The South China Sea Award: A Milestone for International Environmental Law, the Duty of Due Diligence and the Litigation of Maritime Environmental Disputes?

STEPHEN FIETTA, JIRIES SAADEH AND LAURA REES-EVANS*

ABSTRACT

In 2013, the Philippines initiated arbitration proceedings against China under Part XV of the United Nations Convention on the Law of the Sea (“UNCLOS”). The arbitration sought to determine “the legal basis of maritime rights and entitlements in the South China Sea, the status of certain geographic features in the South China Sea, and the lawfulness of certain actions taken by China in the South China Sea.”

The Tribunal issued its final award (“Award”) on July 12, 2016. The Award is a milestone in international environmental law as it relates to the law of the sea. This Article examines the Award’s findings with respect to China’s large-scale construction of artificial islands in the South China Sea, alleged State-sponsored fishing activities by Chinese-flagged vessels, and the harvesting of endangered species by Chinese vessels and fishermen. The Article discusses the legal and evidentiary standards adopted by the arbitral tribunal, States’ positive duties of due diligence and vigilance with respect to the marine environment, and potential future implications for marine environmental and conservation disputes.

All told, the implications of the Award for the justiciability of international environmental disputes are significant. In light of the Award’s conclusions as to the nature and scope of the environmental obligations under UNCLOS, it is arguable that any State party to UNCLOS has standing to bring an environmental complaint against any other State party with respect to the conduct of its nationals or flagged vessels in any maritime area. This might be especially important where the conduct concerned threatens severe damage to the marine environment or conservation, including with respect to endangered species or fragile ecosystems.

* Stephen Fietta, M.A. University of Cambridge; Jiries Saadeh, LL.M., Leiden University, M.A. University of Oxford; and Laura Rees-Evans LL.M., New York University, M.A. University of Oxford. The authors, Stephen Fietta, Jiries Saadeh, and Laura Rees-Evans are lawyers at Fietta LLP, a law firm dedicated to public international law. Opinions expressed in this article do not necessarily reflect those of the firm or its clients. © 2017, Stephen Fietta, Jiries Saadeh and Laura Rees-Evans.
Regardless of whether the implications of the Award will extend so far, the Award will provide a seminal precedent both in the litigation of international environmental disputes and in relation to the nature and scope of States’ “due diligence” obligations, both under UNCLOS and more broadly.

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INTRODUCTION

The South China Sea spans almost 3.5 million square kilometers of the western Pacific Ocean.¹ It is a crucial global shipping lane, a substantial source of fish,  

¹ S. China Sea Arb. (Phil. v. China), Case No. 2013-19, PCA Case Repository, Award, ¶ 3 (July 12, 2016) [hereinafter Philippines/China Award (Merits)].
and parts of it are believed to hold significant hydrocarbons.² It is also home to a number of endangered species and highly biodiverse coral reef ecosystems.³ For decades, it has been the subject of overlapping disputes between five of its seven bordering littoral States. Brunei, China, Malaysia, the Philippines, and Vietnam all make claims to sovereign rights over the South China Sea, each of which conflicts with those of their neighbors.⁴

On January 22, 2013, the Philippines initiated arbitration proceedings against China under Part XV of the United Nations Convention on the Law of the Sea (“UNCLOS” or “the Convention”).⁵ The arbitration sought to determine “the legal basis of maritime rights and entitlements in the South China Sea, the status of certain geographic features in the South China Sea, and (most importantly, for the purposes of this article) the lawfulness of certain actions taken by China in the South China Sea.”⁶

On February 19, 2013, China rejected the arbitration and returned the Philippines’ notification and statement of claim.⁷ China is a State party to UNCLOS (and thus subject to Part XV on compulsory dispute settlement). However, China declared from the outset that it would “neither accept nor participate in the arbitration” because, in its view, the arbitral tribunal did not have jurisdiction over the dispute.⁸ Notwithstanding China’s non-participation, a tribunal was constituted (“Tribunal”) on the basis of provisions in the Convention that allow proceedings to continue in the absence of a State party.⁹

An important backdrop to the arbitration was an increase in unilateral activities by China, and its nationals, in areas of the South China Sea that the Philippines considered a part of its exclusive economic zone (“EEZ”). Those activities primarily concerned China’s construction of multiple artificial islands and related land reclamation works, together with the alleged State-sponsored fishing by Chinese-flagged vessels, including the harvesting of endangered species protected by international law. The Philippines’ complaints centered around the

². Id.
³. Id.
⁴. Taiwan also makes disputed claims over various features and their surrounding waters in the South China Sea. Id. ¶ 50; Robert Beckman, The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea, 107 AM. J. OF INT’L L. 142, 144 (2013).
⁶. Philippines/China Award (Merits), supra note 1, ¶ 2.
⁷. Id. ¶ 29.
⁹. UNCLOS, supra note 5, Annex VII, art. 9; Philippines/China Award (Merits), supra note 1, ¶¶ 12, 30. The Tribunal comprised Judge Rüdiger Wolfrum, Judge Stanislaw Pawlak, Judge Jean-Pierre Cot, Professor Alfred H.A. Soons and Judge Thomas A. Mensah (as Presiding Arbitrator).
Spratly Islands archipelago in the southern portion of the South China Sea and another small feature, the Scarborough Shoal, further north.

In an Award on Jurisdiction and Admissibility dated October 29, 2015 ("Award on Jurisdiction"), the Tribunal asserted jurisdiction over certain of the Philippines’ claims, finding, inter alia, that China’s non-appearance in the proceedings did not deprive the Tribunal of the ability to do so. With respect to certain other claims, the Tribunal reserved its jurisdictional findings until the merits phase of the proceeding. In considering its jurisdiction, the Tribunal emphasized that the Philippines had maintained, at all stages of the arbitration, that it was not asking for a ruling on the territorial sovereignty aspects of its dispute with China (which are excluded from the scope of the Convention), nor was it asking the Tribunal to delimit any maritime boundaries (which are excluded from the Tribunal’s jurisdiction by virtue of a Chinese declaration under Article 298 of UNCLOS).

The Tribunal issued its final Award on July 12, 2016 ("Award"). The Award—almost five hundred pages long—dealt with each of the Philippines’ complaints in detail. These complaints covered:

- the ‘nine-dash line’ and China’s claim to historic rights in the maritime areas of the South China Sea (submissions 1 and 2);
- the legal status of features in the South China Sea (submissions 3 to 7);
- the legality of certain Chinese activities in the South China Sea, including in areas within the Philippines’ continental shelf and EEZ, as well as the impact of their activities on the protection and preservation of the marine environment generally (submissions 8 to 13);
- the aggravation or extension of the dispute between the parties (submission 14); and
- the future conduct of the parties (submission 15).

Commentary on the Award has, understandably, concentrated on its consequences for China’s extensive territorial and maritime claims in the South China Sea, based on its ‘nine-dash line.’ Although China has never “expressly clarified the nature or scope of its claimed historic rights . . . [nor] . . . its understanding of the meaning of the ‘nine-dash line,’” the ‘nine-dash line’ is generally taken to represent the outer limits of China’s claims to the South China Sea. A recent depiction of the line was appended to two Notes Verbales, which China submitted.

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10. S. China Sea Arb. (Phil. v. China), PCA Case No. 2013-19, Award on Jurisdiction and Admissibility (Oct. 29, 2015) [hereinafter Philippines/China Award (Jurisdiction)].
11. Id. ¶ 11.
12. Id. ¶ 413.
13. Id. ¶ 8.
14. Philippines/China Award (Merits), supra note 1, ¶ 3.
15. Id. ¶¶ 20–24.
16. Id. ¶ 180.
17. The ‘nine-dash line’ originates from a 1948 official Chinese map, reproduced in Philippines/China Award (Merits), supra note 1, ¶ 75.
to the United Nations Secretary-General in 2009 in response to submissions from Malaysia and Vietnam to the Commission on the Limits of the Continental Shelf. That map is reproduced below (Figure 1), alongside a map showing, in greater detail, the South China Sea and the island groups central to the Award (Figure 2).

Law of the sea specialists have also poured over the Tribunal’s much-anticipated analysis of the distinction between islands, rocks, low-tide elevations, and other maritime features under Article 121 and other provisions of the Convention, because the analysis will likely have widespread implications for many small disputed features around the world. However, the Tribunal’s extensive findings on environmental, conservation, and fishing aspects of the dispute are notable.

