

Appeal of the Negative Decision
on the Motion Submitted by
the Center for Environmental Legal Studies (NG/826) entitled
“Conservation in the South China Sea”

Submitted by the Center for Environmental Legal Studies (NG/826)

Appeal Submitted with the Support of:

International Council on Environmental Law
Environmental Law Institute
Ecological Center of the Philippines

Motion Co-sponsors:

Australian Rainforest Conservation Society (NG/1103)
Ecological Society of the Philippines (NG/621)
Environmental Law Institute (NG/839)
Green Line (NG/1375)
Coastal Area Resource Development and Management Association (NG/1326)
Sierra Club (IN/197)
Leipzig Zoo (NG/25348)
Frankfurt Zoo (NG/69)
Instituto de Conservacao e Desenvolvimento Sustentavel do Amazonas
(NG/25477)
Indus Earth Trust (NGO/24872)
Fundacion Biodiversidad (NG/25269)

7 September, 2016

World Conservation Congress
Honolulu, Hawaii

Table of Contents

- I. Rules of Decision
- II. Statement of Facts
 - A. The South China Sea is a highly productive fishery and contains extensive coral reef ecosystems
 - B. Final Holdings of the Permanent Court of Arbitration
- III. Grounds for this Motion under Rule 52 of the IUCN Statutes
- IV. Merits of the Motion calling for Conservation in the South China Sea
- V. Conclusion

I. Rules of Decision

This motion was submitted pursuant to Rule 52 of the IUCN’s Statutes and Provisions, allowing Members or the Council to present motions past the agreed-upon deadline, at the World Congress. The Resolutions Committee uses a specific criteria to determine whether or not it is appropriate to authorize distribution of a motion; the motion in question must be New and Urgent. The definitions of those terms are listed in the text of Rule 52:

A new motion may be submitted at the World Congress by a Member eligible to vote with the co-sponsorship of at least ten other Members eligible to vote if the Resolutions Committee determines that the *subject of the motions is new and urgent* according to the following criteria and on that basis authorizes their distribution to delegates:

- i. “New” means that the issue which is the subject of the motion has arisen or has been subject to developments occurring after the closing of the deadline for the submission of motions and, at that time, could not have been foreseen; and
- ii. “Urgent” means that the issue is of such importance that its consideration cannot wait until the next Congress before being presented in a motion.¹

In his statement relaying the decision of the Resolutions Committee to the plenary, Simon Stuart, Chair of the IUCN *Species Survival Commission*, indicated that the Committee conceded the urgency of the matter addressed in this motion, but expressed the Committee’s doubt concerning whether or not this matter was “new” within the meaning of Rule 52. We submit to the Steering Committee that **the recent opinion issued by an Arbitral Tribunal convened under the auspices of the Permanent Court of Arbitration (PCA) pertaining to the South China Sea contains new and concrete findings of fact on the status of the marine environment within the area of concern.** As a respected and influential proponent of the conservation of nature, the IUCN must act expediently to protect what can be protected, and prevent any further degradation.

In order to preserve decorum and diplomacy, and concentrate on the information that the IUCN would consider most important in the opinion, the sponsors elected to not include references to

¹ IUCN Rule 52.

the final conclusions of the court with respect to the conflict between the state parties. However, as it has become necessary to explain in greater detail, and considering the gravity of the threats to biodiversity in the area, we feel compelled now to cite to the new and highly specific findings of fact made during the arbitration proceedings of the Permanent Court of Arbitration.

II. Statement of Facts:

A. The South China Sea is a highly productive fishery and contains extensive coral reef ecosystems

To quote the assessment of the PCA concerning the South China Sea:

The South China Sea includes highly productive fisheries and extensive coral reef ecosystems, which are among the most biodiverse in the world.² The marine environment around Scarborough Shoal and the Spratly Islands has an *extremely high level of biodiversity* of species, including fishes, corals, echinoderms, mangroves, seagrasses, giant clams, and marine turtles, some of which are recognized as vulnerable or endangered.³

While coral reefs are amongst the most biodiverse and socioeconomically important ecosystems, they are also fragile and degrade under human pressures.⁴ Threats to coral reefs include overfishing, destructive fishing, pollution, human habitation, and construction.⁵

In the South China Sea, ocean currents and the life cycles of marine species create a high degree of connectivity between the different ecosystems.⁶ This means that the impact of **any environmental harm occurring at Scarborough Shoal and in the Spratly Islands may not be limited to the immediate area,**

² South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China), 2013-19 (PCA 2016), para. 823, available at <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf> [hereinafter *Arbitration Award*]; see also, First Carpenter Report, pp. 3-9; Second Carpenter Report, pp. 3, 26-27; J.W. McManus, *Offshore Coral Reef Damage, Overfishing and Paths to Peace in the South China Sea*, pp. 10-11 (rev. ed., 21 April 2016).

