South China Sea Arbitral Award: Key Outcomes for Protection of the Marine Environment Under UNCLOS

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Philippines claims against China

- **Submission 11**
  - China had tolerated harmful fishing practices and harvesting of endangered species, such as giant clams and sea turtles by Chinese vessels in Scarborough Shoal and Second Thomas Shoal
  - Chinese fishing vessels used cyanide to kill fish and dynamite to blast rare corals to extract giant clams
  - Amended to claim island building activities on Scarborough Shoal, Second Thomas Shoal, Cuarteron Reef, Fiery Cross Reef, Johnson Reef, Hughes Reef, Gaven Reef and Subi Reef.
  - The Philippines alleged that these activities were in violation of Articles 123, 192, 194(1), 194(5) 197, 205, and 206 of UNCLOS.

- **Submission 12**
  - Construction activities on Mischief Reef as constituting violations of China’s duties to protect and preserve the marine environment
Marine environment of the South China Seas

- 7% of the world’s coral reefs
- “Rainforest of the seas”
- Critical habitat for many species
- Highest diversity of reef-building corals in the world in the southern sector
- Biodiversity
Marine environment of the South China Seas

- Sea turtle listed as endangered under Annex I of CITES (Convention on International Trade in Endangered Species of Wild Flora and Fauna)
- Poached by Chinese fishing vessels
Marine environment of the South China Seas

• Giant clams Listed in Annex I of CITES as endangered species
• Extracted by boat-propellers to break coral and extract giant clams
Marine environment of the South China Seas

- Boat-propeller chopping method
- To crush coral reefs to extract giant clams
- Massive destruction of coral and harvesting of giant clams
- “Devastating and long-lasting.” harm…”
Suction cutter dredge used for island building created more than 12.8million m$^2$ of new land in less than 3 years.
Tian Jing Hao China’s largest suction cutter dredger: 4500m² per/hr sand, rock and more
South China Sea: A Maritime Dispute Region
Maritime entitlements

• LTE: Second Thomas Shoal and Mischief Reef in an area formed part of the Philippine’s exclusive economic zone.

• HTF: Tribunal concluded that Scarborough Shoal, Cuerteron Reef, Fiery Cross Reef, Johnson Reef, McKennan Reef, and Gaven Reef (North) were high-tide features and characterized them as “rocks” under Article 121(3) of UNCLOS = TS entitlement
Separation of maritime entitlements from environmental harm claims

• Tribunal:
  • Environmental obligations in Part XII apply to states *irrespective of where the alleged harmful activities take place*
  • Not contingent upon a determination of questions of sovereignty over any particular feature, or determination of the status of any maritime feature, but whether China exercised “jurisdiction or control” over the harmful activities
  • Part XII applies to all States with respect to the marine environment, within and beyond national jurisdiction—”*questions of sovereignty are irrelevant to the application of Part XII.*”

• Obligation *erga omnes*?
  • Part XII [eg Article 192 and 194(5)] obligations *erga omnes*?
  • An obligation owed to the international community? To other States Parties of UNCLOS?
**Article 281 of UNCLOS**

- Philippines argued that Articles 192 and 194(5) were guided by CBD and CITES
- Philippines claimed harm to the marine biodiversity
- No mention of “biodiversity” UNCLOS?
- CBD? Or UNCLOS?
- **Tribunal**
  - CBD overlaps some with Article 192 and 194 but does not preempt as it applies to protection of biodiversity in general
  - Can read Article 192 and 194 to include protection of marine “biodiversity” and coral reefs respectively
  - A clear exclusion of Part XV procedures is required in order for Article 281 to present an obstacle for the Tribunal’s jurisdiction
    
