CASE CONCERNING CERTAIN ACTIVITIES IN THE DEGROOT SEA
(KINGDOM OF VATTEL V. FEDERAL REPUBLIC OF FULTON)

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

03A

MEMORIAL FOR APPLICANT KINGDOM OF VATTEL

TABLE OF CONTENTS

INDEX OF AUTHORITIES

TREATIES

PARIS AGREEMENT (adopted 12 December 2015, entered into force 4 November 2016) C.N.63. 2016.TREATIES-XXVII.7. d.

UNITED NATIONS DOCUMENTS

INTERNATIONAL LAW COMMISSION (ILC), Draft Principles on the Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 148, A/CN.4/SER.A/2001/Add.1 (Part 2).

INTERNATIONAL LAW COMMISSION (ILC), Draft Articles on the Law of the Non-Navigational Uses of International Watercourses and Commentaries thereto and Resolution on Transboundary Confined Groundwater, *Yearbook of the International Law Commission*, 1994, Vol. II, Part Two, p. 89 A/CN.4/SER.A/1994/Add. l (Part 2).

UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT, Declaration of the United Nations Conference on the Human Environment, UN Doc A/CONF.48/14/Rev.1 (1972).

DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, OFFICE OF LEGAL AFFAIRS, Marine Scientific Research: A Revised Guide to the Implementation of the Relevant Provisions of the United Nations Convention on the Law of the Sea, 2010, < www.un.org/depts/los/doalos_publications/publicationstexts/msr_guide%202010_final.pdf > (accessed 12.2.2019).

UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT, Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 Vol. I (1992).

UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL (ECOSOC), Guidance on Public Participation in Environmental Impact Assessment in a Transboundary Context, ECE/MP.EIA/6 (2004).

DECISIONS OF INTERNATIONAL COURTS AND TRIBUNALS

INTERNATIONAL COURT OF JUSTICE

Corfu Channel Case (United Kingdom v. Albania) (Merits), Judgment, [1949] ICJ Rep, p. 4.

South West Africa (Liberia v. South Africa) (Preliminary Objections), Judgment, [1962] ICJ Rep, p. 328.

Fisheries Jurisdiction (United Kingdom v. Iceland) (Merits), Judgement, [1974] ICJ Rep, p. 3.

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, [1996] ICJ Rep, p. 226.

Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, [2010] ICJ Rep, p. 14.

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan) (Provisional Measures) Order of 27 August 1999, ITLOS Reports 1999, p. 280.

M/V Saiga (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p.I0.

The M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea), Judgment (Sep. Op. Vukas), ITLOS Reports 1999, p. 10.

The MOX Plant Case (Ireland v. United Kingdom) (Provisional Measures), Order of 3 December 2001, ITLOS Reports 2001, p. 95.

The MOX Plant Case (Ireland v. United Kingdom) (Provisional Measures, Sep. Op. Wolfrum), Order of 3 December 2011, ITLOS Reports 2001, p. 131.

Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore) (Provisional Measures) Order of 8 October 2003, ITLOS Reports 2003, p. 10.

The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment, ITLOS Reports 2013, p. 4.

Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion of 2 April 2015, ITLOS Reports 2015, p. 4.

PERMANENT COURT OF ARBITRATION

In the Matter of an Arbitration Between Barbados and the Republic of Trinidad and Tobago (Barbados v. Republic of Trinidad and Tobago), Award on the Merits 11 April 2006, PCA Case N° 2004-02.

In the Matter of the Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Award on the Merits 18 March 2015, PCA Case N° 2011-03.

In the Matter of the South China Sea Arbitration (Republic of the Philippines v. People's Republic of China) (Award on Jurisdiction and Admissibility), Award 19 October 2015, PCA Case Nº 2013-19.

In the Matter of the South China Sea Arbitration (Republic of the Philippines v. People's Republic of China), Award on the Merits 12 July 2016, PCA Case Nº 2013-19.

ACADEMIC LITERATURE

ALBERSTADT, R., 'Has the Status of "Maximum Sustainable Yield" Become an International Customary Rule?' (2014) *Beijing Law Review* Vol. 5(4), pp. 264-271.

ANDERSON, D., 'Article 283 of the United Nations Convention on the Law of the Sea' in MALICK, T. N. and WOLFRUM, R. (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber amicorum Judge Thomas A. Mensah* (Brill Nijhoff, 2007).

ATAPATTU, S. A, *Emerging Principles of International Environmental Law* (Brill, 2007).

BERNAL, P. AND SIMCOCK, A., 'MARINE SCIENTIFIC RESEARCH' IN UNITED NATIONS (ED.). THE FIRST GLOBAL INTEGRATED MARINE ASSESSMENT: WORLD OCEAN ASSESSMENT I (ONLINE) (CUP,2017) AVAILABLE AT: HTTP://WWW.UN.ORG/DEPTS/LOS/GLOBAL_REPORTING/WOA_RPROC/CHAPTER_30.PDF (ACCESSED 27.2.2019)

BOYLE, A., 'The Environmental Jurisprudence of the International Tribunal for the Law of the Sea' (2007) *The International Journal of Marine And Coastal Law*, Vol. 22(3), pp. 369-381.

CHURCHILL, R. R. and LOWE, A. V., *Law of the Sea*, (3rd ed., Juris Publishing, 1999.

DUPUY, P. and VINUALES, J. E, *International Environmental Law* (2nd ed., Cambridge University Press, 2018).

GARCIA-REVILLO, M. G., *The Contentious and Advisory Jurisdiction of the International Tribunal for the Law of the Sea* (Brill Nijhoff, 2015).

GILLESPIE, A., 'The Precautionary Principle in the Twenty-First Century: A Case Study of Noise Pollution in the Ocean' (2007) *International Journal of Marine and Coastal Law*, Vol. 22(1), pp. 61-87.

JOYNER, C. C., 'Biodiversity in the Marine Environment: Resource Implications for the Law of the Sea' (1995) *Vanderbilt Journal of Transnational Law*, Vol. 28(4), pp. 635-688.

LINEBAUGH, C., 'Joint Development in a Semi-Enclosed Sea: China's Duty to Cooperate in Developing the Natural Resources of the South China Sea' (2014) *Columbia Journal of Transational Law*, Vol. 52(2), pp. 542-568.

MATZ-LÜCK, N., 'Meeresschutz', in PROELSS, A. (ed.), *Internationales Umweltrecht* (De Gruyter, 2017).

NILSSON C. and GRELSSON, G., 'The Fragility of Ecosystems: A Review' (1995) *Journal of Applied Ecology*, Vol. 32(4), pp. 677-692.

NORDQUIST, M. H., *United Nations Convention on the Law of the Sea 1982, A Commentary* (Vol. II, Martinus Nijhoff Publishers, 1993).

NORDQUIST, M. H., *United Nations Convention on the Law of the Sea 1982, A Commentary* (Vol. V, Martinus Nijhoff Publishers, 1989).

OXMAN, B. H., 'Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals', in ROTHWELL, D. R., et al. (eds.), *The Oxford Handbook of the Law of the Sea* (Oxford University Press, 2015).

PROELSS, A. (ed.), *United Nations Conventions on the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017).

ROTHWELL, D. R. and STEPHENS, T., 'Marine Scientific Research', in ROTHWELL, D. R., et al. (eds.), *The Oxford Handbook of the Law of the Sea* (Oxford University Press, 2015).

ROTHWELL, D. R. and STEPHENS, T., *The International Law of the Sea* (2nd ed., Hart Publishing, 2016).

SHANY, Y., *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press, 2003).

SOONS, A. H. A., *Marine Scientific Research and the Law of the Sea* (Deventer-Kluwer, 1982).

TANAKA, Y., *The International law of the Sea* (Cambridge University Press, 2012).

INTRODUCTION

From time immemorial, the *Utrechtis Lawis* have migrated between the waters of the Kingdom of Vattel (hereafter Vattel) and the maritime areas that are now the exclusive economic zone (hereafter EEZ) of the Federal Republic of Fulton (hereafter Fulton). From October, through to July they are found in Vattel's waters. In August, they migrate to Fulton's EEZ in order to spawn, before returning to Vattel in September. Especially the Vatteller aboriginal communities have a very close relationship with the fish. After gaining independence from the Kingdom of Scelle, both Vattel and Fulton were concerned with the continued wellbeing of the stock and undertook various negotiations aiming at its conservation. This led to the listing of the *Utrechtis Lawis* in the Appendices of the Convention on the Conservation of Migratory Species of Wild Animals (hereafter CMS) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (hereafter CITES).

However, in January 2017, Fulton started construction and subsequent operation of a wave-energy farm in its EEZ, located right in the migratory path of the *Utrechtis Lawis*. This project was undertaken without any consultation with or even notification to Vattel. Then, in January 2018, Vattel had to register a significant decrease in the abundance of population of the *Utrechtis Lawis* in the Monana Region of the Sea of DeGroot, where the main fishing for *Utrechtis Lawis* takes place. Following an unanswered *note verbale* addressed to Fulton requesting its cooperation, Vattel twice sent its research vessel, the SS Newton, to collect data on the state of the marine environment around the wave-energy farm. But a Fultonian coast guard vessel expelled the SS Newton from Fulton's EEZ on both occasions. Throughout, Fulton has remained hostile towards Vattel's attempts to determine the reasons for the decrease and ensure the stock's conservation. Given the urgency of the matter, and as a last means, Vattel is now respectfully addressing this Honourable Tribunal with three submissions.