The Tribunal found that a variety of Chinese conduct had breached core environmental obligations of the Convention, including: the obligations of UNCLOS State Parties to “protect and preserve the marine environment” (Article 192); to take “all measures . . . that are necessary to prevent, reduce and control pollution of the marine environment” (Article 194(1)); and 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” (Article 194(5)).\footnote{Philippines/China Award (Merits), supra note 1, ¶ 983.} The Tribunal also found that China had violated: its duty to have “due regard” for the Philippines’ rights over its EEZ (Article 58(3)); its obligations to cooperate with other States with respect to the protection and preservation of the marine environment (Articles 123 and 197); and its obligation to undertake and communicate environmental impact assessments with respect to its construction of artificial islands in the South China Sea (Article 206).\footnote{Id. ¶¶ 757, 993.}

Importantly, the Tribunal’s finding of multiple violations of UNCLOS drew in part from the provisions of other multilateral environmental treaties, specifically: (i) the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”), which the Tribunal considered to represent “part of the general corpus of international law” that informs the content of the Convention’s obligations to preserve and protect the marine environment;\footnote{Id. ¶ 956.} and (ii) the Convention on Biological Diversity (“CBD”), which the Tribunal found to provide an “internationally accepted definition . . . of ecosystem.”\footnote{Id. ¶ 945.}

The Award also reached notable conclusions about the extent of States’ “due diligence” obligations with respect to illegal, unreported, and unregulated fishing activities by nationals and flagged vessels within the EEZs of other States.\footnote{Id. ¶ 744.} The Tribunal held that, in tolerating and failing to exercise due diligence to prevent illegal fishing by its flagged vessels in the Philippines’ EEZ, China had failed to

\begin{footnotesize}
\begin{itemize}
\item \footnote{Philippines/China Award (Merits), supra note 1, ¶ 983.}
\item \footnote{Id. ¶¶ 757, 993.}
\item \footnote{Id. ¶ 956.}
\item \footnote{Id. ¶ 945.}
\item \footnote{Id. ¶ 744.}
\end{itemize}
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FIGURE 1. Map Attached to China’s 2009 Notes Verbales (Showing ‘Nine-dash line’)

Source: Philippines/China Award (Merits), supra note 1, at 77.
FIGURE 2. South China Sea

Source: Philippines/China Award (Merits), supra note 1, at 9.
meet its due diligence obligation under Article 58(3) of the Convention.23

This Article examines the Award’s multiple findings with respect to the environmental aspects of the dispute in the South China Sea, and reflects on their broader implications both for international environmental law and public international law more generally (in particular, the multifaceted duty of “due diligence”). It does so through three key steps.

First, the Article considers the issue of China’s non-participation in the proceedings and the Tribunal’s consequent decision to assume a “special responsibility” to establish that it had jurisdiction over the dispute and that the Philippines’ claim was well-founded. Second, the Article reflects on the development of the duty of due diligence in international environmental law, beginning with the principle’s origins in public international law and tracing its development to the present day (including how it is embodied within UNCLOS). Third, the Article considers the Tribunal’s interpretation and application of the Convention’s environmental and related due diligence obligations, including references to harmful fishing practices, harvesting of endangered species, and construction of artificial islands in the South China Sea. The Article concludes by identifying some important practical implications of the Award for future litigation by States regarding their environmental and conservation disputes.

I. CHINA’S NON-PARTICIPATION AND THE TRIBUNAL’S “SPECIAL RESPONSIBILITY” TO ESTABLISH THAT IT HAD JURISDICTION OVER THE DISPUTE AND THAT THE CLAIM WAS WELL-FOUNDED

The Tribunal in Philippines v. China was presented with the initial question of whether it could proceed with the case in the absence of China. The Tribunal in its Award on Jurisdiction found, as a preliminary matter, that China’s non-participation did not deprive it of jurisdiction under Part XV and Annex VII of UNCLOS.24 It noted that the Convention expressly anticipates that the “[a]bsence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings.”25

China’s absence raised important considerations of procedural equality and burden of proof. The Tribunal observed that China would be bound by any award under the Convention, regardless of its non-participation.26 The Tribunal emphasized, however, that “[t]he situation of a non-participating Party . . . imposes a special responsibility on the Tribunal,” which required it to do more than “simply accept the Philippines’ claims or enter a default judgment.”27 Rather, the Tribunal

23. Id.
24. Philippines/China Award (Merits), supra note 1, ¶ 150.
25. UNCLOS, supra note 5, Annex VII, art. 9; Philippines/China (Merits), supra note 1, ¶ 12, (referring to Article 296, para. 1 of UNCLOS and Article 11 of Annex VII).
26. Philippines/China Award (Merits), supra note 1, ¶ 12.
27. Id.
determined that, before making its Award, it should “satisfy itself ‘not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.’” 28 This created a series of important practical consequences for the conduct of the case and the Tribunal’s assessment of the Philippines’ environmental complaints.

A. THE TRIBUNAL’S APPROACH TO JURISDICTION

The Tribunal took a proactive role in identifying, formulating, and subsequently addressing China’s potential objections to jurisdiction. It did so by gleaning China’s concerns from its public statements and other communications. Of particular relevance for this purpose was a “Position Paper” on the matter of jurisdiction, published by the Chinese Ministry of Foreign Affairs on December 7, 2014, and deposited with the Permanent Court of Arbitration by the Chinese Embassy in The Hague. 29 The Tribunal treated the Position Paper as setting out a series of objections to jurisdiction. 30 The Tribunal accordingly bifurcated the proceeding so as to address those objections as preliminary questions, prior to any examination of the merits.

In the context of the Tribunal’s environmental findings, two of China’s three main objections to jurisdiction are worthy of special note. 31 First, China argued that the essence of the dispute was the territorial sovereignty over several features in the South China Sea, which was an issue beyond the scope of the Convention. 32 Second, China argued that the subject-matter of the dispute fell within the scope of China’s Article 298 declaration, excluding disputes concerning maritime delimitation and military activities from UNCLOS’s compulsory dispute settlement procedures. 33

The Tribunal found that, although the Parties certainly disputed the land sovereignty over certain features in the South China Sea, the matters submitted to arbitration by the Philippines were different and thus did not concern the sovereignty question. 34 The Tribunal also found that “a dispute concerning the

28. Id.
29. Id. ¶ 13.
30. Id. ¶ 14.
31. China’s other objection was that it and the Philippines had agreed, through bilateral instruments and the Declaration on the Conduct of Parties in the South China Sea, to settle their relevant disputes through negotiations. By unilaterally initiating the arbitration, the Philippines had, according to China, breached its obligation under international law. China’s Position Paper, supra note 8, ¶ 3; Philippines/China Award (Jurisdiction), supra note 10, ¶ 14.
32. China’s Position Paper, supra note 8, ¶ 3; Philippines/China Award (Jurisdiction), supra note 10, ¶ 14.
34. Philippines/China Award (Jurisdiction), supra note 10, ¶¶ 152–54.
existence of an entitlement to maritime zones is distinct from a dispute concerning the delimitation of those zones in an area where the entitlements of parties overlap.”\textsuperscript{35} In the Tribunal’s view, since the Philippines had not requested it to delimit any overlapping entitlements between the two States, the dispute did not concern maritime delimitation.\textsuperscript{36}

Importantly, however, a number of the Philippines’ submissions assumed that Chinese activities had taken place within the Philippines’ EEZ, a matter that was disputed by China. The Tribunal observed that it would only be able to address those submissions if it first determined that China could not possibly have any overlapping entitlement in the area concerned.\textsuperscript{37} The Tribunal deferred consideration of this matter until the merits phase of the proceeding.\textsuperscript{38} At that stage, the Tribunal determined that there were no overlapping entitlements that required delimitation because there was no legal basis for any Chinese claims to the maritime areas concerned.\textsuperscript{39} Accordingly, the Tribunal found that China’s Article 298 declaration excluding delimitation disputes from compulsory dispute resolution did not apply.\textsuperscript{40}

The Tribunal also deferred the question of whether any of China’s disputed activities were “military” in nature, an issue relevant to China’s declaration under Article 298(1)(b), until the merits phase.\textsuperscript{41} When resolving this issue in the Award, the Tribunal looked to what it called China’s “repeated statements that its installations and island-building activities [in the South China Sea were] intended to fulfil civilian purposes.”\textsuperscript{42} The Tribunal concluded that the military activities exception did not apply and could not preclude its jurisdiction.\textsuperscript{43} Accordingly, the Tribunal concluded that it had jurisdiction over the Philippines’ complaints about, \textit{inter alia}, Chinese fishing activities and artificial island construction.\textsuperscript{44}

B. THE TRIBUNAL’S ASSESSMENT OF WHETHER THE PHILIPPINES’ CLAIM WAS “WELL FOUNDED IN FACT AND LAW”

In Section IV.A of the Award, the Tribunal set out in detail the proactive steps it had taken to fulfill its “special responsibility” to satisfy itself that “the claim

35. \textit{Id.} \textsuperscript{¶} 156. The Tribunal added that “A maritime boundary may be delimited only between States with opposite or adjacent coasts and overlapping entitlements. In contrast, a dispute over claimed entitlements may exist even without overlap, where—for instance—a State claims maritime zones in an area understood by other States to form part of the high seas or the Area for the purposes of the Convention.” \textit{Id.}

36. \textit{Id.} \textsuperscript{¶} 157.

37. \textit{Id.}

38. \textit{Id.} \textsuperscript{¶} 394.

39. \textit{Id.} \textsuperscript{¶} 633.

40. \textit{Id.}

41. \textit{Id.} \textsuperscript{¶} 1011.

42. \textit{Id.} \textsuperscript{¶¶} 935–38.

