Three Perspectives on Marine Life in International Disputes

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Abstract

This article charts three different approaches that international courts and tribunals have taken to marine life. Some have viewed marine life primarily as an economic resource, worthy of conservation only in order to ensure future exploitation. Others have seen marine life as an object of conservation in its own right. Yet others have tried to balance the two perspectives. The article also examines the sources that seem to have influenced the judges, finding that these range from the applicable law to external sources and contested legal principles.

Keywords

conservation; natural resources; environmental law; law of the sea; settlement of international disputes

Introduction

This article analyses how international courts and tribunals have viewed marine life in international disputes. The article contends that international courts have used three different approaches to marine life: Seeing the conservation of a natural resource merely as a tool to ensure its future exploitation; seeing conservation as an end in itself; and balancing these approaches. These three perspectives are described in separate subsections in the second section. The third section then analyses what may have influenced the judges in these cases. The first subsection shows that some judges have stuck to the approach to marine life found in the applicable law and in closely related sources. The next shows that other judges seem to have been influenced by external sources and general developments in international environmental law. The final subsection covers cases where judges have cited contentious legal principles and backed them up by referring to academic debates. Section 4 is a conclusion.

This article analyses five decisions in depth. These are the International Court of Justice's (ICJ) 1974 *Fisheries Jurisdiction* judgments and the 2014 *Whaling in the Antarctic* judgment;[1] the 2016 *South China Sea* arbitration award (under the auspices of the Permanent Court of Arbitration),[2] World Trade Organization (WTO) Appellate Body's 1998 *US – Shrimp* report,[3] and the International Tribunal for the Law of the Sea's (ITLOS) 1999 *Southern Bluefin Tuna*

[1] *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3 [*United Kingdom* v. *Iceland*]; *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 17 [*Germany* v. *Iceland*]; *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226 [*Whaling in the Antarctic*].

[2] *The Republic of Philippines* v. *The People's Republic of China*, PCA case No. 2013-19, Award, 12 July 2016 [*South China Sea Arbitration*].

[3] Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998 [*US – Shrimp*].

provisional measures order.[4] There are other international disputes that concern marine resources, but these five are the ones where international courts and tribunals have shown how they approach marine life.

Marine life means 'living things that are found in the sea'.[5] This covers plants, animals, and other organisms.[6] The cases discussed in this article deal with certain specific species of marine life: whales (*Whaling in the Antarctic*), tuna (*Southern Bluefin Tuna*), sea turtles (*US–Shrimp* and *South China Sea)*, and giant clams (*South China Sea*). The 1974 *Fisheries Jurisdiction* cases concerned fisheries resources in general.

A starting point for this article is the tension between conserving and exploiting marine life. Global seafood production is around 200 million tons annually.[7] In 2018 global exports represented an economic value of 164 billion US dollars, according to The Food and Agriculture Organization of the United Nations.[8] The seafood industry is an important source of nutrition, employment and capital in many countries.[9] The oceans 'provide food for a billion people'.[10] At the same time, the marine environment and marine life face numerous threats, in particular various forms of pollution, overfishing, climate change, habitat loss, and invasive species.[11] At the moment, 'marine biodiversity is clearly under threat', with 'ubiquitous' population declines.[12] More than three quarters of global fisk stocks 'are fully exploited, overexploited, depleted, or recovering from depletion'.[13]

This tension between exploitation and conservation is 'typical' in international environmental law generally.[14] In the regulation of whaling, for example, the difficulty is 'allowing the use of a natural living resource while at the same time preventing its extinction'.[15] High seas fisheries is 'a lucrative activity' that may lead to the 'serious depletion' of various species of marine life, which may threaten the 'long-term sustainability' of 'the whole marine ecosystem'.[16] Marine life is an important source of 'food supply for a growing world population', even though 'more and more fish stocks are overexploited or depleted'.[17] The

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[4] *Southern Bluefin Tuna* cases *(New Zealand* v. *Japan; Australia* v. *Japan)*, Provisional Measures, Order of 27 August 1999 [*Southern Bluefin Tuna*].

[5] *Collins Dictionary*, 'marine life' at https://www.collinsdictionary.com/dictionary/english/marine-life; accessed 5 September 2022.

[6] Nele Matz-Lück and Johannes Fuchs, 'Marine Living Resources' in Donald Rothwell et al. (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press, Oxford, 2015) 491-515, 493 define 'marine living resources' as 'fish, cephalopods, crustaceans and marine mammals', but that definition is aimed at organisms that can be exploited commercially, which is a narrower category than organisms that can be subject to conservation measures.

[7] The Food and Agriculture Organization of the United Nations, *The State of World Fisheries and Aquaculture 2020: Sustainability in Action* (United Nations, New York, 2020), 2.

[8] *Ibid*., at p. 83.

[9] Matz-Lück and Fuchs (n 6), at p. 491-492.

[10] Adriana Fabra, 'Marine Environment: Pollution and Fisheries' in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (2nd ed, Oxford University Press, Oxford, 2021) 529-553, at p. 529.

