South China Sea Arbitration and the Protection of the Marine Environment: Evolution of UNCLOS Part XII Through Interpretation and the Duty to Cooperate

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I Introduction

The Arbitral Award of 12 July 2016 in the South China Sea Arbitration is progressive not only in the sense that it contributed to clarify the definition of an island in international law, but also in the sense that it confirmed that Part XII (Protection and Preservation of the Marine Environment) of the United Nations Convention on the Law of the Sea (UNCLOS) can evolve through interpretation and the duty to cooperate. The Award touches upon fundamental questions regarding to what extent Part XII of UNCLOS can interact with other environmental treaty regimes and whether such interaction through interpretation can be seen as an evolution of Part XII of UNCLOS to adapt to new challenges without creating an implementation agreement or amending UNCLOS. The Award is also illuminating because the Tribunal confirmed that the duty to communicate the results of an environmental impact assessment (EIA) is absolute, regardless of different capacities of States. The Tribunal further alluded to a link between the duty to communicate results of an EIA and the duty to cooperate, which is recognized as a fundamental principle in the protection of the marine environment in international jurisprudence.

This article first provides an overview of the Arbitral Award regarding the protection and preservation of the marine environment. It then analyses the
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tribunal’s references to the 1992 convention on Biological Diversity (cbd)\(^4\) and the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (cites)\(^5\) in interpreting Article 192 and 194(5) of unclos. It discusses reasons why the arbitral tribunal’s application of Article 31(3)(c) of the Vienna Convention on the Law of Treaties\(^6\) was limited to the clarification of general terminologies such as “ecosystem” and “depleted, threatened or endangered species.” The article then examines the arbitral tribunal’s interpretation of Article 206 of unclos on eia and the duty to communicate the results of an eia in the context of the duty to cooperate enshrined as a fundamental principle under Part XII of unclos. Finally, it assesses to what extent the South China Sea Arbitration contributed to advance international marine environmental law and whether it will have impacts on future decision-making.

11 The Background

The philippines made 15 submissions in the South China Sea Arbitration.\(^7\) Submissions No. 11 and No. 12 (b) were related to the protection of the marine environment in two categories of conduct: fishing practices and construction activities. In Submission No. 11, the philippines claimed that china had violated its obligations to protect and preserve the marine environment under unclos at scarborough shoal, second thomas shoal, cuarteron reef, fiery cross reef, gaven reef, johnson reef, hughes reef and subi reef, by tolerating and actively supporting environmentally harmful fishing practices undertaken by chinese fishing vessels at these features.\(^8\) Submission No. 12(b) was related to the philippines’ claim that china’s construction activities on mischief reef, including constructing artificial islands, installations, and structures, violated china’s duties under unclos to protect and preserve the marine environment.

\(^7\) South China Sea Arbitration, supra note 2, at para. 112.
\(^8\) Ibid. The original philippines’ Submission No. 11 was related only to scarborough shoal and second thomas shoal, but the tribunal granted the philippines to amend its submissions upon its request because the proposed amendment to add six other reefs was “related to or incidental to the philippines’ original Submissions and did not involve the introduction of a new dispute between the parties” (paras 818–820).