43. \textit{Id.}

44. \textit{Id.}
These steps included:

- making extensive enquiries into the Philippines and its experts;\(^4^5\)
- appointing its own independent experts, including three experts to assist in its analysis of the impact of Chinese artificial island-building activities on coral reef ecosystems in the South China Sea;\(^4^7\)
- seeking all available information on China’s stance on relevant environmental issues, including specifically and directly asking China whether it had undertaken any environmental impact studies;\(^4^8\)
- issuing multiple requests that each of the Parties comment on various evidence concerning the prevailing conditions of features in the South China Sea;\(^4^9\) and
- instructing archivists and, through them, recovering historical records from archives (in particular, from the United Kingdom Hydrographic Office and from France’s Bibliothèque Nationale and Archives Nationales d’Outre-Mer),\(^5^0\) upon which the Parties were again invited to comment.\(^5^1\)

The Tribunal’s use of its own experts in making its environmental determinations—and its proactive interrogation of the experts presented by the Philippines—were particularly important to the Award’s final assessment of the facts. The Tribunal decided against conducting any site visits, however, because it considered “historical records concerning conditions on features in the Spratly Islands, prior to them having been subjected to significant human modification, to be more relevant than evidence of the situation currently prevailing.”\(^5^2\) In any event, the Tribunal viewed a site visit as a practical impossibility in light of China’s resolute opposition to the arbitral process. As it observed, China “objected strongly to the possibility of any site visit to the South China Sea by the Tribunal.”\(^5^3\)

II. THE DUTY OF DUE DILIGENCE IN INTERNATIONAL ENVIRONMENTAL LAW

The Tribunal’s substantive findings on environmental, conservation, and fishing aspects of the dispute are inextricably tied to its treatment of China’s “due diligence” obligations under UNCLOS. As the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (“ITLOS”) explained in its Activities in the Area Advisory Opinion, an obligation of due diligence is “an obligation to deploy adequate means, to exercise best possible efforts, to do the

45. Id. ¶¶ 129–42.
46. Id. ¶¶ 132, 134–35.
47. Id. ¶¶ 84–85, 90, 136.
48. Id. ¶ 137.
49. Id. ¶ 139.
50. See, e.g., id. ¶¶ 89–99, 140–41, 198.
51. Id. ¶ 198.
52. Id. ¶ 142.
53. Id.
utmost, to obtain th[e] result.”54 It is therefore an obligation “of conduct” and not “of result.”55

As a number of international courts and tribunals have observed, the duty of due diligence incorporates a requirement that States exercise a “certain level of vigilance.”56 Thus, the International Court of Justice (“ICJ” or “the Court”) in the *Pulp Mills on the River Uruguay* case observed that due diligence is:

[A]n 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.57

This section outlines the origins of this duty of due diligence in general international law and explains its development, prior to the Award, in international environmental law (including under UNCLOS).

A. THE DUTY OF “DUE DILIGENCE” IN GENERAL INTERNATIONAL LAW

The obligation of “due diligence” has a long history in international law. Its foundations can be traced back to the writings of Grotius and Vattel, and its remit was developed further through a number of nineteenth and early twentieth century arbitral decisions.58 For example, the *Alabama Claims Arbitration* tribunal applied it in the context of the duty of neutrality.59 It was also considered in decisions of mixed claims commissions and arbitral tribunals that dealt with States’ claims for damages over injuries suffered by their nationals at the hands of

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55. Id.
57. Id.
58. Grotius applied the principle in recognizing a State’s responsibility for the crimes of its citizens, where a State knows of the crime and fails to prevent it, or where a State fails to punish such conduct (see JOANNA KULESZA, DUE DILIGENCE IN INTERNATIONAL LAW 38–41, citing HUGO GROTIUS, ON THE LAW OF WAR AND PEACE, at Book II, Chapter XVII, 157 (R. Tuck ed., Liberty Fund 2005)). Vattel recognized an obligation of due diligence in relation to the principle that a sovereign, in permitting foreigners to enter its territory, “engages to protect them as his own subjects, and to afford them perfect security, as far as depends on him.” See ÉMÉR DE VATTEL, THE LAW OF NATIONS, 313, ¶ 104 (Béla Kapossy & Richard Whatmore eds., Liberty Fund 2008) (1797), Book II, Chapter VIII, ¶ 104.
59. Ala. Claims Arbitration (U.S. v. Gr. Brit.), 29 R.I.A.A. 125, 129, 131 (1872). The tribunal found, inter alia, that “due diligence . . . ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfil the obligations of neutrality on their part”; and that insufficiency of domestic legal means of action could not justify a failure of due diligence.
non-State actors.\textsuperscript{60} In the \textit{S.S. Lotus Case}, Justice Moore (in his dissenting opinion) found it “well settled that a State is bound to use due diligence to prevent the commission within its dominions of criminal acts against another nation or its people.”\textsuperscript{61}

The principle of due diligence has since been applied in multiple branches of international law including in relation to the use of force,\textsuperscript{62} international humanitarian law,\textsuperscript{63} and international trade.\textsuperscript{64} However, it is in the fields of international investment law, international human rights law, and international environmental law that the principle has played a particularly important role. Across all fields of international law, a failure to exercise due diligence can render the acts of a private party legally attributable to the State, or can constitute a breach of a primary obligation.\textsuperscript{65}

In international investment law, arbitral decisions throughout the twentieth and twenty-first centuries have confirmed the centrality of the principle of due diligence to the full protection and security of treatment standard (“FPS stan-

\textsuperscript{60} Prominent examples are \textit{Janes} and \textit{Neer}. In \textit{Janes}, the tribunal found that Mexico was liable to the USA for having failed to apprehend the killer of an American citizen. Laura M.B. Janes et al. (U.S. v. United Mexican States), 4 R.I.A.A. 82, 86, ¶¶ 17–18 (1925). In \textit{Neer}, the tribunal found that the propriety of governmental acts should be put to the test of “international standards,” and that the treatment, “in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.” L.F.H. Neer (U.S. v. United Mexican States), 4 R.I.A.A. 60, 61–62 (1926).

\textsuperscript{61} S.S. “Lotus” (Fr. v. Turk.), Judgment, 1927 PCIJ (ser. A) No. 10, at 88 (Sept. 7) (Moore, J., dissenting).

\textsuperscript{62} See, \textit{e.g.}, G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, (Oct. 24, 1970) (“Every state has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.”); S.C. Res. 1267, preambular ¶ 5 (Oct. 15, 1999) (condemning the sheltering and training of terrorists in Afghan territory controlled by the Taliban); S.C. Res. 1368 ¶ 3 (Sept. 12, 2001) (recognizing the culpability of those “harbouring the perpetrators, organizers and sponsors” of terrorist acts). \textit{See also}, THOMAS M. FRANCK, \textit{RECURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS} 67 (2002) (“It is becoming clear that a victim-state may invoke Article 51 to take armed countermeasures in accordance with international law and UN practice against any territory harbouring, supporting or tolerating activities that culminate in, or are likely to give rise to, insurgent infiltrations or terrorist attack.”).


\textsuperscript{64} See, \textit{e.g.}, Appellate Body Report, United States–Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan, ¶¶ 78–79, WTO Doc. WT/DS192/AB/R (adopted Oct. 8, 2001).

standard”). In the words of the tribunal in Lauder v. Czech Republic, the FPS standard “obliges the [p]arties to exercise such due diligence in the protection of foreign investment as reasonable under the circumstances.” Tribunals have also confirmed the existence of a stand-alone duty of due diligence in protecting foreign investors and their investments under customary international law. Although the decisions of international tribunals are less consistent as to what precisely the due diligence obligation requires in relation to FPS, it is clear that it does not entail strict liability for any harm caused to a foreign investor or its investment. Correspondingly, in order to prevail in a “due diligence” argument, a foreign investor must identify sufficient evidence that a State has failed to fulfill its due diligence obligation.

In international human rights law, various provisions of international human rights instruments require States to take specific action to protect individuals and groups against human rights abuses, including those perpetrated by non-State actors. In those cases, failure to exercise due diligence gives rise to a breach of a State’s primary obligations. State responsibility may arise out of private acts in other ways, including failure to exercise due diligence to prevent, punish,


67. Lauder v. The Czech Republic, UNCITRAL, Final Award, ¶ 308 (Sept. 3, 2001) [hereinafter Lauder].


70. See, e.g., Wena Hotels Ltd. v. Arab Repub. of Egypt, ICSID Case No. ARB/98/4, Award, ¶¶ 85–89 (Dec. 8, 2000) (finding sufficient—or “convincing”—evidence that Egypt was aware of threats to, but took no action to protect, Wena’s investment); Lauder, supra note 67, ¶ 309; Noble Ventures, supra note 68, ¶ 166; Rumeli Telekom A.S and Telsim Mobil Telekomikasyon Hizmetleri A.S v. Repub. of Kaz., ICSID Case No. ARB/05/16, Award, ¶¶ 668–70 (July 29, 2008); Convial Callao, supra note 69, ¶¶ 649–60.

71. See, e.g., European Convention on Human Rights art. 2(1), Nov. 4, 1950, 213 U.N.T.S. 221 (providing that: “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”). The first sentence of Article 2(1) has been consistently interpreted to concern not only deaths resulting from the use of force by agents of the State, but also to lay down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction. See, e.g., L.C.B. v. U.K., App. No. 23413/94, 1998-III Eur. Ct. H.R., ¶ 36 (1998). This interpretation of Article 2 has also been applied in the environmental context. See, e.g., Öneryildiz v. Turkey, App. No. 48939/99, 38 Eur. H.R. Rep. 12, ¶¶ 65, 91–94 (2004) [hereinafter Öneryildiz].
investigate, or redress human rights violations by private acts. As the Inter-American Court of Human Rights ("IACHR") held in Velásquez-Rodríguez v. Honduras (a case of "forced disappearance"):

[a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.

