BRILL
NIJHOFF

ASIA-PACIFIC JOURNAL OF OCEAN LAW AND POLICY
3 (2018) 5-30

brill.com/apoc

Assessing Environmental Impact and the Duty to Cooperate

Environmental Aspects of the Philippines v China *Award*

Zoe Scanlon
Centre for International Law, National University of Singapore, Singapore, Singapore
scanlon.zoe@gmail.com

Robert Beckman
Centre for International Law, National University of Singapore, Singapore, Singapore
cilbeckman@nus.edu.sg

Abstract

The *Philippines v China* Award contained a number of novel and highly progressive findings with respect to obligations for the protection of the marine environment under UNCLOS. Thus far, these elements of the decision have gone largely unexamined in the surrounding literature. This article concentrates on two specific aspects of these findings: the obligations in respect of environmental impact assessments in articles 205 and 206, and articles 197 and 123 and the duty to cooperate. It analyses the Award and identifies some concerns with the Tribunal's reasoning in these areas. Although broadly, the Award upholds effective protections for the marine environment; this article highlights aspects of the decision in which different approaches could have been taken that would have led to stronger outcomes for the marine environment.

Keywords

UNCLOS – law of the sea – ITLOS – South China Sea – environmental law – *Philippines v China* – duty to cooperate

 | DOI 10.1163/24519391-00301002

I Introduction

In a significant decision that addressed numerous questions of law of the sea and public international law more generally, the Arbitral Tribunal in the *Philippines v China* case handed down its Final Award on 12 July 2016. Substantial interest and commentary on the Tribunal's findings has ensued, particularly on the aspects relating to islands and maritime zone entitlements. There has, however, been comparatively little comment on the Tribunal's findings on the obligations in the United Nations Convention on the Law of the Sea (the Convention) on the protection and preservation of the marine environment. This is surprising in light of the fact that many of these findings were novel, significant and very progressive. Further, several of the Convention articles ruled on had not previously been considered by international courts or tribunals.

This article examines the international environmental law aspects of the *Philippines v China* decision. It focuses on two particular aspects of these findings: the obligations in respect of environmental impact assessments in article 205 and 206, and the duty to cooperate and the Tribunal's application of articles 197 and 123. It analyses the Award and highlights some concerns with aspects of the Tribunal's reasoning, including aspects of the decision that arguably could have taken a stronger approach to protections for the marine environment. Despite these concerns, it argues that the decision can broadly be seen as upholding effective protections for the marine environment.

II Summary of Findings on the Protection and Preservation of the Marine Environment

The Tribunal's findings on the protection of the marine environment were handed down in response to the Philippines' legal submissions 11 and 12.[1] In these two submissions, the Philippines alleged that China had engaged in activities that violated its obligations under the Convention to protect and preserve the marine environment.

In submission 11, the Philippines alleged:

> China has violated its obligations under the Convention to protect and preserve the marine environment at Scarborough Shoal, Second Thomas

1 *Philippines v China*, Award, PCA Case no 2013–19 (12 July 2016).

> Shoal, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef and Subi Reef.[2]

In submission 12, the Philippines alleged:

> China's occupation of and construction activities in Mischief Reef…(b) violate China's duties to protect and preserve the marine environment under the Convention.[3]

The Philippines argued that China had violated these obligations through two different activities: first, through harmful fishing practices, and second, through harmful construction activities on occupied features.[4] In respect of harmful fishing practices, the Philippines argued that China's 'toleration, encouragement of, and failure to prevent environmentally destructive fishing practices by nationals' violated the duty to protect and preserve the marine environment in articles 192 and 194.[5] The Philippines claimed that China had 'allowed its fishermen to harvest coral, giant clams, turtles, sharks and other threatened or endangered species which inhabit the reefs' and to 'use dynamite to kill fish and destroy coral, and to use cyanide to harvest the live fish.'[6] In respect of China's island building activities, the Philippines argued that large amounts of rocks and sand had been dredged from the seabed and deposited on shallow reefs, destroying those parts of the reef, impacting the ecological integrity of the South China Sea and in depriving the coral of sunlight, had impeded its ability to grow.[7] Through these activities, the Philippines alleged that China had violated articles 123, 192, 194, 197, 205 and 206 of the Convention.[8]

In addressing the allegations relating to fishing practices, the Tribunal first considered the content of articles 192 and 194 of the Convention. It stated that the language of 194(5) confirms that Part XII of the Convention is not limited to measures aimed strictly at marine pollution.[9] The Tribunal looked to wider

2 *Ibid*, at [815].

3 *Ibid*, at [816].

4 *Ibid*, at [817].

5 *Ibid*, Philippines' Memorial [6.66], [7.35]; *Ibid*, at [894].

6 *Ibid*, Merits hearing transcript (Day 3), 12; *Ibid*, at [894].

7 *Ibid*, at [901].

8 *Ibid*, at [906].

9 Relying on the *Chagos Arbitration*. The Annex VII Tribunal in the *Chagos Arbitration* found that 'article 194…is not limited to measures aimed strictly at controlling pollution and

international environmental law in approaching this obligation. In interpreting the term 'ecosystem' it noted the absence of a definition of that term in the Convention, however that 'internationally accepted' definitions do exist, such as that found in article 2 of Convention on Biological Diversity (CBD).[10] In considering the term 'endangered species' in article 194 it looked to the Appendices to the Convention on the International Trade in Endangered Species (CITES) to give content to that term.[11]

It held that the duty to prevent the harvest of endangered species follows from article 192, read against the background of other applicable law[12] and that the general obligation in article 192 is given particular shape by article 194(5) in the context of fragile ecosystems.[13] It found that article 192 imposes a due diligence obligation to take those measures 'necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered special and other forms of marine life.'[14] In this regard, the Tribunal concluded that a State must prevent the direct harvesting of species internationally recognised as being threatened with extinction. Further, it must prevent harms that would affect depleted, threatened or endangered species indirectly through destruction of their habitat.[15]

A *Poaching of Endangered Species by Chinese Fishing Vessels*

Having considered the content of the Convention provisions, the Tribunal turned to their application in the circumstances. It noted that the types of sea turtles found on board Chinese fishing vessels are listed in Appendix I to CITES[16] as a species threatened with extinction.[17] It noted that giant clams and

---

extends to measures focused primarily on conservation and the preservation of ecosystems' in *Chagos Marine Protected Area Arbitration* (*Mauritius v United Kingdom*), Award, UNCLOS Annex VII Tribunal (18 March 2015), [538]. This was argued in the Philippines in its oral submissions, see *Philippines v China, supra* note 1, Transcript, Day 3, at 25.

