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International Law and China's Reclamation Works in the South China Sea

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Introduction

Since late 2014, the international media has been filled with reports critical of the fact that China is undertaking large-scale reclamation works on several of the seven or eight reefs it occupies in the Spratly Islands.[1] In response to the press reports, the Spokesperson for the Ministry of Foreign Affairs (MOFA) made the following comments in a press conference on 9 April 2015:

> China has indisputable sovereignty over the Nansha Islands and their adjacent waters. The Chinese government has been carrying out maintenance and construction work on some of the garrisoned Nansha islands and reefs with the main purposes of optimizing their functions, improving the living and working conditions of personnel stationed there, better safeguarding territorial sovereignty and maritime rights and interests, as well as better performing China's international responsibility and obligation in maritime search and rescue, disaster prevention and mitigation, marine science and research, meteorological observation, environmental protection, navigation safety, fishery production service and other areas. The relevant construction, which is reasonable, justified and lawful, is well within China's sovereignty. It does not impact or target any country, and is thus beyond reproach.[2]

Chinese officials and commentators have also pointed out that other claimants to islands in the South China Sea have built installations and structures on the maritime features they occupied in the Spratly Islands and that in some cases the other claimants also did reclamation works on the features in order to build airstrips or expand the size of the islands. Most of these activities took place when the occupied the features in the 1970s and 1980s, but in some cases the claimants have continued to maintain or upgrade the facilities. Therefore, some Chinese accuse the critics of China's reclamations of applying a double standard.

China's critics have responded by saying that China's actions are different because the scale of China's reclamations vastly exceeds the works done by other claimants on the islands they occupy in the Spratly Islands, and that China's reclamation works are

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[1] See, for example, http://www.scmp.com/news/china/article/1620894/reef-biggest-island-spratlys-and-chinas-not-done-yet-fiery-cross; http://www.kmt.org.tw/english/page.aspx?type=article&mnum=112&anum=15286; http://www.interaksyon.com/article/102569/chinas-reclamation-on-west-ph-sea-reef-halfway-done---catapang; http://www.wsj.com/articles/china-expands-island-construction-in-disputed-south-china-sea-1424290852?tesla=y; http://www.ibtimes.com/south-china-sea-land-reclamation-satellite-images-show-chinese-progress-man-made-1818986; http://www.philstar.com/headlines/2015/03/12/1432807/chinas-latest-expansion-deny-philippines-access-ayungin#ixzz3UA2RpsFj; http://www.wantchinatimes.com/news-subclass-cnt.aspx?cid=1101&MainCatID=11&id=20150312000178; http://www.gmanetwork.com/news/story/452933/news/nation/phl-calls-on-int-l-community-to-press-to-stop-reclamation-in-south-china-sea; http://thediplomat.com/2015/04/us-blasts-chinas-great-wall-of-sand-in-the-south-china-sea/; http://globalnation.inquirer.net/105974/photos-confirm-china-reclamation-experts-hit-reef-degradation-in-spratly/.

[2] http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1253488.shtml.

significantly changing the status quo in the South China Sea. The critics have also argued that the manner of the reclamation works being undertaken by China is vastly different because entire reefs are being dredged and destroyed, and as a result, significant damage is being done to the marine environment and marine biodiversity in the South China Sea. The MOFA Spokesperson addressed these concerns in part in her statement:

> China's construction projects on the islands and reefs have gone through scientific assessments and rigorous tests. We put equal emphasis on construction and protection by following a high standard of environmental protection and taking into full consideration the protection of ecological environment and fishing resources. The ecological environment of the South China Sea will not be damaged. We will take further steps in the future to monitor and protect the ecological environment of relevant waters, islands and reefs.[3]

In this paper, I will address the extent to which the reclamation works are governed by and consistent with the rules and principles of international law. I will focus in particular on the relevant provisions of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).[4] Because China and the other States claiming sovereignty over islands in the South China Sea are parties to UNCLOS, it is therefore the starting point for analysing the legality of their conduct under international law.