The IACHR has consistently held that a State may be responsible for breach of its duty to prevent violations of the right to life or personal integrity if it: (a) knew, or should have known, of the existence of a real and immediate risk; and (b) failed to take the necessary measures within the scope of its powers which, judged reasonably, might have been expected to prevent or avoid that risk. It has also repeatedly held that the obligation on States to prevent violence against women is one of “due diligence.”

The European Court of Human Rights ("ECHR") has referred to the jurisprudence of the IACHR in applying the principle of “due diligence.” It has also developed a body of jurisprudence imposing a due diligence-style obligation on States in the environmental context, centered around a “positive duty . . . to take reasonable and appropriate measures” to secure rights to respect for home, private, and family life under Article 8 of the European Convention on

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72. Human Rights Comm., General Comment No. 31 [80] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add. 13, ¶ 8 (May 26, 2004) (noting that “[t]here may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities’’); Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19: Violence Against Women (Eleventh Session, 1992), U.N. Doc. A/47/38, ¶ 9 (noting that “States may [. . .] be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation’’); Comm. on Econ., Soc. and Cultural Rights, CESC General Comment No. 12: The Right to Adequate Food (art. 11), ¶ 19, U.N. Doc. E/C.12/1999/5, (1999) (noting that violations of the right to food can occur through, inter alia, “failure to regulate activities of individuals or groups so as to prevent them from violating the right to food of others”).


B. DUE DILIGENCE IN INTERNATIONAL ENVIRONMENTAL LAW

Though the principle of due diligence has been important in a number of fields of international law, it has held a special significance in the field of international environmental law. This section charts the development of the principle of due diligence, within the field of international environmental law, from its origin to its treatment in recent decisions of international courts and tribunals. Recent developments have emphasized States’ obligations of “vigilance” with respect to the environmentally damaging activities of private persons within their jurisdiction and control, and the role of the precautionary principle in interpreting and applying such obligations.

1. Origins of the Principle of Due Diligence in International Environmental Law

With respect to international environmental law, the principle of due diligence found early expression in the Trail Smelter case.78 There, the tribunal identified a general obligation on States to exercise due diligence in relation to the creation or toleration within their territory of pollution dangers to other States. It held that:

[N]o State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties of persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.79

The principle expressed in Trail Smelter has been confirmed and extended in a number of subsequent international environmental instruments, initially of a “soft law” and subsequently a “hard law” nature.80 The “soft law” declarations arising out of the first and second global environmental conferences (the “Stockholm Declaration” of June 16, 1972 and the “Rio Declaration” of June 14, 1992 respectively) have been particularly influential in the development of “hard” international environmental obligations, as explained in the following sections.

79. Id.
80. See, e.g., Kenneth W. Abbott & Duncan Snidal, Hard and Soft Law in International Governance, 54 INT’L ORG. 421, 421–22 (2000) (defining hard law as “legally binding obligations that are precise (or can be made precise through the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law;” and defining soft law as one that “begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision and delegation.”).
2. Soft Law Development of the Principle of Due Diligence in International Environmental Law

Principle 21 of the Stockholm Declaration and, subsequently, Principle 2 of the Rio Declaration confirmed that States have a right to exploit their resources pursuant to their own environmental policies, but also have “the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”81 These two Declarations moved beyond the principle identified in Trail Smelter by referring to activities not only within a State’s “territory,” but more generally to activities conducted within a State’s “jurisdiction or control.”82

The Rio Declaration further extended the Stockholm Declaration and the Trail Smelter decision by introducing the precautionary approach, wherein the degree of diligence required will vary according to the nature and foreseeability of the risks of a particular activity. As Principle 15 states, this “precautionary approach” requires that the “lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation,” where the threat of damage is “serious or irreversible.”83 As the Seabed Disputes Chamber observed in 2011 in its Activities in the Area Advisory Opinion, the formulation of the precautionary approach set out in Principle 15 has been incorporated into a growing number of “hard law” instruments, including treaties.84 According to the Seabed Disputes Chamber, this “has initiated a trend towards making this approach part of customary international law.”85

The International Law Commission’s Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (“ILC Draft Articles on Transboundary Harm”) confirm the principles of the Stockholm and Rio Declarations.86 The preamble states that “the freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited.”87 Article 3


82. Stockholm Declaration, supra note 81, at 5.

83. Principle 15 of the Rio Declaration provides, in full, that: “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” Rio Declaration, supra note 81, at 6.

84. Activities in the Area Advisory Opinion, supra note 54, ¶¶ 125–27.

85. Id. ¶ 135.


provides that “[t]he State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof.”

“Transboundary harm” is defined as “harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin.” The commentary to Article 3 explains that the obligation of the State of origin is one of due diligence, with the required standard of State conduct being that which is “generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance.” The commentary also confirms that the precautionary principle implies that States need to keep their obligations of prevention under continuous review in order to respond to advances in scientific knowledge.

3. Hard Law Development of the Principle of Due Diligence in International Environmental Law

The seminal decision of the ICJ in Pulp Mills adopted a similar formulation to Article 3 of the ILC Draft Articles on Transboundary Harm in describing the meaning of an obligation to protect and preserve the aquatic environment of the River Uruguay. In the Pulp Mills decision, the ICJ referred to its finding in the Nuclear Weapons Advisory Opinion that there exists in the “corpus of international law relating to the environment” a “general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control.” It found that the obligation to preserve the aquatic environment was an obligation to act with due diligence. That obligation required each party, inter alia, to “take all appropriate measures” to enforce their regulations on public or private operators under its jurisdiction.

The ICJ confirmed that “the principle of prevention” (reflected in Article 3 of the ILC Draft Articles on Transboundary Harm) is a “customary rule” with its “origins in the due diligence that is required of a State in its territory.” According to the principle of prevention, a State is “obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of

88. Id. ¶ 98, art. 3.
89. Id. ¶ 98, art. 2(c).
90. Id. at 391–92.
91. Id. at 394.
92. Id. at 393.
94. Arg. v. Uru., 2010 I.C.J. at 68, ¶ 93 (citing Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 29 (July 8)).
95. Id. ¶ 197.
96. Id.
97. Id. ¶ 101.
another State.”\textsuperscript{98} The ICJ also confirmed that, while a precautionary approach may be relevant in the interpretation and application of the provisions of the relevant treaty, the use of that approach did not entail a reversal of the burden of proof.\textsuperscript{99}

The ICJ in \textit{Pulp Mills} also considered the obligations on States, under international law, to gather and provide information on the environmental risks of activities undertaken within their jurisdiction or control. It held (consistent with Principle 17 of the Rio Declaration) that there is now a requirement under general international law “to undertake an environmental impact assessment where there is a risk that [a] proposed industrial activity may have a significant adverse [transboundary] impact,”\textsuperscript{100} and that such activities should be subject to continuous monitoring of their effects on the environment.\textsuperscript{101} The obligation of due diligence would not be satisfied if a State initiating a project that would affect the aquatic environment did not undertake an environmental impact assessment of its project.\textsuperscript{102}

The ICJ’s conclusions in \textit{Pulp Mills} on the collection and provision of information regarding environmental risks mirror similar conclusions reached by the ECHR in \textit{Tătar v. Romania} in the context of considering the right to private and family life under Article 8 of the European Convention on Human Rights. In that case, which emerged out of the contamination of the River Danube by a commercial gold-mining facility, the ECHR underlined that the State licensing process must involve adequate investigations and studies to evaluate and prevent the possible adverse effects of private activities that could damage the environment and thereby impact the rights of individuals.\textsuperscript{103} The ECHR also emphasized the importance of public access to the conclusions of such studies and to information for evaluating the danger to which the public may be exposed.\textsuperscript{104}

The joined cases of \textit{Costa Rica v. Nicaragua} and \textit{Nicaragua v. Costa Rica} further refined the environmental due diligence principle.\textsuperscript{105} These cases concerned Nicaraguan complaints about Costa Rica’s construction of a road, and Costa Rican complaints about Nicaraguan river dredging. The ICJ drew a distinction between procedural and substantive due diligence obligations in international environmental law.\textsuperscript{106} It explained that procedural due diligence

\footnotesize
\textsuperscript{98} Id.
\textsuperscript{99} Id. ¶ 164.
\textsuperscript{100} Id. ¶ 204.
\textsuperscript{101} Id. ¶ 205.
\textsuperscript{102} Id. ¶ 204. The ICJ added in ¶ 205 that general international law does not, however, stipulate the scope and content of an environmental impact assessment.
\textsuperscript{104} Id. ¶¶ 88, 113.
\textsuperscript{106} Id. ¶ 100.
obligations include the obligation to conduct an environmental impact assessment, and the obligation to notify and consult, whereas a State’s substantive due diligence obligation is to exercise due diligence to prevent significant transboundary harm.\textsuperscript{107} ICJ (and ECHR) jurisprudence shows that the evidential burden is generally somewhat higher in the context of complaints about substantive failures to prevent transboundary environmental harm than it is in the context of complaints about procedural irregularities.