10 *Ibid*, at [945].

11 *Ibid*, at [959].

12 *Ibid*.

13 *Ibid*.

14 *Ibid*.

15 *Ibid*.

16 The CITES system operates by subjecting international trade in specimens to certain controls. Any import, export, re-export or introduction from the sea of species covered by the CITES Convention must be authorised through a licensing system. Species listed in Appendix I are species deemed to be threatened with extinction. Trade in specimens of species listed in Appendix I is only permitted in exceptional circumstances. There are approximately 900 species listed in Appendix I. See CITES website: https://www.cites.org.

17 *Philippines v China*, *supra* note 1 at [959].

certain corals found in the Spratly Islands are listed in Appendix II to CITES[18] and are 'unequivocally threatened' even if not subject to the stringent controls of Appendix I. It also found that these clams play a significant role in the overall growth and maintenance of the reef structure. The Tribunal reasoned that CITES is the subject of nearly universal adherence – including by both the Philippines and China and considered that it forms part of the 'general corpus of international law' that informs the content of articles 192 and 194(5) of the Convention.[19]

The Tribunal held that the harvesting of sea turtles, corals and giant clams, which are endangered species had occurred on a scale that had had a harmful impact on the fragile marine environment.[20] In its view, the failure to take measures to prevent such practices would constitute a breach of articles 192 and 194(5) of the Convention.[21] It found that China was aware that Chinese-flagged vessels were engaging in these activities[22] on a significant scale[23] in a manner that was severely destructive to the coral reef ecosystem[24] and that China had a duty to adopt rules and measures to prevent such acts and maintain a level of vigilance in enforcing those rules and measures.[25] The Tribunal found no evidence to indicate that China had taken any steps to enforce those rules and measures against fishermen engaged in the poaching of endangered species,[26] and was satisfied of the evidence indicating China must have known of, and deliberately tolerated and protected, the harmful acts.[27] In light of this, the Tribunal concluded that China had breached its obligations under articles 192 and 194(5) to take necessary measures to protect and preserve the marine environment with respect to the harvesting of endangered species from the

18 Species listed in Appendix II to CITES are not necessarily deemed to be threatened with extinction but may become so unless trade is closely controlled. A number of species are also listed in Appendix II that are 'look-alike species' – species that resemble a species listed for conservation reasons, or, species a specimen of which resembles a specimen of a species listed for conservation reasons (article II, paragraph 2 of the CITES Convention). There are approximately 26,400 species listed on Appendix II. Appendix II See CITES website: https://www.cites.org.

19 *Philippines v China*, *supra* note 1 at [956].

20 *Ibid*, at [960].

21 *Ibid*.

22 *Ibid*, at [963]–[964].

23 *Ibid*, at [1203] (B) (12)(a).

24 *Ibid*, at [1203] (B) (12)(b).

25 *Ibid*, at [964].

26 *Ibid*.

27 *Ibid*.

fragile ecosystems at Scarborough Shoal and Second Thomas Shoal.[28] It also found that China had breached its obligation to protect and preserve the marine environment through its toleration and protection of vessels flying its flag that had harvested giant clams across the Spratly Islands using the propeller chopping method.[29]

Among the most progressive and controversial of the Tribunal's findings on the marine environment were its findings that articles 192 and 194 of the Convention had been 'informed' by, and that their content was 'further detailed' by, other sources of international law.[30] These issues, however, are beyond the scope of this article.

B *The Impact of China's Island-Building Activities on the Marine Environment*

The Tribunal considered that the obligation to protect and preserve the marine environment would include a positive 'duty to prevent, or at least mitigate, significant harm to the environment when pursuing large-scale construction activities.'[31] It was satisfied that China's island building activities on the seven reefs it occupied in the Spratly Islands had caused devastating and long-lasting damage to the marine environment.[32] It considered that through its construction activities, China had breached its obligation under article 192 to protect and preserve the marine environment.[33] It also found that China had conducted dredging in such a way as to pollute the marine environment with sediment, in violation of article 194(1).[34] Finally, it held that China had violated its duty under article 194(5) to take measures necessary to protect and preserve rare or fragile ecosystems as well as the habitats of depleted, threatened or endangered species and other forms of marine life.[35]

---

28 *Ibid.*

29 *Ibid*, at [966].

30 Matter of an Arbitration (*Philippines v China*), Award on Jurisdiction and Admissibility, PCA Case no 2013–19, 29 October 2015 at [941]–[942].

31 *Philippines v China*, *supra* note 1 at [941]. Relying on Indus Waters Kishenganga Arbitration (*Pakistan v. India*), Partial Award, 18 February 2013, PCA Award Series (2014), [451]; quoting Arbitration Regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands, Award of 24 May 2005, PCA Award Series (2007), RIAA Vol. XXVII 35 at 66–67, [59].

32 *Philippines v China*, *supra* note 1 at [983].

33 *Ibid.*

34 *Ibid.*

35 *Ibid.*

In respect of the allegations regarding China's construction activities, the Tribunal found that China's land reclamation and construction of artificial islands, installations, and structures at the reefs it occupies had caused severe and irreparable harm to the coral reef ecosystem.[36] It held that China had not cooperated or coordinated with the other States bordering the South China Sea in respect of the protection and preservation of the marine environment in respect of these activities.[37] It further considered that China had 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.[38] In light of these findings, it declared that China had violated its obligations under articles 192, 194(1), 194(5), 206, 197 and 123 of the Convention.[39]

III Environmental Impact Assessments and the Obligation to Monitor and Assess: Articles 205 and 206

A significant aspect of the Tribunal's decision concerned the obligations in articles 204, 205 and 206 of the Convention. These articles comprise the 'Monitoring and Environmental Assessment' section of Part XII, and outline States' obligations around planned activities and the evaluation, monitoring and communication of risks to the marine environment from those activities. They can broadly and collectively be termed an obligation to monitor and assess.

More specifically, however, article 204 provides:

> 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.