[11] *Ibid*.; Tim Stephens, *International Courts and Environmental Protection* (Cambridge University Press, Cambridge, 2009), at p. 196.

[12] E.g. Thomas Luypaert and others, 'Status of Marine Biodiversity in the Anthropocene' in Simon Jungblut, Viola Liebich and Maya Bode-Dalby (eds), *YOUMARES 9 - The Oceans: Our Research, Our Future* (Brill, Leiden, 2020) 57-82, at p. 57.

[13] David Freestone, 'Fisheries, High Seas' in Anne Peters (ed), *Max Planck Encyclopedia of International Law* (Oxford University Press, Oxford, 2009), at para 1; similarly Matz-Lück and Fuchs (n 6), at p. 492.

[14] Elisabeth Andersen and Silja Vöneky, 'Whaling in the Antarctic (*Australia* v *Japan*: New Zealand Intervening)' in Peters (ed), *ibid*., at para 5.

[15] Andersen and Vöneky*, ibid.*

[16] Freestone (n 13), at para 36.

[17] Johannes Fuchs, 'Marine Living Resources, International Protection' in Peters (ed) (n 13), at para 1.

same tendency is seen in international trade law, where '[s]imultaneously ensuring environmental protection and achieving economic growth is considered very problematic'.[18]

Perspectives on Marine Life

An Economic Perspective

The first of the three perspectives on marine life that are examined in this article is an economic one, where focus is on ensuring the future economic exploitation rather than on conserving marine life for its own sake. This perspective can be seen in the ICJ's 1974 *Fisheries Jurisdiction* cases, which were decided in 1974.

The cases sprang out of the 'Cod Wars' between Iceland and the United Kingdom (UK) and West Germany. In 1958 Iceland asserted a 12 nautical mile fisheries zone.[19] The UK and West Germany opposed Iceland's claim.[20] The UK and West Germany accepted Iceland's claims following negotiations.[21] An aspect of the negotiated outcome was that additional claims would be submitted to the ICJ. When Iceland in 1971 adopted a policy of aiming to establish a 50 nautical mile fisheries zone, the UK and West Germany instituted proceeding before the ICJ. They asked the Court to declare the proposed zone to be 'without foundation in international law'.[22] Iceland did not take part in the proceedings.[23]

The Court's conclusion was that the Icelandic claim was contrary to the 1958 Geneva Convention on the Continental Shelf and 'not opposable to' the UK or West Germany, and that the parties had 'mutual obligations to undertake negotiations in good faith'.[24] In the following decades States asserted and accepted gradually larger fisheries zones. It only took three years before 'all the parties to the case had extended their fishing limits to 200 nautical miles'.[25] This limit was then confirmed by the ICJ,[26] and enshrined in the United Convention on the Law of the Sea (LOSC),[27] Article 57. Therefore, the ICJ's reasoning on fisheries jurisdiction 'did not have a significant impact on the evolution of the law of the sea'.[28]

When discussing the concept of preferential fishing rights for coastal rights, the Court recognised the need to 'preserve […] fish stocks', and claimed that the 'the need for a catch-limitation' had 'become indispensable' in the region.[29] However these limitations were only to be imposed 'in the interests of their rational and economic exploitation'.[30] If fish stocks are conserved simply in order to ensure that they can be exploited further in the future, they are not assigned any intrinsic environmental value. This is 'an economic conception of conservation'.[31]

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[18] Elvira Pushkareva, 'Environmentally Sound Economic Activity, International Law', in Peters (ed), *ibid*., at para 1.
[19] *United Kingdom v. Iceland* (n1), at p. 12; *Germany* v. *Iceland* (n 1), at p. 183.
[20] *United Kingdom v. Iceland* (n1), at p. 12; *Germany* v. *Iceland* (n 1), at p. 183.
[21] *United Kingdom v. Iceland* (n1), at p. 13; *Germany* v. *Iceland* (n 1), at p. 185.
[22] *United Kingdom v. Iceland* (n1), at p. 7; *Germany* v. *Iceland* (n 1), at p. 179.
[23] *United Kingdom v. Iceland* (n1), at p. 8; *Germany* v. *Iceland* (n 1), at p. 180.
[24] *United Kingdom v. Iceland* (n1), at p. 34; *Germany* v. *Iceland* (n 1), at p. 205.
[25] Robin R. Churchill, 'Fisheries Disputes' in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (Oxford University Press, Oxford, 2018), at para 8.
[26] E.g. *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at p. 35
[27] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 UNTS 396..
[28] Peter Tomka, 'Fisheries Jurisdiction Cases (United Kingdom v Iceland; Federal Republic of Germany v Iceland)' in Anne Peters (ed), *Max Planck Encyclopedia of International Law* (Oxford University Press, Oxford, 2007), at para 16.
[29] *United Kingdom v. Iceland* (n1), at p. 27; *Germany* v. *Iceland* (n 1), at p. 195.
[30] *United Kingdom v. Iceland* (n1), at p. 27; *Germany* v. *Iceland* (n 1), at p. 195.
[31] Stephens (n 11), at p. 211.