In relation to procedural obligations, the ICJ in \textit{Costa Rica v. Nicaragua} confirmed its finding in \textit{Pulp Mills} that the obligation of due diligence requires a State to carry out an environmental impact assessment where there is a risk of “significant” transboundary harm.\textsuperscript{108} The ICJ also confirmed that if the environmental impact assessment concludes that a planned activity raises a risk of significant transboundary harm, the due diligence obligation requires the State planning the activity “to notify and consult in good faith with the potentially affected State.”\textsuperscript{109} On the facts of \textit{Costa Rica v. Nicaragua}, the ICJ found that the evidence before it did not suggest that Nicaragua’s river dredging program posed a risk of significant transboundary harm.\textsuperscript{110} Accordingly, “Nicaragua was not required to carry out an environmental impact assessment.”\textsuperscript{111} Echoing the \textit{Trail Smelter} standard of proof, the ICJ further found that Costa Rica had “not provided any convincing evidence” that Nicaragua’s dredging activities caused transboundary harm.\textsuperscript{112} As a result, it found that Nicaragua had also not breached its substantive obligations of due diligence.\textsuperscript{113}

In relation to Nicaragua’s claims against Costa Rica, the ICJ found that the evidence before it indicated that the construction of the road by Costa Rica did carry a risk of significant transboundary harm, thereby triggering the obligation to conduct an environmental impact assessment.\textsuperscript{114} Costa Rica had not conducted such an assessment and had therefore breached its procedural obligations.\textsuperscript{115} However, the Court found that Nicaragua had failed to prove that the construction of the road in fact caused significant transboundary harm. Accordingly, on the evidence before it, the ICJ again concluded that there had been no breach of any

\textsuperscript{107} The ECHR similarly distinguishes between procedural and substantive obligations in relation to the environment under Article 8 of the European Convention on Human Rights. \textit{See}, e.g., Tătar, \textit{supra} note 103, ¶ 88.

\textsuperscript{108} The ICJ noted that Nicaragua’s dredging program did not give rise to a risk of “significant transboundary harm” and therefore Nicaragua was not required to carry out an environmental impact assessment. \textit{Construction of a Road (Nicar. v. Costa Rica), supra} note 105, ¶¶ 101–04, 153.

\textsuperscript{109} \textit{Id.} ¶ 104.

\textsuperscript{110} \textit{Id.} ¶ 105.

\textsuperscript{111} \textit{Id.}

\textsuperscript{112} \textit{Id.} ¶ 119.

\textsuperscript{113} \textit{Id.} ¶¶ 113–20.

\textsuperscript{114} \textit{Id.} ¶ 156.

\textsuperscript{115} \textit{Id.} ¶ 173.
substantive environmental due diligence obligation.116

In *Pulp Mills*, the Court implicitly applied the evidentiary standard identified in *Trail Smelter* in seeking to determine whether Uruguay had breached its substantive obligation to prevent pollution and preserve the aquatic environment. It found that Argentina had failed to present “clear” or “convincing” evidence in various respects,117 and overall that there was “no conclusive evidence” that Uruguay had failed to act with due diligence.118 The Court’s decisions in both *Pulp Mills* and *Costa Rica v. Nicaragua/Nicaragua v. Costa Rica* thus demonstrate one of the perennial challenges for claimants in international environmental disputes related to alleged breaches of substantive obligations: namely, the need to present “clear” and “convincing” evidence to “prove” that there has been a breach of such obligations of international environmental law.

C. PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT AND RELATED “DUE DILIGENCE” OBLIGATIONS UNDER UNCLOS

As part of its broader “constitution for the oceans,” Part XII of UNCLOS sets out a series of obligations for States with regard to the protection and preservation of the marine environment and related due diligence obligations.119 Article 192 establishes the overriding obligation to protect and preserve the marine environment. Article 194 sets out measures that States are required to take to prevent, reduce, and control pollution. Article 194(2) contains an archetypal “due diligence” obligation, requiring States to take all measures “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.”120 Article 235 provides that “States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment,” and that “[t]hey shall be liable in accordance with international law.”121

In its provisional measures order in *Southern Bluefin Tuna* (1999), which concerned a complaint by Australia and New Zealand against Japan’s experimental fishing program for endangered tuna species, ITLOS confirmed that a central element of the protection and preservation of the marine environment under Article 192 is “the conservation of the living resources of the sea.”122 This led it to hold that, under the circumstances, the parties should “act with prudence and caution to ensure that effective conservation measures are taken to prevent

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118. *Id.* ¶ 265.
119. UNCLOS, *supra* note 5, Part XII.
120. *Id.* at Part XII, art. 194(2).
121. *Id.* at Part XII, art. 235(1).
serious harm to the stock of southern bluefin tuna.”123 In doing so, ITLOS linked the obligation of due diligence to the precautionary approach.

In its Seabed Mining Advisory Opinion, the Seabed Disputes Chamber of ITLOS considered the meaning of the “responsibility to ensure” in the context of activities conducted on the deep sea-bed under Article 139(1) of UNCLOS.124 It determined that the obligation to “ensure” was not one to “achieve, in each and every case,” but an obligation of conduct and “due diligence.”125 The Seabed Disputes Chamber noted that the concept of “due diligence” is variable and “may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge.”126 It may also vary according to the risks involved—so that the standard of due diligence is more onerous for riskier activities.127

Consistent with the provisional measures order in Southern Bluefin Tuna, the chamber confirmed that the precautionary approach is an integral part of the general obligation of due diligence.128 Significantly, it added that the precautionary approach is in the process of becoming part of customary international law.129 According to the Chamber, the due diligence obligation therefore requires States, in respect of activities on the deep sea-bed:

> to take all appropriate measures to prevent damage that might result from the activities of contractors that they sponsor. This obligation applies in situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks.130

The Chamber’s decision confirms that “States are expected to act already when there is insufficient evidence but where the consequences may be severe and

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123. Id. ¶ 77.
124. Activities in the Area Advisory Opinion, supra note 54, at 40, ¶¶ 107–116. Article 139(1) provides that “States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part. The same responsibility applies to international organizations for activities in the Area carried out by such organizations.” UNCLOS, supra note 5, art. 139, ¶ 1.
125. Activities in the Area Advisory Opinion supra note 54, ¶ 110.
126. Id. ¶ 117.
127. Id.; See also Öneryildiz, supra note 71, ¶ 73.
128. Activities in the Area Advisory Opinion, supra note 54, ¶ 132 (referring to Southern Bluefin Tuna Cases, supra note 122, ¶¶ 77, 79, 80).
129. Id. ¶ 135 (referring inter alia to Pulp Mills, supra note 56). The Seabed Disputes Chamber also noted that rules setting out direct obligations of a State to apply a precautionary approach may provide for different treatment for developed and developing sponsoring States. Id. ¶ 160. Article 194, ¶ 1 UNCLOS, provides an example of such a provision, requiring States to take measures to prevent, reduce and control pollution of the marine environment “in accordance with their capabilities.”
130. Activities in the Area Advisory Opinion, supra note 54, ¶ 131.
ITLOS confirmed the approach of the Seabed Dispute Chamber to the principle of due diligence, as well as its application to illegal fishing activities, in its 2015 advisory opinion on illegal, unreported, and unregulated (“IUU”) fishing. According to ITLOS, it followed from Articles 58(3), 62(4) and 192 of UNCLOS that flag States are “obliged to take the necessary measures to ensure that their nationals and vessels flying their flag are not engaged in IUU fishing activities.” ITLOS therefore confirmed that, in relation to fishing activities, the obligation of “due diligence” was not limited to a State’s maritime areas. Rather, it extended to the exercise by States with power over “entities of their nationality and under their control.” In the maritime context, this obligation is a corollary of Article 94(1) UNCLOS, which requires each State to effectively “exercise its jurisdiction and control over ships flying its flag in ‘administrative, technical and social matters.’”

III. THE TRIBUNAL’S INTERPRETATION AND APPLICATION OF THE CONVENTION’S ENVIRONMENTAL AND RELATED “DUE DILIGENCE” OBLIGATIONS

The Award’s most important findings with respect to States’ environmental and related “due diligence” obligations under UNCLOS concerned: first, the nature and scope of general obligations with respect to the marine environment under Part XII; second, the consequences of its conclusion that China had tolerated, encouraged, and failed to prevent harmful fishing practices and the harvesting of endangered species; third, the application of Part XII to China’s substantial recent construction of artificial islands in the South China Sea; and fourth, the consequences under Article 58(3) of China’s failure to exercise due diligence with respect to unlawful fishing activities within the Philippines’ EEZ. Each finding will be summarized in turn.

133. Id. ¶¶ 124–25, 129.
134. Id.
135. Id. ¶ 124.
136. Id. ¶ 129.
137. Id. ¶ 126 (referring to Activities in the Area Advisory Opinion, supra note 54, ¶ 108).
A. THE TRIBUNAL’S INTERPRETATION OF THE GENERAL ENVIRONMENTAL OBLIGATIONS OF STATES UNDER PART XII OF UNCLOS

The main environmental provisions invoked by the Philippines were Articles 192 and 194 of UNCLOS. As noted above, Article 192 imposes a general obligation on States to “protect and preserve the marine environment.” Article 194 imposes an obligation to take “all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment,” including “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 Philippines submitted that China had violated its obligations under Part XII in two principal ways: first, by tolerating, encouraging, and failing to prevent environmentally destructive fishing practices (including the harvesting of endangered species) from its nationals at specific shoals and reefs in the South China Sea, and second, by its occupation and construction activities on various reefs, particularly in relation to what it claimed to be the “catastrophic’ environmental impact of the more recent construction activities.”

