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INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

CASE CONCERNING CERTAIN ACTIVITIES IN THE DEGROOT SEA

KINGDOM OF VATTEL v. FEDERAL REPUBLIC OF FULTON

MEMORIAL FOR THE RESPONDENT

- THE FEDERAL REPUBLIC OF FULTON -

28 FEBRUARY 2019

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TREATIES AND CONVENTIONS

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MISCELLANEOUS

INTRODUCTION

1. Pursuant to the Order of the International Tribunal for the Law of the Sea (hereinafter "ITLOS" or "Tribunal"), the Federal Republic of Fulton (hereinafter Fulton) has the honor to submit to the Tribunal its Counter-Memorial to the Memorial of the Kingdom of Vattel (hereinafter Vattel) filed in the Registry, in relation to the case concerning certain activities in the DeGroot Sea.

2. Vattel claims that ITLOS has jurisdiction to seize the dispute between Vattel and Fulton, under Part XV of the 1982 United Nations Convention on the Law of the Sea (hereinafter "UNCLOS" or "the Convention"). It has further requested the Tribunal to find that:

(ii) By constructing the wave energy farm Fulton is violating its international obligations related to cooperation, including those under relevant conventions;

(iii) Fulton's actions are inconsistent with its obligations on the protection and preservation of the marine environment and the conservation and management of transboundary fish stocks under international law;

(iv) The exclusion of the *SS Newton* was an infringement of Vattel's freedoms existing in Fulton's EEZ.

3. As the Counter-Memorial will further explain, Fulton respectfully challenges the jurisdiction of this Tribunal. In particular, Fulton contends that this Tribunal has jurisdiction over the instant case as Vattel failed to demonstrate real and clear attempt to solve the dispute by other means, as per Part XV, Section 1 of UNCLOS. More specifically, Vattel has not complied with its obligation to settle the dispute by peaceful means of Section 1, before resorting to the compulsory dispute settlement mechanisms of Part XV, Section 2. Moreover, Vattel has not complied with the obligation to exchange views, in accordance with Article 283. In the alternative, the exceptions included in Fulton's declaration pursuant to Article 287 UNCLOS are applicable, thus ITLOS has no jurisdiction. In the event that ITLOS can assert jurisdiction, the Tribunal may examine in *proprio motu* the limitation applicable under Article 297 and reject its jurisdiction.

4. Were the Tribunal to find, nonetheless, that it has jurisdiction over the instant case, Vattel rejects each and all of the claims made by Vattel in its Memorial and further requests the Tribunal to declare that Vattel has infringed the sovereign rights of Fulton in its EEZ. The reasons upon which Fulton bases its opposition and claim are essentially as follows:

4.1. In relation to the construction of the wave energy farm, Fulton did not violate any international obligations related to cooperation, including those under relevant conventions. The obligation to cooperate under international law does not prohibit Fulton to exercise its

sovereign right to construct the wave energy farm in its EEZ. Specifically, Fulton did not breach its obligations under UNCLOS to cooperate with Vattel, since the construction of the wave energy farm was not within a disputed marine area. Additionally, Fulton has no specific obligation to cooperate in the semi-enclosed Sea of DeGroot and it has not violated its obligation to cooperate for the protection and preservation of the marine environment. Lastly, Fulton has fulfilled its obligation to cooperate in accordance with other relevant environmental treaties, such as the CBD and the CMS.

4.2. With regard to the protection and preservation of the marine environment and the conservation and management of transboundary fish stocks, Fulton's actions were compatible with its obligations arising from Part V and Part XII of UNCLOS. Furthermore, Fulton fulfilled its obligations under customary international law, as by constructing the wave energy farm, Fulton did not breach its duty of due diligence and it did not cause any transboundary harm to the marine environment. In addition, Fulton did not have an obligation to take precautionary measures. Alternatively, in the event that transboundary harm occurred, Fulton fulfilled its procedural obligations to prevent such harm.

4.3. Finally, Vattel infringed the sovereign rights of Fulton by sending the *SS Newton* to conduct marine scientific activities in Fulton's EEZ on two occasions. More specifically, Vattel violated Fulton's exclusive jurisdiction to conduct and regulate marine scientific research in its EEZ. In any event, Vattel failed to obtain express or implied consent for conducting MSR. Moreover, Fulton had the right to cease the unauthorized MSR in its EEZ and ask *SS Newton* to leave the area, as Vattel's freedom of navigation was not exercised with due regard to Fulton's sovereign rights.

5. Consequently, Fulton respectfully asks the Tribunal to adjudge and declare that it lacks jurisdiction with regard to the claim submitted by Vattel in its Application filed with ITLOS. Alternatively, Fulton respectfully requests ITLOS:

(i) to reject each of Vattel's claims; and

(ii) to declare that Vattel has infringed the sovereign rights of Fulton by sending the *SS Newton* to conduct marine scientific activities in Fulton's EEZ on two occasions.

STATEMENT OF FACTS

Fulton and Vattel are independent States located in the Pradelle region with opposite coasts. They are separated by the semi-enclosed Sea of DeGroot, which has a width of 380 nautical miles (nm) at its narrowest part. The two States have enjoyed a generally peaceful relationship; the only difference between them has been the unresolved delimitation, due to a disagreement on delimitation concerning the Bay of Selden – an alleged historic bay in Vattel – and its effect on the median line. Fulton contests the historic nature of the Bay of Selden and takes the position that the closing line is incompatible with Article 10(5) of UNCLOS and that the waters enclosed by the line are not internal waters. The marine area created by the overlapping claims of Vattel and Fulton is called the Monana Region. Both Vattel and Fulton declared their EEZ through national legislation.

The Monana Region is of particular significance for both States as it is the main fishing area where fishers of Fulton and Vattel fish for *Utrechtis lawis*, a fish species that occurs in Vattel's waters from October to July, but subsequently migrates into Fulton's EEZ in August and September in order to spawn. Vattel and Fulton have undertaken various negotiations aimed at agreeing on joint conservation measures for the stock and their joint efforts led to the inclusion of the *Utrechtis lawis* in Annex II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora and Annex II of the Convention on the Conservation of Migratory Species of Wild Animals. In July 2015, the non-governmental organization World Wildlife Fund (WWF) published a report stressing the importance of the migratory route of the *Utrechtis lawis.*

In April 2016, Fulton decided to construct a large wave energy farm in order to fulfill its Nationally Determined Contribution under the Paris Agreement under the United Nations Framework Convention on Climate Change. Prior to the commencement of the construction activities, Fulton assigned its National University to conduct an environmental impact assessment and invited the public to participate and submit comments. In January 2017, public hearings were held, where WWF's Fultonian branch participated. After the completion of the EIA, Fulton made publicly available an executive summary of the report, affirming that there was no conclusive evidence that the construction and operation of the wave energy farm would cause harm to the health of the *Utrechtis lawis'* stock. Subsequently, three devices which compose the farm were constructed and started operation 150 nautical miles from Fulton's coast and landward to the Monana Region, where each devise has a safety zone of 500 meters.

A follow-up study was conducted when the farm started its operation in June 2017, and the National University of Fulton confirmed the conclusion it had reached previously.

In January 2018, Vatteller fishermen allegedly noticed a decrease in the abundance of *Utrechtis lawis* in the Monana Region. In January 2018, Vattel requested Fultonian cooperation in assessing the impact of the wave energy farm on the status of the stock through a *Note Verbale*. A month later, on 15 February 2018 Vattel send *SS Newton* – a Vattel-owned vessel, exclusively used to perform marine scientific research – to collect data on the status of the marine environment around the wave energy farm. On 17 February 2018, a Fultonian coast guard vessel approached the *SS Newton* and, after it ascertained that it had not obtained prior authorization for data collection, requested the *SS Newton* to leave the area.

Two days later, the Fultonian President made a public declaration addressing the incident of unauthorized marine scientific research as a violation of Fulton's sovereign rights. She further reassured that there is no proof that the decreased abundance of the *Utrechtis lawis* in the Monana Region is a consequence of the construction and operation of the wave energy farm and that the stock's abundance in Fultonian waters has actually increased over the last two years. On 24 August 2018, Vattel sent *SS Newton* back to the wave energy farm where it was asked to leave by the Fultonian coast guard. On the basis of the partial data collected by the *SS Newton,* there have been no conclusive results available concerning the actual decrease of the stocks.

Following the events and in light of the fact that the *Note Verbale* of 14 January remained unanswered, Vattel submitted the dispute concerning certain activities in the DeGroot Sea to the International Tribunal for the Law of the Sea.