Firstly, by failing to notify and consult with Vattel regarding its wave-energy farm, Fulton violated its obligation to cooperate with Vattel and has therefore violated its international obligations under the United Nations Convention on the Law of the Sea (hereafter LOSC, the Convention), as well as other relevant conventions. In addition, Fulton did not take into account Vattel's rights and interests in the protection of the DeGroot Sea and failed to cooperate in evaluating the environmental impact of the farm. Finally, Fulton also did not respect its obligation to cooperate with Vattel in conducting the environmental impact assessment.

Secondly, Fulton's actions are also 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. By establishing its wave-energy farm within the migratory path of *Utrechtis Lawis,* without taking any protective measures, Fulton has violated Art. 194 (5) LOSC with regard to the protection of the habitat of threatened species, as well as the protection of fragile ecosystems in the DeGroot Sea. Moreover, the subsequent significant decrease in abundance of *Utrechtis Lawis* population constitutes significant transboundary harm to Vattel's environment, which Fulton has caused and simultaneously failed to prevent. Furthermore, by establishing a large wave-energy farm all at once and without any protective measures, in full knowledge of the potential risks, Fulton did not employ a precautionary approach. And finally, Fulton also failed to protect a threatened migratory species.

Lastly, the exclusion of the SS Newton was an infringement of Vattel's freedoms, existing in Fulton's EEZ, due to the activities conducted by Vattel not falling within the scope of marine scientific research and therefore falling under the freedoms of Art. 58 LOSC. But even if this Honourable Tribunal were to find otherwise, this dispute would still require an equitable solution based on Art. 59 LOSC. On top of that, it must be noted that Fulton is wrong in alleging that Vattel has infringed the sovereign rights of Fulton by sending the SS Newton to conduct marine scientific activities. The activities conducted by the SS Newton are not directly linked to the sovereign rights enjoyed by Fulton under Art. 56 (1) LOSC.

For all the above reasons, Vattel respectfully requests this Honourable Tribunal to adjudge and declare that:

I. By constructing the wave-energy farm Fulton is violating its international obligations related to cooperation, include those under the relevant conventions.
II. 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.
III. The exclusion of the *SS Newton* was an infringement of Vattel’s freedoms existing in Fulton’s EEZ.

STATEMENT OF FACTS

Background

Vattel and Fulton are both located in the semi enclosed Sea of DeGroot. Having enjoyed a very peaceful relationship in the past, the only disagreement between the two States, until recently, concerned the delimitation of their respective EEZs. This is due to Fulton's unreasonable refusal to recognise Vattel's rightful claim of the Bay of Selden as a historic bay. This refusal impacts on the delimitation of the two States' respective EEZs, creating overlapping claims to the Monana region of the Sea of DeGroot.

The Monana Region is of utmost importance to Vattel, as it constitutes the primary area for fishing the *Utrechtis Lawis*. The *Utrechtis Lawis* occurs in Vattel's waters from October to July but migrates into Fulton's EEZ for spawning in August and September, before returning to Vattel. In 2015, the World Wildlife Fund (hereafter WWF) issued a report stressing the importance of this migratory route for the very survival of the *Utrechtis Lawis*. According to that report, any interference with the migratory path has the potential of causing the species to go extinct. The *Utrechtis Lawis'* need for protection has furthermore been recognised by both Vattel and Fulton, as the two States have successfully joined efforts to have it listed in Appendix II of CITES and of CMS.

Construction of the Wave-Energy Farm

In April 2016, Fulton unilaterally decided to construct a large wave-energy farm as a way to meet its Nationally Determined Contribution (hereafter NDC) under the Paris Agreement. The farm is located 150 nm off Fulton's coast, landward of the Monana region. Prior to construction, Fulton assigned its National University to conduct an environmental impact assessment (hereafter EIA) and invited the public to participate and submit comments. Only a few months later, in January 2017, Fulton started construction, and then operation of the farm.

Declining Numbers of the *Utrechtis Lawis* Stock

In January 2018, a significant decrease in abundance of *Utrechtis Lawis* in the Monana Region was reported. Subsequently, Vattel's government sent a *note verbale* to Fulton, in which it requested Fulton's cooperation in assessing the impacts of the wave-energy farm on the stock. However, Fulton never saw fit to reply to that note or otherwise cooperate with Vattel.

Data Collection by the SS Newton

Receiving further disturbing reports on the state of the *Utrechtis Lawis*, Vattel's research vessel SS Newton intended to collect data on the situation of the marine environment around the wave energy farm in February and August 2018. However, these attempts were thwarted by the Fultonian coast guard.

Remaining deeply concerned by the state of the *Utrechtis Lawis* and exasperated by Fulton's absolute and unreasonable refusal to cooperate, Vattel considers the submission to this Honourable Tribunal of the dispute between itself and Fulton to be the only way to reach settlement and hopefully achieve long-term sustainable conservation of the *Utrechtis Lawis* stock in the Sea of DeGroot.

STATEMENT OF JURISDICTION

Both Vattel and Fulton have made declarations under Art. 287 (1) LOSC recognizing the International Tribunal for the Law of the Sea (hereafter ITLOS) as a means to settle this dispute. This Honourable Tribunal thus has jurisdiction to hear every aspect of this dispute, primarily based on Art. 288 (1) LOSC for elements concerning the interpretation or application of the LOSC, and secondly based on Art. 288 (2) LOSC for elements concerning the interpretation or application of international instruments related to any aspect of the law of the sea.

Fulton's claim that Vattel did not attempt to resolve this dispute by other means, thus precluding ITLOS from having jurisdiction, cannot be followed. Firstly, Vattel did engage in an exchange of views and furthermore, it will be demonstrated that the other means to solve a dispute under the LOSC were inapplicable.

In a second attempt to undermine the jurisdiction of Your Honourable Tribunal, Fulton refers to the exceptions in its declaration made under Art. 287 (1) LOSC. However, these exceptions cannot be interpreted in a way that would preclude ITLOS from having jurisdiction. It will be argued that alternative procedures would not lead to a binding decision, as required by Art. 282 LOSC. For alternative procedures leading to binding decisions, it is required that the Parties to the conflict explicitly agreed to settle their dispute via these means, *quod non*.

Lastly, the mere recognition of special arbitration for certain elements of the dispute cannot preclude This Honourable Tribunal from having jurisdiction.

PLEADINGS

JURISDICTION

CHAPTER 1

ITLOS Has Jurisdiction for this Dispute Without Limitations *Ratione Materiae*

1.1. Both Vattel and Fulton have made a declaration under Art. 287 (1) LOSC in which they recognise the competence of ITLOS. This Tribunal thus has jurisdiction to hear this case, based on Art. 288 (1) LOSC for the aspects of this dispute concerning the interpretation or application of the LOSC. Moreover, Art. 288 (2) LOSC and Art. 21 of Annex VI (Statute of ITLOS) extend the jurisdiction of Your Tribunal to the aspects of this dispute concerning the interpretation or application of international agreements related to the purposes of LOSC. It will become evident in the part about the merits, that the invoked international instruments fulfil this requirement. This leads to the conclusion that this Honourable Tribunal has jurisdiction to hear every aspect of the present dispute.

CHAPTER 2

ITLOS Has Jurisdiction to Hear this Matter Since Vattel Did Not Fail Any Obligation to Resolve the Dispute by Other Means

2.1. Fulton alleges in its first ground disputing the jurisdiction of Your Tribunal that Vattel did not attempt to resolve the dispute by other means. In this chapter, it will be argued that Vattel was under no such obligation in light of the relevant provisions of the LOSC. More specifically, Vattel first of all complied with the general obligation to resort to peaceful means (A). Secondly, the obligation to exchange views based on Art. 283 LOSC was not breached (B). Lastly, other means of settling disputes based on exceptions contained in the LOSC are inapplicable to the current dispute (C).

A. General Obligations to Resort to Peaceful Means Are Fulfilled

2.2. Art. 279 LOSC obliges the State parties to settle disputes by the peaceful means indicated in Art. 33 (1) of the Charter of the United Nations (hereafter: UN Charter). The means listed in this article are: *"negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."* There exists no obligation for States to resort to all of these means[1], nor is a State

[1] A. Proelss (ed.), *United Nations Conventions on the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017) (hereafter: Commentary), p. 1817.

obliged to pursue procedures under Part XV section I when it concludes that the possibilities of settlement have been exhausted.[2] Judicial settlement is listed as a peaceful means, therefore, ITLOS, as a form of judicial settlement, is a peaceful means. Vattel thus respected its obligation to resort to peaceful means and was under no obligation to resort to any other means before submitting the dispute to Your Honourable Tribunal.

