

The South China Sea Award and the duty of “due regard” under the United Nations Law of the Sea Convention

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Decision Commented On: [Award on the Merits](#) of the Annex VII Tribunal, In the Matter of the South China Sea Arbitration, *The Republic of the Philippines v The People’s Republic of China*, 12 July 2016

As recited in an earlier [post](#) by Nigel Bankes, the Annex VII Tribunal in the South China Sea Arbitration (SCSA) handed down its Award on the Merits in the dispute between the Philippines and China on 12 July 2016. The dispute between the parties involves China’s extensive maritime claims in the South China (many within the context of the so-called nine dash line), claims in relation to fishing activities by Chinese flagged vessels, as well as claims in relation to China’s dredging and construction activities associated with reclamation activities on a series of maritime features in the South China. The Tribunal ruled in favour of the Philippines on almost all issues in its 479 page unanimous and comprehensive decision.

This post examines the Tribunal’s interpretation of the duty of “due regard” under [the United Nations Law of the Sea Convention](#) (LOSC) Article 58(3) in the course of its consideration of Submission No. 9 by the Philippines. That submission requested that the Tribunal declare that “China has unlawfully failed to prevent its nationals and vessels from exploiting the living resources in the exclusive economic zone of the Philippines” (at para 717). The obligation of “due regard” is one of the key mechanisms adopted in the LOSC to balance the potentially competing interests of coastal states and other uses of the new maritime zone, the exclusive economic zone, recognized by LOSC.

The Tribunal concluded that China was in breach of its obligation of “due regard” under LOSC Article 58(3):

... China has, through the operation of its marine surveillance vessels in tolerating and failing to exercise due diligence to prevent fishing by Chinese flagged vessels at Mischief Reef and Second Thomas Shoal in May 2013, failed to exhibit due regard for the Philippines’ sovereign rights with respect to fisheries in its exclusive economic zone. Accordingly, China has breached its obligations under Article 58(3) of [LOSC]. (at para 757; emphasis added)

This post elaborates on that conclusion.

Facts

The South China Sea is a semi-enclosed sea in the western Pacific Ocean, south of China and west of the Philippines, important for shipping, fisheries, a biodiverse coral reef ecosystem, and

the potential for substantial oil and gas resource exploitation (at para 3). Mischief Reef and Second Thomas Shoal are coral reefs located in the centre of the Spratly Islands, in the southern part of the South China Sea (at paras 290, 3).

The Philippines' Submission No. 9 concerned Chinese government and fishing vessel activities at Mischief Reef and Second Thomas Shoal, and was one of six submissions (Nos. 8 to 13) dealing with Chinese activities in the South China Sea. The Tribunal's considerations of Submissions Nos. 8, 12 and 14 (not analysed in this post) all dealt with activities at Mischief Reef and Second Thomas Shoal, and together comprise a broader factual background to Submission No. 9.

In the case of Submission No. 8, the Tribunal noted that the core of the dispute with respect to living and non-living resources was that both the Philippines and China had acted on the basis that each, and not the other, had exclusive rights to these resources (at para 696). With respect to living resources, for example, China promulgated a 2012 fishing moratorium in respect of an area where the Philippines claimed fisheries jurisdiction (at para 712). Although the Tribunal decided the Philippines had not established that China prevented Filipino fishermen from fishing at Mischief Reef or Second Thomas Shoal, it noted it could "readily imagine" that the presence of Chinese enforcement vessels at both locations, combined with China's general claim to fisheries jurisdiction, could lead Filipino fishermen to avoid such areas (at para 715).

In respect of Submission No. 12 on China's occupation and construction activities on Mischief Reef, the Tribunal noted that these included the construction of artificial islands and installations (such as concrete platforms supporting three-story buildings, a helipad, communications equipment, wharves, fortified seawalls, temporary loading piers, cement plants, a 250-metre-wide channel to allow transit into the lagoon) and the presence of dredger vessels, cargo ships and ocean tugs (at paras 994, 1003, 1009, 1004).

Regarding Submission No. 14, the Tribunal took note of the vessel grounded on Second Thomas Shoal in 1999 by the Philippine Navy on board of which the Philippines has maintained a small detachment of marines, reports of Chinese government vessels and unidentified aircraft in the vicinity, and the interception of two Philippines supply vessels by two Chinese Coast Guard vessels (at paras 1113, 1115, 1117, 1123).