STATEMENT OF JURISDICTION

The Kingdom of Vattel and the Federal Republic of Fulton, being parties to the 1982 United Nations Convention on the Law of the Sea, have recognized the jurisdiction of the International Tribunal for the Law of the Sea in accordance with Article 287 of UNCLOS. However, Fulton objects to this Tribunal's jurisdiction, as the Declaration of the Federal Republic of Fulton under Article 287 of the UNCLOS is not applicable for the purposes of the present dispute. Accordingly, Fulton requests the Tribunal to decline jurisdiction.

PLEADINGS

I. ITLOS HAS NO JURISDICTION TO SEIZE THE DISPUTE BETWEEN VATTEL AND FULTON

A. Vattel failed to demonstrate real and clear attempt to solve the dispute by other means, as per Part XV, Section 1 of UNCLOS

1. Vattel has not complied with its obligation to settle the dispute by peaceful means under Section 1, before resorting to the compulsory dispute settlement mechanisms of Part XV, Section 2

The 1982 UN Convention on the Law of the Sea (UNCLOS or the Convention)[1] establishes a dispute settlement system that constitutes an integral part of the Convention.[2] In particular, Part XV UNCLOS regulates dispute settlement and sets out compulsory dispute settlement procedures, which are binding on State parties.[3] Part XV, Section 1 UNCLOS (Articles 279-285) promotes resolution of disputes through political channels, prior to judicial settlement, by enabling States to utilize a range of peaceful methods.[4]

Article 279 UNCLOS establishes the core obligation of States to settle their disputes concerning the interpretation or application of UNCLOS by peaceful means of their own choice, in accordance with Article 2(3) and 33(1) of the UN Charter.[5] Article 280 of the Convention confirms that nothing in Part XV impairs the freedom of States to use means of their own choosing.[6] If States have agreed on a peaceful mechanism of their own choice, then such agreement may preclude recourse to the compulsory procedures of Part XV, Section 2, as per Articles 281 and 282 UNCLOS. As pointed out by former ITLOS Vice-President Nelson, "it is in the requirements contained in articles 281 and 282 that can be found the crucial test whereby there can be any resort to the compulsory procedures embodied in Section 2 of Part

[1] United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3.
[2] Nguyen, N, "The UNCLOS Dispute Settlement System: What Role Can It Play in Resolving Maritime Disputes in Asia?" (2018) 8 *Asian Journal of International Law* 91, 91.
[3] Colson, DA, Hoyle, P, "Satisfying the Procedural Prerequisites to the Compulsory Dispute Settlement Mechanisms of the 1982 Law of the Sea Convention: Did the Southern Bluefin Tuna Tribunal Get It Right?" (2003) 34 *Ocean Development and International Law* 59, 59.
[4] Klein, N, *The Role of Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press, 2004) 29, 31.
[5] Charter of the United Nations, 24 October 1945, 1 UNTS XVI.
[6] UNCLOS, Article 280. See also, *South China Sea Arbitration (Philippines v China)*, Permanent Court of Arbitration, Award of 12 July 2016, para.191.

XV. In other words, the bar created by these articles can only be circumvented when the requirements are met".[7]

The structure of Part XV ensures that traditional methods of inter-State dispute settlement of Section 1 have priority over compulsory procedures stipulated in Section 2, which are only available in a narrow range of cases.[8] Article 286 UNCLOS explicitly states that compulsory dispute settlement procedures can only be invoked "where no settlement has been reached by recourse to Section 1". Therefore, compulsory dispute procedures of Section 2 are of a subsidiary nature, whereas Part XV, Section 1 sets out the fundamental principles concerning dispute settlement.[9] Consequently, and as a preliminary matter, a party seeking to bring a matter before Section 2 procedures must demonstrate that it has attempted unsuccessfully to settle the dispute by means provided for in Section 1.[10]

In the present case, Vattel failed to demonstrate that it has unsuccessfully attempted to settle the dispute by resorting to Section 1 means, which would have enabled it to bring the dispute before the compulsory procedure under Part XV, Section 2 of UNCLOS. In particular, the *Note Verbale* sent by Vattel – with a rather limited content – is the only communication between the parties and cannot be considered as a sufficient attempt to resolve the dispute through means provided in Section 1. Therefore, ITLOS as a compulsory procedure of Part XV, Section 2 does not have jurisdiction to seize the dispute.

2. The obligation to exchange views under Article 283 has not been fulfilled by the limited and insufficient communications between Vattel and Fulton

Another precondition that needs to be fulfilled before resorting to Part XV, Section 2 procedures is the obligation to exchange views enshrined in Article 283. This requirement intends to ensure that a State would not be taken entirely by surprise by the initiation of compulsory proceedings.[11] Article 283 ensures that a party may transfer a dispute from one

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[7] *MOX Plant (Ireland v. United Kingdom), Provisional Measures*, Order of 3 December 2001, ITLOS Reports 2001, p. 95 Separate opinion of Vice-President Nelson, p. 115, para. 6.

[8] Allen, S, "Article 297 of the United Nations Convention on the Law of the Sea and the Scope of Mandatory Jurisdiction" (2017) 48 *Ocean Development and International Law* 313, 317.

[9] Churchill, RR, Lowe, AV, *The Law of the Sea* (3rd ed., Manchester University Press, 1999) 454; Sheehan, A, "Dispute Settlement under UNCLOS: The Exclusion of Maritime Delimitation Disputes" (2005) 24 *University of Queensland Law Journal* 165, 167.

[10] UNCLOS, Article 286; Colson, DA, Hoyle, P, *supra* note 3, 62; Yu, M, Xie, Q, "Why the Award on Jurisdiction and Admissibility of the South China Sea Arbitration Is Null and Void: Taking Article 283 of the UNCLOS as an Example" (2017) 2017 *China Oceans Law Review* 45, 49.

[11] Burdeau, GB, "Compulsory Dispute Settlement Methods under the UNCLOS: Scope and Limits under the Scrutiny of the Jurisprudence" (2017) 2017 *China Oceans Law Review* 15,

mode of settlement to another, especially one entailing a binding decision, only after appropriate consultations between all parties concerned.[12] Thus, the obligation to exchange views is not an empty formality, to be dispensed with at the whim of a disputant.[13]

Exchange of views constitutes a continuing obligation applicable at every stage of the dispute.[14] For instance, in the *Southern Bluefin Tuna Case*, the Tribunal considered that the obligation to exchange views was fulfilled since negotiations were "prolonged, intense and serious" and since during the course of those negotiations the Applicants explicitly invoked UNCLOS.[15] Furthermore, in *China/Philippines Award*, the Permanent Court of Arbitration (PCA) noted that a rather extensive record of communications indicated that the parties discussed the manner in which their dispute could be settled,[16] while such communications continued until shortly before the Philippines initiated the arbitration.[17]

The fulfillment of this obligation is not established by a mere action of views exchanging. Instead, four criteria must be met: (a) there should be a real dispute concerning the interpretation or application of the Convention, (b) the views exchanged should relate to the dispute, (c) the exchange of views should happen after the dispute arises, and (d) the object of such exchange is not the dispute, but the means to settle the dispute.[18] Moreover, in the *Philippines/China Award*, the PCA indicated that in order to accomplish the principal goals of prior exchange between the disputing parties, two other decisive requirements need to be met: (a) clarification of the parties' respective positions on the disputing issues, and (b) both parties need to approach these positions in good faith and to be genuinely interested in seeking agreed solutions to the dispute between them.[19]

It is the Respondent's submission that the preconditions set by Article 283 were not fulfilled. Specifically, Vattel merely sent a *Note Verbale* on 14 January 2018, in which it requested "Fultonian cooperation in assessing the impact of the devices on the status of the

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21-22; Martin, JMC, "Prior Consultations and Jurisdiction at ITLOS" (2014) 13 *Law and Practice of International Courts and Tribunals* 1, 1.

[12] Sheehan, *supra* note 9, 171.

[13] Chandrasekhara Rao, P, "Law of the Sea, Settlement of Disputes" (2011) *MPEPIL*, para. 12.

[14] Martin, *supra* note 11,16.

[15] *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures*, Order of 27 August 1999, ITLOS Reports 1999, p. 280, para. 55; Klein, N, *supra* note 4, 33.

[16] *South China Sea Arbitration*, paras. 334, 348.

[17] Ibid, para. 337.

[18] Yu, Xie, *supra* note 10, 48.