B. Vattel Did Not Fail its Obligation to Exchange Views Based on Art. 283 LOSC

2.3. Art. 283 LOSC requires State parties to *"proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means"*. This article introduces a preliminary procedural step, which must precede invocation of the compulsory procedures under Arts. 286 and 287 by a party to a dispute.[3] In the following paragraphs, it will be demonstrated that Vattel complied with this obligation.

2.4. First, it must be stressed that Art. 283 LOSC does not contain an obligation to negotiate, nor to exhaust existing negotiations.[4] The obligation to exchange views is an obligation of conduct and a State is not obliged to continue an exchange of views when it concludes that the possibilities of reaching agreement have reasonably been exhausted.[5] The exchange is completed when the second State expresses its view in response to the first State's views or chooses to remain silent after a reasonable period of time for response has elapsed.[6] On the 14th of January 2018, Vattel requested Fulton's cooperation in assessing the impact of the wave-energy farm on the status of the *Utrechtis Lawis* stock by sending a *note verbale*. Until this present day, this *note verbale* remained unanswered. Stronger still, instead of replying to the *note verbale*, the president of Fulton bluntly stated that there is no proof of a causal link between the decreased abundance of the *Utrechtis Lawis* and the construction and operation of the wave-energy farm. The concerns expressed by Vattel – based on scientific rapports of the WWF of

[2] *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)* (Provisional Measures) Order of 27 August 1999, ITLOS Reports 1999, p. 280, para. 60 (hereafter: Southern Bluefin Tuna Cases).
[3] *The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, p. 4.
[4] A. Proelss, *Commentary*, p. 1831.
[5] *The MOX Plant Case (Ireland v. United Kingdom)* (Provisional Measures), Order of 3 December 2001, ITLOS Reports 2001, p. 95, para. 60 (hereafter MOX Plant Case).
[6] D. Anderson, 'Article 283 of the United Nations Convention on the Law of the Sea' in T. N. Malick and R. Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber amicorum Judge Thomas A. Mensah* (Brill Nijhoff, 2007), p. 852.

July 2015 and January / February 2018 – were not taken seriously by Fulton at all. Given the blatant unwillingness of Fulton to cooperate, it would be unreasonable to require Vattel to send another *note verbale* to fulfil the requirement of exchanging views, given that 1) the *note verbale* of the 14th of January is an implicit request to exchange views and 2) that that *note verbale* remains unanswered to this day. The president's statement cannot be considered as a reply. Obviously, States have to cooperate to assess the situation of a migrating fish stock in order to adequately assess its state.[7] The alleged increase of the *Utrechtis Lawis* in Fulton's waters – which is not based on any scientific reports – if true, clearly only tells one part of the story, given that the nature of the fish is migratory. States are not obliged to continue with an exchange of views when they conclude that such an exchange could not yield a positive result.[8] Vattel concluded that the possibilities of reaching agreement have been exhausted, which allows it to terminate the exchange of views[9], and resort to judicial means.

2.5. On top of all of this, one must also bear in mind that Vattel and Fulton undertook various negotiations aiming at the joint conservation of the stock – which did not amount to any results but the insertion in the Appendices II of CITES and CMS. It is clear that for the adequate protection of a fish stock such as the *Utrechtis Lawis*, regional/bilateral agreements are needed. This is further confirmed by Art. 63 LOSC, which requires States in the position of Fulton and Vattel to seek measures to coordinate and ensure the conservation and development of such fish stock. The negotiations can thus hardly be labelled 'successful'. Given the disputed nature of the Monana region and the various negotiations regarding joint conservation measures for the stock, the current dispute is but an extension of the previous. Indeed, Vattel – concerned by the conservation of the *Utrechtis Lawis* – aimed, by sending the *note verbale*, to cooperate with Fulton to assess the impacts of the wave-energy farm on the stock, thus in the same context as the negotiations held earlier. Art. 283 (1) LOSC cannot reasonably be interpreted to require that, when several years of negotiations have already failed to resolve the dispute, the Parties

[7] Cfr. Art. 63 LOSC.
[8] *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore)* (Provisional Measures) Order of 8 October 2003, ITLOS Reports 2003, p. 10, para. 48 (hereafter Land Reclamation Case).
[9] *MOX Plant Case*, para. 60.

should embark upon further and separate exchanges of views regarding its settlement by negotiation.[10]

2.6. One must also take into account the urgency of the matter. In January 2018, Vattel first learned of a significant decrease in the abundance of the *Utrechtis Lawis*. A significant decrease in the stock of an already protected species can have enormous consequences. After having sent the *note verbale* on the 14th of January, Vattel has waited for at least seven months[11] for a reply. Vattel cannot seriously be required to send another *note verbale* to again be ignored for months, given the very urgency of this matter.

C. Other Means Linked to Exceptions Contained in the LOSC Are Inapplicable

2.7. There are a few exceptions to jurisdiction contained in the LOSC that would appear – *prima facie* – to be applicable to this case, thus precluding Your Tribunal from having jurisdiction. A more thorough reading of these provisions, however, reveals that these exceptions do not apply in this particular matter.

2.8. It will be argued in part of the merits that the research activities of Vattel cannot be considered as marine scientific research (hereafter MSR) in the sense of the LOSC. In the unlikely event that Your Tribunal were to rule otherwise, Art. 297 (2) LOSC states that "coastal States are not obliged to accept the submission to such [in accordance with section 2] settlement of any dispute arising out of: (i) the exercise by the coastal State of a right or discretion in accordance with article 246; or (ii) a decision by the coastal State to order suspension or cessation of a research project in accordance with article 253". For the following reasons, neither exception applies to the current dispute. Whereas (i) refers to the right of coastal States to regulate, authorize and conduct MSR[12] or their discretion regarding withholding consent based on certain grounds[13], (ii) refers to a decision made by coastal States to order suspension or cessation of a research project in accordance with Art. 253 LOSC. It is evident that the dispute did not arise from the exercise of any rights or discretion Fulton has under Art. 246

[10] *In the Matter of an Arbitration Between Barbados and the Republic of Trinidad and Tobago (Barbados v. Republic of Trinidad and Tobago)*, Award on the Merits, 11 April 2006, PCA Case N° 2004-02, para. 202 (hereafter Barbados v. Trinidad and Tobago Arbitration).
[11] The second expulsion of the *SS Newton* dates to the 24th of August, thus the *note verbale* remained unanswered for at least seven months.
[12] Art 246 (1) LOSC.
[13] Art. 246 (5) LOSC.

LOSC, nor did the dispute arise from a decision made by Fulton in accordance with Art. 253 LOSC, as MSR conducted without seeking consent does not fall within the scope of that article.[14] Since Vattel does not claim that Fulton is not exercising its rights under Arts. 246 and 253 LOSC in a way compatible with the Convention, but merely states that the exclusion of the *SS Newton* was an infringement of Vattel's freedoms existing in Fulton's EEZ, Art. 297 (2) (b) LOSC does not apply. The dispute thus did not need to be settled via conciliation.

2.9. Art. 297 (3) (b) (i) LOSC further states that "when no settlement has been reached by recourse to section 1 of this Part, a dispute shall be submitted to conciliation under Annex V, section 2, at the request of any party to the dispute, when it is alleged that: (i) a coastal State has manifestly failed to comply with its obligations to ensure through proper conservation and management measures the maintenance of the living resources in the exclusive economic zone is not seriously endangered." The wording of this provision is to be linked to the very *ratione* of Art. 297 LOSC: "a safeguard against an abuse of power by a coastal State and at the same time to avoid an abuse of legal process by other States."[15] This exception should thus be interpreted restrictively. It will later be argued that "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 stock" – however, it will not be argued that these actions seriously endangered the *Utrechtis Lawis*, nor that Fulton manifestly failed to comply with its obligations. In addition, it must be noted that no State has thus far instituted conciliation proceedings under this provision[16], which further confirms the article's very restricted scope of application. For these reasons, it must be concluded that this part of the dispute should not have been brought before a conciliation committee. Art. 297 (1) (c) LOSC thus applies, confirming the jurisdiction of Your Honourable Tribunal.

[14] A. Proelss, *Commentary*, p. 1705.
[15] M. H. Nordquist, *United Nations Convention on the Law of the Sea 1982, A Commentary* (Vol. V, Martinus Nijhoff Publishers, 1989), p. 98 (hereafter Commentary).
[16] B. H. Oxman, 'Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals', in D. R. Rothwell et al. (eds.), *The Oxford Handbook of the Law of the Sea* (OUP, 2015) p. 405.

CHAPTER 3

The Exceptions Made by Fulton in its Declaration Pursuant to Art. 287 LOSC Do Not Preclude ITLOS from Having Jurisdiction

3.1. In this chapter, it will be demonstrated that the exceptions made by Fulton in its declaration pursuant to Art. 287 LOSC cannot preclude Your Honourable Tribunal from having jurisdiction. More specifically, this dispute does not have to be settled via any other peaceful means (A), and in addition, the dispute did not have to be brought to arbitration (B.).