    [Compare: Southern Bluefin Tuna case and Mox Plant case]
Article 281 of UNCLOS

- Philippines argued that Articles 192 and 194(5) were guided by CBD and CITES
- Philippines claimed harm to the **marine biodiversity**
- No mention of “biodiversity” UNCLOS?
- CBD? Or UNCLOS?
  - “The Tribunal acknowledges **some overlap** in the **subject matter of Part XII** of the Convention and the subject matter of the CBD. For example, there is a “General Obligation” under Article 192 of the Convention to protect and preserve the marine environment, **which may be broadly enough worded to include the obligation to protect and preserve marine biodiversity**. Similarly, obligations under **Article 194** of the Convention may include the protection and preservation of the **biological diversity represented by coral reefs**.”
Article 192 and 194(5)

"States have the obligation to protect and preserve the marine environment “ (Art. 192)

Tribunal

- Article 192 is to be informed by other provisions of the Convention and other applicable rules of international law.
- Interpretation of Article 192
  - Obligation to protect = protect actively against future harms
  - Obligation to preserve = maintain or improve existing state of environment
  - Obligation not to degrade the marine environment
- Article 192 includes the obligation to protect and preserve marine biodiversity
- Article 194(5): Duty to prevent the harvesting of endangered species (as listed in CITES)
- Duty to protect biodiversity that applies to coral reefs
Due Diligence Obligation

- **Pulp Mills case**
- ICJ determined that the obligation to protect the [aquatic] environment was an obligation of conduct and required the state to exercise due diligence.
- Due diligence 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, to safeguard the rights of the other party."
- [See also Seabed Dispute Chambers Advisory Opinion on Activities in the Area, IUU Fisheries Advisory Opinion]
Due Diligence

- Due diligence obligation for Articles 192 and 194

  Tribunal:
  “...to take those measures necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.”

- Due diligence obligation is triggered when a State is “aware that vessels flying its flag are engaged in the harvest of species internationally as being threatened with extinction or are inflicting significant damage on rare or fragile ecosystems or the habitat of depleted, threatened or endangered species”

- The State must adopt rules and measures to prevent such acts and maintain a level of vigilance in enforcing them
Environmental Impact Assessment

- **Section 4**
- **Article 204**
  - **Monitoring of the risks or effects of pollution**
    - 1. States shall, consistent with the rights of other States, **endeavour, as far as practicable**, directly or through the competent international organizations, to observe, measure, evaluate and analyse, by recognized scientific methods, the risks or effects of pollution of the marine environment.
    - 2. In particular, States shall keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment.
- **Article 205**
  - **Publication of reports**
    - States shall publish reports of the results obtained pursuant to article 204 or provide such reports at appropriate intervals to the competent international organizations, which should make them available to all States.
- **Article 206**
  - **Assessment of potential effects of activities**
    - 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 and shall communicate reports of the results of such assessments in the manner provided in article 205.
Environmental Impact Assessment

- Philippines claimed China had an obligation to undertake EIA under Article 206 before undertaking construction activities and report findings under Article 205.

- Article 206 is a direct obligation under UNCLOS and general obligation under international law (Advisory Opinion on Activities in the Areas).

- Tribunal: Obligations under Articles 204 and 206 qualified with “to endeavor” and “as far as is practicable,” leaving some discretion to the State.

- Is there discretion to conduct EIA in light of recent decisions? [Pulp Mills and Construction of Road Case (harm to shared resources)]

- Tribunal” However, the duty for the State to communicate reports of assessments under Article 205 was ‘absolute’.
Tribunal’s conclusions

• Tribunal found that China had violated Articles 123, 192, 194 (1) and (5), 197, and 206

• Tribunal on artificial island-building activities of China describing the damage to the marine environment as “devastating and long-lasting.” in violation of Article 192

• Dredging activities polluted the marine environment with sediment in violation of Article 194(1) according to the Tribunal

• **State responsibility?** Breach of an international obligation by the state or attributable to the state

• **Liability?**
Comments

- Strengthens the UNCLOS as the principle convention for protection and preservation of the marine environment
- Important contribution to clarification of the obligation to protect and preserve the marine environment, especially including biodiversity as part of Article 192
- Linkages between the Convention and other conventions to interpret Part XII important (ie. CITES and CBD)
- Award builds upon previous international judicial decisions (eg due diligence and EIA) contributing to the development of international law on environmental protection
- Obligation erga omnes?
Thank you