

**The 9th South China Sea International Conference  
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**International Law and Protection  
of Marine Environment  
in the South China Sea**

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# **I. Philippines' Submissions and the Award**



▪ **Submission No. 11**

(11) China has violated its obligations under the Convention to protect and preserve the marine environment at Scarborough Shoal, Second Thomas Shoal, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef and Subi Reef

▪ **Award on the Submission No. 11**

(12) FINDS, with respect to the protection and preservation of the marine environment in the South China Sea:

- a. that fishermen from Chinese flagged vessels have engaged in the harvesting of endangered species on a significant scale;
- b. that fishermen from Chinese flagged vessels have engaged in the harvesting of giant clams in a manner that is severely destructive of the coral reef ecosystem; and
- c. that China was aware of, tolerated, protected, and failed to prevent the aforementioned harmful activities; and

DECLARES that China has breached its obligations under Articles 192 and 194(5) of the Convention;





■ **Submission No. 12 (b)**

“(12) China’s occupation of and construction activities on Mischief Reef

(b) violate China’s duties to protect and preserve the marine environment under the Convention; and [...]”

■ **Award on the Submission No. 12(b)**

(13) FINDS further, with respect to the protection and preservation of the marine environment in the South China Sea:

a. that China’s land reclamation and construction of artificial islands, installations, and structures at Cuarteron Reef, Fiery Cross Reef, Gaven Reef(North), Johnson Reef, Hughes Reef, Subi Reef, and Mischief Reef has caused severe, irreparable harm to the coral reef ecosystem;

b. that China has not cooperated or coordinated with the other States bordering the South China Sea concerning the protection and preservation of the marine environment concerning such activities; and

c. that China has failed to communicate an assessment of the potential effects of such activities on the marine environment, within the meaning of Article 206 of the Convention; and

DECLARES that China has breached its obligations under Articles 123, 192, 194(1), 194(5), 197, and 206 of the Convention;



## **II. Jurisdictional Issues over Submission No. 11 and 12(b)**



# Jurisdictional Issues

- **Environmental obligations in Part XII apply to States irrespective of where the alleged harmful activities took place**
  - Not dependent on (1) the question of sovereignty over any particular feature, (2) a prior determination of the status of any maritime feature, (3) the existence of an entitlement to an EEZ in the area, (4) the prior delimitation of any overlapping entitlements

[Q] Can any State party to the UNCLOS bring the case against the other Party who violates the provisions of Part XII irrespective of legal standing?



# Jurisdictional Issues

- **Law enforcement activities exceptions in Art. 298 not applicable**
  - The exception in Art. 298(1)(b) concerns a coastal State's rights in its EEZ and does not apply to incidents in a territorial sea
  - Article 297(1)(c) expressly reaffirms the availability of compulsory dispute settlement for disputes concerning “alleged violations of international rules and standards for the protection and preservation of the marine environment”



# Jurisdictional Issues

- **Characterization of China's construction activities at the maritime features as civilian nature**
  - Relying on China's repeated statements and President Xi's statement, the Tribunal notes that China's conduct falls outside the scope of Article 298(1)(b)

[Q] Is the Tribunal's approach consistent with applying the military activities exception in Art. 298(1)(b)?

- Relying on China's intention on the construction activities v. Existence of “disputes concerning military activities” on the China's activities at Second Thomas Shoal



# **III. Interpretation and application of Arts. 192 and 194 of the Convention by incorporating the obligation under the CBD and the CITES**



# General obligation in Art. 192

- Art. 192: “States have the obligation to protect and preserve the marine environment.”
- Art. 192 does impose “a duty on States Parties, the content of which is informed by the other provisions of Part XII and other applicable rules of international law”
- “The content of the general obligation in Article 192 is further detailed in the subsequent provisions of Part XII, including Article 194, as well as by reference to specific obligations set out in other international agreements, as envisaged by Article 237.”