[19] *South China Sea Arbitration*, para. 349.

stock", as it alleged that the number of *Utrechtis Lawis* had decreased.[20] The *Note Verbale* is used for communications which do not carry as great an importance as, for instance, a note (*lettre*) and it does not usually contain an *appel*.[21] Even if a *Note Verbale* suffices as an appropriate means of communication, its content did not reflect the entirety of the disputing issues between the two States, but only a portion of the dispute. Thus, the communication made by Vattel through the *Note Verbale* was the only communication between the Applicant and the Respondent, and does not contain any real and clear attempt to solve the dispute by other means.

B. In the alternative, the exceptions included in Fulton's declaration pursuant to Article 287 UNCLOS are applicable, thus ITLOS has no jurisdiction

Article 287 UNCLOS provides the flexibility to State parties to choose one or more of four different procedures for compulsory settlement under Part XV through a declaration indicating their preferred choice(s).[22] Article 287(1) stipulates that a State is free to choose one or more of the four compulsory procedures entailing binding decisions, that is, (a) the ITLOS (b) the ICJ, (c) an arbitral tribunal constituted in accordance with Annex VII UNCLOS, and (d) a special arbitral tribunal constituted in accordance with Annex VIII.[23] Moreover, Article 287(4) UNCLOS provides that if the parties to a dispute have accepted "the same procedure" for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree. In the event that the disputing States have not accepted the same forum by parallel declarations or agreement then the dispute may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree.[24]

In the Declaration of the Republic of Fulton pursuant to Article 287 UNCLOS, it is stated that the Respondent chose, in the following order: (a) the ITLOS, (b) the special arbitral

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[20] Facts, paras. 7-8.

[21] Behrens, P, "Forms of Diplomatic Communications" (2009) *MPEPIL*, para. 7.

[22] Boyle, AE, "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction" (1997) 46 *International and Comparative Law Quarterly* 37, 40. See also, Collier, J, Lowe, V, "Dispute Settlement in the Law of the Sea" in Collier, J, Lowe, V, (eds.) *The Settlement of Disputes in International Law* (Oxford University Press, 1999).

[23] See Charney, JI, "The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea" (1996) 90 *American Journal of International Law* 69; Mensah, TA, "The Dispute Settlement Regime of the 1982 United Nations Convention on the Law of the Sea" (1998) 2 *Max Planck Yearbook of United Nations Law* 307.

[24] UNCLOS, Article 287(5); Oxman, BH, "Courts and Tribunals: the ICJ, ITLOS and Arbitral Tribunals" in Rothwell, DR, Oude Elferink, AG, Scott, K, Stephens, T, (eds.) *The Oxford Handbook of the Law of the Sea* (Oxford University Press, 2015) 399.

tribunal constituted in accordance with Annex VIII, and (c) the ICJ.[25] Furthermore, and similar to the practice of eastern European States,[26] Fulton has chosen special arbitration for disputes concerning the interpretation or application of the UNCLOS relating to fisheries, the protection and preservation of the marine environment and navigation, including pollution from vessels and by dumping.[27] In its respective Declaration, the Kingdom of Vattel chose (a) the ITLOS and (b) the ICJ.[28]

The Fultonian Declaration explicitly confers exclusive jurisdiction to special arbitration for any dispute concerning the interpretation or application of the Convention relating to fisheries, the protection and preservation of the marine environment, and navigation. On the contrary, Vattel has not chosen special arbitration as a dispute settlement mechanism. Consequently, and since the parties have not accepted the same procedure for these particular issues, the dispute should have been submitted to arbitration in accordance with Annex VII, as per Article 287(4), and not to ITLOS.

C. Even if ITLOS has jurisdiction, the Tribunal may examine *proprio motu* the limitation applicable under Article 297

Section 3 of Part XV sets forth limitations and exceptions to the applicability of the compulsory jurisdiction of Section 2. More specifically, Article 297 establishes the basic rules that apply automatically in certain categories of disputes.[29] The exceptions of Article 297 are designed to take out of the compulsory settlement process certain categories of disputes that touch upon vital interests of the State, such as sovereign rights or jurisdiction within its EEZ, conduct of MSR and EEZ fisheries disputes.[30] In the *Philippines/China Award*, the PCA considered it imperative to examine in detail, *proprio motu* and in light of China's general remarks on Article 297, whether a limitation on its jurisdiction follows from Article 297, in order to satisfy itself that it has jurisdiction over the dispute.[31] Furthermore, the PCA considered that it is likewise incumbent on it to address any issue of jurisdiction not raised by the Respondent and satisfy itself as to whether it has jurisdiction over the dispute to the greatest extent possible.[32]

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[25] Facts, Annex.
[26] Churchill, Lowe, *supra* note 9, 458. The exact same wording is used in Declarations pursuant to Article 287 by other States such as Belgium, Germany, Austria and Portugal.
[27] Facts, Annex.
[28] Facts, Annex.
[29] Oxman, *supra* note 24, 404; *South China Sea Arbitration*, para. 354.
[30] Churchill, Lowe, *supra* note 9, 455.
[31] *South China Sea Arbitration*, para. 358.
[32] Ibid, para. 392.

The dispute between Vattel and Fulton deals with all the aforementioned issues, as it concerns breach of sovereign rights or jurisdiction within the EEZ of Fulton, since the *SS Newton* conducted MSR in relation to the living resources therein. Therefore, the limitations set out in Section 3 should apply and deprive the jurisdiction of ITLOS.

D. Consequently, ITLOS does not have jurisdiction to seize the dispute

In accordance with Articles 286 and 288, there are three conditions for a State party to refer an international dispute to the compulsory jurisdiction of an international court or tribunal provided by Article 287(1). First, the existence of a "dispute concerning the interpretation or application of UNCLOS"; second, "no settlement has been reached by recourse to Section 1" and; third, the limitations and exceptions provided by Section 3 are not applicable to the subject of the dispute.[33] Only where settlement is not possible by means freely chosen by the parties to the dispute or no limitation or exceptions apply do the elaborate compulsory dispute settlement provisions come into play.[34] Since the obligations under Section 1 of Part XV have not been fulfilled, the compulsory procedures of Section 2 cannot be invoked. Even if obligations under Section 1 are considered to be fulfilled, the limitations of Article 297 apply automatically. Therefore, ITLOS has no jurisdiction to seize the dispute.

II. BY CONSTRUCTING THE WAVE ENERGY FARM FULTON DID NOT VIOLATE ANY INTERNATIONAL OBLIGATIONS RELATED TO COOPERATION, INCLUDING THOSE UNDER RELEVANT CONVENTIONS

A. Vattel and Fulton's general obligation to cooperate under international law does not prohibit Fulton to exercise its sovereign right to construct the wave energy farm

The notion of international cooperation can be found in Article 1 of the UN Charter along with other principles, such as maintenance of international peace, security, and friendly relations among States.[35] However, these principles only describe the objectives of the UN as an organization and the duty to cooperate is of a purely declaratory nature and does not contain a general legal obligation to cooperate.[36]

The term "cooperation" has never been defined by an international treaty or a resolution of an international organization; even the UN General Assembly Resolution 2625, "The Declaration on Principles of International Law concerning Friendly Relations and Co-

[33] Kawano, M, "The South China Sea Arbitration and the Dispute in the South China Sea" in NIDS International Symposium on Security Affairs, *Maintaining Maritime Order in The Asia-Pacific* (The National Institute for Defense Studies, 2018) 79.
[34] Churchill, RR, Lowe, AV, *supra* note 9, 454.
[35] UN Charter, Article 1.
[36] Wolfrum, R, "International Law of Cooperation" (2010) *MPEPIL*, para. 16.

operation among States", proceeds from a preconceived terminology.[37] It is also noteworthy that the Declaration is drafted in terms of "principles" rather than "rights and duties".[38] Furthermore, a legal obligation to cooperate cannot be founded upon the various resolutions of the UN General Assembly, as they lack law-making function and are only recommendatory in character.[39] From the sole wording of the Declaration it becomes evident that it falls short of defining a general legal obligation to cooperate.[40] Thus, there is no internationally accepted general obligation for cooperation that Fulton should comply with for the constructing of the wave energy farm.

In addition, according to Articles 56 and 60 UNCLOS, States have the sovereign right to explore, exploit, conserve and manage their natural resources and produce energy from the water, currents and winds and have jurisdiction with regard to the establishment and use of installations and structures.[41] Hence, Fulton has the sovereign right to explore, exploit, conserve and manage its natural resources and produce energy by constructing the wave energy farm, and did not violate any international obligations related to cooperation.

