CASE COMMENT: THE LAW ON ENVIRONMENTAL IMPACT ASSESSMENTS IN THE SOUTH CHINA SEA ARBITRATION (THE REPUBLIC OF THE PHILIPPINES V THE PEOPLE'S REPUBLIC OF CHINA)

SAKINA ZULFIQAR ALI

Sakina is a fourth-year law student at the Lahore University of Management Sciences (LUMS). Her research interests involve international development and international law. She has previously interned at the National Commission on the Rights of the Child and has served as the youngest Secretary-General of the Model United Nations society at LUMS.

1. INTRODUCTION

The expansive claims of China over the sovereignty of the South China Sea have been a constant source of tension among competing interest-holders. The geostrategic location of and the abundance of natural resources in the South China Sea mark it as one of the most contentious areas in the world. In 2013, the Philippines instituted arbitration proceedings against China at the Permanent Court of Arbitration (PCA) under the United Nations Convention on the Law of the Sea, 1982 (UNCLOS). The Tribunal's Award addressed several issues within the law of the sea, ruling on the status of maritime features in the South China Sea, the source of maritime entitlements, and the illegality of certain actions of China in the South China Sea. The Award dedicates an entire section to China's obligations to protect and preserve the marine environment. This comment focuses on the Tribunal's findings on the obligation to conduct an environmental impact assessment (EIA) and communicate its findings under Articles 205 and 206 of UNCLOS.

An environmental impact assessment (EIA) is a procedure that examines and assesses the environmental impacts of planned activities before approval and proposes measures to reduce and continually monitor effects on the

environment.[1] The procedural duty of conducting an EIA is rooted in the substantive obligation to prevent environmental damage.[2] The principle of prevention obligates States 'to use all available means to avoid activities' undertaken in their territory or 'jurisdiction that cause significant damage to the environment of another State.'[3]

The duty to conduct an EIA has received customary status[4] and is also featured in treaties in several areas of environmental law, including biodiversity protection, climate change, and the usage of international watercourses. An example of one such treaty is the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) 1991, which mandates States Parties to incorporate the obligation to conduct an EIA in their domestic legislation for certain activities listed in Appendix I that may have a 'significant adverse transboundary impact.'[5]

While already regarded as part of customary international law, the renewed interest in EIAs is accredited to the momentous passing of the Agreement Under the United Nations Convention on the Law of The Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ Agreement) in 2023, and the debate surrounding the inclusion of EIAs in the Draft Exploitation Regulation of the International Seabed Authority's Draft Mining Code. The need for EIAs is particularly acute in the latter case since our understanding of the biodiversity and ecosystem of the deep sea-bed is incomplete.[6] Further, the rising demand for technology is propelling the extraction of metals such as

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[1] UNEP, Goals and Principles of Environmental Impact Assessment, UNEP Res. GC14/25, 14th Session.

[2] Declaration of the United Nations Conference on the Human Environment 1997 (Stockholm Declaration), Principle 21

[3] *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Order, Provisional Measures, [2006] ICJ Rep 113 [101]

[4] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, [2011] ITLOS Rep 10 [145]

[5] Convention on Environmental Impact Assessment in a Transboundary Context (adioted 25 February 1991, entry into force 10 September 1997) 1989 UNTS 309 ('Espoo Convention'), art 2(3).

[6] IUCN, 'Deep-sea mining' (*IUCN,* May 2022) <https://www.iucn.org/resources/issues-brief/deep-sea-mining> accessed 10 December 2023.

copper, zinc, lithium, etc., and other minerals from the ocean bed. threatening the survival of habitats and species.

