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The due diligence obligations of the flag state with respect to its fishing vessels and the environment

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Decision commented on: The Matter of the South China Sea Arbitration, Between the Republic of Philippines and The People's Republic of China, Award on the Merits (SCSA) of 12 July 2016 (Registry, the Permanent Court of Arbitration).

Pursuant to Articles 286, 287 and Article 1 of Annex VII of the Convention on the Law of the Sea (LOSC), the Republic of Philippines instituted arbitral proceedings on 22 January 2013 concerning the legal basis of maritime rights and entitlements in the South China Sea, the status of certain geographical features in the South China Sea, and the lawfulness of certain actions taken by China in the South China Sea.

The Philippines made fifteen submissions to the Tribunal, some of which are discussed in earlier posts on this Award. This post focuses on submission no. 9, and submissions no. 11 and no. 12B, in so far as they concern the due diligence obligations of the flag state with respect to its fishing vessels in relation to environmental obligations. The post first examines submission no. 9. In this part of the Award, the Tribunal confirms the obligation of China, as the flag state, to exercise due diligence with respect to Chinese vessels fishing in the Philippines' exclusive economic zone (EEZ). This consolidates some of the ITLOS' recent observations in its *Advisory Opinion to the SRFC* (SRFC) on the standard of responsibility expected from the flag state. It does not shed any light on what can constitute due diligence. The Tribunal considered the standard of due diligence in some more detail as part of submissions no. 11 and no. 12B, dealing specifically with the standard of due diligence required from China, as the flag state, with respect to Chinese vessels carrying out harmful fishing practices. This constitutes the second part of this post. The post concludes with some observations.

1 Submission No. 9

1.1 Background and preliminary issues

Submission no. 9 concerned China's failure to prevent its nationals and vessels from exploiting the living resources in the Philippines' EEZ, in particular around Mischief Reef and Second Thomas Shoal. Since 2013, the Philippines had repeatedly observed Chinese fishing vessels active in that area, accompanied by government vessels. As explained in the post by Elferink here, the Tribunal had concluded that Mischief Reef and Second Thomas Shoal were low-tide elevations, incapable of generating maritime zones, and therefore within areas which can only constitute the EEZ of the Philippines (SCSA, para. 735).

1.2 The obligation on the flag state to ensure that its nationals and vessels flying its flag do not fish unlawfully in the EEZ of another state

The question put to the Tribunal was whether China had violated its obligations under the LOSC by tolerating fishing by Chinese vessels in what can only constitute the Philippines' EEZ.

The LOSC provides that the coastal state has sovereign rights for the purpose of exploring and exploiting, conserving and managing the living resources in its EEZ (Art. 56(1)). It is the coastal state who decides on the total allowable catch (Art. 61(1)), and it is also the coastal state which controls how other states can access the surplus catch – if there is any (Art. 62). Furthermore, Art. 62(4) stipulates that nationals from other states fishing in the EEZ must comply with the laws and regulations of the coastal state, and sets out a list of areas which the coastal state may regulate, including licensing and other access procedures. Art. 58(3) imposes an obligation directly on flag states, requiring them to have due regard to the rights and duties of the coastal state and to comply with the laws and regulations of the coastal state.

The Tribunal concluded that the obligation of due regard, read in conjunction with the obligations directly imposed upon private parties, extends to a duty on the flag state to take the necessary measures to ensure that its nationals and vessels flying its flag do not fish unlawfully in the EEZ of another state (SCSA, para. 743). In so doing, the Tribunal referred to the *Advisory Opinion to the SRFC* (discussed in an earlier post here). In SRFC, the ITLOS held that the obligation of a flag state to ensure that vessels flying its flag are not engaged in illegal fishing is an obligation of conduct, and therefore one of due diligence (discussed in more detail below) (SRFC, para. 129). The SCSA Tribunal agreed with this in the case at hand, stating that anything less than due diligence by a state to prevent its nationals from unlawfully fishing in the EEZ of another state would fall short of the regard due pursuant to Art. 58(3) (SCSA, para. 744). Due regard is discussed in detail in an earlier post by Gaunce here.