B. Fulton did not breach its obligation under UNCLOS to cooperate with Vattel

1. The construction of the wave energy farm is consistent with Fulton's obligation to cooperate in undelimited maritime areas

In relation to undelimited maritime areas, Articles 74(3) and 83(3) UNCLOS respectively request "spirit of understanding and cooperation" to enter into provisional arrangements of a practical nature and so as to not jeopardize or hamper the reaching of a final agreement for the delimitation of the EEZ or continental shelf between States.[42] The provisions of Articles 74(3)

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[37] Resolution 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, A/RES/25/2625, adopted on 24 October 1970; Loewenstein, K, "Sovereignty and International Co-operation" (1954) 48 *American Journal of International Law* 222, 224; Wolfrum, *supra* note 36, para. 16.

[38] Carbone, SM, di Pepe, LS, "Fundamental Rights and Duties of States" (2009) *MPEPIL*, para. 15.

[39] Öberg, MD, "The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ" (2005) 16 *European Journal of International Law* 883. See also, *South West Africa, Second Phase,* Judgment, ICJ Reports 1966, p. 6, para.98; Basak, A, *Decisions of the United Nations Organs in the Judgments and Opinions of the International Court of Justice* (Zakład Narodowy, 1969).

[40] Wolfrum, *supra* note 36, para. 17.

[41] UNCLOS, Articles 56(1)(a), 56(1)(b)(i) and 60(1)(b); Brown, ED, "The Significance of a Possible EC EEZ for the Law Relating to Artificial Islands, Installations, and Structures, and to Cables and Pipelines, in the Exclusive Economic Zone" (1992) 23 *Ocean Development and International Law* 115, 116.

[42] UNCLOS, Article 74(3) and 83(3).

and 83(3) do not clarify their substantive obligation or their geographical limitation.[43] The ICJ, when designating the relevant maritime area in delimitation cases, indicated that an "undelimited" maritime area comprises that part of the maritime space in which the potential entitlements of the parties overlap.[44] In similar vein, ITLOS indicates that activities in undelimited areas that could not be plausibly claimed by the other party would not jeopardize or hamper the reaching of a final agreement for the delimitation.[45]

The wave energy farm was constructed 150 nm from Fulton's coast, clearly within its EEZ where no overlapping entitlements could plausibly exist.[46] Therefore, it is the Respondent's submission that the area in which the wave energy farm was constructed could not be considered as undelimited in accordance with the aforementioned definition and the obligations enshrined in Articles 74 and 83 are not applicable.

Even if the area of the construction of the wave farm falls indeed within the definition of undelimited areas pursuant to Articles 74 and 83, Fulton did not breach any obligations imposed by UNCLOS. As established in the *Guyana v. Suriname Case,* the obligation to enter into provisional arrangements constitutes an implicit acknowledgement of the importance of avoiding the suspension of economic development in a disputed maritime area, as long as such activities do not affect the reaching of a final agreement.[47] Furthermore, the PCA distinguished between activities that lead to permanent physical change to the sea-bed, which are impermissible, and those that cause no such change, which will normally not fall foul of the prohibition to not jeopardize or hamper the final agreement on delimitation.[48]

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[43] British Institute of International and Comparative Law, Report on the Obligations of States under Articles 74(3) and 83(3) of UNCLOS in respect of Undelimited Maritime Areas (2016) 12.

[44] *Territorial and Maritime Dispute (Nicaragua v. Colombia),* Judgment, ICJ Reports 2012, p. 624, para. 159. See also, Ioannides, NA, "Rights and Obligations of States in Undelimited Maritime Areas: The Case of the Eastern Mediterranean Sea" in Minas, S, Diamond, HJ, (eds.) *Stress Testing the Law of the Sea: Dispute Resolution, Disasters & Emerging Challenges* (Leiden, Brill Nijhoff, 2018).

[45] *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire),* Provisional Measures, Order of 6 March 2015, ITLOS Reports 2015, p. 140, paras. 58 and 62. See also, *South China Sea Arbitration*.

[46] Facts, para. 6.

[47] *Guyana v. Suriname, Award of the Arbitral Tribunal,* 17 September 2007, Permanent Court of Arbitration, para. 460.

[48] Ibid, para. 481. See also, *Aegean Sea Continental Shelf, Interim Protection,* Order of 11 September 1976, ICJ Reports 1976, p. 3, paras 30-33.

Fulton's wave energy farm consists of three floating oscillating body converters, anchored to the ocean floor and was constructed in accordance with international standards.[49] It is the Respondent's submission that such installations do not cause permanent physical change to the seabed and therefore do not breach the precondition of cooperation pursuant to Article 73 and 84 UNCLOS, as they could not in way jeopardize nor hamper a final agreement for the delimitation.

2. Moreover, Fulton has no special obligation to cooperate in semi-enclosed seas

The notion of cooperation can also be found in Article 123 of the Convention, which rather weakly stipulates that States bordering semi-enclosed seas "should" cooperate with each other. More specifically, Articles 122 and 123 UNCLOS are the only Articles dealing expressly with those States bordering enclosed or semi-enclosed seas.[50] However, the vague language used in Article 123, such as "should cooperate" and "shall endeavour […] to coordinate", does not create autonomous and binding obligations.[51] According to ITLOS in the *MOX Plant case,* Article 123 is casted in weak terms in order to safeguard the worldwide application of the Convention's provisions and its unified character.[52] Furthermore, it is widely supported that Article 123 of the Convention is couched in the language of "exhortation", simply indicating the need for and desirability of cooperation and co-ordination of activities in enclosed and semi-enclosed seas.[53] Consequently, Fulton had no special obligation to cooperate with Vattel in the semi-enclosed DeGroot sea.

3. Finally, Fulton did not violate its obligation under UNCLOS to cooperate for the protection and preservation of the marine environment

Article 197 UNCLOS, incorporated in Part XII Section 2, provides that States shall cooperate on a global basis and on a regional basis for the protection and preservation of the marine environment, taking into account characteristic regional features.[54] Part XII requires States to

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[49] Clarifications on para. 6.

[50] Vukas, B, "Enclosed or Semi-Enclosed Seas" (2013) *MPEPIL*, para. 15.

[51] Franckx, E, Benatar, M, "The "Duty" to Co-Operate for States Bordering Enclosed or Semi-Enclosed Seas" (2013) 31 *Chinese (Taiwan) Yearbook of International Law and Affairs* 66, 72; Birnie, P, Boyle, A, Redgwell, C, *International Law and the Environment* (Oxford University Press, 2009) 176.

[52] *MOX Plant (Ireland v. United Kingdom), Provisional Measures*, Order of 3 December 2001, ITLOS Reports 2001, Separate opinion of Judge Anderson, p. 124, p. 129.

[53] Nordquist, MH, Grandy, NR, Nandan, SN, Rosenne, S, *United Nations Convention on the Law of the Sea 1982, Volume III* (Brill, Nijhoff, 1995) p. 366; Grbec, M, *Extension of Coastal State Jurisdiction in Enclosed and Semi-Enclosed Seas* (Routledge, 2014) 36; Vukas, *supra* note 50, para. 17.

[54] UNCLOS, Article 197.

cooperate primarily in the task of adopting global and regional rules and standards.[55] Moreover, in *Costa Rica v. Nicaragua*, the ICJ suggested that a State's obligation to notify and cooperate with potentially affected States is created only when an environmental impact assessment (EIA) confirms that there is a risk of significant transboundary harm.[56]

Before commencing the construction activities, Fulton assigned its National University to conduct an EIA and invited the public to participate and submit comments.[57] Fulton did not have an obligation to notify and cooperate with Vattel, as there was no conclusive evidence that the construction and operation of the wave energy farm would impact the health of the *Utrechtis lawis*' stock according to the EIA conducted by the National University of Fulton. This conclusion was also reaffirmed by a follow-up study which was conducted when the farm started operating.[58] Furthermore, over the years, Fulton and Vattel have undertaken various negotiations aimed at agreeing on joint conservation measures for *Utrechtis lawis*.[59] Their joint effort led to the *Utrechtis lawis* being listed under Annex II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[60] and Annex II of the Convention on the Conservation of Migratory Species (CMS).[61] The construction of the wave energy farm was necessary in order for Fulton to fulfill its National Determined Contribution (NDC) under the Paris Agreement under the United Nations Framework Convention on Climate Change (UNFCCC).[62] Thus, Fulton has complied with the obligation to cooperate in the task of adopting global and regional rules and standards for the protection and conservation of the *Utrechtis lawis* in the light of the wave energy farm development.