UNCLOS and the development of international law

Perhaps unfortunately for China, the principles and rules of international law are more certain now than they were when the other claimants occupied maritime features in the Spratly Islands in the 1970s and 1980s and built installations and structures on them. The Third United Nations Conference on the Law of the Sea began in 1973 with the objective of establishing a comprehensive set of legal rules governing activities in the oceans. UNCLOS took nine years to negotiate and was adopted on 10 December 1982. It then took almost 12 years, until 16 November 1994, for it to enter into force. All five States with claims in the South China Sea have ratified UNCLOS: Philippines on 8 May 1984; Vietnam on 25 July 1994; China on 7 June 1996; Malaysia on 14 October 1996; and Brunei Darussalam on 5 November 1996.[5] The Convention entered into force for Brunei Darussalam on 5 December 1996, 30 days after its date of ratification. Therefore, since 5 December 1996 the five

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[3] http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1253488.shtml.
[4] United Nations Convention on the Law of the Sea, 10 December 1982, UNTS 1833 at 3 (entered into force 16 November 1994) [UNCLOS]. As of 15 April 2015, there were 167 parties (including the European Union).
[5] For the dates of signature, ratification and accession of all treaties to which the UN Secretary-General is a depository, see UN Treaties Collection, online at https://treaties.un.org/pages/ParticipationStatus.aspx.

claimant States have been legally bound by the provisions of UNCLOS in their relations with each other.

It should also be noted at the outset that many of the articles in UNCLOS have been further clarified through decisions of international courts and tribunals that have applied and interpreted its provisions in cases submitted to them. As will be explained, some of the provisions in UNCLOS, especially those on the protection and preservation of the marine environment, have been interpreted in light of the development of international environmental law since the 1990s. As a result, the obligations of States Parties to protect and preserve the marine environment are much more developed now than they were in the 1970s and 1980s.

Sovereignty and maritime claims under UNCLOS

As a general principle, the high seas, the seabed and subsoil under the high seas, and the air space above the high seas, are not subject to a claim of sovereignty by any State.[6] States can claim sovereignty only over land territory, including islands. States can also claim sovereignty over a 12 nautical mile (nm) belt of sea adjacent to their coast, called the territorial sea. The sovereignty of a State over its territorial sea includes the airspace above the water and seabed and subsoil under the water. However, the sovereignty of the coastal State is subject to the right of all ships to exercise passage rights through the territorial sea.[7]

An "island" is the only maritime feature that is subject to a claim of sovereignty and to a 12 nm territorial sea. An island is defined in article 121(1) of UNCLOS as a "*naturally formed area of land* surrounded by and *above water at high tide*" [emphasis added]. The International Court of Justice (ICJ) has ruled that an island can consist of any type of land, including coral, so long as it is naturally formed and surrounded by and above water at high tide.[8]

Maritime claims are claims to rights and jurisdiction in the maritime space surrounding land territory or islands. The principle underlying maritime claims is that "the land dominates the sea".[9] This means that maritime claims can only be made from land

[6] UNCLOS, *supra* note 4, Art 89.
[7] UNCLOS, *supra* note 4, Art 2.
[8] Territorial and Maritime Dispute (Nicaragua v Colombia) 2007 ICJ para 37.
[9] This principle has been accepted by the Government of China. See Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, 7 December 2014, para 11, available at

territory, including islands.

UNCLOS establishes rules governing the rights and jurisdiction of States in the maritime zones beyond the limits of the territorial sea. UNCLOS provides that coastal States have "sovereign rights" for the purpose of exploring and exploiting the natural resources in two maritime zones beyond the territorial sea – the exclusive economic zone (EEZ) and the continental shelf. In these zones the coastal State does not have "sovereignty", only "sovereign rights" to explore and exploit the natural resources.[10] All other States may exercise high seas freedoms in the EEZ of any State, including the freedoms of navigation and overflight.[11] A coastal State may claim an EEZ extending to 200 nm from the baselines from which the territorial sea is measured.[12] In some cases, a coastal State can also claim an "extended continental shelf" beyond 200 nm.[13]

UNCLOS makes important distinctions with respect to the maritime zones that can (or cannot) be claimed from islands, rocks, low-tide elevations and artificial islands. If a reef meets the definition of an "island" - a naturally formed area of land surrounded by and above water at high tide – it is in principle entitled to the same maritime zones as other land territory, including a 12 nm territorial sea, a 200 nm EEZ and a continental shelf.[14] However, UNCLOS creates an exception for a category of islands known as "rocks". Article 121(3) of UNCLOS provides that "rocks which cannot sustain human habitation or economic life of their own are not entitled to an EEZ or continental shelf". In other words, "rocks" are only entitled to a 12 nm territorial sea.