1.3 The scope and application of due diligence

The Tribunal remarked upon the difficulty of determining the precise scope and application of the obligation on a flag state to exercise due diligence in respect of its vessels in another state's EEZ. Fishing activities can be covert, and at times may happen far away from government control (SCSA, para. 754). In other words, illegal fishing, even where it happens repeatedly, is not, in and of itself, proof that a flag state has not exercised due diligence. This had previously also been confirmed in the *Advisory Opinion to the SRFC* (SRFC, para. 150). In the case at hand, however, it was easily established that China had not exercised due diligence. Chinese government vessels had escorted and protected the Chinese fishing vessels. Therefore, the SCSA Tribunal did not have to determine whether China had done enough to prevent the fishing activities. The Chinese government has been fully aware that the activities were being carried out and would have been able to halt them had it chosen to do so (SCSA, para. 755).

2 Submissions No. 11 and No. 12B

2.1 Background and preliminary issues

The Philippines had recorded instances of environmentally harmful fishing practices and the harvesting of endangered and threatened species by Chinese fishermen in the waters of Scarborough Shoal and other parts of the South China Sea since the late 1990s. The marine resources allegedly caught by Chinese fishermen – as observed, documented, and at times confiscated, by the Philippines – included *inter alia* assorted corals, marine turtles, giant clams, sharks, eels, giant oysters, and sea shells. The alleged harvesting techniques for obtaining these resources included the use of cyanide, dynamite, and propellers to break up coral and release giant clams.

The Tribunal addressed submission no. 11 and part of submission no. 12 (12B) together. They both concern the protection and preservation of the marine environment, namely China's alleged violations of the LOSC through harmful fishing practices and harmful construction activities. Due diligence was however only discussed in relation to harmful fishing practices, which is the focus of this post.

2.2 The content of a state's obligation to protect and preserve the marine environment, and the threshold for its responsibility

The Philippines asked the Tribunal to establish whether China had breached its obligations under the LOSC to protect and preserve the marine environment by allowing harmful fishing practices to be carried out. It was therefore necessary for the Tribunal to define both the content of a state's obligation to protect and preserve the marine environment, and the threshold for its responsibility. In doing so, and in line with the Philippines' submission, the Tribunal relied exclusively on Part XII of the LOSC, which relates to the protection and preservation of the marine environment. Part XII applies to all maritime areas, including areas of national jurisdiction. The Tribunal's conclusions are therefore independent from any finding of sovereignty over the disputed features – one way or the other.

While Part XII is principally concerned with controlling marine pollution, the Tribunal referred with approval to the Award in *Chagos Marine Protected Area* (Chagos), which rejected "the suggestion that (…) Part XII (is) limited to measures aimed at controlling marine pollution. While the control of pollution is certainly an important aspect of environmental protection, it is by no means the only one" (Chagos, para. 320; SCSA, para. 945). The SCSA Tribunal moreover recalled the oft-cited statement of the ITLOS in *Southern Bluefin Tuna (Provisional Measures)* (SBT), that "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment" (SBT, para. 70; SCSA, para. 956). Building on these cases which had already broadened the scope of Part XII, the Tribunal concluded that it could apply the provisions of Part XII to the allegedly harmful fishing activities carried out by China.

The first of the general provisions of Part XII is Art. 192, which stipulates that "States have the obligation to protect and preserve the marine environment". The provision is a landmark one. At the time of the adoption of the LOSC, it was the first explicit statement, in a global treaty, of this general obligation binding all states. Article 192 gives effect to the Preamble of the LOSC, also cited in the Award, which recognizes *inter alia* the desirability of establishing a legal order for the seas and oceans to promote the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection, and preservation of the marine environment. Art. 192 thus formulates a general legal principle. It sets out both a positive obligation to take active measures to protect the marine environment (from future damage) and to preserve it (in the sense of maintaining or improving its present condition), and a negative obligation not to degrade it (SCSA, para. 941).

The exact scope of the general obligation under Art. 192 to protect and preserve the marine environment is not clear from the wording of the provision itself but the Tribunal took the view that its contents could be informed by three categories of norms: the corpus of international law relating to the environment; the other provisions of Part XII; and, through Art. 237 (one of the other provisions of Part XII), by reference to specific obligations set out in other international agreements (SCSA, paras. 941, 942). The Tribunal discussed the following aspects of these in some detail:

First, and referring to the *Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion* (Nuclear Weapons), the Tribunal considered that the corpus of international law relating to the environment requires that

states ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control (Nuclear Weapons, para. 29; SCSA, para. 941). Citing with approval the *Kishenganga (Partial Award)*, the SCSA Tribunal also held that, therefore, States have a positive "duty to prevent, or at least mitigate, significant harm to the environment when pursuing large scale construction activities" (Kishenganga, para. 451 (citing *Iron Rhine*, para. 59); SCSA, para. 941). The term 'environment' should thus be understood broadly; the duty under Art. 192 extends to a duty to respect the environment of other states and areas beyond national control. Moreover, the level of harm that must be prevented or at least mitigated when pursuing large scale construction activities must be significant.