Some paragraphs later the Court recognised a coastal population's 'interest in conservation', but this interest is based on the need to safeguard their 'economic dependence' and 'livelihood' rather than because the environment has intrinsic value.[32] Later in the decisions the Court compared the parties' interests in the relevant fishing waters, and aimed to give '[d]ue recognition to [their] rights'.[33] The parties' rights were 'limited' by 'the needs of conservation'.[34] This conservation would be 'for the benefit of all [States]'.[35] The Court does not mention any benefit to the environment itself.

Even though the Court's decision was quickly superseded by State practice, the case gives a useful illustration of the contemporary approach to maritime conservation. The cases are 'part of the Court's history' concerning maritime zones.[36] The same can be said about its view of conservation, as newer decision have had different perspectives on marine life, as shown in the following subsections. The Court's approach to conservation was the same as that found in some of the applicable law and closely related sources, and this is discussed further in Section 3.1.

Conservation For Its Own Sake

A different perspective on marine life is to see its conservation as an end in itself. Under this conception the primary aim would be simply to protect marine life, without a view to its future exploitation by humans.

This conception can be found in the ICJ's *Whaling in the Antarctic* judgment of 2014. The case was instituted by Australia against Japan, with New Zealand intervening. Australia argued that Japan's official 'JARPA II' whaling programme violated the zero catch limit in paragraph 10(e) in the Schedule to the International Convention for the Regulation of Whaling (ICRW),[37] that Japan had also violated 'the obligation not to undertake commercial whaling of fin whales in the Southern Ocean Sanctuary' in paragraph 7(b) and the moratorium on using factory ships in paragraph 10(d).[38] New Zealand's intervention focused on the interpretation of the ICRW Article VIII(1), which permits states to 'to kill, take and treat whales for purposes of scientific research'.[39]

An important question for the Court was whether JARPA II was, in fact, undertaken 'for purposes of scientific research'.[40] The Court first interpreted the term 'for purposes of scientific research', and then assessed the programme in light of the provision. Its conclusion was that the programme did not 'fall within the provisions of' Article VIII(1), which meant that Japan had violated its obligations under the Convention and its Schedule.[41] Japan later withdrew from the Convention (as permitted by Article XI), and recommenced whaling in mid-2019.[42]

Australia and Japan 'emphasized conservation and sustainable exploitation as the object and purpose of the Convention'.[43] Japan preferred to focus on sustainable exploitation, while Australia highlighted conservation. These differences in emphasis mirrors the

[32] *United Kingdom v. Iceland* (n1), at p. 29; *Germany* v. *Iceland* (n 1), at p. 198.
[33] *United Kingdom v. Iceland* (n1), at p. 31; *Germany* v. *Iceland* (n 1), at p. 200.
[34] *United Kingdom v. Iceland* (n1), at p. 31; *Germany* v. *Iceland* (n 1), at p. 200.
[35] *United Kingdom v. Iceland* (n1), at p. 31; *Germany* v. *Iceland* (n 1), at p. 200.
[36] Tomka (n 28), at para 16.
[37] International Convention for the Regulation of Whaling (Washington, 3 December 1946, in force 10 November 1948) 161 UNTS 72.
[38] *Whaling in the Antarctic* (n 1), at p. 249.
[39] *Ibid.*, at p. 250.
[40] *Ibid.*, at p. 242.
[41] *Ibid.*, at p. 299-300.
[42] Andersen and Vöneky (n 14), at para 33.
[43] *Whaling in the Antarctic* (n 1), at p. 251.

fundamental conflict that is the topic of this article, between conservation of marine life as part of nature and the exploitation of marine life as an economic resource. The Court took a broader view, holding that the purpose of Article VIII(1) was generally to 'foster scientific knowledge', which could 'pursue an aim other than either conservation or sustainable exploitation'.[44]

The Court's did not see itself as 'called upon to resolve matters of scientific or whaling policy',[45] but it was prepared to determine whether 'lethal sampling' was used 'on a larger scale than is reasonable in relation to achieving the programme's stated research objectives'.[46] After reviewing the programme in depth, the Court seemed to largely share Australia's view that Japan's 'target sample size for minke whales was set for non-scientific reasons'.[47] While Court did not state outright that Japan's activities qualified as commercial whaling,[48] and held Solomonically that the purpose of Article VIII(1) was neither conservation nor exploitation, it could not reconcile the scale of Japan's hunting with its stated and documented purpose. Since Japan's whaling programme could not be justified as scientific, it was contrary to the zero-catch limit in the ICRW Schedule and thus illegal.[49]

The Court's approach represents a contrast with that in the 1974 *Fisheries Jurisdiction* judgments, where the Court's reasoning focused entirely on dividing the economic resource pie between the parties without regard to any interest in or obligation to conserve the environment. Whales, by contrast, were not to be subject to any form of commercial exploitation but were rather to be conserved as part of the natural environment. As in the 1974 *Fisheries Jurisdiction* judgments, the Court's understanding of conservation in *Whaling in the Antarctic* was held closely to that found in the applicable law, which is examined further in Section 3.1 below.