36 *Ibid*, at [1203] (B) (13)(a).
37 *Ibid*, at [1203] (B) (13)(b).
38 *Ibid*, at [1203] (B) (13)(c).
39 *Ibid*, at [1203] (B) (13).

Article 205 provides that:

> States shall publish reports of the results [of such monitoring] or provide such reports at appropriate intervals to the competent international organizations, which should make them available to all States.

Article 206 requires that:

> 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 such assessments in the manner provided in article 205.

Here, the Tribunal was specifically faced with the question of whether China had prepared and communicated an assessment of the effects of its activities pursuant to article 206 in respect of its island building activities in the South China Sea.

A *The Tribunal's Findings on China's Monitoring and Assessment with Respect to its Construction Activities*

With respect to the allegations on monitoring and assessment, the Tribunal found that given the scale and impact of its 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.'[40] Accordingly, it considered that China was, by virtue of its obligations under the Convention, required 'as far as practicable,' first, to conduct and prepare an Environmental Impact Assessment (EIA), and second, to communicate reports of the results of those assessments.[41]

The Tribunal noted that it had not identified any report that would resemble an EIA prepared by China in respect of these activities that would meet the requirements of article 206.[42] However, as there was no EIA made available to the Tribunal, it was not able to 'make a definitive finding' that China had failed to prepare an EIA, particularly in light of Chinese officials' assertions that it

40 *Ibid*, at [988].

41 *Ibid.*

42 *Ibid*, at [989].

had done so.[43] This was despite the Tribunal's suggestion that although China was not participating in the arbitration, it had found ways to communicate statements through officials or others writing consistently with China's interests. Thus, the Tribunal reasoned, had China wished to draw attention to an EIA, it could have.[44] In turning to the second aspect of article 206 – the obligation to communicate an EIA – it found that 'the obligation to communicate is, by the terms of article 205, to "competent international organizations", which should make them available to all States.'[45] Although China's representatives had assured the States Parties to the Convention that its construction activities 'followed a high standard of environmental protection,' it had not provided any assessment in writing 'to that forum or any other international body,' as far as the Tribunal was aware.[46] Further the Tribunal noted that despite its own request for a copy of China's EIA, China had not provided an EIA to the Tribunal.[47] For these reasons, it found that China had failed in its duty under article 206 to communicate reports of the results of its assessments of the potential effects of its activities on the marine environment.[48]

B *The Threshold Triggering the Obligation to Undertake an Environmental Impact Assessment*

On the issue of whether China was obliged to prepare an EIA in these circumstances, the Tribunal's conclusions were relatively strong and appeared to follow the previous jurisprudence in this area. The language of article 206 provides that an assessment is only required where 'States have reasonable grounds' for believing their planned activities may cause harm. Although this kind of qualified language might been seen as providing significant latitude for States to deny that the obligation has been engaged, it has been said that the 'reasonableness' requirement contains an *objective* standard in determining the threshold for the requirement to undertake an EIA.[49] In finding that there was adequate evidence to suggest China should have had 'reasonable grounds' for believing its activities would cause 'substantial pollution of or significant and harmful changes to the marine environment,' the Tribunal appears to have

43 *Ibid*, at [991].

44 *Ibid*.

45 *Ibid*.

46 *Ibid*.

47 *Ibid*.

48 *Ibid*.

49 N. Craik, *The International Law of Environmental Impact Assessments: Process, Substance and Integration* (Cambridge University Press, Cambridge, 2008), at 98.

applied an objective standard. That it did so was positive and upholds important protections for the marine environment. This was undoubtedly appropriate given the scale of China's activities and the risk of environmental harm to neighbouring States, particularly the Philippines.

C *The Required Content of an EIA*

Another aspect on which article 206 is ambiguous relates to the content required in any EIA. Where the threshold of likely harm is satisfied, States are required to undertake an EIA, but only 'as far as practicable.' This is not a threshold question and, as such, does not relieve a State from undertaking an EIA. Rather, it impacts on the detail and depth in which the EIA must be prepared.[50] Understandably, without any EIA to evaluate, the Tribunal was not in a position to make a finding as to whether the content or standard required in an EIA by article 206 in these circumstances had been satisfied. Neither did it provide any guidance on this point.[51] Nonetheless it assessed China's domestic legislative standards for EIA preparation[52] and found that the statement and report by the State Oceanic Administration of China that it had located fell short of these standards.[53] However, the Tribunal did not elaborate on what would be required in an EIA in these circumstances.

D *The Duty to Communicate an EIA*

The Tribunal also considered the second element of article 206 – the obligation to communicate reports of the results of such assessments. Article 206 provides that this can be done through one of the mechanisms provided for in article 205 – that is, by providing the assessment to a competent international organisation, or by publishing it. Yet the Tribunal did not appear to apply the specific language of article 205. It found, broadly, a failure on China's part to 'communicate' any assessment and concluded that China had violated article 206 on this basis. However it did not analyse in any detail whether either of the

50 Seabed Dispute Chamber Advisory Opinion, [145] p 50; Craik, *supra* note 49, 99. The *travaux prepapratoires* on this element of article 206 do not elaborate on its purpose, however it seems likely that this flexibility would be to account for capacity limitations on developing States.

51 There are different views on what content is required. For instance, in *MOX Plant*, Ireland argued that the specific conditions of the requisite EIA in that case were determined with reference to the requirements in the European Community Law (Directive 85/337), the 1987 UNEP guidelines and the 1991 *Espoo Convention*. Ireland's Memorial, at 115, [7.12].

52 *Philippines v China*, *supra* note 1, at [990].

53 *Ibid*. The Tribunal did not expand on its reasons for this finding.

two article 205 'communication' methods referred to in 206 had been satisfied on the facts.

First, it undertook an assessment of the second option (provision of the assessment to an international organisation). There is significant ambiguity around which organisations might constitute relevant organisations for the purposes of article 206. Some have argued that the most likely candidates are regional seas commissions[54] yet this can certainly not be presumed. An early negotiation draft referred to 'the international organisation (United Nations agency) concerned.'[55] Another would have required the assessment to be provided to the United Nations Environment Program.[56] However there was reluctance at that stage to limit reporting to one particular organisation[57] since this might exclude a relevant regional body.[58] Others, however, saw this as a global issue[59] and in later negotiation rounds the suggestion to not specifically name any organisation was accepted.[60] It can be concluded from this negotiating history that whether and which international or regional organisations exist to whom an EIA could be provided, will depend on the circumstances of any particular case.