As factual background related specifically to Submission No. 9, the subject of this post, the Tribunal noted that, since 3 May 2013, China had maintained a "significant presence" of naval and China Marine Surveillance vessels near Second Thomas Shoal (at para 719). The government vessels were accompanied by fishing vessels (at para 720). The Tribunal also noted reports of Chinese fishing vessels escorted by Chinese government ships at Mischief Reef (at para 721). The Tribunal concluded that accounts of officially organised Chinese fishing fleets and close coordination between Chinese fishing vessels and government ships in the area supported the inference that China's fishing vessels were organised and coordinated by the government—and that, in any event, Chinese government vessels were aware of the actions of Chinese fishermen and would have been able to halt them (at para 755).

Positions of the Parties

In its submissions on issue No. 9 the Philippines relied on the [ITLOS advisory opinion](#) in the *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion*, 2 April 2015 (*Fisheries Advisory Opinion*) for the interpretation that, under LOSC

Articles 58(3) and 62(4), a state has a due diligence obligation to ensure its nationals and vessels comply with coastal state regulations in the EEZ and do not engage in illegal, unreported and unregulated (IUU) fishing activities (at para 726; and see SCSA [Merits Hearing Transcript \(Day 4\)](#) pp 84-87, citing *Fisheries Advisory Opinion* at paras 123, 124, 128, 138). China's position (as described in diplomatic correspondence with the Philippines, China being a non-participant in the proceedings) was that it did not consider the Philippines to have rights in the relevant area (at para 730).

The Tribunal's Considerations

The Tribunal concluded that it had jurisdiction with respect to Submission No. 9 on the basis that none of the features claimed by China are capable of generating any entitlement to an EEZ overlapping that of the Philippines (at paras 733-734), and that therefore Articles 15, 74, 83 on delimitation and Articles 297(3)(a), 298(1)(a)(i), 298(1)(b) on exceptions to jurisdiction do not apply (at paras 694-695).

The Tribunal identified the law applicable to the issue of China's "presence" in the area of Mischief Reef and Second Thomas Shoal (at paras 735-741) as including two elements: first, LOSC Article 61(1) dealing with the jurisdiction of the coastal state (the Philippines) as to the allowable catch within the EEZ, and LOSC Article 62(2) and (3) as to access by flag state vessels to surplus allowable catch, and second—with particular emphasis—Article 62(4) on the obligations of flag state nationals fishing in the coastal state's EEZ, and Article 58(3) on the obligation of flag states in the coastal state's EEZ. This last provides that:

In exercising their rights and performing their duties under this Convention in the exclusive economic zone, 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 in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part. (emphasis added)

The Tribunal's interpretation of "due regard" under Article 58(3) contains a number of steps.

First, with respect to the "nature" of the obligation, the Tribunal, without further comment, references the observations in the [Award on the Merits](#) of the Annex VII Tribunal in the *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, 18 March 2015 (*Chagos*) with respect to "due regard" under Article 56(2) (not 58(3)) reproducing from that Award as follows:

... the ordinary meaning of "due regard" calls for the [first State] to have such regard for the rights of [the second State] as is called for by the circumstances and by the nature of those rights. The Tribunal declines to find in this formulation any universal rule of conduct. The Convention does not impose a uniform obligation to avoid any impairment of [the second State's] rights; nor does it uniformly permit the [first State] to proceed as it wishes, merely noting such rights. Rather, the extent of the regard required by the Convention will depend upon the nature of the rights held by [the second State], their importance, the extent of the anticipated impairment, the nature and

importance of the activities contemplated by the [first State], and the availability of alternative approaches. (at para 742, citing *Chagos Award* at para 519) (square brackets added by the SCSA Tribunal)

Second, remarking on the specific context of the duties of a flag state with respect to fishing by its nationals in a coastal state's EEZ, the Tribunal noted its agreement with the reasoning of ITLOS in its *Fisheries Advisory Opinion*, stating that:

...[ITLOS] interpreted the obligation of due regard, when read in conjunction with the obligations directly imposed upon nationals by Article 62(4), to extend to a duty “to take the necessary measures to ensure that their nationals and vessels flying their flag are not engaged in IUU fishing activities.” The *Fisheries Advisory Opinion* goes on to note that:

the obligation of a flag State . . . to ensure that vessels flying its flag are not involved in IUU fishing is also an obligation “of conduct” . . . as an obligation “of conduct” this is a “due diligence obligation”, not an obligation “of result” . . . The flag State is under the “due diligence obligation” to take all necessary measures to ensure compliance and to prevent IUU fishing by fishing vessels flying its flag. (at para 743, citing *Fisheries Advisory Opinion* at paras 124, 129)

Finally, applying Article 58(3) the Tribunal determined that:

... [Evidence] support[s] an inference that China's fishing vessels are not simply escorted and protected, but organised and coordinated by the Government...

The obligation to have due regard to the rights of the Philippines is unequivocally breached when vessels under Chinese Government control act to escort and protect Chinese fishing vessels engaged in fishing unlawfully in the Philippines' [EEZ]. (at paras 755-756)

Commentary

In the course of its brief consideration of the duty of “due regard,” the Tribunal makes no direct use of the interpretative rules set out in the [Vienna Convention on the Law of Treaties](#) (VCLT)--neither explicitly, nor implicitly referencing the interpretative approach outlined in VCLT Articles 31 and 32 (ordinary meaning, context, object and purpose, or any “supplementary” interpretative means) or to the intentions of the parties.

It might have done. Earlier in the Award, the Tribunal elaborated on the procedural safeguards that ensured China suffered no disadvantage with respect to evidence and claims as a result of its non-participation in the proceedings (at paras 119-121). The Tribunal might have been well advised to take a similar approach with respect to the interpretation of “due regard”. Instead, as noted above, the SCSA Tribunal relies heavily on the reasoning of two prior decisions, the *Chagos Award* and the *Fisheries Advisory Opinion*.

While not strictly a source of international law, reference to international jurisprudence is nevertheless commonplace in practice, whether for adjudicative consistency, efficient reference to existing law, or the making of new law through clarification of existing law (see for discussion Thomas Buergenthal, “Lawmaking by the ICJ and Other International Courts” (2009) 103 *Proceedings of the Annual Meeting (American Society of International Law)* 403, and Harlan Grant Cohen, “Theorizing Precedent in International Law” and Gleider Hernández, “Interpretative Authority and the International Judiciary” both in Andrea Bianchi, Daniel Peat & Matthew Windsor eds, *Interpretation in International Law* (Oxford: OUP, 2015)).

The *Chagos* Award on its own might not obviously represent an interpretative consensus on the meaning (or nature) of “due regard”, even if that were possible for a duty the content of which will necessarily arise from the specific circumstances under consideration. Like the SCSA, *Chagos* was decided by an Annex VII Tribunal which did not elaborate extensively on its interpretative reasoning with respect to “due regard”, although that Tribunal did implicitly refer to the VCLT in referring (albeit abruptly) to the “ordinary” meaning of the term.

Also, as noted by the SCSA Tribunal itself (at para 742), the *Chagos* Tribunal had before it the “reversed situation”—that is, the question of the “due regard” duty of the coastal state in the EEZ under Article 56(2), rather than “due regard” duty of the flag state under Article 58(3). The SCSA Tribunal does not explicitly conclude whether it equates the respective “due regard” duties of coastal and flag states or whether the interpretation of the one can serve as context for interpretation of the other. The understanding that “due regard” in LOSC Articles 56(2) and 58(3) is mirrored—in the sense of being in the first instance equally weighted or without pre-eminence as between a coastal state (with its sovereign rights) and a flag state (with its freedoms of the high seas)—has been echoed in jurisprudence and literature, but there is not universal consensus on this point. (See, for example, [M/V “SAIGA” \(No. 2\) \(Saint Vincent and the Grenadines v Guinea\)](#), [Separate Opinion of Judge Laing](#), [1999] 3 ITLOS Rep 10 at para 52, [M/V “Virginia G” \(Panama v Guinea-Bissau\)](#), [Dissenting Opinion of Judge ad hoc Sérgio Correia](#) [2014] ITLOS Rep 1 at para 16, Alexander Proelss, “The Law on the Exclusive Economic Zone in Perspective: Legal Status and Resolution of User Conflicts Revisited” (2012) 26 *Ocean Yrbk* 87, James Kraska, “Resources Rights and Environmental Protection in the Exclusive Economic Zone” in *Military Activities in the EEZ: A U.S. China Dialogue* (Newport, Rhode Island: China Maritime Studies Institute, U.S. Naval War College, 2010) 75.) Also, apart from the mutual duties of “due regard” under Articles 58(3) and 56(2), the two provisions elaborate on the respective duties of coastal and flag states differently. Under Article 58(3) the flag state has the general obligation of “due regard” as well as the specific duty to “comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part”, while under Article 56(2) the coastal state’s twin obligations of “due regard” and to “act in a manner compatible with the provisions of [LOSC]” are both framed more generally.