Another decision that featured conservation for its own sake is the *South China Sea* arbitral award. This case emerged from the dispute over maritime rights and entitlements in the South China between States the People's Republic of China (PRC), the Philippines, Vietnam, Malaysia, Indonesia, and Brunei, as well as the Republic of China (which none of the other parties recognise as an independent State). The political dispute primarily concerns who has sovereignty over numerous and varied maritime features in the South China Sea and what kind of maritime rights this sovereignty confers, and thus where to draw the resulting maritime boundaries between the disputants.

In 2013 the Philippines instituted arbitral proceedings in the Permanent Court of Arbitration against the PRC on the basis of the LOSC Part XV. An arbitral tribunal instituted under the LOSC part XV can only decide claims based on the LOSC. The Tribunal could therefore not decide on the sovereignty of maritime features in the South China Sea, since this not regulated by the Convention.[50] The Tribunal could also not delimit maritime boundaries, since the PRC had excluded this from its acceptance of the compulsory dispute settlement in the LOSC.[51] The Philippines' claims focused on four areas: the rejection of 'historic rights' as a basis for maritime rights beyond those enumerated in the LOSC; the extent of sovereignty conferred by certain disputed maritime features; the lawfulness of specific Chinese actions in the South China Sea; and Chinese aggravation and extension of the dispute.[52] Some of the

[44] *Ibid.*, at p. 252.
[45] *Ibid.*, at p. 254.
[46] *Ibid.*, at p. 260.
[47] *Ibid.*, at p. 289.
[48] Allessandra Lehmen, 'International Environmental Court', in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (Oxford University Press, Oxford, 2018), at para 14.
[49] *Whaling in the Antarctic* (n 1), at p. 295.
[50] *South China Sea Arbitration* (n 2), at p. 1-2.
[51] *Ibid.*, at p. 2.
[52] *Ibid.*, at p. 2-3.

specific Chinese actions where fishing activities, and these are the focus of this article, even though they 'were a relatively minor aspect of the case'.[53]

There was some controversy over whether the Tribunal had jurisdiction to decide the dispute, since it would have to draw a fine line between sovereignty and maritime boundaries, which it could not rule on, and the extent of maritime entitlements conferred by the disputed maritime features, which it could rule on.[54] The Tribunal issued an extensive ruling on jurisdiction in 2015, where it found that it did have jurisdiction over seven out of 15 claims, with ruling on the other eight being postponed to the merits stage.[55]

The Tribunal issued its award on the merits in 2016. The Tribunal largely sided with the Philippines, finding among other things that the PRC did not have 'historic rights' in the South China Sea, that the disputed maritime features could not support the PRC's maritime claims, that various PRC actions were unlawful, and that the PRC had aggravated and extended the dispute.[56] The PRC boycotted the proceedings from the beginning, refraining from appointing an arbitrator or being represented by counsel.[57]

Among the contested PRC actions was the harvesting of various marine life in the South China Sea. The Tribunal found that this covered 'threatened or endangered species',[58] including sea turtles and giant clams. The Tribunal applied the LOSC Article 192, which obliges States 'to protect and preserve the marine environment'. It found that this provision embodied a 'duty to prevent the harvest of endangered species'.[59] This duty was 'given particular shape in the context of fragile ecosystems by Article 194(5)',[60] which obliges States to adopt measures 'necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life'.

The PRC's harvesting of sea turtles was, according to the Tribunal, 'a harm to the marine environment as such'.[61] The harvesting of giant clams at a large scale also had 'a harmful impact on the fragile marine environment'.[62] The PRC had therefore breached its obligations under the LOSC.[63]

The Tribunal's assessment makes no accommodation for any interest the PRC might have had in exploiting the sea turtles and giant clams as an economic resource. There is no discussion of ensuring the future exploitation of sea turtles and giant clams, and there is no question of dividing this economic resource between the PRC and the Philippines. Nor does the Tribunal attempt to prohibit only certain fishing techniques or delimit fishing quotas, as in the *US – Shrimp* and *Southern Bluefin Tuna* cases, discussed in Section 2.3 below. The Tribunal's reasoning in the *South China Sea* award is thus similar to that found in the *Whaling in the Antarctic* case, in that the relevant marine life is seen only as a part of natural environment whose preservation constitutes an aim in itself.

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[53] Churchill (n 25), at para 15. Alan Boyle and Catherine Redgwell, *Birnie, Boyle & Redgwell's International Law and the Environment* (4th ed, Oxford University Press, Oxford, 2021), at p. 109-110 nonetheless classify the dispute as an 'environmental dispute'.
[54] *South China Sea Arbitration* (n 2), p. 45-70.
[55] *The Republic of Philippines* v. *The People's Republic of China*, PCA case No. 2013-19, Award on Jurisdiction and Admissibility, 29 October 2015, p. 149.
[56] *Ibid.*, at p. 471-477.
[57] *Ibid.*, at p. 3.
[58] *Ibid.*, at p. 378-379.
[59] *Ibid.*, at p. 381.
[60] *Ibid.*, at p. 381.
[61] *Ibid.*, at p. 382.
[62] *Ibid.*, at p. 382.
[63] *Ibid.*, at p. 384.