## General obligation in Art. 192

- Article 237(1): “The provisions of this Part are without prejudice to the specific obligations assumed by States under special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment and to agreements which may be concluded in furtherance of the general principles set forth in this Convention.”
- The tribunal seems to give positive meaning to “without prejudice to” clause in Art. 237(1)





# Types of the obligations under Arts. 192 and 194

- **Obligation in relation to activities directly taken by States and their organs**
- **Obligation to ensure activities within its jurisdiction and control do not harm the marine environment**
  - Obligation to ensure is an obligation of conduct and it requires “due diligence”
  - Due diligence of flag State not only adopting appropriate rules and measures but also a certain level of vigilance in their enforcement and the exercise of administrative control



# Protection and preservation of ecosystem

- **Ecosystem and habitat in Art. 194(5)**
  - Art. 194(5): “The measures taken in accordance with this Part 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”
  - No definition of ecosystem in the Convention but “internationally accepted definition” in Art. 2 of the Convention on Biological Diversity



# Harvesting of vulnerable, threatened and endangered species

- **Harvesting of sea turtles, giant clams and corals**
  - Species threatened with extinction and subject to international controls on trade under Appendix I and II to the CITES Convention respectively
  - CITES forms part of the general corpus of international law that informs the content of Arts. 192 and 194(5)
  - General obligation in Art. 192: a due diligence obligation to prevent the harvesting of endangered species and to take those measures necessary to protect and preserve rare and fragile ecosystems as well as the habitat of depleted, threatened or endangered species



# Harvesting of vulnerable, threatened and endangered species

- **Conclusion on violation of Arts. 192 and 194(5)**
  - “China breached its obligations under Arts. 192 and 194(5) of the Convention, to take necessary measures to protect and preserve the marine environment, with respect to the harvesting of endangered species from the fragile ecosystems at Scarborough Shoal and Second Thomas Shoal”
  - “China has also breached its obligation to protect and preserve the marine environment in respect of its toleration and protection of the harvesting of giant clams by the propeller chopping method”



# Harvesting of vulnerable, threatened and endangered species

- **China's violation of Arts. 192 and 194(5)**

[Q] Specific obligations under special conventions and agreements without compulsory dispute settlement mechanism can be incorporated into general obligations in Arts. 192 and 194(5) of the Convention with Part XV compulsory procedures?

[Q] Is it proper interpretation that Art. 237 allow general obligations in Arts. 192 and 194 to expand its contents and to be subject to compulsory procedures under Part XV of the Convention?



## **IV. Obligation on Environmental Impact Assessment**



# Obligation on EIA

- **Art. 204 Monitoring of the risks or effect of pollution**
- **Art. 205 Publication of reports**
- **Art. 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.



# Obligation on EIA

- **Legal nature of the obligation on EIA under the Convention**
  - Arts. 204 and 205: the terms “reasonable” and “as far as practicable” contain an element of discretion for the State concerned
  - Art. 206:
    - (1) “the obligation to conduct an environmental impact assessment is a direct obligation under the Convention and a general obligation under customary international law”
    - (2) “the obligation to communicate reports of the results of the assessment is absolute”





# Obligation on EIA

- **China's violation of its domestic law on EAI**
  - EIA must be objective, open and impartial, comprehensively consider impacts on various environmental factors and the ecosystem they form after the implementation of the plan or construction project and thus provide scientific basis for the decision-making
  - With respect to construction projects, EAI should include analysis, projection and evaluation on the potential environmental impacts of the project, and suggestions on implementation of environmental monitoring
  - Both the SOA Statement and Report fall short of the criteria under the China's EIA Law of 2002



# Obligation on EIA

## ■ China's violation of Art. 206

- the obligation to communicate is, by the terms of Article 205, to “competent international organizations, which should make them available to all States.”
- Although China's representatives have assured the States parties to the Convention that its “construction activities followed a high standard of environmental protection,” it has delivered no assessment in writing to that forum or any other international body as far as the Tribunal is aware
- The Tribunal found that China has not fulfilled its duties under Article 206 of the Convention



## **V. Implications of the Award for marine environmental protection**



# Contribution of the Award and its limits

- The award is a mile stone in international environment law
- Contributing to clarifying the general obligation under Arts. 192, 194 and 206 of the Convention
- The reasoning of the award is built on international jurisprudence on international environmental law
- Wider obligations to communicate reports of EIA
- It remains to be seen to what extent the specific obligation of other convention and agreements on environment can be incorporated into the general obligations of the Convention