Similarly, the BBNJ Agreement represents a significant step towards a more comprehensive legal framework on the rights and obligations of States to protect and preserve the marine environment in areas beyond national jurisdiction, which includes the high seas and the seabed/ocean floor outside national jurisdiction. In particular, Part IV of the BBNJ Agreement exclusively deals with EIAs and lays down the procedural requirements in impressive detail. However, unlike UNCLOS, the BBNJ's EIA obligations do not extend to areas within the national jurisdiction of States. Therefore, retrospectively analysing the South China Sea Award in light of the BBNJ Agreement offers insights into the extent to which the law on EIA in maritime areas has developed and areas where further progress is needed.

This case comment begins with an overview of the Philippine's main contentions against China regarding the obligation to conduct and EIA, and the Tribunal's ruling on the matter. Next, the Tribunal's decision is analysed against four key concerns regarding EIAs under UNCLOS: scope of the duty, threshold to trigger an obligation under Article 206, specific content of an EIA, and the duties to communicate and monitor. Generally, UNCLOS does not detail any procedural obligations associated with EIAs, like notification and consultation, that are mentioned in other legal instruments. It is within this context that the ruling of the Tribunal in the South China Sea Arbitration gains significance. Thus, the next part explores whether the Tribunal succeeded in filling the gaps left by the Convention.

2. OVERVIEW OF THE TRIBUNAL'S FINDINGS ON CHINA'S ALLEGED BREACH OF ARTICLE 206 OF UNCLOS

The South China Sea hosts a wide variety of fisheries and some of the world's most biodiverse coral reef ecosystems. Some species are vulnerable or endangered, and human activities threaten fragile coral reefs.[7] The vitality of ecosystems everywhere in the South China Sea was threatened by the

[7] *South China Sea Arbitration*, *Philippines v China*, Award, ICGJ 495 (PCA 2016) [824]

'environmental harm occurring at Scarborough Shoal and in the Spratly Islands due to connectivity between ecosystems.'[8]

According to the Philippines, China conducted activities that breached its obligations to protect and preserve the marine environment through Submissions No. 11 and 12(b). The allegations relate to two activities: harmful fishing and construction practices.[9] This comment focuses on the latter claim, particularly China's land reclamation and construction on seven reef features located in the Spratly Islands. China's land reclamation activities involved dredging, which extracted large amounts of sand, rock, and other materials from the seabed and deposited them onto shallow reefs, directly destroying the reef habitat and indirectly impacting several organisms.[10]

Along with others, the Philippines accused China of breaching Articles 123, 192, 194, 197, 205, and 206 of UNCLOS through such activities. In particular, the Philippines claimed that China was under an obligation to carry out an EIA under Article 206, assessing 'possible effects on the marine ecosystem of the South China Sea, the coral reefs at issue, the biodiversity and sustainability of living resources there and endangered species.'[11]

The obligation to conduct an EIA is incorporated under Article 206 of the United Convention on the Law of the Seas (UNCLOS), which reads as follows:

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.

[8] ibid [825].
[9] ibid [817].
[10] ibid [857].
[11] ibid [911].

Article 206 obliges States to assess the detrimental environmental consequences of proposed activities before their approval and to communicate the results of such an assessment. Article 205 requires States to either publish their EIA reports or 'provide such reports at appropriate intervals to the competent international organisations, which should make them available to all States.' While Article 206 doesn't explicitly mention the term 'environmental impact assessment' or 'environmental impact statement,' the requirements listed in Articles 205 and 206 match the basic requirements of an EIA, and the jurisprudence of ITLOS confirms this.

According to the Philippines, China's State Oceanic Administration (SOA) Report and SOA Assessment fell short of the requirements under Articles 205 and 206.[12] The Tribunal had to infer the Chinese position from official statements since China generally did nt participate in the proceedings and provided no statement on the Philippines' Submissions No. 11 and 12(b). The Tribunal could only identify the SOA Statement and the SOA Report as environmental studies conducted by China. It invited the Chinese government to submit a copy of the relevant EIA to the Tribunal, but China failed to do so.

When considering whether China had conducted and communicated environmental impact assessments of the relevant land reclamation and island-building activities, the Tribunal began by emphasising the customary nature of the obligation under Article 206. Ultimately, based on the considerations discussed below, the Tribunal found China to have breached its obligations under Article 206.