Balancing the Perspectives

Some decisions by international courts and tribunals have attempted to balance the two perspectives on marine life discussed above.

The WTO Appellate Body's report in the *US – Shrimp* case is an example. Four States (India, Malaysia, Pakistan, and Thailand) claimed that the United States had violated the Agreement establishing the World Trade Organization (WTO Agreement) by only allowing shrimp to be imported into the US if it had caught with specific nets.[64] The nets in question allowed sea turtles to escape, in order to minimise the number of collateral sea turtle deaths during shrimp fishing. The four applicant States argued that this violated the General Agreement on Tariffs and Trade (GATT 1994) Article XI:1.[65] This provision bars 'prohibitions or restrictions other than duties, taxes or other charges [...] on the importation of any product'. The US argued that its measure was justified under the WTO Agreement Article XX(g). This provision permits certain trade restrictions 'relating to the conservation of exhaustible natural resources'.

A WTO panel was established to hear the case and concluded in May 1998 that the US legislation 'was not consistent with Article XI:1 of GATT 1994, and cannot be justified under Article XX of GATT 1994'.[66] The United States appealed the panel's findings to the WTO Appellate Body.[67] The Appellate Body issued its report in November 1998. The Appellate Body held that sea turtles were an 'exhaustible natural resource' in the sense Article XX(g), reversing the panel's finding on this point. Even so, the disputed legislation failed to comply with the chapeau of Article XX, because it, in the Appellate Body's view, 'constitute[d] arbitrary and unjustifiable discrimination between Members of the WTO'.[68] The US modified its scheme and later prevailed in compliance proceedings.[69]

The panel report, which was appealed to the Appellate Body, focused more on free trade in shrimp,[70] and thus on marine life as an economic resource. This is distilled most clearly in the panel's general statement that 'certain unilateral measures', including the US legislation at issue in the dispute, 'insofar as they could jeopardize the multilateral trading system' must be regarded as 'not within the scope of measures permitted under the chapeau of Article XX'.[71] Before commencing the interpretation of 'exhaustible natural resources', the Appellate Body made a general statement on the same point. The Appellate Body disagreed with the panel, holding instead that every part of the WTO Agreement, properly interpreted, serves to maintain rather than undermine the international trading system.[72] Under this view the aim the GATT 1994 Article XX is to balance trade liberalisation against other interests.[73]

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[64] Agreement establishing the World Trade Organization (Marrakesh, 15 April 1994, in force 1 January 1995) 1867 UNTS 154.

[65] General Agreement on Tariffs and Trade 1994 (Marrakesh, 15 April 1994, in force 1 January 1995) 1867 UNTS 187; Panel Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R, adopted 6 November 1998, p. 7 [*US – Shrimp (panel)*].

[66] *US – Shrimp (panel*) (n 65), at p. 300.

[67] *US – Shrimp* (n 3), at p. 1.

[68] *Ibid.*, at p. 75.

[69] Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, p. 50.

[70] Manjiao Chi, '"Exhaustible Natural Resource" in WTO Law: GATT Article XX(g) Disputes and Their Implications' 2014 48 *Journal of World Trade* 939-966, at p. 964.

[71] *US – Shrimp (panel*) (n 65), at p. 298.

[72] *US – Shrimp* (n 3), at p. 43.

[73] Petros C. Mavroidis, 'Trade and Environment after the Shrimps-Turtles Litigation' (2000) 34 *Journal of World Trade* 73-88, at p. 79.

The Appellate Body seems to have viewed the panel as being too focused on promoting free trade, and instead put a stronger emphasis on environmental protection.[74] Where the panel saw conservation as 'an external threat to the trading system', the Appellate Body 'established a bold new approach to integrating trade law and environmental law'.[75] In the Appellate Body's approach there is room for both economic exploitation, with shrimp as an object of free trade, and for viewing sea turtles as a part of the natural environment that needs protection. The sea turtles were not to be protected simply in order to be harvested later.

The ITLOS' 1999 provisional measures order in the *Southern Bluefin Tuna* cases is another decision that seems to attempt a balancing of different approaches to marine life.

The cases were instituted by Australia and New Zealand against Japan, and were based on an assertion that Japan had violated the LOSC Articles 64 and 116 to 199, by fishing for tuna without sufficient conservation measures or regard to New Zealand's or Australia's rights and interests.[76] Australia and New Zealand maintained that an experimental fishing programme which Japan had instituted exceeded the catch limits that had been set by the Commission for the Conservation of Southern Bluefin Tuna.[77] This commission was established by the 1993 Convention for the conservation of southern bluefin tuna, whose parties in 1999 were Japan, Australia, and New Zealand.[78] The Commission adopts decision with the unanimous vote of all member States (Article 7).