The Philippines argued that China’s obligations under Part XII were not dependent on determining “which Party, if any, has sovereignty or sovereign rights or jurisdiction over Scarborough Shoal or Second Thomas Shoal or Mischief Reef” or any of the other features the Philippines referred to in its submissions. It argued that the general obligation on States under Article 192 covers areas within national jurisdiction as well as areas beyond it. Importantly, the Philippines relied on other multilateral environmental conventions, to which it and China are parties, for the purposes of asserting its interpretation of Part XII. In particular, it asserted that, “the interpretation of Article 192 may be guided by reference to standards in other multilateral environmental instruments, such as CITES and the CBD.”

The Tribunal agreed that the obligations in Part XII apply to all States with respect to the marine environment in all maritime areas, “both inside the national jurisdiction of States and beyond it.” As a result, in its view, “questions of sovereignty are irrelevant” to the application of Part XII.

139. Philippines/China Award (Merits), supra note 1, ¶¶ 894, 906–11.
140. UNCLOS, supra note 5, Part XII, art. 192.
141. Id. at Part XII, arts. 194(1), 194(5).
142. Philippines/China Award (Merits), supra note 1, ¶ 894.
143. Id. ¶ 901.
144. Id. ¶ 892.
145. Id. ¶ 907.
146. Id. ¶ 908.
147. Id. ¶ 940 (citing Fisheries Advisory Opinion, supra note 132, ¶ 120).
148. Id.
Next, the Tribunal examined the general obligations of States under Part XII. In doing so, it applied the principles of due diligence set out in Section II above. The Tribunal considered it “well-established” that Article 192 imposes a duty on State Parties, the content of which “is informed by the other provisions of Part XII and other applicable rules of international law.”\textsuperscript{149} The Tribunal thus explained that Article 192 entails both a positive obligation to “take active measures to protect and preserve the marine environment” and a negative obligation “not to degrade the marine environment.”\textsuperscript{150} It emphasized that States also have a positive “‘duty to prevent, or at least mitigate’ significant harm to the environment when pursuing large-scale construction activities.”\textsuperscript{151}

The Tribunal noted that Articles 192 and 194 establish obligations not only in relation to the activities of the State and its organs, but also in relation to ensuring that activities undertaken by non-State actors within the State’s jurisdiction and control do not harm the marine environment.\textsuperscript{152} The Tribunal referred, in particular, to the ITLOS \textit{Fisheries Advisory Opinion}, which confirmed that the obligation to “ensure” was one of conduct, requiring “due diligence.”\textsuperscript{153} That due diligence required the flag State of fishing vessels not only to “adopt . . . appropriate rules and measures” but also to have a “certain level of vigilance in their enforcement and the exercise of administrative control.”\textsuperscript{154} Upon receiving reports of non-compliance from another State, the flag State must therefore “investigate the matter,” take “any action necessary to remedy the situation,” and “inform the reporting State of that action.”\textsuperscript{155}

Critical to the Tribunal’s assessment of Chinese nationals’ alleged harmful fishing activities and artificial island-building was the obligation under Article 194(5) of UNCLOS to take measures necessary to protect and preserve “rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species.”\textsuperscript{156} In that regard, the Tribunal found that CITES, which “is the subject of nearly universal adherence,” represented “part of the general corpus of

\begin{itemize}
  \item \textsuperscript{149} Id. ¶¶ 941–42, 956.
  \item \textsuperscript{150} Id. ¶ 941.
  \item \textsuperscript{151} Id. (referring to Indus Waters Kishenganga Arbitration (Pak. v. India), PCA Case No. 2011-01, Partial Award, ¶ 451 (PCA Arb. Trib. Feb. 18, 2013); and citing the Iron Rhine (“Ijzeren Rijn”) Railway (Bel. v. Neth.) arbitration, PCA Case No. 2003-02, Award, at 66–67, ¶ 59 (Arb. Trib. May 24, 2005)).
  \item \textsuperscript{152} Id. ¶ 944.
  \item \textsuperscript{153} Id. (referring to Fisheries Advisory Opinion, supra note 132, ¶¶ 118–36). See also Southern Bluefin Tuna Cases, supra note 122, ¶ 70; Pulp Mills, supra note 56, ¶ 197. See further, and as discussed in the subsequent section, Philippines/China (Merits), supra note 1, ¶ 956 (finding that Article 192 “includes a due diligence obligation to prevent the harvesting of species that are recognised internationally as being at risk of extinction and requiring international protection”), 959 (finding that Article 192 “extends to the prevention of harms that would affect depleted, threatened, or endangered species indirectly through the destruction of their habitat”).
  \item \textsuperscript{154} Philippines/China Award (Merits), supra note 1, ¶ 944 (referring to Fisheries Advisory Opinion, supra note 132, ¶ 131; and citing Pulp Mills, supra note 56, ¶ 197).
  \item \textsuperscript{155} Id. (referring to Fisheries Advisory Opinion, supra note 132, ¶ 139).
  \item \textsuperscript{156} Id. ¶¶ 950–60.
\end{itemize}
international law” that informs the content of the obligations under Articles 192 and 194(5) to preserve and protect the marine environment. It echoed the *Southern Bluefin Tuna* finding that the conservation of the living resources of the sea is an element of the protection and preservation of the marine environment. However, it elaborated by holding that such obligation “includes a due diligence obligation to prevent the harvesting of species that are recognized internationally as being at risk of extinction and requiring international protection.” The Tribunal noted that sea turtles, giant clams, and corals harvested on a large scale by Chinese vessels, sometimes escorted by Chinese naval vessels, were listed in CITES as being threatened with extinction (and, in the case of sea turtles, “subject to the strictest level of international controls on trade”).

On similar lines, the Tribunal found that Article 2 of the CBD provides an “internationally accepted” definition of “ecosystem,” as “a dynamic complex of plant, animal, and micro-organism communities and their non-living environment interacting as a functional unit.” This was fundamental to the Tribunal’s determination that Part XII is “not limited to measures aimed strictly at controlling marine pollution” (confirming the decision of the tribunal in *Chagos Marine Protected Area*), but also covers measures necessary to protect and preserve “rare or fragile ecosystems” and “the habitat of depleted, threatened, or endangered species and other forms of marine life.” The Tribunal had “no doubt” from the evidence before it that the marine environments, where the allegedly harmful activities had taken place, were “rare or fragile ecosystems” within the CBD definition and the habitats of “depleted, threatened, or endangered species.”

**B. THE TRIBUNAL’S APPLICATION OF PART XII TO THE ALLEGATION THAT CHINA TOLERATED, ENCOURAGED, AND FAILED TO PREVENT HARMFUL FISHING PRACTICES AND THE HARVESTING OF ENDANGERED SPECIES**

The Philippines argued that China’s toleration, encouragement of, and failure to prevent environmentally destructive fishing practices by Chinese fishermen violated its duty to protect and preserve the marine environment under Articles 192 and 194 of the Convention. It also argued that China had allowed its fishermen to: (a) harvest “coral, giant clams, turtles, sharks, and other threatened

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157. Id. ¶ 956.
158. Id.
159. Id.
160. Id.
161. Id. ¶ 945.
163. UNCLOS, *supra* note 5, art. 194, ¶ 5.
164. Philippines/China Award (Merits), *supra* note 1, ¶ 945.
165. Id. ¶ 894.
or endangered species;” and (b) “to use dynamite to kill fish and destroy coral, and to use cyanide to harvest live fish.”

Following a review of all the evidence before it, the Tribunal concluded that, as a matter of fact, Chinese fishermen and fishing vessels had been involved in harvesting threatened or endangered species on a number of occasions. The Tribunal determined that Chinese fishermen had been found in possession of corals and marine turtles as far back as 1998, and listed a catalogue of other proven examples. For example, it noted that recent evidence from 2015 indicated “the large-scale harvest of endangered hawksbill sea turtles by Chinese fishermen, whose arrest by Philippine authorities led to protests by China.”

The Tribunal also concluded that Chinese vessels had used harmful dynamite and cyanide fishing methods, citing incidents from 2005 and 2006. However, after 2006, there was only one mention on the record of the “use by Chinese fishing vessels of explosives,” which the Tribunal noted was “uncertain as to the provenance of the vessels,” and which was “unsupported by contemporaneous reports, inventories, and photographs.”

As a matter of law, the Tribunal reaffirmed that Article 192 included an obligation of due diligence to prevent the harvesting of species that are recognized internationally as requiring protection. The Tribunal explained that “Article 192 imposes a 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.’”

That “due diligence” obligation included a duty to adopt rules to prevent harmful activities, and to “maintain a level of vigilance in enforcing those rules.”