A. This Dispute Does Not Have to Be Settled by Any Other Peaceful Means

3.2. The exceptions made by Fulton in its declaration are to be linked to the phrase – repeated twice – 'in the absence of any other peaceful means'. This sentence cannot be interpreted in a way that would preclude ITLOS from having jurisdiction. The use of this sentence could mislead to the conclusion that the selected fora are subordinate to any other means. However, this is impossible given 1) the text of Art. 287 LOSC and 2) the whole system for compulsory dispute settlement. This sentence should thus rather be interpreted as giving preference to any other forum agreed upon by both litigants.[17] In the current chapter, it will become clear that Vattel and Fulton did not agree on any other fora to settle this dispute.

3.3. While it has already been demonstrated in the previous chapter that other dispute settlement mechanisms within the LOSC do not apply, the question remains to what extent the conclusion and ratification of instruments such as the Convention on Biological Diversity (hereafter CBD) can be interpreted to mean that parties implicitly preferred this forum over the ones chosen in their declaration, among which ITLOS is given preference. Concerning the relation between such instruments – with their respective dispute settlement regimes – Arts. 282 and 281 LOSC are relevant.

3.4. Art. 282 LOSC implies that, if parties to a dispute have consented in advance to any other multilateral or bilateral dispute settlement mechanism, then that mechanism displaces the Part XV procedures, provided it entails a binding decision, unless parties agree otherwise. This article thus requires any other dispute settlement procedure to entail a binding decision, leading to the conclusion that an agreement referring a question to negotiation or conciliation cannot

[17] M. G. Garcia-Revillo, *The Contentious and Advisory Jurisdiction of the International Tribunal for the Law of the Sea* (Brill Nijhoff, 2015) p. 168-169.

normally serve as a bar against invoking the LOSC procedures.[18] If Fulton were to claim that Vattel should have first resorted to negotiations for matters falling under CITES[19], CMS[20], CBD[21] or the Convention on Environmental Impact Assessment in a Transboundary Context (hereafter Espoo Convention)[22], this conflicts with the very nature of negotiations – not leading to a binding decision. For the dispute settlement regimes leading to a binding decision to apply *in lieu* of Part XV, the agreement of Parties to a conflict still cannot be presumed, but must be expressed explicitly in respective agreements.[23] Concerning the CBD, it can even be added that it provides for no binding mechanism whatsoever, and does not exclude other procedures.[24] In absence of such explicit agreement, ITLOS remains competent.

3.5. Art. 281 LOSC allows parties to contract out of Part XV by substituting for it any other peaceful means of their choice to settle a dispute between them.[25] In their agreement to resort to a particular procedure, "parties may specify that this procedure shall be an exclusive one and that no other procedures (including those under Part XV) may be resorted to even if the chosen procedure should not lead to a settlement."[26] Non-LOSC procedures would therefore only be exclusive if the parties so 'specify'.[27] If Fulton were to argue that the ratification of the CBD, CITES, CMS or the Espoo Convention implies that the dispute settlement regimes of these instruments apply *in lieu* of Part XV, this clearly goes too far in the light of the above.

3.6. In conclusion, the dispute should not be settled via any other means. Art. 282 LOSC clearly prevents any resort to other dispute settlement mechanisms not leading to a binding decision *in lieu* of the judicial settlement mechanism of Part XV LOSC. And for dispute settlement mechanisms leading to a binding decision to apply *in lieu* of the judicial settlement

---

[18] Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (OUP, 2003), p. 202 *in fine* (hereafter The Competing Jurisdictions).
[19] Art. 18 (1) CITES.
[20] Art. 13 (1) CMS.
[21] Art. 27 (1) CBD.
[22] Art. 15 (1) Espoo Convention.
[23] *The MOX Plant Case (Ireland v. United Kingdom)* (Provisional Measures, Sep. Op. Wolfrum), Order of 3 December 2011, ITLOS Reports 2001, p. 131, p. 131, 132.
[24] *In the Matter of the South China Sea Arbitration (Republic of the Philippines v. People's Republic of China)* (Award on Jurisdiction and Admissibility), Award 19 October 2015, PCA Case Nº 2013-19, paras. 265-269, 281-289, 307-310, 317-321 (hereafter South China Sea Arbitration, Jurisdiction).
[25] A. Proelss, *Commentary*, p. 1821.
[26] M. H. Nordquist, *Commentary*, p. 23 *in fine*.
[27] *Ibid.* p. 23-24; Y. Shany, *The Competing Jurisdictions*, p. 203, footnote 84.

mechanism of Your Honourable Tribunal, parties should have explicitly agreed upon this, *quod non*. In addition, it must be stressed that non-LOSC procedures are only exclusive when parties so specify, *quod non*. While certain parts of the dispute could have been brought before alternative instances, or settled using other mechanisms, there is, in the light of the above, no requirement for Vattel to do so.

B. The Dispute Did Not Have to Be Brought to Arbitration

i. Recognition of Special Arbitration Is Insufficient to Work as a Bar Against the Jurisdiction of Your Tribunal

3.7. Fulton **also** recognises special arbitration at the very end of its declaration. This, however, cannot be interpreted in a way that would prevent ITLOS from having jurisdiction. This would not only contradict the fact that Fulton chose ITLOS as its preferred dispute settlement mechanism, but also the very wording of that part of Fulton's declaration. With the use of the word 'also', Fulton indicates that it is only in addition to the previous means that it recognizes the validity of a special arbitrational tribunal. In addition, that such statements made by only one State to the dispute could prevent ITLOS from having jurisdiction for certain elements of the dispute would contradict the consensual nature of the dispute settlement regime of the LOSC, as Vattel did not recognize such special arbitration.

ii. Art. 287 (5) LOSC Is Not Applicable Since Parties Did Agree on Your Honourable Tribunal to Settle This Dispute

3.8. Art. 287 (5) LOSC furthermore refers a dispute to arbitration if parties have not accepted the same procedure for settlement of the dispute, unless parties agree otherwise. Any argument made by Fulton that the parties to the present dispute have not accepted the same procedure for the settlement of the dispute, contradicts the very declarations made by both Fulton and Vattel. Given that 1) both parties did not agree on any other forum to solve this dispute in a way that is in conformity with Arts. 281 and 282 LOSC and 2) the mere addition of <u>also</u> recognizing special arbitration for parts of the dispute cannot work as a bar against the jurisdiction of This Tribunal, there is *in se* no disagreement. Fulton and Vattel have accepted the jurisdiction of This Honourable Tribunal, so Art. 287 (5) LOSC cannot be invoked.

3.9. In short, the allegations of Fulton cannot work as a bar against the jurisdiction of Your Honourable Tribunal. Vattel did not breach its obligations to solve this dispute by peaceful means, and it has furthermore complied with the obligation to exchange views. In addition, the

exceptions formulated by Fulton in its declaration pursuant to Art. 287 LOSC cannot preclude the jurisdiction of this Honourable Tribunal.

MERITS

Having established that, in the view of Vattel, the Honourable Tribunal has jurisdiction, this memorial will now turn to the substantive violations of international law committed by Fulton (Ch. 4-6), and the rebuttal of the alleged violations of the law of the sea by Vattel (Ch. 7).

CHAPTER 4

Fulton Violated Its International Obligations Related to Cooperation on the Construction of the Wave-Energy Farm

4.1. Fulton did not comply with the obligation to cooperate when constructing the wave-energy farm since the construction inflicted harm to the stock of the *Utrechtis Lawis*.[28] Fulton violated its obligation to cooperate related to the marine environment, by violating Arts. 123 and 197 LOSC on semi-enclosed seas. The requirements of Art. 123 LOSC supplement the more general requirements stipulated in Art. 197 LOSC on cooperation on a regional basis. *Utrechtis Lawis* is the common environmental concern for both States[29] and the marine environment also encompasses marine living resources or organisms.[30] Hence, the duty to cooperate in protecting the *Utrechtis Lawis* is regulated by Arts. 123 and 197 LOSC. The geographical circumstances of semi-enclosed sea require greater attention on marine environmental protection. Activities undertaken by one State may have a direct impact on the rights, duties and interest of other States bordering that sea.[31] Thus, it is corollary for States to cooperate for the preservation, protection, and management of the marine environment, hence cooperation is substantial to manage the risk of damage to the environment that might be created

[28] *Infra* Chapter 5.
[29] NILOS Moot Court Competition Case 2019, para. 4 (hereafter NILOS Case); Clarifications on para 4, p. 1.
[30] A. Proelss, *Commentary*, p. 23; D. R. Rothwell and T. Stephens, *The International Law of the Sea* (2nd ed., Hart Publishing, 2016), p. 370; *Southern Bluefin Tuna Cases*, para 70; see Art. 1 (4) LOSC.
[31] LINEBAUGH, C., 'Joint Development in a Semi-Enclosed Sea: China's Duty to Cooperate in Developing the Natural Resources of the South China Sea' (2014) *ColumJTransnatL*, Vol. 52(2), p. 554; *Fisheries Jurisdiction (United Kingdom v. Iceland)* (Merits), Judgement, [1974] ICJ Rep, p. 3, para. 31 (hereafter Fisheries Jurisdiction).

by the plans initiated by one State.[32] Since the risk of adverse effects on the *Utrechtis Lawis* was clear, given the series of warnings by the WWF.[33] Thus, Fulton was obliged to cooperate with Vattel on the protection of the marine environment.