The Tribunal issued an order in 1999 where it imposed a variety of provisional measures, including reiterating the parties' previously agreed catch limits and ordering them to resume negotiations.[79] This was done under the clause in the LOSC Article 290 that requires a potential for 'serious harm to the marine environment' as a precondition for imposing provisional measures. The ITLOS' decision effectively halted to Japan's tuna fishing programme, pending a decision on the merits.[80]

The merits phase of the dispute was brought before an arbitral tribunal established under the auspices of the International Centre for Settlement of Investment Disputes (ICSID), which in 2000 ruled that it lacked jurisdiction to decide the case.[81] The Tribunal found that the case was 'a single dispute arising under both' the LOSC and the 1993 Convention for the Conservation of Southern Bluefin Tuna.[82] The 1993 Convention's Article 16 precludes compulsory dispute settlement, and Japan did not consent to the proceedings.[83] In the end the

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[74] Eric Neumayer, 'Greening the WTO Agreements: Can the Treaty Establishing the European Community be of Guidance' (2001) 35 *Journal of World Trade* 145-166, at p. 150.

[75] Howard Mann, 'Of Revolution and Results: Trade-and-Environmental Law in the Afterglow of the Shrimp-Turtle Case' (1998) 9 *Yearbook of International Environmental Law* 28-35, at p. 32. Similarly James Cameron, Kevin R. Gray, 'Principles of International Law in the WTO Dispute Settlement Body' (2001) 50 *International and Comparative Law Quarterly* 248-298, at p. 266-267; Stephanie Switzer, 'The World Trade Organization Dispute Settlement Mechanism', in Edgardo Sobenes, Sarah Mead, Benjamin Samson (eds), *The Environment Through the Lens of International Courts and Tribunals* (Springer, Berlin, 2022) 121-158, at p. 144.

[76] *Southern Bluefin Tuna* (n 4), at p. 285-288.

[77] *Ibid.*, at p. 293.

[78] Convention for the Conservation of Southern Bluefin Tuna (Canberra, 10 May 1993, in force 20 May 1994) 1819 UNTS 359. South Korea, Indonesia, and South Africa joined later.

[79] *Southern Bluefin Tuna* (n 4), at p. 297-300.

[80] Dean Bialek, 'Australia & New Zealand v Japan: Southern Bluefin Tuna Case' (2000) 1 *Melbourne Journal of International Law* 153-161, at p. 155.

[81] *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, Award on Jurisdiction and Admissibility*, Decision of 4 August 2000, at p. 48-49.

[82] *Ibid.*, at p. 42.

[83] This interpretation was later rejected in *South China Sea The Republic of Philippines* v. *The People's Republic of China*, PCA case No. 2013-19, Award on Jurisdiction and Admissibility, 29 October 2015, at p. 86-87; Lan Ngoc Nguyen, 'International Tribunal for the Law of the Sea', in Edgardo Sobenes, Sarah Mead, Benjamin Samson (eds), *The Environment Through the Lens of International Courts and Tribunals* (Springer, Berlin, 2022) 71-98, at p. 74; Churchill (n 25), at para 13.

parties reached a negotiated settlement.[84] According to one counsel in the case, the provisional measures order contributed to the resolution of the dispute.[85]

In its provisional measures order, the ITLOS stated generally that 'the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment'.[86] This is a recognition of the need to protect tuna stocks as part of nature, as opposed to merely as a future economic resource. Assessing the southern bluefin tuna specifically, the ITLOS noted that the stock was 'severely depleted' and 'at its historically lowest levels', and agreed with the parties that this was 'a cause for serious biological concern'.[87] The Tribunal added that 'the actions of Japan have resulted in a threat to the stock',[88] and it argued that the very 'existence' of the species was at risk.[89] The Tribunal did not take issue with tuna fishing when stocks were plentiful. Exploitation was to be limited because the sustainability of the stocks is threatened.

The Tribunal also stated that the parties should take steps to ensure 'conservation and promoting the objective of optimum utilization of the stock'.[90] This is an economic conception of conservation, like that used in the ICJ's 1974 *Fisheries Jurisdiction* judgments. The ITLOS in *Southern Bluefin Tuna* thus combined and balanced different perspectives on marine life.

[84] Churchill (n 25), at para 13.
[85] Bill Mansfield, 'Compulsory Dispute Settlement after the Southern Bluefin Tuna Award' in Alex G. Oude Elferink and Donald R. Rothwell (eds), *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (Martinus Nijhoff, Leiden, 2004) 255-272, at p. 265; Churchill (n 25), at para 13. Similarly Ted L. McDorman 'An Overview of International Fisheries Disputes and the International Tribunal for the Law of the Sea' (2001) 21 *Yearbook of International Environmental Law* 119-149, at p. 148.
[86] *Southern Bluefin Tuna* (n 4), at p. 295.
[87] *Ibid*.
[88] *Ibid.*, at p. 296.
[89] *Ibid*.
[90] *Ibid*.

Influences on the Judges

The Applicable Law and Closely Related Sources

This section examines sources that seem to have influenced the judges in the disputes analysed in the previous section. Some decisions have applied perspectives found in the applicable law as well as closely related rules.