3. SCOPE OF ARTICLE 206

The scope of Article 206 extends to 'all planned activities under [a State's] jurisdiction or control.' The provision seems to have universal application, covering all maritime areas, including those within the national jurisdiction of a State and those beyond national jurisdiction. Accordingly, the nationality of

[12] ibid [911].

the person or enterprise responsible for the activity is rendered irrelevant[13] as long as it is within the jurisdiction or control of a State. However, the Convention does not define what constitutes 'control,' but the Sea-Bed Committee has previously asserted that control was related to activities rather than areas.[14] Further, while the extent of 'control' needed to trigger this provision remains unanswered, the drafting history indicates that a factual link, rather than a legal one, between the State and the concerned activities, needs to be satisfied.[15] This fact, coupled with the general language of 'all planned activities,' signifies that the State's obligation extends to not just the activities of the State but also those of private entities. Yet, the use of the word 'activities' suggests the exclusion of national policies and strategies.

3.1 Tribunal's Finding on Scope

At the outset, the Tribunal confirmed that the scope of Article 206 applies to all maritime areas, both inside and beyond the national jurisdiction of States. Furthermore, the sovereignty of any State over features in the South China Sea was deemed irrelevant to the Tribunal's finding on the Article and Part XII of the Convention at large. The Tribunal adhered strictly to the issue without elaborating or expanding on crucial legal terms, particularly the idea of 'control' within Article 206. This is a reasonable approach since the Tribunal noted that the artificial island-building program was 'part of an official Chinese policy implemented by organs of the Chinese State.'[16] Accordingly, the ambiguity of the term 'control' in Article 206 does not impinge on China's responsibilities in the present case, as there is an evident and clear-cut linkage of the activities with the Chinese State.

An opportunity was presented to address the matter of 'control' in the Tribunal's discussion of Articles 192 and 194. The Tribunal noted that the

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[13] Myron H. Nordquist, Shabtai Rosenne and Alexander Yankov, eds., T*he United Nations Convention on the Law of the Sea 1982: A Commentary*, Volume IV, Martinus Nijhoff Publishers, (1991): 109–124
[14] Boyle A, *United Nations Convention on the Law of the Sea: A Commentary*, Edited by Alexander Proelss (Nomos Verlagsgesellschaft 2017) 1376; Sea-Bed Committee, Note by the Chairman of Working Group 2 Addressed to the Chairman of Sub-Committee III, UN Doc. A/AC.138/SC.III/L.39 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-I), 85, 87 (Annex: WG.2 Working Paper No. 8/ADD.2, note 6).
[15] ibid.
[16] ibid [976].

Articles covered activities undertaken directly by States and their organs and those within their jurisdiction and control. Without any elaboration on 'control,' the Tribunal proceeded to assert the responsibility of a flag State for the activities of its fishing vessels with respect to the obligation to protect and preserve the marine environment. Thus, the exact extent and nature of 'control,' for instance, as elaborated for attribution of responsibility under the law of State responsibility,[17] that a State must exert to trigger the obligation under Article 206 remains unanswered with this Award.

4. THRESHOLD TO TRIGGER THE OBLIGATION UNDER ARTICLE 206

Article 206 lays down two conditions that must be met to meet the threshold necessary to initiate the obligation to conduct an EIA, namely that (i) reasonable grounds must exist to believe that (ii) the proposed activity may cause 'substantial pollution of or significant and harmful changes to the marine environment.' While no definition has been provided for the term 'reasonable,' the term seems to confer an element of discretion on State parties, which is confirmed by the phrase 'as far as practicable' within the same Article. In this regard, Article 206 seems to differ from other instruments, such as Article 14 of the Convention on Biological Diversity, 1992 and Article 2(3) of the Espoo Convention, which require 'likelihood of a significant harm'.