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[55] Birnie, Boyle, Redgwell, *supra* note 51, 176.
[56] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, ICJ Reports 2015, p. 665, para. 173; Tanaka, Y., "Costa Rica v. Nicaragua and Nicaragua v. Costa Rica: Some Reflections on the Obligation to Conduct an Environmental Impact Assessment" (2017) 26 *Review of European, Comparative and International Environmental Law* 91, 95.
[57] Facts, para. 6.
[58] Clarifications on para. 6.
[59] Facts, para. 4.
[60] Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, 993 UNTS 243.
[61] Convention on the Conservation of Migratory Species of Wild Animals, 23 June 1979, 1651 UNTS 333.
[62] Facts, para. 6.

C. Fulton has fulfilled its obligation to cooperate in accordance with other relevant environmental treaties

The Convention on Biological Diversity (CBD)[63] creates a global structure to promote continued international cooperation and to support national implementation and emphasizes the importance of, and the need to promote, international, regional and global cooperation among States for the conservation of biological diversity and the sustainable use of its components.[64] Article 5 of the CBD provides that contracting parties shall, *as far as possible* and *as appropriate*, cooperate with other contracting parties, directly for the conservation and sustainable use of biodiversity. Article 5 of the CBD does not contain an explicit reference to regional cooperation or regional characteristics similar to that contained in Article 197 of UNCLOS.[65] Moreover, the CMS requires range States of migratory species to cooperate to reach a favorable conservation status of migratory species.[66]

Both Vattel and Fulton have undertaken various negotiations aimed at agreeing on joint conservation measures for *Utrechtis lawis* and their joint efforts resulted in the stock being listed under Annex II of both the CITES and CMS.[67] Furthermore, Respondent, in good faith and in spirit of cooperation, conducted an EIA, which presented no conclusive evidence indicating that the construction of the wave energy would impact the health of the stock.[68] Finally, the sole purpose for the construction of the wave farm was to fulfil Fulton's obligations under UNFCCC.[69] Therefore, it is the Respondent's submission that Fulton cooperated as far as possible and appropriate, and that any obligation to cooperate under relevant treaties has been fulfilled.

III. FULTON'S ACTIONS ARE CONSISTENT WITH ITS INTERNATIONAL LEGAL OBLIGATIONS ON THE PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT AND THE CONSERVATION AND MANAGEMENT OF TRANSBOUNDARY FISH STOCKS

A. Fulton's actions were in compliance with its obligations under UNCLOS

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[63] Convention on Biological Diversity, 5 June 1992, 1760 UNTS 69.
[64] See CBD, Preamble; McGraw, DM, "The CBD: Key Characteristics and Implications for Implementation" (2002) 11(1) *Review of European, Comparative and International Environmental Law* 17, 19.
[65] Oude Elferink, AG, "Coastal States and MPAs in ABNJ: Ensuring Consistency with the LOSC" (2018) 33 *International Journal of Marine and Coastal Law* 437, 426.
[66] CMS, Article II.
[67] Facts, para. 4.
[68] Facts, para. 6; Clarifications on para. 6.
[69] Facts, para. 6.

1. Fulton complied with its relevant obligations under Part V UNCLOS on the conservation and management of transboundary fish stocks

Part V UNCLOS (Articles 55-75) establishes the legal regime of the exclusive economic zone (EEZ).[70] Article 56(1) stipulates that the coastal State has sovereign rights to explore and exploit, conserve and manage the natural resources. In similar vein, Article 61 grants the right to coastal states to exploit marine living resources, such as fisheries, but also creates an obligation to ensure the maintenance of these resources.[71] Fish stocks which frequently occur within the EEZs of adjacent states are called 'shared', 'transboundary' or 'joint stocks';[72] however, the term 'transboundary stocks' is sometimes used in a narrow sense, referring to only one type of stocks which occur within two or more EEZs.[73]

At the same time, Article 63(1) UNCLOS regulates the conservation and development of shared stocks in the EEZ and envisages that "[w]here the same stock or stocks of associated species occur within the [EEZ] of two or more coastal States, these States shall seek, either directly or through appropriate sub-regional or regional organizations, to agree upon the measures necessary to co-ordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Part". Indisputably, this provision only requires States sharing stocks to "seek […] to agree" on measures necessary to co-ordinate and ensure the conservation and development of such stocks.[74] Therefore, States are merely required to negotiate in good faith, either directly or through an appropriate regional organisation; yet they

[70] See Andreone, G, "The Exclusive Economic Zone" in Rothwell, DR, Oude Elfrink, AG, Scott, K, Stephens, T, (eds.) *The Oxford Handbook of the Law of the Sea* (Oxford University Press, 2015); Kwiatkowska, B, *The 200 Mile Exclusive Economic Zone in International Law* (Martinus Nijhoff, 1989).

[71] See Hey, E, *The Regime for the Exploitation of Transboundary Marine Fisheries Resources* (Springer, 1989).

[72] See, ILA Cairo Conference (1992), International Committee on the EEZ, Report of the Committee by Prof. Rainer Lagoni on "Principles applicable to living resources occurring both within and without the exclusive economic zone or in zones of overlapping claims"; Matz-Lück, N, Fuchs, J, "Marine Living Resources" in Rothwell, DR, Oude Elfrink, AG, Scott, K, Stephens, T, (eds.) *The Oxford Handbook of the Law of the Sea* (Oxford University Press, 2015) 499.

[73] See, Gulland, A, "Some Problems of the Management of Shared Stocks" (FAO Fisheries Technical Paper No. 206. 1980), Report of FAO/SEAFDEC, Workshop on Shared Stocks in Southeast Asia (FAO Fisheries Report No. 337. 1985). p. 2.

[74] Hayashi, M, "The Management of Transboundary Fish Stocks under the LOS Convention" (1993) 8 *International Journal of Marine and Coastal Law* 245.

are not required to reach agreement on co-ordinated measures.[75] Additionally, Article 63(1) is rather vague and gives States very little guidance in conducting such negotiations.[76]

The *Utrechtis lawis* is a transboundary stock shared between Vattel and Fulton.[77] Over the years, the two States have undertaken various negotiations aimed at agreeing on joint conservation measures for the stock, thus fulfilling their obligation under Article 63(1). Furthermore, their joint efforts led the *Utrechtis lawis* to be listed under Annex II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and Annex II of the Convention on the Conservation of Migratory Species of Wild Animals (CMS).[78] Consequently, Fulton is compliant with Article 63(1) and its obligation to conserve and manage the transboundary fish stock.

2. Furthermore, Fulton complied with its obligations under Part XII of UNCLOS for the protection and preservation of the marine environment

As stated in the *Southern Bluefin Tuna Cases*, "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment".[79] Such obligation is imposed on all States parties by Article 192(1) of the Convention, which requires the protection and preservation of the marine environment. Article 193 UNCLOS provides that "States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment". Moreover, Article 194(1) UNCLOS stipulates that "States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection".

In relation to wave energy farms, there is no scientific proof on whether they may pollute the marine environment or threaten marine living recourses. On the contrary, the production of energy from waves has been characterized as beneficial, since the use of such renewable energy source does not produce any greenhouse gases,[80] harmful wastes or

[75] Ibid.
[76] Churchill, RR, "The Management of Shared Fish Stocks: The Neglected "other" Paragraph of Article 63 of the UN Convention on the Law of the Sea" in Strati, A, Gavouneli, M, Skourtos, N, (eds.) *Unresolved Issues and New Challenges to the Law of the Sea Time Before and Time After* (Martinus Nijhoff, 2006).
[77] Facts, para. 4.
[78] Ibid.
[79] *Southern Bluefin Tuna*, para. 70.
[80] Cruz, J, *Ocean Wave Energy, Current Status and Further Perspectives* (Springer, 2008).

pollutants when converting wave into electrical energy.[81] Finally, it is proven that artificial habitats created by such devices are suitable for colonization by a variety of marine animals, thus working as an artificial reef and as sanctuary areas for threatened or vulnerable species.[82]

Fulton, pursuant to its exclusive right to construct and to authorize and regulate the construction of installations for the production of energy from the water, currents and wind in its EEZ, as per Articles 56 and 60 of UNCLOS, built a wave energy farm.[83] The construction of the wave energy farm did not cause pollution to the marine environment of the Monana Region, namely to the *Utrechtis lawis*, nor to the territory of Vattel. In any case, the wave farm was built following an EIA conducted by independent academics, thus fulfilling Fulton's environmental obligations under Article 194 UNCLOS. Furthermore, there is no proof that the decreased abundance of the *Utrechtis lawis* in the Monana Region is a consequence of the construction and operation of the wave energy farm in Fulton's EEZ. On the contrary, the shared stock abundance has increased in Fultonian waters since the installation of the devices.[84] Vattel's claims are manifestly ill-founded, as there is no credible information as to the decrease of the *Utrechtis lawis* stock. The migratory route of the shared-transboundary fish stock has not been infringed nor has any change to the fish stock abundance been clearly acknowledged.[85] Consequently, the devices installed in the Fultonian EEZ did not cause marine pollution and did not threaten the transboundary stock.