## DECLARATION FOR A DECADE OF COASTAL AND MARINE ENVIRONMENTAL PROTECTION IN THE SOUTH CHINA SEA (2017-2027)

We, the Heads of State/Government of ASEAN Member States, and the People's Republic of China, on the occasion of the 20<sup>th</sup> ASEAN-China Summit in the Philippines and the 15<sup>th</sup> anniversary of the signing of the Declaration on the Conduct of Parties in the South China Sea (DOC) met in Manila, Philippines, on 13 November 2017;

**Recalling** the obligations of Governments under the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the United Nations Decade on Biodiversity (2011-2020), Convention on Biological Diversity (CBD), and relevant international instruments, UN resolutions and other efforts to preserve and protect the coastal and marine environment and resources;

**Further recalling** cooperation to achieve the United Nations Agenda 2030 for Sustainable Development, particularly Goal Number 14, Life Below Water, to promote conservation and sustainable use of the oceans, seas and marine resources;

**Reaffirming** the regional commitments demonstrated in the Joint Statement of the 19th ASEAN-China Summit to Commemorate the 25th Anniversary of ASEAN-China Dialogue Relations (2016) and the Joint Statement of the Foreign Ministers of ASEAN Member States and China on the Full and Effective Implementation of the DOC (2016);

**Recognizing** the Plan of Action to Implement the Joint Declaration on ASEAN-China Strategic Partnership for Peace and Prosperity (2016-2020) and the significant and important progress that ASEAN and China have made towards the implementation of these instruments will contribute to a peaceful, stable, friendly relations and good neighborliness between ASEAN and China;

**Affirming** the commitment of Governments under the Declaration on the Conduct of Parties in the South China Sea (DOC), particularly on undertaking cooperative activities on marine environmental protection;

**Recognizing** that the preservation and sustainable management of the coastal and marine environment is vital to the economic well-being and enhanced quality of life of the peoples of ASEAN Member States and China;

**Noting** that the current environmental situation in the South China Sea requires collective attention and action to protect the marine ecosystem and biodiversity, in particular on vulnerable marine ecosystems and their physical and biogenic structure, including coral reefs, cold water habitats, hydrothermal vents and seamounts, of certain human activities;

**Emphasizing** the need to promote responsible fishing practices, environmentally friendly fishing methods, and combatting illegal, unreported and unregulated fishing (IUUF), to ensure sustainable fishery resources and achieve food security;

**Noting** that pending a comprehensive and durable settlement of territorial and jurisdictional disputes, the parties concerned may explore or undertake relevant cooperative activities, in accordance with universally recognized principles of international law, including the UNCLOS 1982, without prejudice to the positions of the concerned parties to the dispute;

**Noting** that a precautionary and ecosystem-based approach based on the best available science in marine resources management to ensure its rational and sustainable development could be applied as appropriate;

**Noting** that coordinated and cooperative regional efforts are essential for the scientific conservation and management of marine resources and environment, biodiversity, and coastal zone of the ecosystem of the South China Sea;

**Acknowledging** that conservation of endangered and migratory wildlife species warrants cooperation from countries within the region where such species spend any part of their life cycle;

**Reiterating** the need to continue developing and sustaining environmentally-friendly mechanisms to mitigate the effects of climate change and transboundary marine environmental pollution and degradation;

**Recognizing** the significance of the sustainable management and conservation of fresh water eco-systems such as lakes and rivers, wetlands, and adjacent estuaries along coastal areas in the overall health of the marine environment;

**Further recognizing** the importance of protecting the South China Sea as a natural resource base for economic and social development for the present and future generations and recognising the benefits that would be gained from having the South China Sea as a sea of peace, stability and prosperity;

### HEREBY DECLARE THE FOLLOWING:

1. That 2017-2027 is a Decade for the Protection of Coastal and Marine Environment in the South China Sea.

2. That the Governments of the ASEAN Member States and China are committed to meet the aspirations of this Declaration.

# **DECLARATION FOR A DECADE OF COASTAL AND MARINE ENVIRONMENTAL PROTECTION IN THE SOUTH CHINA SEA (2017-2027)**

- ASEAN-China declaration of a Decade for marine environmental protection based on the DOC
- Commitment to meet the aspiration of the declaration but no specific action plan mentioned
- Action plan and cooperation needed to fill the empty canvass of the Declaration with confidence building measures such as designation of MPA, joint scientific research on marine environment, building and sharing information on marine environment



# **Thank you for Attention!**

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