The Tribunal stated simply that an assessment had not been provided to any international organisation that it was aware of. Although this may be the case, this analysis fails to consider who such a 'competent international organisation' might be, with which organisations the Tribunal inquired, or whether a relevant organisation exists in these circumstances at all. The Philippines noted the absence of a regional seas agreement in the South China Sea[61] but did not argue that China had violated the obligation to communicate an EIA in article 206, or express a view as to which (if any) organisation any EIA should have been provided.[62] It may be arguable that the article 205/206 obligation is

54 Craik, *supra* note 49, at 145.

55 M. Nordquist, S. Nandan and J. Kraska, *United Nations Convention on the Law of the Sea: A Commentary* (Brill, 2012) at [206.2].

56 Nordquist, *et al*, *supra* note 55, at [205.2]–[205.3].

57 Further, at that stage UNEP had only recently been established. *Ibid*, at [205.2–205.3].

58 *Ibid*, [205.3].

59 *Ibid*, [205.3].

60 *Ibid*, [205.4].

61 Although it does so in another context – in respect of the duty to cooperate under articles 123 and 197.

62 Although in its oral submissions, the Philippines did emphasise, in another context (duty to cooperate) the UNEP Regional Seas Programme for East Asia, which includes the South China Sea. See UNEP, 'Regional Seas Programme: East Asian Seas' at http://www.unep.org/regionalseas/programmes/unpro/eastasian/default.asp#.

conditional on the *existence* of a relevant competent international organisation in any scenario (as absent such an organisation it would be impossible for States to provide such reports to such an organisation). However, it appears that the best reading of this provision, given the inclusion of the term 'or' in article 205, would be that where there is no such organisation, there is an obligation to 'publish' the report instead. These questions, however, were not considered by the Tribunal.

The second aspect of articles 205 and 206 would allow a State to communicate its EIA by 'publishing' it. This was not considered by the Tribunal at all. One might wonder whether the term requires States to publish the assessment on the internet, or in a newspaper or scientific publication for all to read, for instance, or if it would be satisfied by providing the assessment only to potentially affected States – particularly in light of the fact that the term publish would usually carry with it the implication of a public announcement.[63] In early drafts of article 205, the term 'disseminate' was included.[64] This seems to imply something closer to requiring the direct provision of an assessment to certain actors, rather than general publication. Early drafts also would have required that such assessments would be provided to other States whose interests may be affected.[65] While some commentators have argued that the obligation to notify potentially affected States can be implied by the term 'publish' in article 205,[66] others note this express absence is one of the most puzzling aspects of these articles.[67] Indeed, such a reading does not seem to sit well with the plain meaning of the language in article 205, and the *travaux* appear to suggest that articles 205 and 206 do not include an obligation to notify other States. This is intriguing as to publish an assessment is arguably far more onerous an obligation than to notify affected States. Notification might mean sharing the assessment with a single or a small group of affected States, potentially even on

63 Merriam-Webster dictionary at https://merriam-webster.com.

64 Nordquist, *et al*, *supra* note 55, [205.1]. Indeed, the term disseminate is now used in numerous regional seas conventions.

65 *Ibid*, [206.2], [205.1]. This draft also included a requirement to consult with affected States prior to any alteration of the environment – a requirement that was removed in later drafts, see *Ibid*, [206.3].

66 Craik, *supra* note 49, at 146.

67 *Ibid*, at 145. In the UK's submissions in the *MOX Plant* case, this is also argued – that is, that articles 205 and 206 do not require the results of an assessment to be communicated to a potentially affected State as would be expected in relation to potential transboundary harm. See UK counter-memorial at [5.18].

an in-confidence basis. Publication, on the other hand, would seem to imply access to all, including environmental NGOs and unaffected States who might nonetheless decide to respond with views on the quality, accuracy and rigour of the assessment. If this is indeed the meaning, a State meeting its article 205/206 obligations would potentially be open to significant criticism.

Instead, the Tribunal took an unpredictable approach, not based on the language of the Convention. It was in part on the basis that the Tribunal itself had requested a copy of the EIA and China had not provided one that it reached its finding that China had violated its obligation to communicate an EIA under article 206. It is not clear why this was a factor that influenced the Tribunal in its decision since there is no requirement in articles 205 and 206 to provide such an assessment to any international dispute settlement body or other category of international actor into which the Tribunal might fall. It also noted China's assurances that high standards of environmental protection had been adhered to but that it did not deliver an assessment to the conference of States Parties to support these claims. This is a questionable evaluation of China's compliance with this aspect of articles 205 and 206 – which arguably ought to have assessed whether or not China had published an EIA.

E *Conclusions on the Tribunal's Findings on Articles 205 and 206*

Although there are questionable aspects of the Tribunal's application of article 205 and 206, the overall outcome on this aspect of the decision is nonetheless appropriate. The fact that the Tribunal found a violation of article 206 is unlikely to prove controversial given that no EIA was identified. Rather, it was the Tribunal's methodology and reasoning in reaching that conclusion that was problematic. In the end the Tribunal was not satisfied that an EIA had been communicated in a very general sense – without a detailed consideration of the two aspects of article 205, and accounting for some unusual factors.

Thus, despite somewhat unconvincing reasoning, it appears that in terms of environmental outcomes, the Tribunal's findings on articles 205 and 206 will have a beneficial impact for the marine environment. That the threshold to trigger the EIA requirement was found to have been reached in light of the gravity of China's activities was appropriate. Further, and despite somewhat unconvincing reasoning, the willingness not to adopt too high a standard and find that an EIA had not been communicated appears appropriate. The importance of this is underscored as these articles play an imperative role in the international environmental legal framework established by the Convention. The *travaux preparatoires* to article 206 indicate that the inclusion of an obligation to undertake an EIA was considered from an early point in negotiations

and was never met with any serious opposition,[68] and that 'its purpose is to ensure that [planned activities] may be effectively controlled, and to keep other States informed of the potential risks and effects of such activities.'[69] Indeed, it is now very common for international treaties both at the global and regional level to include a requirement to conduct an EIA[70] and sometimes even rules and procedures to guide this process. However, there is now also considerable support for the view that a customary rule to perform some kind of environmental assessment exists in certain circumstances as well.[71] In this regard, as the threshold, content and communication requirements around EIAs are addressed in future jurisprudence, it is positive that this Award includes robust findings on these elements. This decision will likely go towards reinforcing the importance of EIAs in international law in the context of planned activities that may cause transboundary harm.