Another significant maritime feature defined in UNCLOS is a "low-tide elevation". It is an area of land surrounded by and above water at low tide but submerged at high tide. A low-tide elevation is not entitled to any maritime zones of its own. However, if a low-tide elevation is located within the 12 nm territorial sea of an island, it is under the sovereignty of the island, and it may be used as a basepoint in measuring the territorial sea from that island.[15]

UNCLOS permits coastal States to construct artificial islands, installations and

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http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml
[10] UNCLOS, *supra* note 4, Art 56.
[11] UNCLOS, *supra* note 4, Art 58.
[12] UNCLOS, *supra* note 4, Art 57.
[13] UNCLOS, *supra* note 4, Art 76.
[14] UNCLOS, *supra* note 4, Art 121(2),.
[15] UNCLOS, *supra* note 4, Art 13.

structures on the seabed or on low-tide elevations within their EEZ or on their continental shelf.[16] Artificial islands are those constructed by artificial or man-made activities such as reclamation works. UNCLOS provides that artificial islands, installations and structures are not "islands" under UNCLOS because they are not naturally formed areas of land surrounded by and above water at high tide. Therefore, artificial islands, installations and structures are not entitled to any maritime zones.[17]

Given this background, China's current reclamation works raise several questions.

Are the reclamation works a matter solely within China's domestic jurisdiction or are they also governed by principles and rules of international law?

China claims indisputable sovereignty over the Spratly Islands and its sovereignty claim seems to extend to all the islands, rocks, reefs and shoals in the Spratly Islands, including those which it contends are illegally occupied by the Philippines, Vietnam and Malaysia. However, as explained earlier, the only maritime features that are subject to a claim of sovereignty under international law are those that meet the definition of an island.

The reefs on which the reclamation works are being undertaken have been under the jurisdiction and control of China since the 1980s and 1990s, and China previously constructed installations and structures on them. Although China claims indisputable sovereignty over all the features in the Spratly Islands, the fact remains that the Philippines, Vietnam, Malaysia and Brunei Darassalam all have territorial and maritime claims over the Spratly Islands, and the reefs on which the reclamation works are being undertaken are also subject to sovereignty or maritime claims by Vietnam and the Philippines. In addition, some of the reefs are located within the exclusive economic zone (EEZ) claimed by the Philippines from its main archipelago or within the area beyond the EEZ where the Philippines may claim an extended continental shelf.

Given that other States claim sovereignty over some of the same reefs and sovereign rights over the natural resources in and under the maritime space surrounding the reefs, China's reclamation works are not solely a matter within its domestic jurisdiction. China's actions are also governed by UNCLOS and by the principles and rules of general

[16] UNCLOS, *supra* note 4, Arts 60 and 80.
[17] UNCLOS, *supra* note 4, Art 60(8).

international law.

Will the reclamations works strengthen China's claim to sovereignty over the reefs?

China's reclamation works will significantly increase China's ability to assert control over the reefs and their surrounding waters and its ability to protect and defend its maritime and security interests in the South China Sea. However, the reclamation works will not have any impact on China's claims to sovereignty over the Spratly Islands under international law. The issue of which State has the better claim to sovereignty is governed by the rules and principles of international law on the acquisition and loss of territory, which are set out in the decisions of international courts and tribunals.

Under the rules of the acquisition and loss of territory, once a sovereignty dispute crystallises over an offshore island, any subsequent actions by any party to the dispute on the islands will not enhance its claim to sovereignty under international law. Other States have long disputed China's claim to sovereignty over the islands and formally objected to China's reclamation works. Therefore, the reclamation works may have a significant practical impact on China's ability to control the reefs and the maritime space surrounding the reefs, but they will not enhance China's claim to sovereignty over these features under international law.

Can the reclamation works enhance China's maritime claims?