As for the second condition, UNCLOS provides no definitions for 'substantial pollution of or significant and harmful changes'. Some commentators have argued that the disjunctive structure of the provision provides two different thresholds, with 'substantial' being a higher standard than 'significant.'[18] This is supported by the commentary to Article 2 of the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, which states that 'significant' is a factual, rather than a legal, standard and is greater than 'detectable' but less than 'substantial' or

[17] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States),* Judgment on Jurisdiction and Admissibility, [1984] ICJ Rep 392; *Prosecutor v Tadić (Duško)*, Appeal Judgment, ICL 93 (ICTY 1999).
[18] Neil Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (Cambridge University Press 2008) 133.

'serious.'[19] On the other hand, some argue that the two criteria do not set different thresholds but address different threats to the marine environment.[20] Unfortunately, the preparatory documents do not provide any reason for using two different terms, especially since earlier proposed drafts by States only mentioned substantial pollution.[21]

4.1 Tribunal's Finding on Threshold

The Tribunal held that 'given the scale and impact of the island-building activities…, China could not reasonably have held any belief other than that the construction 'may cause significant and harmful changes to the marine environment.'"[22] Thus, China's obligation to conduct an EIA - as far as practicable - and communicate the results had been triggered.

Generally, as previously discussed, the term 'reasonable' confers some level of discretion upon States in deciding and conducting an EIA. The EIA obligation only becomes mandatory when such reasonable grounds are believed to exist. The Tribunal also confirmed the element of discretion,[23] suggesting a subjective test in determining whether the activities have caused significant and harmful changes. China's position forwarded that the construction activities would not damage the marine environment and ecosystem in the South China Sea and that a high standard of environmental protection was followed.[24] Since the Article does not provide for what needs to be done to establish that reasonable grounds do not exist, such as a screening process, a strict reading of the law would lead to the conclusion that China was not obligated to conduct an EIA.

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[19] International Law Commission 'Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries' (2001) 2(2) Yearbook of the International Law Commission 152.
[20] Nordquist, Rosenne and Yankov (n 13) 1375.
[21] ibid; Sea-Bed Committee, Note by the Chairman of Working Group 2 Addressed to the Chairman of Sub-Committee III, UN Doc. A/AC.138/SC.III/L.52 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-I), 89, 92 (Annex: WG.2 Working Paper No. 13); Third Committee UNCLOS III, Results of Consideration of Proposals and Amendments Relating to the Preservation of the Marine Environment, UN Doc. A/CONF.62/C.3/L.15/ADD.1 (1975), OR III, 200 (Art. IX). 22 UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/PART III (1975).
[22] *South China Sea Arbitration*, Award (n 7) [988].
[23] ibid [948].
[24] ibid [981].

However, this is different from the Tribunal's conclusion. While the Tribunal should be commended for holding China to a strict standard in protecting the marine environment, its reasoning in reaching such a conclusion requires further attention. Despite asserting the discretionary nature of Article 206 indicated by the term 'reasonable,' at other points in the Award, the Tribunal's reasoning gave the impression that the threshold test is objective. The Tribunal relied on the findings of independent experts appointed by the Tribunal, under Article 24(1) of the Arbitral Tribunal's Rules of Procedure, to conclude that China's activities had an unequivocal and unprecedented impact on the reefs in the region.[25] Accordingly, China was obligated to conduct an EIA since there were reasonable grounds to believe that significant harm was being caused.

China's assessment of the nature and impacts of the construction activities did not align with the conclusions reached by the reports that the Tribunal relied on.[26] However, the Tribunal did not emphasise national considerations when determining whether the obligation to conduct an EIA had been activated. Instead, the threshold was objectively discerned through reliance on 'impartial and independent' scientific evidence of appointed experts. The Tribunal exhaustively listed all the impacts of Chinese activities on the marine environment, providing some indication of what sort of impact would meet the threshold. However, its failure to elaborate on 'significant' and 'reasonable' and its reliance on independent experts left the law less clear than before. Overall, the Tribunal's reliance on experts, especially in light of China's failure to submit a copy of an EIA despite public officials' statements of having conducted so, is a reasonable approach that ensures that environmental protection is prioritised above all procedural technicalities. However, the law of the sea would have significantly benefited from more transparent and more coherent legal reasoning, rather than factual assertions, regarding the requirements needed to trigger an obligation to conduct an EIA.