IV The Duty to Cooperate: Articles 197 and 123

An additional aspect of the Award relating to the protection of the marine environment was the Tribunal's findings on articles 197 and 123 of the Convention.

68 Nordquist, *et al*, *supra* note 55, [206.2].

69 *Ibid*, [206.1], 122.

70 See for example, the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), the Protocol to the Antarctic Treaty on Environmental Protection, the Convention on Biological Diversity and the ASEAN Agreement on the Conservation of Nature and Natural Resources. Although it has been acknowledged that many of the EIA obligations in environmental treaties vary in the strength of the requirement and that they do not include detailed rules setting out specific steps and requirements that these obligations entail. See further, Craik, *supra* note 49, at 89.

71 Craik, *supra* note 29, at 90. For example, see the separate opinion of Judge Weeramantry in *Case Concerning the Gabcikovo-Nagymaros Project*, 1997, ICJ Reports, 7 at 111. See also article 7 of the ILC Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities (2001) which provides 'Any decision in respect of the authorization of an activity within the scope of the present articles shall, in particular, be based on an assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment.' Vol 3(1), Annex 73. *Pulp Mills* was the first case in which an international court held that an EIA is obligatory in cases of significant transboundary harm, despite the absence of any reference in the relevant treaty between the parties to produce an EIA [204].

Article 197 provides:

> States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.

Article 123 provides:

> States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organization:
>
> (a) To coordinate the management, conservation, exploration and exploitation of the living resources of the sea;
>
> (b) To coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;
>
> (c) To coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;
>
> (d) To invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article.

In its consideration of these articles, the Tribunal highlighted the emphasis in earlier ITLOS findings that the duty to cooperate is a fundamental principle of international law.[72] The Tribunal noted an absence of convincing evidence that China had attempted to cooperate or coordinate with other States bordering the South China Sea[73] and concluded that through its island building activities, China had violated articles 123 and 197.

72 *Philippines v China*, *supra* note 1, at [946], [984]–[985].

73 *Ibid*, at [986].

A *Analysis of the Tribunal's Findings on the Duty to Cooperate*

This aspect of the Tribunal's judgment is disjointed and not clearly reasoned, and in many ways, difficult to reconcile with the language of articles 123 and 197. Additionally, the brevity of the reasoning make it difficult to follow. Beyond the single line noting the absence of evidence of coordination, the Tribunal provides no detailed explanation as to *how* China's lack of cooperation constituted a breach of articles 197 and 123.

The Philippines' submissions on these articles are perhaps instructive on how the Tribunal reached its findings. The Philippines' written submissions do not argue that China violated articles 123 or 197 of the Convention.[74] It first argued a violation of articles 123 and 197 when pressed on these questions by the Tribunal during oral hearings.[75] The Philippines argued that certain obligations implicit in article 197 are spelled out in article 123.[76] It referred to early decisions on the duty to cooperate,[77] which, it argued, indicated that the duty to cooperate is a 'fundamental principle in the prevention of pollution of the marine environment under Part XII of [the Convention] and general international law.' It noted that in those cases, the parties were ordered to 'cooperate, consult, exchange information and monitor and assess the risks and effects of their activities.'[78] The Philippines then argued that there was little evidence China had attempted to cooperate[79] and noted the existence of particular regional organisations – the FAO Asia-Pacific Fisheries Commission[80] (which has not adopted any conservation measures)[81] and the UNEP Regional Seas Program for East Asia, arguing that China's activities did not resemble the environmental priorities set out on the Regional Seas Programme website.[82] The

74 In fact there is no reference to article 123 in the Philippines written submissions at all. The sole reference to article 197 serves only to suggest that complementary environmental treaties were contemplated in UNCLOS, with reference to the Philippines' arguments on article 192 of UNCLOS, and the Convention for Biological Diversity.

75 *Philippines v China,* Transcript on the Merits, Day 3, 26 November 2015, at 40; Transcript on the merits, Day 4, 30 November 2015, at 186–187.

76 *Philippines v China,* Transcript on the Merits, Day 3, 26 November 2015, at 40.

77 I.e. *MOX Plant*, *Land Reclamation*, the *ITLOS Fisheries Advisory Opinion.*

78 *Philippines v China, supra* note 76, at 40.

79 *Ibid*, at 42.

80 The FAO Asia-Pacific Fisheries Commission was established in 1948 and is a Part XIV FAO body. Agreement for the Establishment of the Asia-Pacific Fishery Commission (as amended October 1996), entered into force June 1997.

81 *Philippines v China,* Hearing on the Merits, Annex LA-321.

82 *Philippines v China, supra* note 76, at 43. Although the Philippines also acknowledges that within the contested parts of the South China Sea there are no Marine Protected Areas,

Philippines argued that China had done nothing to give effect to its obligation to cooperate in the protection of the marine environment, but rather, had been aggressive and sought to exclude others. It argued that China had thereby violated its obligation to cooperate under articles 123 and 197.[83]

B *The Appropriate Application of Articles 197 and 123*

Arguably, the Tribunal should have taken a different approach to this question. It should have applied the facts of this case with much greater analysis of the specific language of article 197 and 123 and, in case of any doubt as to the meaning of those articles, with a *Vienna Convention on the Law of Treaties* treaty interpretation, rather than reading a general notion of cooperation into the (very specialised) language of articles 197 and 123. The language of these articles makes clear that they have specific applications and cannot be equated to a general obligation to cooperate, which could be violated – as was found to be the case here – by a lack of evidence of 'attempting to cooperate and coordinate' with neighbouring States.