³ Arbitration Award at para. 823; see also S. Wells, International Union for Conservation of Nature and Natural Resources, "Tridacna gigas," *IUCN Red List of Threatened Species* (Annex 724); S. Wells, IUCN, "Tridacna maxima," *IUCN Red List of Threatened Species* (Annex 725); S. Wells, IUCN, "Tridacna squamosa," *IUCN Red List of Threatened Species* (Annex 726).

⁴ C. Mora, et. al, *Dredging in the Spratly Islands: Gaining Land but Losing Reefs*, 14 PLOS BIOLOGY 1, 1-2 (Mar. 31, 2016).

⁵ Arbitration Award at para. 824.

⁶ *Id.*

but can affect the health and viability of ecosystems elsewhere in the South China Sea.⁷

B. Final Holdings of the Permanent Court of Arbitration:

In making its final conclusions under UNCLOS, the PCA found with respect to the protection and preservation of the marine environment in the South China Sea that fishermen from Chinese flagged vessels have engaged in the harvesting of endangered species on a significant scale and 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*.⁸ As a result, the PCA held that China had breached its obligations under Articles 192 and 194(5) of UNCLOS.⁹

The PCA also found with respect to the protection and preservation of the marine environment in the South China Sea the practice of 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*, and that as a result China has breached its obligations under Articles 123, 192, 194(1), 194(5), 197, and 206 of UNCLOS.¹⁰

The PCA also found during the time the arbitration was ongoing a large artificial island had been constructed on Mischief Reef and found that land reclamation and construction of artificial islands, installations, and structures has caused *severe, irreparable harm to the coral reef ecosystem at Mischief Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, Hughes Reef, and Subi Reef* and has permanently destroyed evidence of the natural condition of Mischief Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, Hughes Reef, and Subi Reef.¹¹

III. Grounds for this Motion under Rule 52 of the IUCN Statutes

In the limited time we had to prepare this appeal, we consulted with members of the group that proposed the South Atlantic Marine Sanctuary motion, also pursuant to Rule 52. The group's motion was approved by the Motions Working Group/Resolutions Committee this morning. In the 4th Sitting, SSC Chair Simon Stuart stated briefly that the motion was accepted **based on new findings of fact**, and we have now clarified with the motion's sponsors that these findings of fact were issued by the Scientific Committee of the International Whaling Commission, which is now unequivocally advocating for the creation of that sanctuary.

We observe many similarities between the above situation and the situation leading to the creation of our motion. In both situations, new findings of fact presented by an internationally

⁷ *Id.* at para. 825.

⁸ Arbitration Award at para. 1203.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

respected and authoritative legal body came to light after the motions submission deadline. We submit to the Steering Committee that the similarities between the circumstances leading to the creation of the South Atlantic Marine Sanctuary motion as compared to our South China Sea Marine Peace Park motion further support our contention that **the subject of our motion is not only “urgent” within the definition of Rule 52, but also “new” within the definition of Rule 52.**

In January 2013, the Republic of the Philippines initiated an arbitration in the Permanent Court of Arbitration (PCA) against the People’s Republic of China pursuant to Part XV and Annex VII of the UN Convention on the Law of the Sea. The PCA convened an Arbitral Tribunal, which reviewed recent environmental degradation to the South China Sea coral reefs under UNCLOS. The four main issues of contention were related to marine entitlements and the ongoing development occurring in the area that were potential threats to biodiversity and the preservation of marine ecosystems.

The opinion of the Permanent Court of Arbitration (PCA) which prompted this motion was published July 12, 2016. The deadline for submitting online motions to the IUCN World Conservation Congress in Honolulu was Friday, February 12, 2016 at 12:00 p.m. GMT. As the PCA opinion was not published until five months after the deadline, **the drafters of this motion could not have anticipated the outcome of the arbitration, nor the extensive findings of fact made by the court regarding environmental damage to the coral reefs and illegal fishing taking place in the South China Sea. Failing to recognize this court’s findings weakens the ocean dispute settlement process which IUCN has spent decades establishing.**