As to the “nature” of the duty of “due regard”, the obligation includes, or is, a duty to balance concurrent coastal and flag state entitlements and duties—as described, for example, in the *Chagos* Award passage reproduced by the SCSA Tribunal:

...the extent of the regard required by the Convention will depend upon the nature of the rights held by [the second State], their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the [first State], and the

availability of alternative approaches. (at para 742, citing *Chagos Award* at para 519) (square brackets added by the SCSA Tribunal)

The *Chagos* Tribunal applied this balancing analysis as follows:

There is no question that Mauritius' rights have been affected by the declaration of the MPA. In the territorial sea, Mauritius' fishing rights have effectively been extinguished. ... the [Respondent] United Kingdom's undertaking for the eventual return of the Archipelago gives Mauritius an interest in significant decisions that bear upon its possible future uses... The Tribunal considers Mauritius' rights to be significant and entitled, as a matter of good faith and the Convention, to a corresponding degree of regard. (*Chagos Award* at para 521)

The SCSA Tribunal does not replicate this calculus exactly (i.e. it does not directly contemplate the specific importance of the interests and activities of China and the Philippines, nor impairment or alternative approaches), though it does appear to balance relevant LOSC provisions in the course of its conclusion on the meaning of "due regard" under Article 58(3):

Given the importance of fisheries to the entire concept of the exclusive economic zone, the degree to which the Convention subordinates fishing within the exclusive economic zone to the control of the coastal State, and the obligations expressly placed on the nationals of other States by Article 62(4) of the Convention, the Tribunal considers that anything less than due diligence by a State in preventing its nationals from unlawfully fishing in the exclusive economic zone of another would fall short of the regard due pursuant to Article 58(3) of the Convention. (at para 744)

Presumably a balancing analysis of concurrent coastal and flag state rights and duties is more relevant with respect to an activity by one state that is prescribed (the performance of a duty) or protected (for example, the declaration of an Marine Protected Area by a coastal state, as in *Chagos*, or navigation by a flag state) but which nevertheless might impair the interests of another state, rather than to an activity that is unlawful in the first instance, such as organizing and coordinating IUU fishing activities in another state's EEZ.

With respect to the content of due diligence, the SCSA Tribunal goes only so far as to note that:

In many cases, the precise scope and application of the obligation on a flag State to exercise due diligence in respect of fishing by vessels flying its flag in the exclusive economic zone of another State may be difficult to determine. (at para 754)

An analysis of the specific content of due diligence is presumably unnecessary in this case given that China's conduct was found to be beyond the scope of diligence—that is, its government vessels were found to have escorted, protected, organized and coordinated IUU fishing activities (at paras 754-756).

The SCSA Award is, notably, the first decision to determine a breach of "due regard" obligations by a flag state under Article 58(3) and (agreeing on this with the *Fisheries Advisory Opinion*)

framing the breach as arising from a violation of a general principle of international law not directly expressed in LOSC (see *Fisheries Advisory Opinion* at para 110). In contrast, the two decisions that have found breaches of “due regard” by a coastal state under Article 56(2), the *Chagos Award* and the [Award on the Merits](#) of the Annex VII Tribunal In the Matter of *The Arctic Sunrise Arbitration (Netherlands v Russia)*, 14 August 2015, each framed the respective breaches of “due regard” in terms of conduct incompatible with LOSC provisions other than Article 56(2) (see *Chagos Award* at paras 520, 534, 540, 544; and *Arctic Sunrise Award* at paras 231, 333.)

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