4.2. The duty to cooperate is a fundamental principle of the protection of the marine environment under Part XII LOSC.[34] Further, commentators have recognized, and it can be deducted from case law, that the obligation to cooperate includes cooperation in exchanging information,[35] a duty to notify and consult with States potentially affected by an activity having consequences on the environment,[36] and the obligation to jointly evaluate the environmental impacts of certain activities.[37]

4.3. For these purposes, the duty to cooperate based on Art. 123 and 197 LOSC means that Fulton is obliged to consider the rights of Vattel in constructing the wave-energy farm (A), to notify and consult with Vattel on the construction of the wave-energy farm by and to conduct exchange of information on the effect of the wave-energy farm (B), to conduct joint evaluation of the environmental impacts of the construction (C), to cooperate and invite the Vatteller public to the EIA and public participation (D).

A. Fulton Failed to consider Vattel's Rights in the Protection of the DeGroot Sea

4.4. Fulton's obligation to cooperate with Vattel includes the responsibility to take into account Vattel's rights and interests in the protection of the DeGroot Sea.[38] In this context, during the construction and operation of the wave-energy farm, Fulton has not cooperated with

---

[32] A. Proelss, C*ommentary*, p. 1331; *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, [2010] ICJ Rep, p. 14, para. 49 (hereafter Pulp Mills Case).
[33] NILOS Case, para. 5, 7; Clarifications on para. 6.
[34] *MOX Plant Case*, para. 82; A. Proelss, *Commentary*, p. 1331; see e.g. *MOX Plant Case*, para. 82; *Land Reclamation Case*, para. 92; *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC),* Advisory Opinion of 2 April 2015, ITLOS Reports 2015, p. 4, para. 140.
[35] P. Dupuy and J. E. Vinuales, *International Environmental Law* (2nd ed., CUP, 2018), p. 74; *MOX Plant Case*, para 89 (a).
[36] *Ibid;* United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 Vol. I (1992), Principle 19 (hereafter Rio Declaration).
[37] *Fisheries Jurisdiction*, para. 72; *Pulp Mills Case*, para 281; *MOX Plant Case*, para 89 (b).
[38] *Fisheries Jurisdiction*, para. 71

Vattel at all. Fulton cannot proceed as it wishes without considering Vattel's rights.[39] Fulton did not respond to Vattel's *note verbale* requesting cooperation in assessing the impact of wave-energy farm on the *Utrechtis Lawis* stock, which indicates Fulton's unwillingness to cooperate and consider Vattel's rights and interests.

B. Fulton Failed to Conduct Proper Notification and Consultation with Vattel Concerning the Construction of the Wave-Energy Farm

4.5. It is implausible to assume that the construction of the wave-energy would not create adverse effects on the region. A series of warnings from the WWF have provided sufficient information to consider the possibility of an adverse impact to the marine environment.[40] However, from the initiation period until the operation of the wave-energy farm, Fulton has never notified or consulted with Vattel regarding any possible impacts on the marine environment caused by such construction. But at least consultation must be conducted with Vattel as the State holding the rights. The ICJ has stated that such consultations must be undertaken in good faith (1), in a timely manner (2), in a spirit of understanding of other State's concerns in connection with the proposed activities (3) and if possible by submitting suggestions of compromise (4).[41] Fulton failed to do any of the above. Furthermore, Fulton has never directly exchanged information with Vattel on the possible impacts on the Sea of DeGroot by such constructions.

C. The Environmental Impact of the Construction Should Have Been Evaluated in Cooperation with Vattel

4.6 Fulton failed to cooperate in monitoring the impact of the wave-energy farm. Art. 197 LOSC imposes an active obligation on States to protect the marine environment[42], which remains relevant after the construction of the wave-energy farm. Fulton argues, based on their EIA and follow-up study, that there is no impact on the *Utrechtis Lawis*, however, this does not eliminate Fulton's obligation to cooperate and coordinate with Vattel to conduct joint evaluation of the activity.[43] However, Fulton has never requested a joint effort to evaluate the

[39] *In the Matter of the Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award on the Merits 18 March 2015, PCA Case N° 2011-03, para. 519 (hereafter Chagos Arbitration).
[40] NILOS Case, para. 5, 7; Clarifications on para. 6.
[41] *Chagos Arbitration*, para. 528.
[42] A. Proelss, *Commentary*, p. 1330.
[43] Art. 204 LOSC.

impact of the construction. Fulton thus breached its obligation to conduct a joint evaluation of the impact of the wave-energy farm.

D. Fulton Failed to Cooperate with Vattel During the EIA

4.7. Art. 206 LOSC requires Fulton to assess potential effects of any planned activities under its jurisdiction which may cause substantial pollution or significant and harmful changes to the marine environment. In this matter, the construction of the wave-energy farm may have harmful effects on the marine environment, as indicated by the 2015 WWF report.[44] By not engaging with Vattel during the EIA, Fulton failed to cooperate. Indeed, Fulton did conduct an EIA and did monitor the operation of the wave-energy farm. However, since the possible impact of a wave-energy farm is *per se* transboundary, cooperation and consultation with potentially affected States is corollary.[45] Fulton thus violated this obligation.

4.8. If Your Honourable Tribunal examines the application of the Espoo Convention, it must be noted that even though wave-energy farms are not included in Annex I, this does not waive the obligation to cooperate. Art. 2 (5) Espoo Convention implies that even when an activity is not listed in Annex I, the concerned Parties shall enter into discussions on whether the proposed activities will likely cause a significant adverse transboundary impact. In this case, Fulton has never informed, notified, or requested Vattel to do so.

4.9. In addition to the above, public participation has been recognized as a significant element of any EIA in many international instruments. Principle 10 of the Rio Declaration states that "Environmental issues are best handled with participation of all concerned citizens […] and the opportunity to participate in decision making process." This right of participation has been acknowledged in various international instruments.[46] Furthermore, public hearings must be held in a way that is both transparent and fair, so that the proceedings are not biased: all sides

[44] NILOS Case, para. 5.
[45] A. Boyle, 'The Environmental Jurisprudence of the International Tribunal for the Law of the Sea' (2007) *IJMCL*, Vol. 22(3), p. 376; *Southern Bluefin Tuna Case*, para 79, *Land Reclamation Case*, para. 96.
[46] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in environmental Matters; Convention (No. 169) Concerning Indigenous and Tribal People in Independent Countries; ECOSOC, Guidance on Public Participation in Environmental Impact Assessment in a Transboundary Context, ECE/MP.EIA/6 (2004).

must be given an opportunity to be heard.[47] However, Fulton did not invite Vattel's public to its public hearings. This shows the lack of cooperation by Fulton when assessing the environmental impact of the wave-energy farm.[48]

4.10. Based on the previous paragraphs, the actions of Fulton to construct and operate the wave-energy farm without attempting to cooperate and coordinate with Vattel breaches Arts. 123 and 197 LOSC, which results in a manifest violation of Fulton's duty to cooperate.

CHAPTER 5

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

5.1. In addition to violating its obligations on cooperation, Fulton has also violated its obligations under international law regarding the protection and preservation of the marine environment and the conservation and management of transboundary fish stocks. Fulton did not take the necessary steps to protect the habitat of a threatened species and moreover also failed to abstain from damaging that same habitat (A). In addition, Fulton did not protect the fragile ecosystem of the DeGroot Sea from the devastating impacts of its wave-energy farm (B). Furthermore, by constructing and operating that farm, Fulton also caused significant transboundary harm to Vattel's environment, contrary to its obligations to prevent and to not cause such harm (C). And finally, Fulton also failed to adopt a precautionary approach (D).

A. Fulton Failed to Respect its Obligation to Protect the Habitat of Threatened Species

5.2. Art. 192 LOSC obliges States to protect the marine environment, an obligation which is further elaborated by Art. 194 LOSC.[49] Art. 194 (5) LOSC, which applies to the entirety of Part XII[50], obliges States to take the measures necessary to protect and preserve the habitat of, *inter alia*, threatened species. This positive obligation to take action includes a negative obligation

[47] S. A. Atapattu, *Emerging Principles of International Environmental Law* (Brill, 2007) p. 362.
[48] *In the Matter of the South China Sea Arbitration (Republic of the Philippines v. People's Republic of China)*, Award on the Merits 12 July 2016, PCA Case Nº 2013-19, para. 986 (hereafter South China Sea Arbitration).
[49] *South China Sea Arbitration*, paras. 941, 942.
[50] *Ibid*., para. 945, *Chagos Arbitration*, paras. 320, 538.

to refrain from any harmful activities.[51] Species listed in Appendix II of CITES[52] have been recognised as threatened in the sense of Art. 194 (5) LOSC.[53] The *Utrechtis Lawis* therefore qualifies as a threatened species.

5.3. The habitat of a species is the place or type of site where an organism or population naturally occurs.[54] In their migration cycle, the *Utrechtis Lawis* naturally occur in Fulton's EEZ in August and September. It must be stressed that the *Utrechtis Lawis* has a very strong relationship with its habitat in Fulton's EEZ, which serves as the species' spawning grounds. Thus, Fulton was under the obligation to refrain from any activities that harm the *Utrechtis Lawis'* habitat and take the necessary measures for their protection and preservation.