First, if a reef is a low-tide elevation because it is above water at low tide but submerged at high tide, can major reclamation works make it an island subject to a claim of sovereignty that is entitled to maritime zones of its own? The answer is no. If a reef is above water at high tide because of reclamation works, it becomes an artificial island. It cannot become an island because an island must be naturally formed. As explained earlier, neither a low-tide elevation nor an artificial island is entitled to any maritime zones of its own.

Second, if a reef contains one or more very small and uninhabitable rocks that are naturally formed areas of land surrounded by and above water at high tide, but major reclamation works significantly enlarge the reef into a large island on which a small community can live, does the reef become an island entitled to an EEZ and continental shelf of its own? Since an island is defined under UNCLOS as a "*naturally formed* area of land surrounded by and *above water at high tide*" [emphasis added], it should not be permissible to use artificial means to change a rock into an island entitled to an EEZ and continental shelf

of its own.

What is the legal status of the reefs on which China is undertaking reclamation works?

In the arbitration case initiated by the Philippines against China, the Philippines has requested the arbitral tribunal to rule on the legal status of the reefs occupied and controlled by China.[18] In its Statement of Claim, the Philippines maintains that three features in the Spratly Islands that are under China's occupation and control are "islands" as defined in article 121 of UNCLOS. They are Cuarteron Reef, Fiery Cross Reef and Johnson South Reef. However, the Philippines maintains that all three of these islands are "rocks" entitled only to a 12 nm territorial sea because they are not capable of sustaining human habitation or economic life of their own. China has occupation and control of the three reefs and it is undertaking large-scale reclamation works on them. However, both the Philippines and Vietnam also claim sovereignty over them.

The Philippines has also asked the arbitral tribunal to rule on the status of four features in the Spratly Islands that are occupied by China and on which China is engaged in reclamation works. It maintains that these features are low-tide elevations because they are above water only at low tide. The four features mentioned in the Statement of Claim of the Philippines are Mischief Reef, Subi Reef, McKennon Reef and Gavin Reef. In addition, officials in the Government of the Philippines have reportedly stated that China is also occupying and carrying out reclamation works on a fifth reef in the Spratly Islands that is a low-tide elevation – Eldad Reef.[19] Consequently, the Philippines maintains that unless these reefs are within 12 nm of an island, they would not be subject to a claim of sovereignty and would not be entitled to any maritime zones.

The Philippines has also asked the arbitral tribunal to rule on the legal status of one feature outside the Spratly Islands – Scarborough Shoal. The Philippines admits that Scarborough Shoal meets the definition of an island in article 121 because four or five rocks on the atoll are above water at high tide. However, it maintains that they are "rocks" entitled only to a 12 nm territorial sea because they are not capable of sustaining human habitation or

[18] The Permanent Court of Arbitration is serving as the secretariat for the case. For information on the case, see http://www.pca-cpa.org/showpage.asp?pag_id=1529. The Statement of Claim of the Philippines is available at http://www.dfa.gov.ph/index.php/newsroom/unclos

[19] http://globalnation.inquirer.net/105974/photos-confirm-china-reclamation-experts-hit-reef-degradation-in-spratly/

economic life of their own.

Who has jurisdiction over artificial islands constructed on low-tide elevations?

Under articles 60 and 80 of UNCLOS, a coastal State has the exclusive right to construct and to authorise and regulate the construction, operation and use of artificial islands in its EEZ or on its continental shelf. The problem that arises in the Spratly Islands is that it may not be clear which State is the coastal State for the purpose of exercising jurisdiction. For example, if Gavin Reef is a low-tide elevation as maintained by the Philippines, it is located within the 12 nm territorial sea of Namyit Island (Hongxiu Dao), an island that China, the Philippines and Vietnam claim sovereignty over, even though it is currently occupied by Vietnam. Therefore, in order to determine which State has jurisdiction over Gavin Reef, it would first have to be determined which State has sovereignty over Namyit Island. By contrast, if Mischief Reef is a low-tide elevation as alleged by the Philippines, the coastal State with jurisdiction would be the State in whose EEZ it lies since there is no island within 12 nm from Mischief Reef. Since Mischief Reef is within the EEZ of the Philippines measured from its main archipelago, the Philippines asserts that Mischief Reef is within its jurisdiction. China is likely to take the position that Mischief Reef is an island over which it has sovereignty.