Moreover, insofar as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) can be considered to be part of the corpus of international law, because of its near-universal ratification, the Tribunal concluded that the general obligation to protect and preserve the marine environment includes the obligation to prevent the harvesting of species that are recognized internationally as being at risk of extinction and requiring international protection (SCSA, para. 956).

Second, the Tribunal read Art. 192 in the context of the other provisions of Part XII, including Art. 194(5). Art. 194 (5) stipulates that "the measures taken in accordance with (Part XII) shall include those 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". The Tribunal therefore held that the general duty under Art. 192 extends to the prevention of harms that would affect depleted, threatened, or endangered species indirectly through destruction of their habitat (SCSA, para. 959). Two other paragraphs of Art. 194 also inform the content of Art. 192. Thus, Art. 194(2) requires states to take "all measures necessary *to ensure* that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment" (emphasis added) and Art. 194(3) refers *inter alia* to measures designed to minimize to the fullest extent possible the release of certain harmful substances, pollution from vessels, and pollution from other installations and devices. As mentioned above, in *Advisory Opinion to the SRFC*, the ITLOS held that the obligation "to ensure" is one of conduct, and the standard of responsibility one of due diligence. The SCSA Tribunal referred to this with approval (SCSA, para. 944). It should be noted that the *Advisory Opinion to the SRFC* built on the *Seabed Disputes Chamber Advisory Opinion* (SDC), which, whilst not directly cited by the SCSA Tribunal, had explicitly referred to Art. 194(2) by way of example of an obligation of due diligence. The Seabed Disputes Chamber held that "the expression 'to ensure' is often used in international legal instruments to refer to obligations in respect of which, while it is not considered reasonable to make a State liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the State under international law (see ILC Articles on State Responsibility, Commentary to article 8, paragraph 1) (...) An example may be found in article 194, paragraph 2 . . .". (SDC, paras. 112, 113).

To sum up, a state's obligation to protect and preserve the marine environment pursuant to Part XII is as follows: A state has a general duty to protect and preserve the marine environment and its living resources, and this entails both positive obligations to protect and to preserve, and a negative obligation not to do harm. The content of the obligation to protect and preserve includes at least a duty to prevent the harvest of endangered species recognized internationally as requiring international protection. It extends moreover to the prevention of harms that would affect depleted, threatened, or endangered species indirectly through the destruction of their habitat. This general duty extends both to activities taken by the state and its organs, and to ensuring that activities within its control and jurisdiction do not harm the marine environment – including the environment of other states or of areas

beyond national control. The standard of responsibility for this general duty is one of due diligence. The content of due diligence will be discussed in the next section.

2.3 Determining China's breach of the duty to protect and preserve the marine environment: establishing environmental harm

In applying the law to China's allegedly harmful fishing practices, the Tribunal first of all concluded that it was satisfied, on the basis of the evidence before it, that Chinese vessels had indeed engaged in the harvesting of threatened or endangered species, such as corals, giant clams, and hawksbill turtles (SCSA, para. 950) on several occasions, and that cyanide and dynamite had been used on several occasions (SCSA, para. 968).