5.4. However, nothing indicates that any such measures were taken. Instead, Fulton, in full knowledge of the potentially disastrous consequences prognosticated in the 2015 WWF report, operated the wave-energy farm from June 2017 onwards. Thus, when the *Utrechtis Lawis* were migrating from Vatteller waters in July/August 2017 towards Fulton's EEZ, their migratory path was obstructed by a large wave-energy farm, effectively cutting them off from their spawning grounds. The wave-energy farm has therefore had a major impact on their habitat, as evidenced by the significant decrease in abundance of the fish stock.

5.5. This decrease cannot be attributed to Vattel, as Vattel has neither changed its fishing practices, nor increased its fishing capacities. Such a rapid and radical decrease, occurring right after the establishment of Fulton's wave-energy farm, can thus not be caused by overexploitation from Vattel. The wave-energy farm is the only factor that changed in the DeGroot Sea. Therefore, the decrease in *Utrechtis Lawis* must be attributed to it.

---

[51] *Ibid*., para. 941.

[52] CITES aims at the protection of wild fauna and flora, including marine species, and informs the content of Art. 192 and 194 (5) LOSC. It is therefore related to the protection and preservation of the marine environment, which is also an important mandate of LOSC (See: CITES, pmbl; LOSC, pmbl, *South China Sea Arbitration*, para 956; *Southern Bluefin Tuna Cases*, para. 70.

[53] *South China Sea Arbitration*, para. 957.

[54] Art. 2 CBD. The CBD applies by virtue of its Art. 4 and because the oceans fall within the jurisdictional scope of the CBD (See: C. C. Joyner, Biodiversity in the Marine Environment, Resource Implications for the Law of the Sea' (1995) *VandJTransnatlL*, Vol. 28(4), p. 646). Any threat to a species is automatically a threat to biodiversity, which the CBD intends to conserve (CBD, Art. 1, pmbl). This relates to the conservation of living resources and thus gives This Tribunal jurisdiction in the matter (see LOSC, pmbl).

5.6. As an obligation of conduct, Art. 194(5) LOSC requires due diligence of States. By not taking any protective and preserving measures at all, and instead implementing plans with detrimental effects on the habitat and species, Fulton clearly did not act with the due diligence expected of a good government.[55] The population increase of *Utrechtis Lawis* in Fulton's waters, asserted by Fulton without any substantiating evidence, cannot be considered proof that Fulton has taken the measures necessary to protect and preserve fragile ecosystems. Therefore, Fulton violated its obligation to protect the habitat of threatened species.

B. Fulton Also Failed to Protect a Fragile Ecosystem

5.7. Arts. 192 and 194 (5) LOSC further obliges States to take the measures necessary to protect and preserve fragile ecosystems and refrain from any harmful actions. The LOSC does not define the term 'ecosystem', but the definition of Art. 2 CBD is generally accepted.[56] Accordingly, ecosystems are "dynamic complex[es] of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit." Their fragility is determined by the degree of change in abundance of species following disturbance.[57] The *Utrechtis Lawis*, a living component of the DeGroot Sea's ecosystem, suffers a severe decline in abundance following the impact of Fulton's wave-energy farm. It is thus a fragile species. And this fragility renders the entire ecosystem of the Sea of DeGroot fragile due to the interdependence inherent in all ecosystems.[58] Fulton was therefore under the obligation to adopt the necessary measures to protect and preserve the DeGroot Sea ecosystem and to simultaneously not harm it. But, as elaborated above[59], Fulton did not adopt any measures and instead decided to establish a large wave-energy farm, harming the ecosystem in the process.

---

[55] ILC, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, *UNYBILC*, 2001, Vol. II, Part Two, p. 148, A/CN.4/SER.A/2001/Add.1 (Part 2), p. 155 (hereafter Draft Articles on Prevention of Transboundary Harm).
[56] *South China Sea Arbitration*, para. 945.
[57] C. Nilsson and G. Grelsson, 'The Fragility of Ecosystems: A Review' (1995) *J Appl. Ecol.*, Vol. 32(4), p. 677, 678.
[58] ILC, Draft Articles on the Law of the Non-navigational Uses of International Watercourses and Commentaries thereto and Resolution on Transboundary Confined Groundwater, *UNYBILC*, 1994, Vol. II, Part Two, p. 89 A/CN.4/SER.A/1994/Add. l (Part 2), p. 118.
[59] *Supra* A.

C. Fulton Violated its Obligation to Refrain from Causing and Preventing Harm to the Environment of Vattel

5.8. Art. 193 LOSC and Art. 3 CBD confer to States the sovereign right to exploit their natural resources. However, they simultaneously impose a duty to ensure the protection of the environment in general (and in a transboundary context in particular[60]), and thus to refrain from causing significant harm. This can be qualified as "something more than 'detectable' but need not be at the level of 'serious' or 'substantial.'"[61] It must lead to a real detrimental effect.[62] The 'significant decrease in the abundance of *Utrechtis Lawis*'[63] in Vattel's waters, detected by Vatteller fishermen, clearly constitutes a significant harm to Vattel's marine environment. As already demonstrated[64], this decrease can only be caused by Fulton's wave-energy farm.

5.9. Fulton's obligation not to harm Vattel's environment is one of due diligence. It has to 'take all the means at its disposal' to avoid that activities under its jurisdiction or control cause significant transboundary harm.[65] The standard of due diligence against which a State's conduct is evaluated is that which is generally considered to be appropriate and proportional to the degree of risk of significant transboundary harm of a particular activity. That degree should be foreseeable, and the State must know or should have known that the activity has such a risk.[66] Based on the 2015 WWF report, Fulton was well aware of the risks associated with interfering in the *Utrechtis Lawis'* migratory path. Since the findings of Fulton's EIA were inconclusive, Fulton could not have simply relied on them to assume that the risk of significant harm would not manifest itself. Fulton was thus required to take actions to prevent that harm. But Fulton did no such thing, since conducting an EIA is in itself not a suitable measure to prevent transboundary harm. Nor did it consider any alternatives, such as different locations or starting with a smaller operation to assess the impacts. This is all the more significant as the Paris

[60] The prohibition to cause significant transboundary harm is also firmly established in customary law (e.g. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep, p. 226, para. 29, *Pulp Mills Case*, para. 101; *Corfu Channel Case (United Kingdom v. Albania)* (Merits), Judgment, [1949] ICJ Rep, p. 4, p. 22, United Nations Conference on the Human Environment, Declaration of the United Nations Conference on the Human Environment, UN Doc A/CONF.48/14/Rev.1 (1972), Principle 21).
[61] ILC, Draft Articles on Prevention of Transboundary Harm, p. 152.
[62] *Ibid*.
[63] NILOS Case, para. 7.
[64] *Supra* A.
[65] *Pulp Mills Case*, para. 101.
[66] ILC, Draft Articles on Prevention of Transboundary Harm, p. 155.

Agreement does not require Fulton to operate a wave-energy farm in order to fulfil its NDC. There would be other possibilities that allow Fulton to achieve its targeted reduction.

5.10. Due to the significant environmental harm it causes, any qualification by Fulton of its wave-energy farm as a measure of environmental protection would be absurd. There is no such thing as protection through harm. Moreover, by ratifying the Paris Agreement, Fulton itself noted 'the importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity, [...]'.[67] But Fulton's wave-energy farm violates this by damaging the integrity of the DeGroot Sea ecosystem and seriously threatening its biodiversity. Its establishment is therefore not in accordance with the Paris Agreement. All of the above proves that Fulton has clearly not used 'all the means at its disposal' to prevent the transboundary harm. Therefore, Fulton has violated both the obligation to not cause and the obligation to prevent transboundary harm.

D. Fulton Failed to Adopt a Precautionary Approach

5.11. The *Utrechtis Lawis* is a straddling fish stock migrating between the EEZs of Vattel and Fulton.[68] Art. 6 FSA requires the adoption of a precautionary approach to, *inter alia*, conservation and management of straddling fish stocks. The precautionary approach states that where there are threats of serious or irreversible damage, the lack of full scientific certainty cannot be used as a reason not to take protective action.[69]As stressed in *supras A* and *C*, Fulton knew of the fragility of the *Utrechtis Lawis* and the risks of significant damage associated with any interference with its migratory path. Since the exact effects of such an interference are unknown and Fulton's EIA could not conclusively determine that the wave-energy farm would not harm the *Utrechtis Lawis*, there was scientific uncertainty. A precautionary approach on Fulton's part was therefore warranted.

---

[67] Paris Agreement, pmbl.

[68] Art. 3 (1) and (2) Fish Stocks Agreement (hereafter FSA), see: R. Alberstat, 'Has the Status of "Maximum Sustainable Yield" Become an International Customary Rule?' (2014) *BLR* Vol. 5(4), p. 269; N. Matz-Lück, N., 'Meeresschutz', in A. Proelss (ed.), *Internationales Umweltrecht* (De Gruyter, 2017).p. 412, 442. The width of the DeGroot Sea being confined to 380 - 400 nm, there is no High Seas pocket (see: NILOS Case, para 1, 2). Thus only Arts. 5, 6 and 7 FSA apply. As an Implementation Agreement to LOSC concerned with the conservation of fish stocks, the purpose of the FSA is clearly related to that of LOSC (FSA, pmbl and Art. 2; LOSC, pmbl). This Tribunal therefore has jurisdiction for this claim.