On the evidence, the Tribunal concluded that it was “clear” that China had been fully aware of the harmful practices employed by fishing boats flying its flag. Notwithstanding that it is a contracting Party to CITES and the CBD and passed its own 1989 Law of the Protection of Wildlife, the Tribunal found “no evidence in the record” that China had taken any effective steps to enforce those rules and measures against fishermen engaged in poaching of endangered species. Rather, the photographic evidence of endangered species (including giant clams and sharks) on board vessels being escorted by Chinese naval vessels

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166. Id.
167. Id. ¶¶ 950–53.
168. Id. ¶ 950.
169. Id. ¶ 952.
170. Id. ¶ 968.
171. Id. ¶ 969.
172. Id. ¶ 959.
173. Id. ¶ 961.
174. Id. ¶ 962.
175. See id. ¶¶ 962–63.
176. Id. ¶¶ 962–64.
showed that China had not only tolerated, but also aided those activities.177 The Tribunal therefore concluded—with “no hesitation”—that China had breached its obligations under Articles 192 and 194(5) of the Convention to take necessary measures to protect and preserve the marine environment with respect to the harvesting of endangered species by fishermen from Chinese flagged vessels.178

However, the Tribunal reached a different conclusion with respect to allegations of harmful fishing practices involving the use of cyanide and explosives, due to a lack of “sufficient evidence.”179 The Tribunal took note of studies from the Philippines’ expert on environmental issues in finding that the use of dynamite and cyanide constituted “pollution” of the marine environment, and that failure to take measures against their use would constitute a breach of Articles 192, 194(2), and 194(5).180 It also found that China had an obligation of due diligence to ensure that its fishing vessels did not pollute the marine environment.181 However, in contrast to its findings with respect to the harvesting of endangered species, the Tribunal determined that there was “scant evidence in the case record about the use of explosives and cyanide over the last decade or Philippine complaints about its use.”182 This suggested that China may have taken measures to prevent such practices.183 Consequently, on the evidence before it, the Tribunal was not prepared to make a finding of breach by China with respect to the use of cyanide and explosives by fishermen from Chinese fishing vessels.184

C. THE TRIBUNAL’S APPLICATION OF PART XII OF UNCLOS TO CHINA’S CONSTRUCTION OF ARTIFICIAL ISLANDS IN THE SOUTH CHINA SEA

The Tribunal also considered the environmental impact of China’s island-building activities, which it observed had accelerated dramatically following the Philippines’ request for arbitration in early 2013.185 It noted, for example, with respect to Cuarteron Reef in the Spratly Islands, that the installation photographed on that reef in August 2015 was “approximately 200 times larger than the

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177. Id. ¶ 964.
178. Id.
179. See id. ¶¶ 971–75.
180. Id. ¶ 970.
181. Id. ¶ 971.
182. Id. ¶ 975.
183. Id.
184. Id.
185. Id. ¶¶ 854, 976. As an initial matter, the Tribunal was required to consider whether questions raised by China’s construction of artificial islands fell outside its jurisdiction by virtue of being “military activities” for the purposes of Article 298(1)(b) of the Convention. See id. ¶¶ 1011–28. After a thorough analysis of China’s public statements, including statements made in September 2015 by President Xi Jinping, see id. ¶ 937, the Tribunal concluded that it could not deem activities to be military in nature when China itself had consistently affirmed their civilian nature. See id. ¶ 938, 1028. Accordingly, the Tribunal had jurisdiction to consider the Philippines’ submissions with respect to China’s artificial island-building. Id. ¶ 1028.
original installation in 2012.\textsuperscript{186} The Tribunal cited to estimates calculating that China had built approximately 231,000 square meters of new land and created a channel approximately 125 meters wide for large vessels to access and berth within a harbor cut out of the natural reef platform.\textsuperscript{187} The Tribunal observed similar accelerations of Chinese works on other reefs in the Philippines’ EEZ. With respect to Fiery Cross Reef, for example, the Tribunal noted that:

\begin{quote}
[t]he massive scale of China’s construction efforts on Fiery Cross Reef is apparent in aerial and satellite photography. Satellite photography reproduced as Figures 20 and 21 on page 343 shows the reef’s progression from its nearly natural state in January 2012 (with China’s original installation just visible at the southern end) to an artificial island complex, complete with a large runway, covering the entire reef platform in October 2015.\textsuperscript{188} Photographs provided in the Award reflected the rapid changes caused by Chinese construction activities during the course of a few years:

Such photographic evidence—taken both from nearby vantage points and from satellites—was central to the reports of experts appearing in the proceeding and
\end{quote}

\textsuperscript{186} Id. ¶ 866.  
\textsuperscript{187} Id.  
\textsuperscript{188} Id. ¶ 870.
The Tribunal’s independent expert on coral reefs, Dr. Sebastian Ferse, was particularly critical of China’s most recent activity, stating unequivocally that it had “impacted reefs on a scale unprecedented in the region.” He relied upon a 2016 study analyzing satellite imagery, finding that up to sixty percent of the shallow reef habitat at the seven relevant reefs had been directly destroyed by China’s island-building activities. The Tribunal asked its appointed experts to consider and address various public assertions by Chinese scientists as to the environmental impact of the construction activities. Dr. Ferse rejected many of those assertions. Among other things, his expert opinion rebutted Chinese allegations that:

- “the nutrients and food organisms can be replenished constantly from surrounding waters”—Dr. Ferse found “very limited support” for the potential replenishment from outside the Spratly Islands.
construction was timed “reasonably, trying to avoid spawn periods of red
snapper (mid-April), tuna (peak from June to August), and bonito (from
March to August)”—Dr. Ferse found that construction had indeed occurred
during spawning periods;194

China avoided “fine sands from going into reclamation areas to maintain the
water quality of coral reef areas”—Dr. Ferse found that satellite and aerial
imagery clearly showed water quality in the vicinity of each construction site
was adversely affected by China’s dredging;195 and

“the restoration of coral reef communities could be realized should effective
measures be taken” and “the ecological impact on the coral reefs is partial,
temporary, controllable, and recoverable”—Dr. Ferse noted the uncertainty
and expense of restoration science and that for large areas of reef affected by
the construction activities, recovery was unlikely, or may take decades to
centuries.196

Based on the expert reports and other “compelling evidence,” the Tribunal had
“no doubt” that China’s artificial island-building activities had caused, with
respect to the seven reefs in the Spratly Islands, “devastating and long-lasting
damage to the marine environment.”197 Those activities consequently breached
Articles 192 and 194 of UNCLOS.198 The Tribunal drew no distinction between
the intensified recent construction activities and those that had preceded them.199

The Tribunal also found that China had failed to take account of obligations
contained in Articles 197 and 123 of the Convention to cooperate and coordinate
with neighboring States on the standards, practices, and implementation of rights
and duties associated with protection of the marine environment.200 The Tribunal
cited China’s apparent failure to prepare “any report that would resemble an
environmental impact assessment that meets the requirements of Article 206 of
the Convention, or indeed under China’s own Environmental Impact Assessment
Law of 2002.”201 It also cited China’s failure to communicate any such environ-
mental impact assessment, even if it did exist.202 In so finding, the Tribunal
affirmed ITLOS’s Activities in the Area Advisory Opinion holding that the
obligation to conduct an environmental impact assessment is a “direct obligation
under the Convention and a general obligation under customary international
law.”203 It also affirmed that “the obligation to communicate reports of the results

194. Id. ¶ 982(b).
195. Id. ¶ 982(c).
196. Id. ¶ 982(d), (i).
197. Id. ¶ 983.
198. Id.
199. Id.
200. Id. ¶¶ 984–86.
201. Id. ¶ 989.
202. Id. ¶ 991.
203. Id. ¶ 948 (referring to Activities in the Area Advisory Opinion, supra note 54, ¶ 145).
of the assessments is absolute.”

Ultimately, this “obligation to communicate” was critical to the Tribunal’s conclusions because it was unable or unwilling to “make a definitive finding” that China had or had not prepared an environmental impact assessment on the facts before it. However, China’s palpable failure to communicate any environmental impact assessments to neighboring States was sufficient for the Tribunal to find a breach of Article 206.

As a final point, the Tribunal determined that “China’s intensified construction of artificial islands on seven features in the Spratly Islands during the course of these proceedings has unequivocally aggravated the disputes between the Parties.” It stated that, “[w]hatever other States have done within the South China Sea, it pales in comparison to China’s recent construction” and lamented that “neither this decision nor any action that either Party may take in response can undo the permanent damage that has been done to the coral reef habitats of the South China Sea.”

D. THE TRIBUNAL’S FINDINGS WITH RESPECT TO UNLAWFUL CHINESE FISHING ACTIVITIES WITHIN THE PHILIPPINES’ EEZ

In its ninth submission, the Philippines asked the Tribunal to declare that China had unlawfully failed to prevent its nationals and vessels from fishing illegally in the Philippines’ EEZ. The Philippines’ complaints related to Chinese fishing activities in the vicinity of two low-tide elevations (Mischief Reef and Second Thomas Shoal) lying within 200 nautical miles of the Philippines’ territorial sea baselines. In light of its findings with respect to the maritime features of the South China Sea and the Chinese “nine dash line,” the Tribunal observed that the areas concerned could only constitute part of the EEZ of the Philippines. As a result, the Philippines—and not China—possessed sovereign rights over the areas’ natural resources.