The Tribunal then turned to the question whether or not these activities had a harmful impact on the environment. In so doing, the Tribunal relied on expert evidence, namely the Ferse Report and examinations conducted by Professor McManus, which described the harmful impact on reef fish communities of removing coral, and the impact of excavating giant clams on corals and reef areas (SCSA, paras. 955, 957). Moreover, all of the sea turtles found on board Chinese vessels appear in Annex I of CITES, and many corals appear in Annex II of CITES (SCSA, para. 956). Given that the content of the duty to protect and preserve the marine environment extends to preventing the direct harvesting of endangered species – as discussed above – the Tribunal was satisfied that the harvesting of endangered sea turtles constituted harm to the marine environment for the purpose of Art. 192 (SCSA, para. 960). Moreover, given that the duty to protect and preserve the marine environment extends to the prevention of harms that would affect species through the destruction of their habitat – also discussed above – the Tribunal was satisfied that the large-scale harvesting of corals and clams constituted a harmful impact on the fragile marine environment for the purpose of Art. 192 (SCSA, para. 979, 983). Finally, with regard to the use of cyanide and dynamite, the Tribunal concluded that these practices are highly destructive methods, irresponsible and unsustainable, and that both cyanide and dynamite are considered to be "pollution" of the marine environment within the meaning of the LOSC (SCSA, para. 970). Because of their harmful impact on he environment, the Tribunal therefore concluded that the failure to take measures against their use would constitute a breach of Arts. 192, 194(2) and 194(5) LOSC. It is interesting to note – without discussing this further here – that the Tribunal felt the need to categorise cyanide and dynamite as "pollution", despite its explicit move away from the pollution-oriented nature of Part XII.

The Tribunal then considered China's responsibility for the environmental harm done by Chinese flagged vessels – and therefore under the jurisdiction and control of China –in relation to three distinct activities, namely: the harvesting of endangered species; damage done to the habitat of certain species; and the use of cyanide and dynamite. I will discuss each in turn.

2.4 China's failure to exercise due diligence with respect to the harvesting of endangered species, the destruction of habitat, and the use of cyanide and dynamite

After having established that the activities of harvesting endangered species, destroying habitat, and using cyanide and explosives had harmed the environment and were carried out under China's jurisdiction and control, the Tribunal looked at whether China was aware of the harmful activities, and whether it had exercised due diligence. In so doing, the SCSA Tribunal referred with approval to the two-pronged standard of due diligence used by the ICJ in *Pulp Mills on the River Uruguay* (Pulp Mills) and subsequently relied upon in the *Seabed Disputes Chamber Advisory Opinion* and the *Advisory Opinion to the SRFC*. In Pulp Mills, the ICJ held that due diligence "is 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 (…)" (Pulp Mills, para. 197; cited in SDC, para. 115; cited in SRFC, para. 131; cited in SCSA, para. 944). In other words, the SCSA Tribunal considered that the duty to protect and preserve the marine environment requires two distinct types of action: first, the adoption of rules and measures to prevent harmful acts; and second, a sufficient level of vigilance in enforcing those rules and measures.

Considering the harvesting of endangered species, the Tribunal found that China had indeed been made aware of these activities, as well as of the Philippines' concerns (SCSA, para. 962). China had made some efforts to prevent the harmful acts, by stating that it would deal with violators; by being party to CITES since 1981; and by having enacted in 1989 a Law of the Protection of Wildlife, which explicitly prohibits the catching or killing of sea turtles and giant clams (SCSA, para. 963). Turning then to the second prong of the due diligence standard, the Tribunal considered whether China had taken the necessary steps to enforce these rules and measures. It found that not only did China turn a blind eye to this practice, but it had even provided armed government vessels to protect the fishing boats. This led the Tribunal to conclude that China had *not* exercised due diligence, and that it had not taken the necessary measures to protect and preserve the marine environment, with respect to the harvesting of endangered species from the fragile ecosystem at Scarborough Shoal and Second Thomas Shoal (SCSA, para. 964).

Turning to the question of destroying habitat, the Tribunal arrived at the same conclusion. China had been fully aware of the practice; and it had actively tolerated the practice as a means to exploit the living resources of the reefs (SCSA, para. 965). Without having to elaborate the standard for due diligence any further, the Tribunal therefore concluded that China had also breached its obligation to protect and preserve the marine environment in respect of its toleration and protection of the harvesting of giant clams by the propeller chopping method (SCSA, para. 966).

Lastly, the Tribunal examined the Philippines' complaint that China had breached the LOSC in relation to Chinese fishermen who used cyanide and explosives at Scarborough Shoal and Second Thomas Shoal. Considering again the two pronged approach described above, the Tribunal first considered China's efforts to adopt rules and measures to prevent the use of cyanide and explosives in fishing activities. China had adopted a Marine Environment Protection Law in 1999, and there was evidence that in 2000, local fishing authorities in Beijing had imposed a penalty on fishermen using explosives near Scarborough Shoal (SCSA, para. 973). Without concluding whether these rules and measures were sufficient for the purpose of exercising due diligence, the Tribunal then moved to the question whether China had failed to adopt the required level of vigilance in the enforcement and control of the rules. The Tribunal did not go into any depth because there was insufficient evidence about the use of explosives and cyanide to allow the Tribunal to conclude that China had failed to take measures to prevent such practices (SCSA, para. 975).