[69] Rio Declaration, Principle 15.

5.12. In a precautionary approach, the activities and measures considered should be temporary in nature and based on the seriousness of the potential risks, including the presence of migratory routes, fragility of species or the nature of the area (e.g. area for spawning).[70] As a first step, basic tentative measures should be taken in order to assess the impact of the activity. Since there was a significant risk of serious harm to the *Utrechtis Lawis* from the wave-energy farm, Fulton should have initiated the project with a small-scale operation and assess its impacts. Instead, Fulton decided to establish the entire 'large' wave-energy farm at once and right in the migratory path of the *Utrechtis Lawis*. Fulton did not adopt a precautionary approach.

5.13. The preceding paragraphs clearly establish that Fulton has violated its international obligations on the protection and preservation of the marine environment and the conservation and management of transboundary fish stocks.

CHAPTER 6

The Exclusion of the SS Newton Was an Infringement of the Freedoms of Vattel in Fulton's *EEZ*

6.1. The exclusion of the *SS Newton* on the 17th of February 2018 and, presumably, around the 24th of August cannot be legally justified and manifestly violates Vattel's freedoms in Fulton's EEZ. In a first series of arguments, it will be substantiated that the exclusion of the *SS Newton* cannot be legally justified, first in the hypothesis that the conduct of the *SS Newton* cannot be qualified as MSR (A). But even if Your Tribunal were to rule otherwise, there is still no legal ground for the exclusion (B). Since the mere illegality of Fulton's conduct does not *ipso facto* mean that Vattel's freedoms were infringed, it will be demonstrated in a second series of arguments that the conduct of the Fultonian coast guard brutally infringed Vattel's freedoms based on Art. 58 LOSC (C). And even if Your Tribunal were to rule otherwise, Art. 59 LOSC would still require an equitable solution to this part of the dispute.

A. The Conduct of Vattel Does Not Fall Within the Scope of MSR in the LOSC, thus Fulton Cannot Justify the Exclusion of the *SS Newton* Based on Art. 253 LOSC

6.2. Although thoroughly discussed during the negotiations of the LOSC, the drafters ultimately chose not to include a definition of MSR. A definition covering its essence, and

[70] A. Gillespie, 'The Precautionary Principle in the Twenty-First Century: A Case Study of Noise Pollution in the Ocean' (2007) *IJMCL*, Vol. 22(1), p. 85, 86.

widely accepted, is: "any scientific study or related experimental work having the marine environment as its object which is designed to increase knowledge of the oceans."[71] As such, MSR will include, inter alia, physical oceanography, marine chemistry and biology, scientific ocean drilling and coring, geological and geographical research, and other activities that have a scientific purpose.[72] The conduct of Vattel does not fall within the scope of this definition.

6.3. When Vatteller fishermen noticed a significant decrease in the abundance of *Utrechtis Lawis*, the Vattel Government tried to cooperate with Fulton in assessing the impact of the wave-energy farm on the status of the stock, by sending a *note verbale*. Given 1) that this *note verbale* remained unanswered and 2) the urgency of the situation (the new WWF report), Vattel decided to send the *SS Newton* to assess the impact of the wave-energy farm itself. Thus, rather than conducting studies on the marine environment *in se* – which falls within the scope of marine scientific research – Vattel wanted to obtain information on the impact of the wave-energy farm on the *Utrechtis Lawis*. Obviously, Vattel therefore needed to collect data of the marine environment around the wave-energy farm, but only in order to be able to assess its impact. Rather than the marine environment, the research activities had the wave-energy farm with its effect on the marine environment as its object. On top of this, the activities aimed at increasing the knowledge on the impact of wave-energy farms on straddling fish stock, and not at increasing the knowledge of the *Utrechtis Lawis* or its marine environment *in* se. The activities performed by the *SS Newton* therefore do not fall within the scope of the widely accepted definition of MSR, thus preventing the application of Part XIII LOSC. If it were to be argued that the fact that the *SS Newton* is exclusively used to perform MSR implies that their activities conducted near the wave-energy farm fall within the scope of MSR in the sense of the LOSC, this conflicts with the fact that the nature of the vessel is of course irrelevant for the qualification of an activity as MSR. When qualifying a certain activity as MSR, the focus is evidently on the conducted activities and not on the equipment.[73]

---

[71] Y. Tanaka, *The International law of the Sea* (CPU, 2012), p. 360; A. H. A. Soons, *Marine Scientific Research and the Law of the Sea* (Deventer-Kluwer, 1982), p. 6 (hereafter MSR in the Law of the Sea).

[72] D. R. Rothwell and T. Stevens, 'Marine Scientific Research', in Rothwell, D. R., et al. (eds.), *The Oxford Handbook of the Law of the Sea* (OPU, 2015)., p. 562.

[73] See e.g. P. Bernal and A Simcock, 'Marine Scientific Research' in UNITED NATIONS (ed.). The First Global Integrated Marine Assessment: World Ocean Assessment I (CUP, 2017), p. 11.

6.4. Since the research activities are not to be considered as MSR, Fulton cannot justify the exclusion of the *SS Newton* based on Art. 253 LOSC, which confers the right to coastal States to require the suspension and cessation of any research activities. Stronger still, for research activities not falling within the scope of MSR, the traditional rule of freedom should apply, meaning that the coastal State has no jurisdiction whatsoever– provided that there is no conflict of interest between the interests of the coastal State and the researching State.[74] Evidently, there was no conflict of interest regarding the activities conducted by the *SS Newton*. It must, once again, be brought to attention that Vattel merely wanted to assess the current situation of the *Utrechtis Lawis* – preferably together with Fulton. Given the joint efforts regarding the protection of the fish, there is obviously no conflict of interest when Vattel, in the absence of a timely reply by Fulton to the *note verbale*, wanted to assess the situation of the fish stock, which is indispensable for adequately protecting it.

6.5. If Fulton were to argue that it could exclude the *SS Newton*, and thus exercise enforcement jurisdiction, based on Art. 73 LOSC, this is contradicted by the *ratione* of this article. Indeed, Art. 73 LOSC allows Fulton, in the exercise of its sovereign rights concerning exploration, exploitation, conservation and management of the living resources in their EEZ, to take enforcement measures "as may be necessary to ensure compliance with laws and regulations adopted by it in conformity with this Convention." It is, first of all, ambiguous if Fulton adopted such legislation – which is indispensable. Secondly, even if Fulton did adopt such regulation, it must still be in conformity with the LOSC in order to serve as a basis for exercising enforcement jurisdiction in the exercise of its sovereign rights. Any regulation prohibiting research activities such as the ones conducted by the *SS Newton* is *per se* not in conformity with the LOSC, as in the absence of the qualification of MSR, the traditional rule of freedom applies.[75]

B. Even if the Research Activities of the *SS Newton* Would Fall Within the Scope of MSR, Fulton Still Had No Legal Basis for Excluding the *SS Newton*

6.6. The Fultonian coast guard requested the *SS Newton* to leave Fulton's EEZ after having ascertained that it had not obtained prior *authorization*. It should first of all be noted that Vattel

[74] A. H. A. Soons, *MSR in the Law of the Sea*, p. 156-157.
[75] *Ibid.*

was under no obligation to request prior authorization, since such obligation only exists in the context of research activities exercised during transit passage.[76]

6.7. Art. 246 (2) LOSC, however, requires that marine scientific research in the exclusive economic zone shall be conducted with the consent of the coastal State. The third paragraph of this article requires coastal States to grant their consent in normal circumstances. The question arises whether the research activities fall within the scope of the fifth paragraph, more specifically (a), in the hypothesis that the project is of direct significance for the exploration and exploitation of natural resources, whether living or non-living. Such research projects may generally be considered to be 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[77] Once again it should be stressed that with its research, Vattel merely wanted to assess the impact of the wave-energy farm devices on the status of the *Utrechtis Lawis*, and thus did not focus on the status of the stock *in se*, and even less on its availability for commercial exploitation. The latter finds confirmation in 1) the fact that Vattel and Fulton undertook negotiations aiming at agreeing on joint conservation measures and 2) the fact that the *Utrechtis Lawis* only occur in Fulton's waters to spawn, and commercial exploitation of fish while spawning would be the most counter-productive activity for species conservation. All the above leads to the conclusion that consent should have been given.