What are China's obligations under the UNCLOS provisions on the marine environment?

There are several provisions of UNCLOS concerning the protection and preservation of the marine environment that apply to the reclamation works. These provisions are applicable despite the fact that China asserts that it has indisputable sovereignty over all the features in the Spratly Islands, including the reefs on which the reclamation works are being carried out. It is significant that the obligations of States to protect and preserve the environment are imposed on the basis of which State has "jurisdiction or control" over activities that are taking place. In other words, the legal obligations to protect and preserve the marine environment are completely independent of the issue of who has sovereignty over the islands.

<u>Due Diligence Obligations under Articles 192 and 194 of UNCLOS</u>

Article 192 provides that States have an obligation to protect and preserve the marine

environment. Article 194(1) imposes a general obligation on States to take all measures consistent with UNCLOS that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities. Article 194(2) imposes an obligation on States regarding transboundary pollution from activities under their jurisdiction and control, that is, activities by ships flying their flag, by entities engaged in seabed activities subject to their jurisdiction, etc. Article 194(5) provides that the measures taken in accordance with Part XII shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life. In other words, it requires States to take measures not only to prevent pollution, but to protect and preserve marine biological diversity.

In addition, it could be argued that Article 194(5) should be read in light of other relevant conventions to which both States are parties, including the 1992 Convention on Biological Diversity (CBD).[20] All the claimant States in the South China Sea are also parties to the CBD. The CBD provides in article 8(d) that States Parties "promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings."

These provisions in UNCLOS establishing a "responsibility to ensure" must be read in light of the reasoning in the *Advisory Opinion on Seabed Activities* in which the Seabed Disputes Chamber defines the "responsibility to ensure" as one of "due diligence".[21] The provisions in UNCLOS establishing a "responsibility to ensure"[22] set out obligations that States Parties must fulfil by exercising their power over entities under their jurisdiction and control, such as ships flying their flag or companies subject to their national jurisdiction. Such "due diligence" obligations may be characterised as obligations "of conduct" and not "of result".[23]

These due diligence obligations require a State to take measures within its legal system, including the adoption of laws and regulations as well as administrative measures to

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[20] Convention of Biological Diversity, adopted on 5 June 1992, entered into force on 29 December 1993, 196 Parties as of 15 April 2015.
[21] Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Rep 2011, paras 107-16 (Advisory Opinion on Seabed Activities).
[22] UNCLOS, *supra* note 4, Arts 194(2), 210(3), 217(1)(2), 235(2).
[23] Advisory Opinion on Seabed Activities, supra note 21 at para 110.

ensure that such laws and regulations are enforced. In paragraph 197 of its judgment in the *Pulp Mills case*, the International Court of Justice (ICJ) described such due diligence obligations in a treaty as follows:

> It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators….[24]

<u>Duty to Conduct EIA and Duty to Cooperate</u>

Articles 204 to 206 of UNCLOS impose general obligations on States to monitor the risks or effects of pollution of the marine environment. Article 204 provides that States should keep under surveillance the effects of activities that they engage in or permit. Article 206 provides that when States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment.

The ICJ has held that if planned activities under the jurisdiction and control of a State may cause significant transboundary pollution, there is an obligation to conduct an environmental impact assessment (EIA). In paragraph 204 of its judgment in the *Pulp Mills case*, the Court stated:

> It may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention that it implies, would not be considered to have been exercised, if a party planning works liable to affect the regime of the river or quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.[25]

In its 2011 *Advisory Opinion on Seabed Activities*, the ITLOS Seabed Disputes Chamber affirmed that the obligation to conduct an EIA is a general obligation under both UNCLOS and customary international law.[26] In paragraph 146 it implied that the obligation

[24] *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, [2010] ICJ Rep 14 *(Pulp Mills)* at para 197.
[25] *Ibid*, para 204.
[26] *Advisory Opinion on Seabed Activities*, *supra* note 21 at para 145.

to conduct an EIA is required under Article 206 of UNCLOS.[27]

Article 206 of UNCLOS was also referred to by the International Tribunal for the Law of the Sea (ITLOS) in the *Land Reclamation Case* between Malaysia and Singapore.[28] That case involved reclamation works being conducted by Singapore on an island within its territorial sea that may have had significant harmful effects on the marine environment of Malaysia. ITLOS indicated that because of the potential transboundary impact, Singapore was under a "duty to cooperate" and that it should have consulted Malaysia and provided information to it at an early stage. In the *Land Reclamation Case,* ITLOS stated that the "duty to cooperate" is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law.[29]

It appears that article 206 is being interpreted in light of Principle 19 of the Rio Principles[30] that were adopted at the 1992 United Nations Conference on the Environment and Development. Principle 19 states that:

> States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.