(1) Article 197

In the case of article 197, the language, which requires States to cooperate 'in formulating and elaborating international rules, standards and recommended practice and procedures' arguably makes this clear. Although China may not have met requirements to consult with and inform other States in the South China Sea that would be affected by its island building activities, the actual breach found by the Tribunal was that China had failed to cooperate *in formulating and elaborating international rules, standards and recommended practices and procedures consistent with* [*the Convention*]. While China's behaviour in respect of its island building activities may have been objectionable and with disregard for its neighbours, to characterise these actions as a breach of a specific obligation to formulate cooperative standards is not logical. It also raises the question of whether the Philippines and the other States surrounding the South China Sea, or even the broader region, ought also to have been found to have violated article 197 as well, in light of the absence of negotiated global or regional rules on these matters.

The *travaux preparatoires* of the Convention are also instructive in the appropriate application of article 197 pursuant to article 32 of the *Vienna Convention on the Law of Treaties*. The *travaux* describe this part of the Convention

areas designated as vulnerable marine ecosystems or any serious restraints on illegal fishing at 43–44.

83 *Philippines v China, supra* note 76, at 44–45.

as formulating 'basic obligations' of States to cooperate in the protection and preservation of the marine environment. It notes that these articles are expressed as legal obligations but do not 'otherwise affect the freedom of action of individual States in the application of the provisions of the section.'[84] Article 197 is described as dealing specifically with a duty to cooperate 'in developing international rules, standards and recommended practices and procedures' for the protection of the marine environment.[85] Proposals for the article were based on draft articles, most of which referred to the need for international cooperation in standard setting.[86]

The negotiating history appears to support a plain reading of this article. That is, that the intent of the article was to set out a requirement for many States to cooperate in respect of global or regional *standard setting* for protections for the marine environment, a collective obligation to work together to decide on rules and standards to that end. This has arguably been carried out fairly consistently since the negotiation of the Convention, through the numerous ocean-related and environmental organisations that have been established and that adopt various legal instruments, such as the International Maritime Organisation, OSPAR, the International Atomic Energy Agency, and regional fisheries management organisations, for example.

(2) Article 123

A similar scenario exists in respect of article 123 of the Convention. First, article 123 requires only that States 'should endeavour.' This language is clearly qualified and hortatory.[87] In *MOX Plant*, Judge Anderson stated that 'article 123 was cast in weak terms in order to safeguard the world-wide application of the

84 Nordquist, *et al*, *supra* note 55, at 78.

85 *Ibid*, at 79.

86 *Ibid*. The main points of contention on this article in negotiations did not concern the content of the duty to cooperate but rather, whether to include some allowance for economic factors or other ways to improve the position of developing countries on these matters, at 80–81.

87 For example, this was argued by the UK in *MOX Plant Case*. UK Counter-Memorial, Page 3, [1.9]. In that case, however, Ireland argued that article 123 expressly imposes certain immediate obligations, see *MOX Plant Case*, Ireland's memorial, 143. Whether article 123 of UNCLOS created binding obligations on States was queried by several commentators at an experts roundtable meeting in British Institute of International and Comparative Law, *Report on the Obligations of States under Article 74(3) and 83(3) of UNCLOS in Respect of Undelimited Maritime Areas* (2016), available at https://www.biicl.org, Annex II, summary report of experts roundtable, at [34].

Convention's provisions and its unified character.[88] To that end, States 'shall endeavour' either directly or through regional organisations to coordinate the conservation, management and use of resources, scientific research and coordinate the implementation of duties with respect to the marine environment. Arguably, this article places on States a common obligation to work together. Again, if the actions of China that constituted the breach of article 123 were its island building activities, it is difficult to see how those actions would constitute a breach of a requirement to endeavour to coordinate the management of resources, coordinate scientific research, or invite other States to coordinate.[89] It may be that the Tribunal considered these activities a breach of article 123(b), as they did not constitute a coordination of the implementation of duties regarding the protection of the marine environment. However, this still appears illogical. While China's island building activities may certainly have *harmed* or *damaged* the marine environment, it is difficult to see how they offend a requirement to coordinate with others on the implementation of a duty to protect the environment, especially when the articles seems to anticipate that this will be done through a regional organisation.

The *travaux* appear to support this idea. The development of article 123 arose from early proposals that envisaged cooperation between States in enclosed and semi-enclosed seas in determining the breadth of the territorial sea.[90] These proposals then began to refer to coordinating States' activities in such areas,[91] eventually explicitly setting out the main areas for cooperation.[92] While early proposals contained the word 'shall,' after 'dissatisfaction' with the provisions, this was converted into an exhortation (*should* cooperate and shall *endeavour*), in order to make the coordination of activities in such seas 'less mandatory.'[93] Later proposals to remove the word 'endeavour' were rejected.[94] On at least two occasions, suggestions to replace 'should' with 'shall' were rejected.[95] This indicates the clear intention of States Parties that,

88 *MOX Plant Case* (Provisional Measures), ITLOS No 10 (2001), Judge Anderson separate opinion, 6.

89 I.e. subsections (a)(c) or (d) of article 123.

90 Nordquist, *et al*, *supra* note 55, at 357.

91 *Ibid*, at 358.

92 *Ibid*, at 360.

93 *Ibid*, at 362. In introducing the revised text, the Chairperson of the Second Committee stated 'I have responded to the expressions of dissatisfaction with the provisions…by making less mandatory the coordination of activities in such seas.'

94 *Ibid*, at 362.

95 *Ibid*, at 364 (Korean proposal), 363 (Iranian Proposal).

unqualified binding obligations be avoided. The *travaux* also confirm that the language of the final text is not consistent with a mandatory obligation.[96] They stress that article 123 'emphasised the need and desirability of cooperation between States bordering an enclosed or semi-enclosed sea'[97] and note that States 'should endeavour' and 'are directed' to work together or through organisations.[98] They suggest that article 123 'encourages' these States 'to initiate attempts to coordinate,'[99] and 'recognises the need for cooperation and coordination of activities.'[100] The *travaux* emphasise that the article is 'couched in the language of exhortation.'[101]

Other States have also envisaged that this is what is anticipated by article 123. For example, in the *MOX Plant* case, the UK argued that in the Irish Sea, the requirements of article 123 were discharged through various instruments including: the London Convention, the OSPAR Convention, the Proposal for a Directive on the Management of Spent Nuclear Fuel and Radioactive Waste, and through various European Community Directives.[102]

C *Conclusions on the Application of Articles 123 and 197*

In this case it is not clear how a violation of article 123 – which does not contain a hard mandatory obligation – was found. Furthermore, it is difficult to see how China's island building activities – while they might constitute a breach of other environmental obligations in the Convention – could constitute a violation by China of these specific responsibilities to coordinate with groups of other States in the performance of collective duties. Articles 123 and 197 make all States in an area collectively responsible to coordinate in these matters. They do not contain obligations triggered by a planned activity with the potential to cause transboundary harm. The Tribunal appears to have equated the obligations in article 123 and 197 with a duty to notify and consult, or a duty to cooperate with affected States in respect of planned activities. Its decision on this aspect of the case seems to reflect an application of Principle 19 of the Rio Declaration, which requires States to notify and consult with potentially affected States on activities that may have an adverse transboundary environmental effect.[103] In light of this, it appears the Tribunal reasoned that because China

96 *Ibid*, 366.