In the *Whaling in the Antarctic* case the ICJ applied the ICRW. The ICRW was adopted in 1946, succeeding two earlier whaling treaties. The Convention initially aimed to balance conservation and exploitation. According to its Preamble one aim of the Convention was 'safeguarding for future generations the great natural resources represented by the whale stocks'. Whales were seen as an 'economic and nutritional' resource and were to be protected 'from further over-fishing'. The Convention's overall aim was thus 'economic exploitation, not ecological sustainability'.[91]

The ICRW set up the International Whaling Commission (Article III), which was empowered to undertake 'studies and investigations' (Article IV), adopt 'regulations' (Article V), and 'make recommendations' (Article VI). In 1982 the Commission adopted a resolution that in effect imposed a moratorium on commercial whaling, by setting catch limits to zero.[92] This came into effect 'for the 1986 coastal and the 1985–86 pelagic season'.[93] Four States (Japan, Norway, Peru, and the Soviet Union) objected and were not bound by the moratorium, but Japan and Peru later withdrew their objections.[94] A partial moratorium, covering certain whale species, had been in effect since 1975.[95] Whaling is therefore a field where regulation has shifted 'from exploitation to strict conservation'.[96]

The ICRW currently makes no allowance for commercial whaling, and this was the approach to marine life that the ICJ took in *Whaling in the Antarctic*. The ICJ's emphasis on conservation of whales for its own sake largely followed from the applicable law.

In the ICJ's 1974 *Fisheries Jurisdiction* cases, the Court took an economic view of conservation, as noted in Section 2.1 above. The Court applied the 1958 Geneva Convention on the Continental Shelf,[97] which says nothing about conservation. This convention was adopted at the 1958 United Nations Conference on the Law of the Sea.[98] At that conference States adopted three other law of the sea conventions. One of them, the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, contains a definition of conservation: Article 2 defines the 'conservation of the living resources of the high seas' as 'measures rendering possible the optimum sustainable yield' in terms of 'human consumption'.

This is a prime example of an 'anthropocentric' view of conservation,[99] since the aim is to maximise the yield harvested than humans rather than conservation for its own sake. This mirrors the approach to marine life that the Court took in the 1974 *Fisheries Jurisdiction* cases.

The same perspective can be seen in the motifs of the disputed Icelandic legislation. They stated that the 'population of Iceland has followed the progressive impoverishment of fishing grounds with anxiety. Formerly, when fishing equipment was far less efficient than it

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[91] Matz-Lück and Fuchs (n 6), at p. 491-492.
[92] International Convention for the Regulation of Whaling, Schedule, Paragraph 10(e); Andersen and Vöneky (n 14), at para 4.
[93] Jochen Braig, 'Whaling', in Anne Peters (ed), *Max Planck Encyclopedia of International Law* (Oxford University Press, Oxford, 2013), at para 31; Matz-Lück and Fuchs (n 6), at p. 510.
[94] Braig (n 93), at para 31.
[95] *Ibid.*, at para 30.
[96] Fuchs (n 17), at para 7; Braig (n 93), at para 10.
[97] Convention on the Continental Shelf (Geneva, 29 April 1958, in force 10 June 1964) 499 UNTS 311.
[98] United Nations, 'United Nations Conference on the Law of the Sea (Geneva, 24 February — 27 April 1958)' (2022) <legal.un.org/diplomaticconferences/1958_los>.
[99] Freestone (n 13), at para 6.

is today, the question appeared in a different light'.[100] The motifs thus expressed concern with overfishing, but the statement was prefaced by the acknowledgement that 'the economy of Iceland depends almost entirely on fishing in the vicinity of its coasts'.[101] Thus it seems that the underlying domestic law too was primarily concerned with conservation for the sake of future exploitation. The ICJ's approach to marine life in the 1974 *Fisheries Jurisdiction* cases was the same as in the applicable law and closely related sources.

External Sources and General Developments In Environmental Law

In some disputes judges seem to have been influenced by external sources and general developments in international environmental law.

The Appellate Body's report in *US–Shrimp* interpreted the GATT 1994 in light of other international legal instruments. First, in order to reach the conclusion that sea turtles constituted an 'exhaustible natural resource', the Appellate Body considered whether the provision could apply to living resources. 'Textually' the Appellate Body thought it could.[102] The Appellate Body also referred to 'biological sciences', according to which living resources are 'susceptible of depletion, exhaustion and extinction'.[103] The Appellate Body then cited 'contemporary concerns of the community of nations about the protection and conservation of the environment', with the signatories to the WTO Agreement in particular recognising 'environmental protection as a goal of national and international policy'.[104] This was evidenced by the Agreement's preamble referring to 'sustainable development'.[105] The Appellate Body added that the term 'natural resources' is 'evolutionary', and referred to a four newer conventions and resolutions that specifically cover living resources: the LOSC; the Convention on Biological Diversity (CBD);[106] Agenda 21; and a Resolution on Assistance to Developing Countries under the Convention on the Conservation of Migratory Species of Wild Animals.[107] These instruments were used as 'interpretive tools'.[108] Finally the Appellate Body found support in 'two adopted GATT 1947 panel reports' which included living resources in the GATT 1947 Article XX(g).[109]