Commentary

The Award adds to a growing body of jurisprudence concerning the level of responsibility of states in the law of the sea and the content of due diligence in concrete cases. This trend began with the *Seabed Disputes Chamber Advisory Opinion* in 2011. The Award first of all *confirms*, in its response to submission no. 9, the conclusion by the ITLOS in its *Advisory Opinion to the SRFC* that the flag state is under a due diligence obligation to ensure that vessels flying its flag do not fish illegally in the EEZ of another state. The Award furthermore *extends* the

obligation to exercise due diligence to an obligation on all states, in all maritime zones, to protect and preserve the marine environment and its living resources (submission 11 and 12B). This general obligation to protect and preserve is to be interpreted broadly, against the background of the corpus of international environmental law, the other provisions of Part XII, and the specific obligations set out in other international agreements (by virtue of Art. 237), and is no longer predominantly associated with controlling pollution.

The Award's discussion of the level of responsibility required to prevent illegal fishing in the EEZ and to protect and preserve the marine environment raises the following questions and observations.

First, the SCSA Tribunal's approach to finding that a flag state is under a due diligence obligation to ensure that its nationals do not fish unlawfully in the EEZ of another state differs from the reasoning adopted by the ITLOS in *Advisory Opinion to the SRFC*. In SRFC, the ITLOS addressed the obligation of the flag state to exercise due diligence in a much broader fashion, using both the general provisions of the LOSC and the specific provisions of the EEZ. In SRFC, the ITLOS first concluded that on the basis of Art. 94 LOSC, the flag state must adopt the necessary administrative measures to ensure that fishing vessels flying its flag are not involved in activities that will undermine its responsibilities in respect of the conservation and management of marine living resources (SRFC, para. 119). The ITLOS then continued that on the basis of Art. 192, states are under a general obligation to protect and preserve the marine environment – which according to the ITLOS extends to an obligation of the flag state to ensure compliance by vessels flying its flag with the relevant conservation measures concerning living resources enacted by the coastal state for its EEZ (SRFC, para. 120). Turning then to the specific provisions of the EEZ, the ITLOS referred to Arts. 58(3) and Art. 62(4) to conclude that flag states must take all the necessary measures to ensure that their nationals and vessels flying their flag are not engaged in illegal fishing within the EEZ of another state (SRFC, para. 124). Citing with approval the *Seabed Disputes Chamber Advisory Opinion*, the ITLOS held that this obligation "to ensure" was one of conduct, and therefore due diligence (SRFC, para. 125-129).

The SCSA Tribunal, on the other hand, based its finding that a flag state must exercise due diligence over its nationals and vessels flying its flag on the obligation to have "due regard to the rights and duties of another state", which is set out in Art. 58(3), read in conjunction with the obligations expressly placed on nationals, set out in Art. 62(4) (SCSA, para. 743). So, rather than approaching the issue of preventing illegal fishing in another state's EEZ from the angle of flag state responsibility, the SCSA Tribunal approached it from the angle of due regard to the rights of the coastal state. The conclusion is the same in the case at hand. Whether it is because a state must have due regard to the rights and duties of the coastal state or because it must ensure that its nationals and vessels flying its flag are not engaged in activities which will undermine its responsibilities in respect of the conservation and management of marine living resources – a flag state must exercise due diligence to ensure that its nationals and vessels flying its flag do not fish unlawfully in the EEZ of another state. The ITLOS' reasoning in *Advisory Opinion to the SRFC* lends itself to a broader application, however. A flag state's conservation and management responsibilities exist across all maritime zones, and its due diligence obligation to ensure that these are not undermined by its nationals and vessels flying its flag therefore does too. The obligation to have due regard to the rights and duties of the coastal state, on the other hand, is limited to the specific context of the EEZ.

A second and related comment concerns the Tribunal's observation that Art. 62(4) imposes an obligation *directly on private parties* to comply with conditions set by the coastal state for access to its EEZ (SCSA, para. 740). The Tribunal clearly distinguished this obligation – which would apply to Chinese nationals and vessels engaged in fishing at Mischief Reef and Second Thomas Shoal and require them to comply with the terms and conditions of the laws and regulations of the Philippines – from the obligation on state parties under Art. 58(3) (SCSA, para.