97 *Ibid*, 356.

98 *Ibid*, 356.

99 *Ibid*, 366.

100 *Ibid*, 366.

101 *Ibid*, 366.

102 *MOX Plant Case*, UK Counter-memorial, at 140, [6.15].

103 Principle 19 of the Rio Declaration provides: States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have

was conducting certain activities, this generated an onus on China to coordinate and cooperate with surrounding affected States. However this is arguably not the correct application of article 123 or 197. Rather, these articles envisage a collective group of States and require them to work together to cooperate for the protection of the marine environment. They seem to have been intended to record the fact that regional groups are the mechanisms through which States ought to approach those protections for the marine environment.

In sum, although there had not previously been a finding by ITLOS or an Annex VII tribunal on either article 197 or article 123,[104] the Tribunal's conclusion that China violated articles 197 and 123 seems irreconcilable with the language of the articles and the *travaux*. It is difficult to see how China's actions in these circumstances could constitute a violation of these articles of the Convention, which relate quite specifically to shared regional responsibilities to develop rules and standards.

D *An Alternative Approach?*

This is not the first occasion on which legal principles of a duty to notify and consult and a duty to cooperate in the context of a risk of transboundary harm have been considered by international courts and tribunals in similar circumstances. Indeed, the Philippines' oral submissions and the Tribunal's Award in the *Philippines v China* case refer to some of these previous decisions.

The *Nicaragua v Costa Rica* case concerned Costa Rica's claim that Nicaragua, through its dredging activities in the San Juan river that borders the two States, had breached its international environmental obligations, including an obligation to notify and consult with Costa Rica concerning those activities.[105] The case also addressed allegations by Nicaragua that Costa Rica had breached its obligation to notify and consult with Nicaragua in respect of its road construction activities by the San Juan river.[106] The International Court of Justice found that 'if an environmental impact assessment confirms that there is a risk of significant transboundary harm, a State planning an activity that carries

a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.' Rio Declaration on Environment and Development (1992) A/CONF.151/26 (Vol I).

104 Arguments were made on these articles in the *MOX Plant Case*, however that case was ultimately withdrawn and thus was never decided by the Annex VII Tribunal.

105 *Construction of a Road in Costa Rica along the San Juan River* (*Nicaragua v Costa Rica*) Judgment, Decision of 16 December 2015, [100].

106 *Ibid,* at [165]. Nicaragua relied on customary international law, or on the basis of obligations in two treaties to which both States were party as the legal basis for this obligation.

such a risk is required, in order to fulfil its obligation to exercise due diligence in preventing significant transboundary harm, *to notify, and consult with, the potentially affected State* in good faith, where that is necessary to determine the appropriate measures to prevent or mitigate that risk.'[107] The parties in that case agreed that an obligation existed at general international law to notify and consult with potentially affected States in respect of activities that carry a risk of significant transboundary harm.[108]

The *MOX Plant* Case[109] concerned a nuclear fuel reprocessing plant authorised by the UK which Ireland claimed would contribute to pollution of the Irish Sea. ITLOS found that the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and under general international law.[110] It found that 'rights arise from this principle' which ITLOS was able to preserve where it considered it appropriate.[111] In light of this, it found that prudence and caution required the Parties to cooperate in exchanging information concerning the risks or effects of the operation of the plant and in devising ways to deal with them, as appropriate.[112] Accordingly, ITLOS prescribed provisional measures requiring that the Parties cooperate and enter into consultations to: exchange further information on the possible consequences for the relevant marine environment, monitor risks or the effects of the MOX Plant for the relevant marine environment, and devise, as appropriate, measures to prevent pollution of the marine environment that might result from the MOX Plant.[113]

In the *Land Reclamation*[114] case, ITLOS took a similar approach. The case concerned land reclamation activities undertaken by Singapore which Malaysia claimed would impinge on its rights. ITLOS emphasised that the duty to cooperate is a fundamental principle under the Convention and general international law 'from which certain rights arise.'[115] It found there had been insufficient cooperation between the parties[116] and given the possible

107 *Ibid*, at [168], see also [104].

108 *Ibid*, at [106].

109 *MOX Plant Case*, *supra* note 88, at [82].

110 *Ibid.*

111 *Ibid.*

112 *Ibid*, at [84].

113 *Ibid*, at [89(1)].

114 *Land Reclamation case* (Malaysia v Singapore) Provisional Measures, ITLOS Case no 12 (2003), at [92].

115 *Ibid*, at [92].

116 *Ibid*, at [97].

implications of the activity on the marine environment, prudence and caution required that the Parties establish mechanisms for exchanging information and assessing the risks or effects, and devise ways to deal with them.[117] In light of this, ITLOS prescribed provisional measures requiring that the Parties cooperate and enter into consultations to: promptly establish a group of independent experts with a mandate to conduct a study to determine the effects of the land reclamation and to propose, as appropriate, measures to deal with any adverse effects from that activity; and to prepare an interim report on the infilling works in a particular area; and regularly exchange information on, and assess risks or effects on Singapore's land reclamation activities.[118]

Broadly, the *MOX Plant* and *Land Reclamation* decisions imposed a requirement to exchange information, to assess the risks or effects of the relevant activity and to devise, cooperatively, ways to deal with these effects. In both cases, ITLOS applied the duty to cooperate principle, either as a general principle of international law, or as a requirement within Part XII of the Convention informed by customary international law.[119] In previous case law there has thus been an acknowledgment of a duty to notify and consult and a duty to cooperate in respect of activities that may cause significant transboundary harm, both at general international law and as a requirement of Part XII of the Convention informed by custom.