[25] ibid [84], [978].
[26] ibid [982].

5. CONTENT OF AN EIA

The stringency of the obligation under Article 206 is further weakened by the absence of assessment criteria necessary to fulfil the obligation. The term 'as far as practicable' confers further discretion upon State parties. However, the term's placement within the Article hints that it relates to the specific content of the EIA rather than the decision to conduct one.[27] This points to the international environmental legal principle of common but differentiated responsibilities (CBDR) which recognises the varying responsibility of States for common problems based on their contribution and capability to address the issue at hand. Such a development-oriented theme demonstrates the historical context of UNCLOS, adopted following the recognition of the CBDR principle in the Stockholm Declaration on the Human Environment, 1972. Consequently, 'as far as practicable' enabled States to adopt EIA standards in accordance with their national laws and capacity.

5.1 Tribunal's Finding on Content

The Tribunal could not 'make a definitive finding' that China had failed to prepare an EIA since Chinese officials and scientists have repeatedly asserted that such an assessment had been undertaken.[28] However, the Tribunal did review the SOA report and SOA Statement against China's own legislative standards and concluded that 'both fall short of these criteria and are far less comprehensive than EIAs reviewed by other international courts and tribunals'[29] The Tribunal seems to have introduced a new criterion of 'comprehensiveness,' along with compliance to domestic standards, for an assessment to qualify as an EIA. Such an approach raises two concerns. Firstly, past case law, as seen in the *Pulp Mills* case, has held that each State is to determine the specific content of an EIA in its domestic legislation. At the same time, it is not an irrefutable position and has been challenged. For instance, Judge *ad hoc* Dugard asserted that 'certain matters inherent in the

[27] Craik (n 18) 99.
[28] But the Tribunal also noted that such a finding is irrelevant to discern whether China breached the obligation under Article 206. *South China Sea Arbitration*, Award (n 7) [991].
[29] ibid [990].

nature of an environmental impact assessment that must be considered if it is to qualify as an environmental impact assessment.'[30] In the present case, the Tribunal neither strictly complied with the *Pulp Mills* approach nor elaborated on what a 'comprehensive' EIA would entail, leaving a grey area in the law.

However, the Tribunal attached a link in the footnote for the Final Environmental Impact Statement for the proposed Abbot Point Growth Gateway Project, possibly as an example of what a 'comprehensive' EIA is. Among other things, the Abbot Point Growth Gateway Project incorporated a stakeholder consultation process, raising the question of whether it is a requirement within the ambit of UNCLOS. The Convention does not explicitly require States to consult affected parties. However, the Tribunal has previously required States to enter into consultations to assess, among other things, the effects or risks of land reclamation activities, as seen in the *Land Reclamation* case[31], and to exchange information on possible consequences to the marine environment in the *MOX Plant* case.[32] The Tribunal's language in both cases suggests that the duty to consult is integral to an EIA. However, neither of the cases specified whether the duty to consult arose from Article 206. The criterion of 'comprehensive' was an excellent opportunity for the Tribunal to rule on whether Article 206 incorporates the duty to consult. Yet, it did not do so.