Increasing Trend to Require the Adoption of a Precautionary Approach

There is also an increasing trend for international courts and tribunals to require States to adopt a precautionary approach when fulfilling their obligations under UNCLOS to protect and preserve the marine environment. The precautionary approach is set out in Principle 15 of the 1992 Rio Declaration as follows:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[31]

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[27] UNCLOS, *supra* note 4, Art 206 (in which Article 205 refers to an obligation to publish reports).
[28] *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore)*, Provisional Measures, Order of 8 October 2003, ITLOS Case No 12 (*Land Reclamation Case*).
[29] *Ibid*, para 92.
[30] Rio Declaration on Environment and Development, in 'Report of the United Nations Conference on Environment and Development', 12 August 1992, UN Doc A/CONF.151/26 (Vol I), 31 ILM 874 (1992 Rio Declaration).
[31] *Ibid*, Principle 15.

In its *Advisory Opinion on Seabed Activities*, ITLOS suggests that it agrees with the ICJ in the *Pulp Mills case* on the precautionary approach and hints that it may be willing to read it into UNCLOS:

> The Chamber observes that the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law. This trend is clearly reinforced by the inclusion of the precautionary approach in the Regulations and in the "standard clause" contained in Annex 4, section 5.1, of the Sulphides Regulations. So does the following statement in paragraph 164 of the ICJ Judgment in Pulp Mills on the River Uruguay that "a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute" (i.e., the environmental bilateral treaty whose interpretation was the main bone of contention between the parties). This statement may be read in light of article 31, paragraph 3(c), of the Vienna Convention, according to which the interpretation of a treaty should take into account not only the context but "any relevant rules of international law applicable in the relations between the parties".[32]

China's obligations with respect to its reclamation works

Given the developing law with respect to protection of the marine environment, the issue that arises is whether China has fulfilled its obligations under UNCLOS and general international law with respect to the protection and preservation of the marine environment.

As noted at the beginning of this paper, China has officially stated that it has taken specific steps to minimise pollution of the marine environment. It has stated that the ecological environment of the South China Sea will not be damaged and that it will take further steps in the future to monitor and protect the ecological environment of relevant waters, islands and reefs. Although it does not expressly say so, this statement suggests that China has conducted EIAs and that it is continuing to monitor the impact of its reclamation activities.

It seems clear that China has not made the EIAs public and has not acknowledged that it has any duty to cooperate with the potentially affected States. If it were to acknowledge that it has a duty to cooperate, it should have conducted a formal environmental impact assessment and shared the results with the potentially affected States and consulted with them. In this case, the Philippines is an affected State because three of the features on which

[32] *Advisory Opinion on Seabed Activities, supra* note 21 at para 135.

China is undertaking reclamation works are either just inside or just outside its 200 nm EEZ. Vietnam is also a potentially affected State because it occupies reefs very close to the reefs on which China is doing the reclamation works.

If China is unwilling to consult with the Philippines and Vietnam with respect to the measures it has taken to minimise harm to the environment from its reclamation activities, it might consider providing the relevant information to neutral experts from a third country. This may counter some of the suspicion about how its activities are causing extensive damage to the marine environment and to marine biodiversity.

What is the relevance of the reclamation works to the *Philippines v China* arbitration?