B. Fulton did not breach its obligations under customary international law

1. By constructing the wave energy farm, Fulton did not breach its due diligence obligation and did not cause any transboundary harm to the marine environment

It is a principle of international customary law that States shall not cause any transboundary harm with their actions on the territory and the environment of another state[86] and must act

[81] Thorpe, TW, "A Brief Review of Wave Energy" (UK Department of Trade and Industry, 1999).

[82] See, Sherman, R, Guilliam, D, Spieler, R, "Artificial reef design: void space, complexity and attractants? (2002) 59(1) *ICES Journal of Marine Science* 196; Lan, CH, Chen, CC, Hsu, CY, "An Approach to Design Spatial Configuration of Artificial Reef Ecosystem" (2004) 22 *Ecological Engineering* 217.

[83] UNCLOS, Article 60.

[84] Facts, para. 7.

[85] Ibid.

[86] *Trail Smelter Case (United States v. Canada)*, 3 RIAA 1905, Arbitral Tribunal, 16 April 1938 and 11 March 1941, 684; *Corfu Channel Case, Judgment of April 9th, 1949,* ICJ Reports 1949, p. 4; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226, para. 29; *Iron Rhine Arbitration* (Belgium v. The Netherlands), Permanent Court of Arbitration, Award of 24 May 2005, paras. 58-59; Sands, P, Peel, J, Fabra, A, MacKenzie, R, *Principles of International Environmental Law* (Cambridge University Press, 2013) 200;

with due diligence.[87] The ICJ held that due diligence is a "general obligation" which "is now part of the corpus of international law relating to the environment".[88] The principle of prevention, which is of customary nature, requires States to take measures to prevent foreseeable environmental harm and to reduce activities that may cause such damage.[89] Any action shall only be taken where there is evidence that the planned activity causes or is likely to cause harm to the environment.[90] The requirements to establish due diligence vary according to the circumstances of the activity creating the transnational risk.[91] Additionally, due diligence is an obligation of conduct, rather than of result, hence a state is expected to deploy adequate means, to exercise best possible efforts and do the utmost.[92]

In the absence of any reliable scientific evidence proving that the alleged decreased abundance of the *Utrechtis lawis* in the Monana Region is a consequence of the construction and operation of the wave energy farm in our EEZ, it cannot be established that Fulton caused transboundary harm to the environment of Vattel. In any case, the wave farm was constructed with due diligence. Specifically, prior to commencing the construction activities, and taking into account the 2015 report of the WWF, Fulton assigned its National University to conduct an EIA.[93] The EIA affirmed that there was no conclusive evidence that the construction and operation of the wave energy farm would impact the abundance of the *Utrechtis lawis*' stock and thus Fulton constructed the wave farm following that report. Furthermore, a follow-up study was conducted when the farm started its operation, and the National University of Fulton

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ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with Commentaries, UN Doc. A/56/10, (2001), p. 155, Article 3, para. 17; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, para. 104.

[87] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, p. 14, para. 193; Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), paras. 104, 153, 168.

[88] *Pulp Mills on the River Uruguay*, para. 193.

[89] *Gabčíkovo -Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, p. 7, para. 140; Atapattou, S, *Emerging Principles of International Environmental Law* (Brill, 2006) 206.

[90] Schroder, M, "Precautionary Approach/Principle" (2009) *MPEPIL*, para. 22.

[91] Handl, G, "Transboundary Impacts" in Bodansky, D, Brunnée, J, Hey, E, (eds.) *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) 550.

[92] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, para. 135.

[93] Facts, para. 6.

confirmed the conclusion it had initially reached.[94] Thus, Fulton acted with due diligence and did not violate its obligation not to cause transboundary harm.

2. Fulton did not have an obligation to take precautionary measures

The precautionary principle has not yet reached the status of customary law due to a number of fundamental uncertainties; uncertainties in the meaning, the application and the implications of the approach, as well as in its consequences (e.g. there is no universal application nor a same threshold of harm on various regional or international instruments).[95] Additionally, there has been no authoritative decision, thus far, by an international court or tribunal recognizing precaution as a principle of general or customary international law.[96] Consequently, Fulton was under no legal obligation to act in accordance with the precautionary approach, since this approach is not a principle nor a rule of customary law.[97]

Finally, although the 1995 UN Fish Stocks Agreement[98] adopts the precautionary approach,[99] its provisions are limited to the conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks, but not to transboundary/shared

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[94] Ibid.

[95] See Hey, E, "The Precautionary Concept in Environmental Policy and Law: Institutionalizing Caution" (1991) 4 *Georgetown International Environmental Law Review* 303; Pyhälä, M, Brusendorff, AC, Paulomäki, H, "The Precautionary Principle" in Fitzmaurice, M, Ong, DM, Merkouris, P, (eds.) *Research Handbook on International Environmental Law* (Edward Elgar, 2010).

[96] Panel Report, European Communities-Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291/R, WT/DS292/R and WT/DS293/R (Sept. 29, 2006) (adopted Nov. 21). See also *EC Measures Concerning Meat and Meat Products (Hormones)*, Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, para. 123; *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, para. 135; *Nuclear Tests* (New Zealand v. France), Judgment, ICJ Reports 1974, p. 253, p. 14; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*; *Pulp Mills on the River Uruguay*; *Southern Bluefin Tuna Cases*, para. 77; *MOX Plant Case*, para. 71; Boisson de Chazournes, L, "Precaution in International Law: Reflection on its Composite Nature" in Ndiaye, T, Wolfrum, R (eds.) *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Brill, 2007) 28.

[97] Boisson de Chazournes, ibid; Hunter, D, Salzman, J, Zaelke, D, *International Enviromental Law and Policy* (2nd ed., Foundation Press, 2002) 407.

[98] United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 2167 UNTS 88, 4 August 1995.

[99] See Articles 5, 6 and Annex II.

species.[100] Thus, the 1995 Agreement is not applicable to the present case as the *Utrechtis lawis* is a shared stock, not a straddling nor a highly migratory species.

C. Even if transboundary harm occurred, Fulton acted with due diligence and fulfilled its procedural obligations to prevent such harm

According to recent developments, in order to fulfil their obligations to exercise due diligence, States must carry out an EIA "before embarking on an activity" likely to cause significant transboundary harm.[101] However, the exact content of the EIA is not regulated under international law; the Espoo Convention is not applicable to this dispute, while Article 206 UNCLOS leaves the scope and content of EIA to be determined by each State. Hence, "it is for each State to decide in its domestic legislation or in the authorization process for the project, the specific content of the [EIA] required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment".[102] Moreover, "once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken".[103] Lastly, in order for an EIA to be sufficient it must provide the necessary information about impacts likely to occur.[104]

In the present case, the independent academics of the National University of Fulton prepared an EIA before commencing the construction activities.[105] Furthermore, the WWF's Fultonian branch participated in the public hearings in January 2017 and reminded Fultonian authorities about the 2015 WWF report.[106] The EIA report concluded that there was no conclusive evidence suggesting that the construction and operation of the wave-energy farms would affect the living resource of the Monana region or cause any pollution to the marine environment.[107] Finally, Fulton continued to monitor the situation with a follow-up study and

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[100] Meltze, E, "Global Overview of Straddling and Highly Migratory Fish Stocks" (1994) 25(3) *Ocean Development and International Law* 255.

[101] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, para. 104.

[102] *Pulp Mills Case,* para. 205.

[103] Ibid.

[104] See, Boyle, A, "Developments in the International Law of Environmental Impact Assessments and their Relation to the Espoo Convention" (2012) 20(3) *Review of European Community and International Environmental Law* 227.

[105] Facts, para. 6.