6. DUTIES TO COMMUNICATE AND MONITOR

Despite being silent on the specific content of an EIA, two distinct duties of communication and monitoring still exist within UNCLOS. Firstly, Article 206 requires States to communicate the results of an EIA by publishing it or sending it to a competent international organisation that will disseminate it amongst States. While the word 'shall' indicates that the duty to communicate is strict, the strength of the duty is enervated by the absence of any mention

[30] *Separate opinion of Judge ad hoc Dugard, Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, Compensation owed by Nicaragua to Costa Rica, [2018] ICJ Rep 15 [161].
[31] *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore)*, Provisional measures, ICGJ 345 (ITLOS 2003)
[32] *MOX Plant Case (Ireland v United Kingdom*), Order, Request for Provisional Measures, ICGJ 343 (ITLOS 2001) 111

of the contents of the reports. Furthermore, no definition is provided for a 'competent international organisation.' Earlier negotiations favored the United Nations Environment Programme (UNEP), and the 1975 draft provided no opportunity for States to publish results themselves.[33] Other proposals only required communicating results to 'States likely to be affected' where an appropriate international organisation was not established.[34]

Secondly, under Article 204 (2), States must continue monitoring the effects of approved activities to determine whether they are likely to pollute the marine environment. The link between Article 204 and Article 206 is premised on the fact that the duty to conduct an EIA is a continuous one. In the *Gabčíkovo-Nagymaros* case, Judge Weeramantry reasoned that constant monitoring is required since it is impossible to anticipate every potential environmental risk prior to the approval of the project.[35]

6.1 Tribunal's Finding on Duties to Communicate and Monitor

The Tribunal held that 'the obligation to communicate reports of the results of the assessments is absolute,'[36] confirming the stringency of duty relayed by the term 'shall.' Such an approach is at variance with the case law of the ICJ that purports that the duty to communicate only arises when an EIA *confirms* a risk of significant [transboundary] harm.[37] Although no justification was provided for why the responsibility to communicate is absolute, a reference to Article 200 of UNCLOS would give a potential reason. Article 200 encourages States to exchange information that is acquired about pollution of the marine environment, regardless of where the pollution occurs. Thus, once the impact of pollution is recognised, States can take appropriate measures to protect and preserve the marine environment.

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[33] Nordquist, Rosenne and Yankov (n 13) 1375; UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/PART III (1975)
[34] Nordquist, Rosenne and Yankov (n 13) 1366.
[35] Separate Opinion of Vice-President Weeramantry, *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7.
[36] ibid 948.
[37] *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* Compensation owed by Nicaragua to Costa Rica, [2018] ICJ Rep 15 [161].

The Tribunal considered the duty to communicate very broadly without evaluating in sufficient detail whether either of the two methods set out in Article 205 had been met. The Chinese Ambassador's assertions at the 25th Meeting of States Parties that China's construction activities were following a high standard of environmental protection were deemed insufficient to meet the obligation in Article 205.[38] Article 205 required an EIA to be submitted in writing to the Meeting or any other international body.[39] While the Tribunal implicitly recognised that the Meeting of State Parties is an appropriate forum to submit EIA reports to, it did not elaborate on what would be included under 'any other international body.' Furthermore, the Tribunal did not consider the alternative option of China publishing the report independently. Given the chequered negotiating history of Article 205, the Tribunal missed an opportunity to clarify the methods and addressees of 'publishing.' The omission of any discussion on publishing could also lead to a conclusion that such an option is only available to China where no competent international organisation exists, as indicated by the negotiating history of the Convention. However, this is a stretch since it goes beyond the language of the Article.

Yet, neither was the Tribunal's reasoning on China's failure to submit a report to the Tribunal within the language of the Article. The Tribunal partly determined China's violation of Article 205 on China's failure to draw the tribunal's attention to an EIA when directly asked to do so. It is unclear why the Tribunal took such an approach since the Article does not mandate submitting an EIA to any dispute settlement body.

As for the duty to monitor, the Philippines never alleged China of breaching Article 204. However, the Tribunal explicitly acknowledged that monitoring the risks or effects of pollution on the marine environment under Article 204 is relevant to the Philippines' submissions.[40] Yet, the Tribunal never considered the duty to monitor, even under the specific section of the Award titled 'China's Construction Activities and the Obligation to Monitor and Assess.' No reason is provided for the lack of deliberation over China's duty to continue surveilling its activities.