To better evaluate the environmental damages, the PCA requested an independent environmental impact assessment of the activities occurring in the South China Sea. Pursuant to Article 24 of the Rules of Procedure, the Tribunal appointed Dr. Sebastian C.A. Ferse of the Leibniz Center for Tropical Marine Ecology in Bremen, Germany to conduct the environmental assessment. Dr. Ferse is a coral reef ecologist with over ten years of research experience in Southeast Asia, the Pacific Islands, East Africa, and the Red Sea. His ecological work has focused on coral reef restoration and ecological functioning and the impact of environmental and anthropogenic factors on coral reef benthic communities.¹²

Additionally, the Tribunal appointed Dr. Peter J. Mumby, a Professor of coral reef ecology at the School of Biological Sciences at the University of Queensland, Australia, and his colleague, Dr. Selina Ward each with over 20 years of experience. Professor Mumby has advised governments and UN agencies on coral reef and fisheries issues. His work focuses on tropical coastal ecosystems and he is involved in developing ecosystem models to investigate conservation measures in mitigating disturbance on reefs. Dr. Selina Ward is a coral biologist who has conducted research into the responses of corals to environmental stress including elevated nutrients, mechanical damage and elements of climate change.¹³

On 26 April 2016, Dr. Ferse, Professor Mumby, and Dr. Ward provided their “Assessment of the Potential Environmental Consequences of Construction Activities on Seven Reefs in the Spratly

¹² *Id.*

¹³ *Id.*

Islands in the South China Sea.” The report was based on an independent review of the factual record, scientific literature, and other publicly available documents, including from China.¹⁴

It is true that a similar motion was filed at the 2000 IUCN World Congress in Amman, Jordan entitled “Spratly Island Group Marine Sanctuary” (CGR2.PRG035). Owing to pressure from states parties and relying on stated commitments of those involved to continue negotiations and actively pursue the creation of a Marine Peace Park in the South China Sea, the motion was withdrawn.

16 years have passed since the World Congress in Amman and the situation has continued to deteriorate. The submission of the environmental impact assessment by Dr. Ferse, Professor Mumby, and Dr. Ward to the PCA (April 26, 2016) and the final arbitral award of the Permanent Court of Arbitration (July 12, 2016) both occurred following the February 12, 2016 deadline to submit motions online to this World Congress. **Both of these submissions represent new findings of fact which led to the drafting of this motion.**

IV. Merits of the Motion calling for Conservation in the South China Sea:

The UN Convention on the Law of Sea mandates protection of the oceans and encourages regional cooperation and scientific studies of the marine environment.¹⁵ Furthermore, the 1992 Declaration of Rio de Janeiro on Environment and Development declares that “peace, development and environmental protection are interdependent and indivisible” and that threats to the peace shall be peacefully resolved.¹⁶

Through this motion, we recognize the dynamic role of coral reefs in protecting terrestrial and coastal ecosystems, providing ecosystem services to coastal communities, and maintaining the ecological health of all oceans. Specifically, coral reefs in the South China Sea are among the most biodiverse marine environments in the world and continued damage will cause irreparable damage to the environmental health of the region, threatens the food security of millions, and may lead to biodiversity loss and ecological disaster.

Measures to achieve peace and measures to ensure conservation are not mutually exclusive.

Rather they are both indispensable to achieving the goal of IUCN to “create a just world that values and conserves nature.” IUCN’s mission “to influence, encourage and assist societies throughout the world to conserve the integrity and diversity of nature and to ensure that any use of natural resources is equitable and ecologically sustainable” is reflected in this motion and in the measures promoted through this motion towards achieving a Marine Peace Park in the South China Sea.

V. Conclusion:

¹⁴ *Id.*

¹⁵ United Nations Convention on the Law of the Sea art. 197, 200, Dec. 10, 1982, 1833 U.N.T.S. 397.

¹⁶ U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, princs. 24-26, U.N. Doc. A/CONF.151/26/Rev.1 (vol. 1), annex 1(Aug. 12, 1992)

We greatly appreciate the opportunity to appeal the decision of the Motions Working Group/Resolutions Committee in order to continue advocating for this motion, the content of which we consider to be integrally relevant to the work of the IUCN. We are hopeful that upon reading this submission, the Steering Committee will allow this motion to enter into the contact group process, in order to be further examined by the plenary. If the Committee has any further questions or reservations, representatives from the entities sponsoring this motion are ready and willing to provide further detail in person and at short notice if necessary.

Center for Environmental Legal Studies (NG/826)

Suzanne Englot, Head of Delegation
senglot@law.pace.edu

Joseph Moravec, Delegate
jmoravec@law.pace.edu