However, while *Philippines v China* appears to present a similar factual scenario, the Tribunal took a different approach than that taken in the previous case law in this area. It acknowledged the first element of the ITLOS jurisprudence: that the duty to cooperate is a fundamental principle of international law.[120] Instead of then looking to general international law, the Tribunal instead found a breach of articles 123 and 197. This approach appears to follow the Philippines' arguments on this point. Despite heavy reliance on *MOX Plant* and *Land Reclamation* the Philippines submissions then argue that China had breached, not a duty to cooperate at general international law or arising from

117 *Ibid*, at [99].

118 *Ibid*, at [106(1)].

119 However the Tribunal did not reach this finding on the basis of a particular article of the Convention. Interestingly, in *MOX Plant*, Ireland argued that the UK had violated articles 123, 197, 206 and 207 of the Convention and in *Land Reclamation*, Malaysia argued that Singapore had violated articles 123, 204, 205 and 206.

120 *Philippines v China*, *supra* note 1, at [946], [984]–[985].

Part XII read in light of customary international law, but rather, articles 123 and 197 of the Convention.[121]

In light of the jurisprudence discussed above, there is a question as to whether the Tribunal could have taken a different approach when making findings on these issues; that is, whether the Tribunal could have followed the line of reasoning in either *Nicaragua v Costa Rica* or *MOX Plant* and *Land Reclamation*. It raises the question of whether, noting the similarity in the facts in these cases (situations of potential transboundary harm) the Tribunal could have applied a legal duty to notify and consult, or a legal duty to cooperate rather than articles 123 and 197. It perhaps could have done so either directly as a general principle of international law, or, relying on Part XII of the Convention read in light of customary international law. Arguably, such an approach would have been preferable to applying articles 197 and 123 of the Convention in circumstances in which those obligations do not appear to be relevant to the factual circumstances. ITLOS made clear findings in *MOX Plant* and *Land Reclamation* that *rights arose* from the duty to cooperate that belonged to the State potentially affected by the transboundary harm.[122] It might be arguable that if a State potentially affected by transboundary harm has a right, that the State potentially causing the potential harm has an *obligation* in that context to provide some form of consultation with the affected State (as was ordered in *MOX Plant* and *Land Reclamation*). Nonetheless it must be acknowledged that some may query whether a right remedied through a provisional measures Order necessarily means a corresponding *obligation* exists that can be ruled on in a decision on the merits.[123] Further, there may be some uncertainty around

121 *Ibid*, Transcript, Day 3, at 44.

122 *MOX Plant Case*, *supra* note 88 at [82]; *Land Reclamation case*, above note 114, at [92].

123 Provisional measures orders are made to preserve the rights of the parties pending the final decision, while on the merits, the responsibility for certain conduct is allocated. In *Ghana/Cote d'Ivoire*, Judge Paik emphasised that determining what would cause irreparable prejudice to a party's rights and what would meet the legal test on the merits are different legal functions, so it is not guaranteed that criteria for the former can be applied by analogy to the latter in *Ghana/Cote d'Ivoire*, Separate opinion of Judge Paik, [9]. However, it has also been argued that 'interim measures of protection may offer assistance in finding answers on merits,' see R. Lagoni, *Interim Measures Pending Maritime Delimitation Agreements* 78(2) American Journal of International Law 365–6 (1984). In *Guyana v Suriname*, the Tribunal found that interim measures cases were nevertheless informative (in determining the types of activities that should be permissible in disputed waters), *Guyana/Suriname* (2007) PCA Case 2004–04, Award of 17 September 2007.

the content of an obligation arising from the general principle of the duty to cooperate.[124]

E *Conclusions on the Tribunal's Findings on Articles 123 and 197*

In summary, on this aspect of the case, the Tribunal's reasoning and findings were not persuasive. The logic is difficult to follow and resulted in findings of violations of article 123 and 197 based on questionable interpretations of those articles. Arguably, the precise language and object of the relevant articles should have been analysed more closely. Further, a much more detailed explanation as to why China's conduct constituted a breach of these provisions should have been outlined. A possible alternative approach could have been to apply a duty to notify and consult or a duty to cooperate in general international law or in Part XII of the Convention informed by customary international law, reflecting the reasoning of previous case law. There are, however, questions as to whether the principles in those cases could be directly relied on in this case. In practice, the Tribunal's findings on the duty to cooperate could be seen as taking a step back from the strong decisions for the protection of the marine environment made in the previous cases discussed, and the direction of general international law in this area.

V Conclusion

In conclusion, *Philippines v China* was undeniably a significant decision in the landscape of international environmental law and the interpretation and application of the Convention. The Tribunal broke a lot of new ground by delivering findings on numerous articles of the Convention, including on articles that had not previously been ruled on by an international dispute settlement body.

The Tribunal's findings and reasoning on the obligation to monitor and assess were not overly controversial. Its willingness to apply a relatively low threshold and find a violation of article 206 on the basis of an absence of any evidence that any EIA had been communicated was a positive outcome and arguably, appropriate in the circumstances. This decision emphasises the significance of EIAs and reinforces the low threshold at which the requirement to undertake an EIA should be triggered under article 206. Although this case was able to offer little insight into the specific content required in EIAs under

124 In *MOX Plant* and *Land Reclamation,* the specific requirements of the Orders made were quite different, thus it would not be clear exactly what form of such an obligation would take.

article 206, it continues to cement the growing position in international law on the importance of EIAs.

The Tribunal's reasoning on articles 197 and 123, however, is less convincing and is difficult to reconcile with the language of those articles. In this regard the possibility of taking an alternative approach through building on the findings of previous case law and applying a duty to notify and consult or a duty to cooperate as a general principle of international law, or as an element of Part XII in light of customary international law, would have been a preferable approach, and would have been a much stronger finding in this context.

Despite the potential to take a stronger approach on some environmental aspects, on the whole, the Tribunal's findings were progressive and upheld strong protections for the marine environment by interpreting international environmental obligations progressively. In that respect, this decision is likely to be seen as important and influential going forward. Although the decision is strictly binding only between the parties, given the breadth it covered and the influence it is likely to hold, it is bound to have an impact on international law beyond its strict legal application. Only time will tell what that impact will be, however, it can be said with some certainty that it will almost certainly have positive impacts for the marine environment.