[38] *South China Sea Arbitration*, Award (n 7) [991].
[39] ibid.
[40] ibid [947].

7. CONCLUDING REMARKS: THE BBNJ AGREEMENT AND THE WAY FORWARD

On 19 June 2023, the United Nations General Assembly adopted the BBNJ Agreement. The purpose of Part IV of the Agreement is to operationalise the provisions of UNCLOS on EIAs, but only for areas beyond national jurisdiction. The Agreement goes a long way in clarifying the exact content of an EIA, filling a gaping hole in the provisions of UNCLOS and its interpretation by ITLOS and PCA. The BBNJ Agreement sets a new threshold to determine whether an obligation to conduct an EIA exists by bifurcating it into a two-step process: screening and assessment. The initial screening process is triggered when an activity may have more than a minor or transitory effect or when the effects are unknown or poorly understood. Only when the screening process establishes that the activity may reasonably cause substantial pollution of or significant and harmful changes to the marine environment will the obligation to conduct an EIA arise.[41] Article 30 of the BBNJ Agreement impressively lists the exact content of the screening and the factors to be considered when deciding whether the planned activities meet the threshold necessary to initiate a screening process. As for the EIA itself, the BBNJ Agreement introduces the duty to publicly notify about the planned activity to ensure the participation of potentially affected States and stakeholders in the EIA process. The provision itself, along with the definitions and detailed procedural obligations provided within Article 32, provides much-needed clarity in the law of EIA in maritime areas. As previously explored, UNCLOS's lack of a notification and consultation requirement has inhibited ITLOS from explicitly linking the duty to consult with the EIA process with Article 206 of UNCLOS.

Despite the progress made in the EIA regime due to the BBNJ Agreement, two key issues still need to be answered. Firstly, the BBNJ Agreement naturally replicates the language of UNCLOS in requiring EIA for planned activities under the 'jurisdiction or control' of parties, even if the scope of the

[41] Agreement Under the United Nations Convention on the Law of The Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ Agreement) 2023, art 30.

BBNJ Agreement excludes areas within the national jurisdiction of States. Like UNCLOS, the BBNJ Agreement contains no definition of 'control.' However, Article 1(2) of the May 2019 Draft Text of the BBNJ Agreement defined '[a]ctivity under a State's jurisdiction or control' as an activity over which a State has effective control or exercises jurisdiction.[42] The definition was deleted in later drafts and the Agreement's final text. While it provides no clarification on 'control', it does limit the scope of control to 'effective control.' It is for international tribunals to clarify what constitutes 'effective control' in the law of the sea regime. Some support can be found in the submissions of States to the Preparatory Committee. For instance, Mexico seemed to consider licensing, funding, and sponsoring private entities within a State's control.[43]

Secondly, the BBNJ Agreement also mirrors the threshold of 'substantial pollution of or significant and harmful changes' in UNCLOS. And just like UNCLOS, the BBNJ Agreement does not offer any guidance on what would constitute 'significant' harm or 'substantial' pollution. Had the Tribunal in the South China Sea Award elaborated on these terms, the UNCLOS and BBNJ Agreement would benefit from such clarity.

In conclusion, the PCA's Award cemented the position of EIAs in the law of the sea. The ambiguous reasoning and low threshold for undertaking an EIA made it possible to legally hold China accountable for its breach of Article 206, fortifying the importance of protecting and preserving the environment. However, the unpredictable, vague, and occasionally contradictory reasoning leaves the law on EIA less clear.

[42] Intergovernmental Conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, Draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (A/CONF.232/2019/6), (17 May 2019).
[43] Mexico's Submission at the Third Session of Preparatory Committee for the Purpose of the Preparation of the Streamlined Version of the Chair's Non-Paper (A/RES/69/292), (24 April 2017).