Issues also arise because China is undertaking the works while a case against it is pending before an arbitral tribunal established under Annex VII of UNCLOS. China has officially notified the tribunal that it will not participate in the arbitration.[33] Nevertheless, under Annex VII of UNCLOS, the absence of a party or failure to defend the case is not a bar to the proceedings. If one party fails to appear to defend the case, the other party may request the tribunal to continue the case and make an award, and the award will be binding on both parties. However, before making an award, the tribunal must satisfy itself that it has jurisdiction and that the claim is well-founded in fact and in law.[34]

The Philippines has asked the Tribunal to rule on the legal status of the maritime features occupied by China. The Philippines has argued that the features occupied by China are either low-tide elevations entitled to no maritime zones of their own or rocks entitled to no EEZ or continental shelf of their own. The reclamation works are being undertaken on these same features. If the Tribunal decides that it has jurisdiction in the case and the jurisdiction to determine the legal status of the features, the fact that China is undertaking reclamation works on them may make it difficult, if not impossible, for the Tribunal to determine the legal status of the features. Also, the conduct of the reclamation works may not be consistent with China's duty under Article 6 of Annex VII of UNCLOS to facilitate the

[33] On 22 January 2013, the Republic of the Philippines instituted arbitral proceedings against the People's Republic of China under Annex VII of UNCLOS. On 19 February 2013, China presented a Note Verbale to the Philippines in which it described "the Position of China on the South China Sea issues," and rejected and returned the Philippines' Notification. In a Note Verbale to the PCA on 1 August 2013, China reiterated "its position that it does not accept the arbitration initiated by the Philippines." PCA homepage at http://www.pca-cpa.org/showpage.asp?pag_id=1529.
[34] UNCLOS, *supra* note 4, Annex VII, Art 9.

work of the Tribunal.

On 13 April 2015, the Department of Foreign Affairs of the Republic of the Philippines made a formal statement on China's Reclamation Activities and their Impact on the Region's Marine Environment. The statement included the following language:

> China's massive reclamation activities are causing irreversible and widespread damage to the biodiversity and ecological balance of the South China Sea/ West Philippine Sea. We cannot accept China's claim that its activities have not caused damage to the ecological environment of the South China Sea.
>
> China has pursued these activities unilaterally, disregarding peoples in the surrounding states who have depended on the sea for their livelihood for generations. The destruction of 300 hectares of coral reef systems resulting from the reclamations is estimated to lead to economic losses to coastal states valued at US$100 million annually.[35]

It does not appear from the Philippine's Statement that the Chinese Government has consulted it or provided it with copies of its studies on the environment impact. Given this lack of consultation and the extensive reclamation works being conducted by China, especially the reclamation on Mischief Reef, the Philippines is likely to raise these issues in the oral hearings in the case. The Philippines could also consider requesting provisional measures from the arbitral tribunal in order to seek an order for China to stop the reclamation works, pending the decision of the Tribunal on jurisdiction and the merits. Article 290 of UNCLOS provides that if a dispute has been submitted to a tribunal, it may prescribe provisional measures "to prevent serious harm to the marine environment, pending the final decision".

China has decided not to participate in the arbitration initiated against it by the Philippines. Therefore, if the Philippines were to request provisional measures, China is not likely to participate in the proceedings. Nevertheless, if the Philippines took such action, and the Tribunal issued an order for provisional measures pending its final decision on jurisdiction and the Award, it would likely result in very negative publicity for China.

Conclusions

Many Chinese may feel that the current reclamation China is undertaking in the Spratly Islands are matters within its domestic jurisdiction, which are no different than the

[35] http://www.gov.ph/2015/04/13/dfa-statement-on-chinas-reclamation-activities-and-the-impact-on-the-regions-marine-environment/

actions taken by other claimant States on the maritime features they occupy and control. Therefore, the criticisms being mounted against it in the international media are not justified.

China's reclamation activities in the Spratly Islands are governed by the principles and rules of international law, especially UNCLOS, because like the other claimant States in the South China Sea, China has ratified UNCLOS and is legally bound by its provisions.

The provisions in UNCLOS are relevant in determining the status of the maritime features in the South China Sea and the rights and jurisdiction of States. UNCLOS also contains clear obligations on States with respect to the protection and preservation of the marine environment. These provisions are being further clarified by the decisions of international courts and tribunals and they are being interpreted in light of emerging principles of international environmental law.

Consequently, China, as party to UNCLOS, should take these factors into account when deciding how to further its national interests in the South China Sea, as its actions with respect to the reclamation are likely to be judged by many members of the international community by the extent to which it complies with its obligations under international law.