.<sup>69</sup> The Chambers did not limit the scope of the *obligation erga omnes* to the Area but included the superjacent water column –the high seas.

The *Draft Articles on State Responsibility* did not explicitly employ the term *obligation erga omnes* but made reference to it in its commentaries.<sup>70</sup> The doctrine of an *obligation erga omnes* means that a state need not show actual direct harm in order to hold another State responsible for a breach of an international obligation.<sup>71</sup>

In the *South China Sea* case, the Tribunal found China had violated a number of provisions of Part XII of UNCLOS as enumerated above. However, The Philippines did not raise issues of state responsibility and liability, including possible reparation. The Philippines had only requested *inter alia* that China comply with its duties under the Convention, including those relevant to the protection and preservation of the marine environment in the South China Sea.<sup>72</sup>

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<sup>69</sup> Id. Tim Stephens, “Principle 26, International Environmental Dispute Settlement” in Jorge E. Viñuales (ed.) *Rio Declaration on Environment and Development: A Commentary* (Oxford: 2015), 599-616.

<sup>70</sup> *Supra.*, at n. 61. See Commentary to Article 48.

<sup>71</sup> *Id.*

<sup>72</sup> Submission 15 of the Philippines.

However, as noted earlier in this paper, one of the questions left unclear was the nature of the legal basis of jurisdiction for the deciding the legal claims of environmental harm as claimed by the Philippines where maritime entitlements are disputed. Were these obligations *erga omnes*? Arguably, in the cases of the low-tide maritime features that were clearly within the Philippine's exclusive economic zone, the Philippines could arguably claim a direct interest under UNCLOS.<sup>73</sup> However, in the cases of high-tide elevations that were characterized as rocks by the Tribunal under Article 121(3), who would be the injured party?

The doctrine of obligations *erga omnes*, that is an obligation owed not only to other contracting States but to *all States*, is best known from the ICJ judgment in the *Barcelona Traction* case.<sup>74</sup> Moreover, as stated in Article 48 of the Draft Articles on State Responsibility, obligation *erga omnes* applies to either a "a group of States including that State" or the "international community as a whole." If Article 192 and the other provisions of Part XII are obligations *erga omnes* this would have tremendous significance for States to bring actions for harm to the marine environment of shared marine spaces regardless of sovereignty or maritime entitlements.

## **Conclusion**

The Tribunal found that China had breached its due diligence obligations to protect and preserve the marine environment under Articles 192 and 194(5) of UNCLOS by tolerating harmful fishing activities, harvesting of endangered species listed in Appendix I and II of CITES and its devastating and long-lasting damage to coral reefs by allowing boat-propeller chopping method of coral reefs. In regard to construction activities (island-building) on the seven Spratly Islands the Tribunal also determined that China had directly breached Articles 192, 194(1), 194(5), 197 (duty to cooperate), 123, and 206 of UNCLOS. (para. 933)

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<sup>73</sup> These were Second Thomas Shoal and Mischief Reef.

<sup>74</sup> *Barcelona Traction, Light and Power Company Limited Case* (Belgium v Spain), 1970 I.C.J. Reports 1970. See also *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 457 at paras 51-53. Obligations *erga omnes* has been recognized in other cases for the principle of self-determination in the *Case Concerning East Timor* (Portugal v. Australia) I.C.J. Reports 1995, p. 90, and the *Advisory Opinion on the Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, I.C.J. Reports, 2003, paras. 88, 155, 156; the prohibition on the use of torture in the International Criminal Tribunal for Yugoslavia in the *Furundzija case* *Prosecutor v. Anto Furundzija*, Decision of December 1998, para. 151.

On the other hand, demonstrating its objectivity, based on a lack of evidence the Tribunal declined to find that China had failed to exercise due diligence in preventing fishing by cyanide and explosives.

The Award is significant for a number of reasons. First, it has separated environmental claims under UNCLOS from territorial and maritime entitlement claims. Second, it has affirmed the principle jurisdiction of UNCLOS for matters relating to protection and sustainable use of marine biodiversity, and the protection and preservation of endangered species and habitats, that would apply to species listed in CITES. Secondly, the Award gave a very clear statement of the meaning of Article 192 that included other rules of international law and conventions, and outlined the different obligations it comprises. Third, the Award has added to the existing jurisprudence on due diligence obligation of States and its application to the protection and preservation of the marine environment as provided under Part XII of UNCLOS. Fourth, the Award reaffirms the obligation of States to conduct environmental impact assessments as a direct obligation and expressly included this to include the obligation to communicate the report under Article 206.

The Award did not however delve into issues of State responsibility and liability as this was not raised. Nonetheless, the Award does raise the question of whether obligations under Article 192 and 194(5) are obligations *erga omnes* whereby any Party to UNCLOS could bring a claim against another party for harm to the marine environment.