740, 741). This construction is unhelpful. To the extent that Art. 62 deals with individual responsibilities at all, the obligations arising from the LOSC – as in international law more generally – arise against the state. Furthermore, it has been argued that Art. 62(4) is not the right provision on which to base these obligations. Judge Paik, in his Separate Opinion to the *Advisory Opinion to the SRFC*, explained this as follows:

Although "States" are direct addressees of the obligation to comply with the laws and regulations of the coastal State, private actors, be they natural or juridical persons, are the ultimate regulatory targets under [Art. 58, paragraph 3], as they are the main actors engaging in various activities in the foreign EEZ. Thus in order to perform its duties under article 58, paragraph 3, of the [LOSC], the State must ensure that those subject to its jurisdiction comply with the laws and regulations adopted by the coastal State in accordance with the provisions of the [LOSC]. Through article 94, paragraph 1, of the [LOSC], those subject to jurisdiction of the State should include a ship flying its flag. Thus when it comes to fishing activities within the EEZ, it follows that a State is under the obligation to ensure that fishing vessels flying its flag comply with the laws and regulations of the coastal State governing fishing activities. On the other hand, article 62, paragraph 4, of the [LOSC] should be understood to provide for the extent of the prescriptive jurisdiction of the coastal State to regulate foreign fishing in its EEZ.

Third, the SCSA Tribunal's test for the level of due diligence required by states differed slightly from that set by the ITLOS in *Advisory Opinion to the SRFC*. The *Advisory Opinion to the SRFC* cited the famous wording of the Seabed Disputes Chamber that the obligation of conduct "is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost" (SRFC, para. 129). This level of vigilance had been suggested in SCSA by the Philippines as the appropriate standard of conduct with regard to submission No. 9, which dealt with China's alleged failure to prevent its nationals from exploiting the Philippines' living resources (SCSA, paras. 726, 727). This was not referred to by the SCSA Tribunal, which instead only cited the standard used in *Pulp Mills on the River Uruguay* that "it is 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 (…)" (Pulp Mills, para. 197; SCSA, para. 944). Of course, the question can be put whether the two-pronged standard for due diligence from Pulp Mills *de facto* amounts to the same standard as exercising best possible efforts and doing the utmost. The term 'certain level of vigilance' *can* be interpreted just as broadly as 'best possible efforts' and 'doing the utmost'. The standard for exercising due diligence is in any event a flexible one. As the SCSA Tribunal itself understands, it is very difficult to assess the scope and application of the obligation to exercise due diligence in any particular case. Activities at sea often happen far away from government control. Frequent misbehaviour does not, in and of itself, mean that a state has not exercised due diligence. Despite the now reasonably well established test for due diligence – namely that a state must adopt the necessary rules and measures, and exercise vigilance in enforcing them – future cases will have to determine what exactly due diligence means in the different contexts (as a flag state, as a coastal state, as a port state, etc.) in which states must protect and preserve the marine environment.

Fourth, the question remains exactly what substantive obligations states are under (if any) on the basis of Art. 192 alone, which concerns the duty to protect and preserve the marine environment. As mentioned, the Tribunal found that this obligation should be read in light of the corpus of international environmental law and the other provisions of Part XII. The Award dealt only with situations that were explicitly governed by another provision in Part XII (here, Art. 194), namely, the need to protect rare and fragile ecosystems and the habitat of depleted, threatened, or endangered species and other forms of marine life. Moreover, the species in question had been recognised by an almost universally ratified treaty (CITES) as requiring protection. Does Art. 192 lay down substantive obligations on states for the protection of 'common' ecosystems and the habittat of generally occurring

species more generally? Does Art. 192 *add* anything to the obligations that states have on the high seas and in their EEZ to conserve and manage fish stocks?

The Award thus opens the door to many other questions. For instance, *how far* does the general obligation of Art. 192 stretch? What is included in the corpus of international law that informs its content? Which international agreements should be referred to, by virtue of Art. 237? How, for example, should Art. 192 be interpreted in relation to coastal states, and can a coastal state's management of its living resources be brought into the remit of compulsory dispute settlement under Part XV by relying on Art. 192? If so, what would constitute due diligence in that case?

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