6.8. Given the urgency of the matter and the fact that the *note verbale* remained unanswered, indicating Fulton's unwillingness to cooperate, Vattel indeed decided to wait no longer. The question, however, remains whether Fulton's coast guard, acting as State organ and thus binding Fulton, could request the *SS Newton* to leave, thus (implicitly) exercising enforcement jurisdiction. It should be noted that coastal States enjoy no enforcement jurisdiction for MSR based on LOSC.[78] Art. 56 (1) (b) (ii) only provides for prescriptive jurisdiction. Stronger still, the LOSC contains no provision that could give coastal States enforcement jurisdiction in matters regarding MSR. If it were to be argued by Fulton that they still had the right to require the suspension or cessation of any marine scientific activity in their EEZ based on Art. 253

[76] Art. 40 LOSC.
[77] Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, 'Marine Scientific Research: A Revised Guide to the Implementation of the Relevant Provisions of the United Nations Convention on the Law of the Sea', 2010, p. 10.
[78] A. Proelss, *Commentary*, p. 1705.

LOSC, this is contradicted by the fact that MSR conducted without seeking consent does not fall within the scope of this article.[79]

C. Sending the *SS Newton* Back Was an Infringement of Vattel's Rights Based on Art. 58 LOSC, and Even if Your Tribunal Were to Rule Otherwise, Art. 59 LOSC Still Requires an Equitable Resolution of this Part of the Dispute

6.9. Not only did Fulton have no right to exclude the *SS Newton* from its EEZ, its overly aggressive actions also violated Vattel's rights based on Art. 58 LOSC, which confers certain freedoms to all States in coastal State's EEZ. There is no doubt that Vattel enjoys the freedom of navigation in Fulton's EEZ, where it tried to assess the impact of the wave-energy farm on the *Utrechtis Lawis*. As the conduct of the *SS Newton* is not to be considered as MSR, it can be interpreted as another internationally lawful use of the sea related to this freedom of navigation. Research activities not falling under the scope of MSR are *ipso facto* lawful. If Fulton were to argue that Vattel did not give due regard to the rights of Fulton as a coastal State, as is required by Art. 58 (3) LOSC, this would be highly hypocritical since the collection of data is exactly what Vattel wanted to do together with Fulton.

6.10. If Your Tribunal were to rule that Vattel's rights have not been infringed, Art. 59 LOSC becomes applicable, since this is a situation that does not fall within the scope of MSR in the sense of LOSC, and, as will be argued in the next chapter, can neither be linked to the (sovereign) rights that Fulton enjoys in its EEZ. Stronger still, existing controversies surrounding the scope of the activities in Arts. 56 (1) and 58 (1) LOSC automatically affect the application of Art. 59[80] – provided that there is a conflict of interest. If Your Tribunal were to rule that there was a conflict of interests, then this article requires that such conflict should be resolved on the basis of equity and in the light of all the relevant circumstances. When the conflict does not involve the exploitation or exploration of resources, as is the case, the interests of other States (*in casu*: Vattel) and the international community as a whole tend to be favoured.[81] The *Utrechtis Lawis* is a species of importance to Vattel in general (cfr. the negotiations undertaken aiming at agreeing on joint conservation measures), and more

---

[79] *Ibid. in fine*.
[80] A. Proelss, C*ommentary*, p. 460.
[81] M. H. Nordquist, *United Nations Convention on the Law of the Sea 1982, A Commentary* (Vol. II, Martinus Nijhoff Publishers, 1993), p. 569; D. R. Rothwell and T. Stevens, *The International Law of the Sea*, 2016, p. 91; *The M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment (Sep. Op. Vukas), ITLOS Reports 1999, p. 10, para. 16.

specifically for its coastal aboriginal communities. The international community as a whole also has an interest in this matter. While the production of marine renewable energy is to be encouraged, this should not negatively affect protected species. If Your Tribunal were to rule otherwise, this would set a dangerous precedent for the protection of endangered species.

6.11. In this chapter, it was demonstrated that the exclusion of the *SS Newton* cannot be legally justified, regardless of the question whether the data collection falls within the scope of MSR. Stronger still, by expulsing the *SS Newton,* Vattel's freedoms of Art. 58 LOSC were infringed. Even if Your Honourable Tribunal were to rule otherwise, then still Art. 59 requires an equitable solution for this part of the conflict, which would be in favour of Vattel.

CHAPTER 7

Vattel Did Not Infringe the Sovereign Rights of Fulton by Sending the *SS Newton* to Conduct Marine Scientific Activities

7.1. Fulton alleges the infringement of its sovereign rights through the marine scientific activities conducted by the *SS Newton*. In the following paragraphs, it will become apparent that this counterclaim is founded on a misinterpretation of Art. 56 (1) LOSC, which states that a coastal State has "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources (…) of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, current and winds." It is true that Fulton, as coastal State, enjoys some sovereign rights. However, these are limited to the listed activities. A direct connection between the activity concerned and the fields mentioned in this article is required for a coastal State to rely on its sovereign rights.[82] In order for Fulton to rely on its sovereign rights, it thus needs to prove that Vattel's activities can be directly linked to the fields mentioned in Art. 56 (1) (a) LOSC. It will be argued that Fulton had no sovereign rights to rely on when it sent the *SS Newton* back, as first of all Vattel did not collect data for the purpose of exploration or exploitation (A). Secondly, the data collection is not an activity that falls within the scope of management or conservation of natural resources (B). Lastly, it will be substantiated that Fulton's sovereign rights regarding the production of energy from water, currents and winds Are irrelevant in this matter (C).

[82] A. Proelss, C*ommentary*, p. 426. E.g. on the direct link required regarding fisheries: *M/V Saiga (Saint Vincent and the Grenadines v. Guinea),* Judgment, ITLOS Reports 1999, p. I0, para. 215.

A. Vattel Did Not Collect Data for the Purpose of Exploration or Exploitation

7.2. With the data collection, Vattel merely aimed at assessing the impact of the wave-energy farm on the stock of the *Utrechtis Lawis* and had no intention to explore or exploit the *Utrechtis Lawis* in Fulton's EEZ. This finds further confirmation in the fact that the fish only migrate to Fulton's waters to spawn. It would be extremely unreasonable for Vattel – a State which engages in the protection of a certain species – to want to engage in exploration or exploitation of the *Utrechtis Lawis* while they are spawning. On top of this, exploring and exploiting in the sense of this article mainly concerns the non-living resources as defined by Art. 77 (4)[83], the *Utrechtis Lawis* is thus not covered.

B. The Data Collection by Vattel is Not an Activity of Management or Conservation of Natural Resources

7.3. The sovereign rights for the purpose of conservation and management of the living resources of the EEZ are further substantiated by Arts. 61-67 LOSC. These articles mostly relate to fisheries.[84] Again, Vattel merely wanted to assess the impact of the wave-energy farm, and thus did not envisage any fishing of the *Utrechtis Lawis*. Since the statement of facts and clarifications do not allow for the *Utrechtis Lawis* to be qualified as an anadromous[85] or catadromous[86] species, Art. 63 LOSC is the only relevant article in this matter. It requires States such as Vattel and Fulton to seek to agree upon measures necessary to coordinate and ensure the conservation and development of such stocks. While the aforementioned States tried to achieve this via negotiations, they did not succeed. It should be noted, however, that Vattel sent the *note verbale* because it wanted to cooperate in assessing the impact of the wave farm on the *Utrechtis Lawis*, Fulton cannot sincerely rely on its sovereign rights concerning management and conservation when it refused to cooperate in assessing the impact of a man-made construction on a protected fish, which is the first step when trying to adequately conserve migratory fish stock. Stronger still: this violates the obligation of good faith and would constitute an abuse of rights.[87]

[83] R. R. Churchill and A. V. Lowe, *Law of the Sea,* (3rd ed., Juris Publishing,1999), p. 166.
[84] A. Proelss, C*ommentary*, p. 426.
[85] Art. 66 LOSC.
[86] Art. 67 LOSC.
[87] Art. 300 LOSC.

7.4. If it were to be argued by Fulton that by sending the *SS Newton* to conduct research activities near the wave-energy farm, Vattel wanted to engage in the exploration of that farm, it should be noted that the sovereign rights regarding exploration and exploitation of natural resources do not deal with non-natural (‘artificial) resources – artificial since offshore wind or wave energy production necessarily involves the operation of platforms and installation.[88]

C. Fulton's Sovereign Rights Regarding the Production of Energy from Water, Currents and Winds Are Irrelevant in this Matter

7.5. If it were to be argued by Fulton that Vattel violated its sovereign rights regarding the production of energy from water, currents and winds, it should once again be stressed that a direct link between this right and the activities by Vattel is missing. Vattel obviously had no interest in the production of energy in Fulton’s EEZ, it merely wanted to assess the impact of the wave farm on the *Utrechtis Lawis*.

7.6. In this chapter, it was demonstrated that Vattel has not infringed any sovereign rights of Fulton with the collection of data around the wave-energy farm, and in addition that Fulton cannot rely on its sovereign rights for this type of activity.

SUBMISSIONS AND PRAYER FOR RELIEF

For the foregoing reasons, Vattel respectfully requests this Honourable Tribunal to adjudge and declare that:

I. This Tribunal has jurisdiction to hear Vattel’s claims

II. By constructing the wave-energy farm Fulton is violating its international obligations related to cooperation, include those under the 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

V. Vattel has not infringed the sovereign rights of Fulton by sending the *SS Newton* to conduct marine scientific activities in Fulton’s EEZ on two occasions.

[88] A. Proelss, *Commentary*, p. 427, 429.