The Tribunal noted that, pursuant to Part V of UNCLOS, the Philippines controlled and regulated access to the fisheries of its EEZ. Article 62(4) requires the nationals of other States to comply with “conservation measures and with the other terms and conditions,” including “licensing and other access

204. Id.
205. Id. ¶¶ 989–91.
206. Id. ¶ 991.
207. Id. ¶ 1177.
208. Id. ¶ 1178.
209. Id. ¶ 717.
210. Id. ¶ 718.
211. Id. ¶ 735.
212. Id.
213. Id. ¶¶ 736–38.
procedures” established by the Philippines.\textsuperscript{214} The Tribunal highlighted that Article 58(3) requires States to “have due regard to the rights and duties of the coastal State” within its EEZ.\textsuperscript{215} It cited with approval the observation of ITLOS in its \textit{Fisheries Advisory Opinion} that the obligation of “due regard” is a “due diligence obligation” to take all necessary measures to ensure compliance and prevent unlawful fishing from vessels flying the flag.\textsuperscript{216} Accordingly, “anything less than due diligence by a State in preventing its nationals from unlawfully fishing in the exclusive economic zone of another would fall short of the regard due pursuant to Article 58(3).”\textsuperscript{217}

On the facts, the Tribunal noted that it had “limited evidence before it” on the disputed Chinese activities.\textsuperscript{218} This was in part because “China’s \textit{de facto} control over the waters surrounding both features effectively limit[ed] the information available.”\textsuperscript{219} The Philippines had presented some reports of sightings by its armed forces, which the Tribunal observed were consistent with China’s assertions of sovereign rights and jurisdiction in the South China Sea generally.\textsuperscript{220} Those assertions of sovereignty by China included the issuing of fishing permits to Chinese nationals that extended to the areas concerned.\textsuperscript{221} The Philippines’ reports were also consistent with “ample, corroborated evidence of fishing by Chinese vessels working in apparently close coordination with government vessels” around other reef formations in the South China Sea, particularly Scarborough Shoal.\textsuperscript{222} The Tribunal considered the similarities with State-sponsored Chinese fishing activities at other features to be a significant indication of what had taken place at Mischief Reef and Second Thomas Shoal.\textsuperscript{223}

The Tribunal concluded that the evidence showed this was not a case of covert unlawful fishing, far from any official presence. On the contrary, “Chinese fishing vessels have in all reported instances been closely escorted by government CMS [China Marine Surveillance] vessels.”\textsuperscript{224} The Tribunal stated that there was “no question that the officers aboard the Chinese Government vessels in question were fully aware of the actions being taken by Chinese fishermen and were able to halt them had they chosen to do so.”\textsuperscript{225} The Tribunal held that China’s due diligence obligation was “unequivocally breached when vessels under Chinese Government control act[ed] to escort and protect Chinese fishing vessels engaged
in fishing unlawfully in the Philippines’ [EEZ].”226

Accordingly, the Tribunal concluded that “through the operation of its marine surveillance vessels in tolerating and failing to exercise due diligence to prevent fishing by Chinese flagged vessels at Mischief Reef and Second Thomas Shoal,” China had failed to exhibit due regard for the Philippines’ sovereign rights within its EEZ.227 Accordingly, China had breached its due diligence obligations under Article 58(3) of the Convention.228

CONCLUSION

The South China Sea arbitration and Award represents a landmark in international environmental law, the duty of due diligence, and the litigation of maritime environmental disputes. The Tribunal’s multiple findings under Part XII of UNCLOS, including the overarching obligation under Article 192 to protect and preserve the marine environment, set a valuable precedent in the context of marine conservation. These findings were all the more remarkable given China’s non-appearance in the proceeding. The Tribunal’s recognition of its “special responsibility” to test the Philippines’ case on jurisdiction, fact, and law in China’s absence, including by way of appointment of independent scientific experts and archivists to assist its task, is particularly notable and important, given the finality and binding force of the Award as a matter of international law.229

The Award is also notable in that it continues the recent trend across multiple international fora (not least, the ICJ and regional human rights courts) of recognizing the distinction between substantive and procedural obligations with respect to the environment. However, in contrast to many recent inter-State environmental cases (such as Pulp Mills and Costa Rica v. Nicaragua/Nicaragua v. Costa Rica), the Tribunal found that the evidence before it demonstrated violations of substantive environmental obligations as well as procedural ones. It did so via a detailed examination of the nature and scope of China’s “due diligence” obligations with respect to the marine environment under the Convention. This approach built on legal analysis undertaken by international courts and tribunals in previous environmental adjudications, including Southern Bluefin Tuna, Pulp Mills, Costa Rica v. Nicaragua/Nicaragua v. Costa Rica, and the two ITLOS advisory opinions. In a similar fashion to these previous adjudications, the Tribunal’s analysis was centered on the assessment of States’ obligations of “vigilance” with respect to the environmentally damaging activities of private persons within their jurisdiction and control, and the role of the precautionary

226. Id. ¶ 756.
227. Id. ¶ 757.
228. Id.
229. Id. ¶ 129.
principle in interpreting and applying such obligations.

The Tribunal’s handling of the evidence was also especially noteworthy. Ever since the *Trail Smelter* case in the 1930s, a perennial challenge faced by complainants in international environmental disputes has been the need to prove their case through “clear and convincing evidence.” Many complainant States have failed in that challenge, especially when claiming violations of substantive environmental obligations and seeking to invoke State responsibility from international law for damage to the environment. In the South China Sea case, by contrast, the Tribunal had “no hesitation” in finding that the evidence before it proved that China had breached its obligations under the Convention to take necessary measures to protect and preserve the marine environment.230

A principal factor in the Tribunal’s finding of substantive violations was its perception of the gravity of the environmental impact of the activities identified in the Philippines’ complaint.231 The artificial island-building activities of China over natural reef formations in the South China Sea over the past five years, which were confirmed by satellite evidence, have been unprecedented. The Tribunal was presented with similarly clear, and uncontested, evidence of the harvesting by Chinese-flagged fishing vessels of endangered species, and of China’s toleration (and in some cases, support) of such activities.232

The Tribunal’s references to the CBD and CITES in interpreting UNCLOS States’ obligation to “protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species” represent a welcome development in the “joining up” of international environmental law standards relating to conservation and the protection of biodiversity.233 This is even more important given the general absence of binding dispute resolution procedures under those conventions, in contrast to the procedures provided by Part XV of UNCLOS.234 While the Tribunal acknowledged that those other conventions represented distinct “parallel regimes” alongside UNCLOS, Article 293 allowed it to apply their standards to the dispute as “other rules of international law not incompatible with [the] Convention.”235

Also of note is the Tribunal’s conclusion that the Convention’s “due diligence” obligations with respect to the marine environment extend to all maritime areas, including those beyond national jurisdiction. The jurisdictional nexus between

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230. *Id.* ¶ 964.
231. See *id.* ¶¶ 954–66.
232. By contrast, the Tribunal was not convinced by the evidence in respect of China’s alleged failures of due diligence in connection with certain other harmful fishing practices by its flagged vessels and nationals.
233. Philippines/China Award (Merits), *supra* note 1, ¶¶ 945, 956–57.
234. Despite near universal adherence (195 States and the EU are parties to the CBD), only Austria, Cuba, Georgia, Latvia, and the Netherlands have to date made declarations accepting compulsory dispute resolution pursuant to Article 27, para. 3 CBD.
235. Philippines/China Award (Jurisdiction), *supra* note 10, ¶¶ 174–77, 282–85; Philippines/China Award (Merits), *supra* note 1, ¶¶ 945, 956, 964.
China and the activities in which it had failed to exercise “due diligence” was not territorial, but rather was based on the fact that such activities had been undertaken by Chinese-flagged vessels (and, in the case of artificial island-building, by China itself). Consequently, the Tribunal found itself able to make findings of violation without ruling on sovereignty over the disputed areas concerned.

The Tribunal’s findings of additional violations by China, such as its failures to cooperate and coordinate with neighboring States in protection of the marine environment, and to communicate environmental impact assessments with respect to its artificial island-building activities, are also significant. However, they are less groundbreaking given similar findings made for similar procedural norms in previous international environmental disputes.

The Tribunal’s conclusion that China had failed to exercise “due diligence” during its fishing activities within the Philippines EEZ, in violation of Article 58(3) of the Convention, is significant with respect to the protection of coastal States’ exclusive rights to regulate fishing within maritime spaces. It offers clear guidance to coastal States that have become frustrated with persistent failures by others to act effectively to discourage IUU fishing activities by their flagged vessels.

All told, the implications of the Award for the justiciability of international environmental disputes are significant. In light of the Article’s conclusions as to the nature and scope of the environmental obligations under Part XII of the Convention, it is arguable that any State party to UNCLOS has standing to bring an environmental complaint against any other State party with respect to the conduct of its nationals or flagged vessels in any maritime area. This might be especially important where the conduct concerned threatens severe damage to the marine environment or conservation, including endangered species or fragile ecosystems. In this regard, it is notable that Articles 192 and 194 of UNCLOS, together with CITES and the CBD, arguably fall within Article 48 of the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, entailing obligations owed to the “international community as a whole.”

Regardless of whether the implications of the Award will extend so far, it will surely provide a seminal precedent in the litigation of international environmental disputes, particularly with respect to the nature and scope of States’ “due diligence” obligations, both under UNCLOS and more broadly.