[106] Facts Para.5

[107] Clarifications on para. 6.

came again to the same conclusion as the first EIA report.[108] It is therefore evident that Fulton complied with all of its procedural obligations and acted with due diligence, despite the lack of conclusive scientific evidence.

IV. VATTEL HAS INFRINGED THE SOVEREIGN RIGHTS OF FULTON BY SENDING THE *SS NEWTON* TO CONDUCT MARINE SCIENTIFIC ACTIVITIES IN FULTON'S EEZ ON TWO OCCASIONS

A. Fulton has exclusive jurisdiction to conduct and regulate marine scientific research in its EEZ

1. The SS Newton was a research vessel sent to conduct MSR in Fulton's EEZ

Part XIII (Articles 238–265) of UNCLOS is dedicated to marine scientific research (MSR).[109] The general rule, found in Article 238, provides that all States have the right to conduct MSR subject to rights and duties of other States under the Convention.[110] MSR is not defined in UNCLOS despite the repeated use of the term in Part XIII of the Convention and throughout its text.[111] Yet, it may be defined as "any scientific study or related experimental work having the marine environment as its object which is designed to increase knowledge of the ocean".[112]

The *SS Newton* is a Vattel-owned vessel which is exclusively used to perform marine scientific research by the Vatteler National Council for Scientific Research (VNCSR).[113] On 15 February 2018, Vattel decided to send the *SS Newton*, to engage in MSR and to collect data on the state of the marine environment around the wave energy farm. Vattel sent the *SS Newton* back to the site of the wave energy farm on 24 August 2018 in order to collect additional data on the marine environment of the Fultonian EEZ.[114]

2. Vattel never informed Fulton about its intention to undertake MSR in Fulton's EEZ and, in any event, Vattel failed to obtain express or implied consent for conducting MSR

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[108] Ibid; *Pulp Mills case*.
[109] UNCLOS, Part XIII.
[110] UNCLOS, Article 238.
[111] See, Gragl, P, "Marine Scientific Research" in Attard, D, Fitzmaurice, M, Martínez Gutiérrez, NA, (eds.) *The IMLI Manual on International Maritime Law: Volume I: The Law of the Sea* (Oxford University Press, 2014). Nordquist, MH, Moore, JN, Soons, AHA, Kim, HS, "Preliminary Material" in Nordquist, MH, Moore, JN, Soons, AHA, Kim, HS, (eds.) *The Law of the Sea Convention: US Accession and Globalization*, (Brill, 2012).
[112] Yoshifumi, T., *The international law of the sea* (2nd edn, Cambridge University Press 2015) 360; Soons, AHA, *Marine Scientific Research and the Law of the Sea* (Kluwer Publishers, 1982), 124; Treves, T, "Marine Scientific Research" in Bernhardt, R, (ed.) *Encyclopedia of Public International Law* (Elsevier, 1997) 295.
[113] Clarifications on para. 7.
[114] Facts, para 7.

Following the general structure of UNCLOS, Part XIII adopts a zonal approach to the regulation of MSR such that "the rights of the coastal state diminish vis-à-vis researching states moving farther seaward from the baseline".[115] In any case, Article 56(1)(b)(ii) refers to the exclusive jurisdiction of coastal States with regard to MSR in their EEZ.[116] This provision must be read along with Article 246 of Part XIII,[117] which provides that the consent of the costal State is required for any MSR activity in both the EEZ and on the continental shelf.[118] Consequently, MSR in the EEZ is only to be conducted with the consent of the coastal State.[119]

Furthermore, and according to Article 248, States that intend to undertake MSR in the EEZ of a coastal State shall, not less than six months in advance of the expected starting date of the MS activity, provide the coastal State with a full description of, *inter alia*: (a) the nature and objectives of the project; (b) the method and means to be used, including name, tonnage, type and class of vessels and a description of scientific equipment; (c) the precise geographical areas in which the project is to be conducted; (d) the expected date of first appearance and final departure of the research vessels, or deployment of the equipment and its removal, as appropriate.[120]

In addition, Article 252 of the Convention establishes an implied consent regime that allows other States to proceed with MSR activities in the EEZ under certain circumstances, even though the consent of the coastal State may not have been forthcoming.[121] Indeed, Article 252 stipulates that States can proceed with an MSR project six months after providing the information required under Article 248 to the coastal State, unless the latter has informed them, within four months of receiving this information, that, for any of the four permissible reasons set out in Article 252, it has withheld or postponed consent. These reasons are that: (a) it has

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[115] Hubert, AM, "Marine Scientific Research and the Protection of the Seas and Oceans" in Rayfuse, R, (ed.) *Research Handbook on International Marine Environmental Law* (Edward Elgar, 2017) 313–336.
[116] UNCLOS, Article 56.
[117] See, Tanaka, Y, *Dual Approach to Ocean Governance: The Cases of Zonal and Integrated Management in International Law of the Sea* (Ashgate, 2009).
[118] UNCLOS, Article 246(1) and (2).
[119] Stephens, T, Rothwell, D, "Marine Scientific Research" in Rothwell, DR, Oude Elferink, AG, Scott, K, Stephens, T, (eds.) *The Oxford Handbook of the Law of the Sea* (Oxford University Press, 2015) 567.
[120] Doussis, E, "Marine Scientific Research: Taking Stock and Looking Ahead" in Andreone, G, (ed.) *The Future of the Law of the Sea Bridging Gaps Between National, Individual and Common Interests* (Springer, 2017) 93.
[121] UNCLOS, Article 252(1). See also, Gorina-Ysern, M, *An International Regime for Marine Scientific Research* (Brill, 2004); Bateman, S, "Hydrographic Surveying in Exclusive Economic Zones: Jurisdictional Issues" (2004) 5 *International Hydrographic Review* 1.

withheld its consent under Article 246; (b) the information given by the State concerned regarding the nature of the objectives of the project does not conform to the manifestly evident facts; (c) it requires supplementary information relevant to the conditions and information, and (d) outstanding obligations exist with respect to a previous MSR project carried out by that State.[122]

Vattel never requested Fulton to grant it permission to conduct marine scientific research in its EEZ. The *Note Verbale* sent by Vattel on 14 January 2018 cannot be considered as a formal request for MSR since it merely requested Fultonian cooperation in assessing the impact of the wave energy farm on the status of the stock.[123] It did not refer to the nature and objectives of the project, to the method and means to be used, to the precise geographical areas in which the project was to be conducted nor to the expected date of first appearance and final departure of the research vessel, as required by Article 248 of the Convention. In any case, and in the event that the *Note Verbale* suffices as a request, as per Article 248, Vattel never obtained Fulton's consent, which is a prerequisite for MSR activities in the EEZ.

Finally, there was no implied consent for MSR activities. In particular, the first MSR activity by *SS Newton* was conducted on 15 February 2018, only one month after the sending of the *Note Verbale*, whereas Article 252 requires six months. On 19 February 2018, Fulton's President, Ms Reena Stroming, explicitly and publicly stated that Vattel's MSR in Fultonian waters was a violation of Fulton's sovereign rights in its EEZ and that Vattel cannot unilaterally decide to undertake MSR projects until it has complied with the necessary procedures, and obtained prior authorization.[124] Thus, prior to the second occasion of the MSR, Fulton informed Vattel that it failed to comply with Article 248 and, thus, Fulton withheld its consent for any MSR activity. For these reasons, Vattel infringed the sovereign rights of Fulton by sending the SS Newton to conduct MSR unlawfully.

3. Vattel's MSR was of direct significance for the exploration of Utrechtis lawis, and thus Fulton had the right not to grant permission

Article 246(3) UNCLOS stipulates that coastal States shall, "in normal circumstances", grant their consent for foreign scientific research activities in their EEZ. The meaning of "normal circumstances" can be deduced from Article 246(3) of the Convention with the effect that consent shall not be withheld with respect to research activities for exclusively peaceful

[122] Birnie, P, "Law of the Sea and Ocean Resources: Implications for Marine Scientific Research" (1995) 10(2) *International Journal of Marine and Coastal Law* 229, 238.
[123] Facts, para. 7.
[124] Facts, para. 7.

purposes and in order to increase scientific knowledge of the marine environment for the benefit of all mankind.[125]

Yet, Article 246(5) UNCLOS enumerates certain research activities, for which coastal States may always withhold their consent in their discretion.[126] Thus, a coastal State may withdraw or withhold its consent if a research project is, among others, of direct significance for the exploration and exploitation of natural resources, whether living or non-living. Given these precisely formulated exceptions to the Convention's consent regime, the coastal State's discretion to refuse consent is absolute in the cases of Article 246(5) UNCLOS.[127] Thus, Article 246(5)(a) makes reference to a research project which is of direct significance for the exploration and exploitation of natural resources. Such research projects may include those which can reasonably be expected to produce results enabling resources to be located, assessed and monitored with respect to their status and availability for commercial exploitation.[128]

In the present case, the MSR conducted by *SS Newton* focused on the exploration and exploitation of a living natural resource in the EEZ of Fulton, namely of the *Utrechtis lawis.* Particularly, Vattel's MSR is not a pure marine scientific research carried out "exclusively for peaceful purposes and in order to increase scientific knowledge for the benefit of all mankind". The MSR was only conducted in order to locate, assess and monitor the status and availability of the *Utrechtis lawis* for the benefit of Vattel,[129] after the alleged decrease of the stock, which is based on the testimonies of Vatteller fishermen and on the noted diminished availability of the *Utrechtis lawis* on Vatteller markets.[130] Therefore, Fulton is entitled under Article 246(5) to withhold its consent.

B. Fulton had the right to cease the unauthorized MSR in its EEZ and ask *SS Newton* to leave the area

1. Vattel's freedom of navigation was not exercised with due regard to Fulton's sovereign rights

[125] UNCLOS, Article 246(3); Churchill, Lowe, *supra* note 9; Tanaka, *supra* note 118, 211.
[126] See, Soons, AHA, *Marine Scientific Research and the Law of the Sea*, (Kluwer, 1982).
[127] Hubert, AM, "The New Paradox in Marine Scientific Research: Regulating the Potential Environmental Impacts of Conducting Ocean Science" (2011) 42 *Ocean Development and International Law* 329, 335.
[128] Marine Scientific Research: A revised guide to the implementation of the relevant provisions of the United Nations Convention on the Law of the Sea (Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, 2010).
[129] Facts, para. 7.
[130] Clarifications on para. 7.

In accordance with Article 58(1) of UNCLOS, "[i]n the exclusive economic zone, all States, […], enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines [...]".[131] However, in exercising their rights and performing their duties in the EEZ under the Convention, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State.[132] Consequently, in the exercise of freedom of navigation the foreign State has a duty to refrain from activities that unreasonably interfere with the exercise of the rights of the coastal State.[133]

Article 56(1)(b)(ii) enables coastal States to exercise their exclusive rights with regard to MSR in their respective EEZs,[134] while on the other hand, other States have the freedom to conduct MSR after relevant authorization by the coastal State as per Article 56(1). Both States in the EEZ must pay mutual due regard in exercising their rights and performing their duties under the Convention.[135] However, the exercise of rights and freedoms in the EEZ is by no means unconditional, but subjected to several terms and conditions.[136] Most importantly, other States shall exercise their rights in good faith, without abuse, as per Article 300 of UNCLOS.[137] Thus, freedom of navigation envisages the right of a State to navigate through a coastal State's EEZ without engaging in unauthorized and illegal activities, which amount to an abuse of rights.[138]

Additionally, the ordinary meaning of the duty of "due regard" can be interpreted as one party's obligation of proper conduct toward another.[139] Indeed, in the *Chagos Marine Protected Area Arbitration*, the PCA referred to "due regard" as follows: "the ordinary meaning of 'due regard' calls for the United Kingdom to have such regard for the rights of

[131] Emphasis added.
[132] UNCLOS, Article 58(3).
[133] Hoffmann, AJ, "Freedom of Navigation" (2011) *MPEPIL*, para. 15.
[134] UNCLOS, Article 56.
[135] Bao, Y, "The South China Sea: Freedom of Overflight or 'Unlawful Activities'?", thediplomat.com, 2018, available at https://thediplomat.com/2018/08/the-south-china-sea-freedom-of-overflight-or-unlawful-activities.
[136] Ibid.
[137] According to Article 300, "States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right".
[138] Bao, *supra* note 136.
[139] Gaunce, J, "The South China Sea Award and the duty of "due regard" under the United Nations Law of the Sea Convention" (2016) *The JCLOS Blog*.

Mauritius as is called for by the circumstances and by the nature of those rights".[140] Furthermore, the PCA in the *South China Sea Arbitration*[141] concluded that China was in breach of its obligation of "due regard" under Article 58(3) of the Convention, as through the operation of its marine surveillance vessels and in tolerating and failing to exercise due diligence to prevent fishing by Chinese flagged vessels, it failed to exhibit due regard for the Philippines' sovereign rights with respect to fisheries in its exclusive economic zone. Accordingly, China was found in breach of its obligations under Article 58(3) UNCLOS.

In similar vein, Vattel failed to respect the sovereign rights of Fulton to authorize and regulate marine scientific research in its EEZ and breached its obligations arising from Article 58(3). Thus, the actions of the Applicant on both occasions to conduct MSR without the coastal State's permission, constitutes an abuse of rights and falls short of the duty to pay due regard to Fulton's sovereign rights with respect to MSR activities within in EEZ.[142]

2. Therefore, Fulton can request the SS Newton to suspend the illegal action and leave its EEZ

Article 253 UNCLOS provides that a coastal State shall have the right to require the suspension of any marine scientific research which is in progress within its exclusive economic zone or on its continental shelf, if the research activities are not being conducted in accordance with Article 248 and/or Article 249 of the Convention.[143] Additionally, in the EEZ a costal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources therein, take measures, including inspection and arrest, that may be necessary to ensure compliance with its laws and regulations.[144] The fact that the Fultonian coast guard on both occasions ascertained that the *SS Newton* was collecting marine data without Fulton's permission enables Fulton to require the cessation of the act as well as demand that Vattel leave the area.

C. In any case, Fulton did not fail to cooperate with Vattel with regard to the MSR

Article 242(1) stipulates that "States and competent international organizations shall, in accordance with the principle of respect for sovereignty and jurisdiction and on the basis of mutual benefit, promote international co-operation in marine scientific research for peaceful

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[140] *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Permanent Court of Arbitration, Award of 18 March 2015, para. 519; *South China Sea Arbitration (Philippines v China)*, Permanent Court of Arbitration, Award of 12 July 2016, para. 742. See also, Gaunce, *supra* note 140.

[141] See, *South China Sea Arbitration*, para. 753.

[142] Facts, para. 7.

[143] Gaunce, *supra* note 140.

[144] UNCLOS, Article 73; Francioni, F, "Peacetime use of Force, Military Activities, and the New Law of the Sea" (1985) 18 *Cornell International Law Journal* 203, 217.

purposes".[145] More specifically, Article 243 requires States and competent international organizations to cooperate with the aim of creating "favorable conditions for the conduct of marine scientific research in the marine environment and to integrate the efforts of scientists in studying the essence of phenomena and processes occurring in the marine environment and the interrelations between them". However, such cooperation is to be undertaken through the conclusion of international agreements, and is an obligation that all interested States must promote.[146]

Fulton never failed to meet its obligation for such international cooperation. In fact, it is evident that Fulton continuously sought to agree on conservation measures of the *Utrechtis lawis* in the Monana Region with Vattel.[147] Their common interest in the protection of the species brought results at the multilateral level, with the insertion of the species in Annexes of CITES and CMS, respectively in 1989 and 1995.[148] Yet, Fulton and Vattel have never concluded any bilateral agreement for the management of the *Utrechtis lawis* and have never concluded an international agreement providing for cooperation and conduct of a joint MSR, so as to give rise to Vattel's right to conduct MSR on the basis of Articles 242-243.

SUBMISSIONS AND PRAYER FOR RELIEF

On the basis of the facts and law set forth in the Memorial, the Federal Republic of Fulton respectfully requests the Tribunal to dismiss all of Vattel's claims, either because they fall outside the jurisdiction of the Tribunal or because they fail on their merits, according to arguments that are articulated above. Moreover, Fulton respectfully requests the Tribunal to adjudge and declare that Vattel has infringed the sovereign rights of Fulton by sending the *SS Newton* to conduct marine scientific activities in Fulton's EEZ on two occasions.

Respectfully submitted on this day, February 28, 2019

Agents for the Respondent

[145] UNCLOS, Article 242(1).
[146] Tanaka, Y, "Obligation to Co-operate in Marine Scientific Research and the Conservation of Marine Living Resources" (2005) 65(4) *Heidelberg Journal of International Law* 937, 941 and 944.
[147] Facts, para. 4.
[148] Clarifications on para. 4.