The invocation of external sources in the report was unusual. Such sources have otherwise only had a 'limited role' in WTO jurisprudence, and the Appellate Body has 'rarely' looked 'outside the WTO framework'.[110] The Appellate Body's reasoning has thus been called a 'remarkable U-turn' and a 'significance divergence' from practice under the GATT 1947.[111]

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[100] *United Kingdom v. Iceland* (n1), at p. 10; *Germany* v. *Iceland* (n 1), at p. 182 *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 10; *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 175, at p. 182.
[101] *Ibid*.
[102] *US – Shrimp* (n 3), at p. 47.
[103] *Ibid.*, at p. 47.
[104] *Ibid.*, at p. 48.
[105] *Ibid*.
[106] Convention on Biological Diversity (Rio de Janeiro, 5 June 1992, in force 29 December 1993) 1760 UNTS 79.
[107] *Ibid*.
[108] Henrik Andersen, 'Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions' (2015) 18 *Journal of International Economic Law* 383-405, at p. 393.
[109] *US – Shrimp* (n 3), at p. 50.
[110] Andersen (n 108), at p. 393.
[111] Aaron Cosbey and Petros C. Mavroidis, 'Heavy Fuel: Trade and Environment in the GATT/ WTO Case Law' (2014) 23 *Review of European Community & International Environmental Law* 288-301, at p. 289; Switzer (n 75), at p. 142.

The report has been described as a 'landmark' case.[112] Pre-1994 GATT panels had found that marine life could constitute 'exhaustible natural resources',[113] in *Tuna-Dolphin I* and *Tuna-Dolphin II*, but these cases did not accept measures that applied extraterritorially.[114] The progression from the *Tuna-Dolphin* cases to *US-Shrimp* shows that 'WTO jurisprudence has become more amenable to integrating environmental concerns over time'.[115]

The Appellate Body emphasised that the treaty that the case focused on, the GATT, was drafted 'more than 50 years ago', and must be interpreted 'in the light of contemporary concerns' regarding 'the protection and conservation of the environment'.[116] The Appellate Body cited a 'recent acknowledgement by the international community of the importance of' protecting 'living natural resources'.[117] It was 'too late in the day' to interpret the GATT otherwise.[118] The GATT was originally drafted in 1947, while the case was decided in 1998. International environmental law is often said to have started developing in the 1970s,[119] and has 'blossomed into a separate branch of international law in a relatively short span of time'.[120] The external sources that the Appellate Body have been part of the development of international environmental law, and the Appellate Body seems to have been influenced by this general development.

Another decision where treaties were interpreted in the light of external sources is the arbitral award in the *South China Sea* case. The PRC had harvested sea turtles that were listed in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) Appendix I,[121] meaning that they had been defined as 'threatened with extinction' by the States parties to the Convention.[122] The PRC has also harvested giant clams that were listed in CITES Appendix II, which meant that they 'may become' threatened with extinction.[123] The CITES was adopted in 1973, and restricts international trade in species that are listed in its appendices.[124]

The Tribunal could not decide claims based on the CITES as such. The legal basis for arbitration was the LOSC Part XV. The Tribunal's jurisdiction was determined by the LOSC Article 288 and limited to 'any dispute concerning the interpretation or application of [the LOSC]'. The Tribunal chose to interpret the LOSC in light of the CITES.

Moreover, the Tribunal interpreted the term 'ecosystem' in the LOSC Article 194 in light of the definition of the same term in the CBD Article 2.[125] This article defines 'ecosystem' as 'a dynamic complex of plant, animal and micro-organism communities and their non-living

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[112] Chi (n 70), at p. 961.
[113] *Ibid.*, at p. 957.
[114] *United States–Restrictions on Imports of Tuna*, Report of the Panel (DS21/R), 3 September 1991; *United States–Restrictions on Imports of Tuna*, Report of the Panel (DS29/R), 16 June 1994.
[115] Harro van Asselt, 'Trade', in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (2nd ed, Oxford University Press, Oxford, 2021) 751-767, at p. 766.
[116] *US – Shrimp* (n 3), at p. 48.
[117] *Ibid.*, at p. 50.
[118] *Ibid*.
[119] Ulrich Beyerlin and Jenny Grote Stoutenburg, 'Environment, International Protection', in Anne Peters (ed), *Max Planck Encyclopedia of International Law* (Oxford University Press, Oxford, 2013), para 3; Pushkareva (n 18), at para 10.
[120] Sumudu Atapattu, 'Emergence of International Environmental Law: A Brief History from the Stockholm Conference to Agenda 2030' in Edgardo Sobenes, Sarah Mead, Benjamin Samson (eds), *The Environment Through the Lens of International Courts and Tribunals* (Springer, Berlin, 2022), 1-33, at p. 28. Similarly Beyerlin and Stoutenburg (n 119), at para 20.
[121] Convention on International Trade in Endangered Species of Wild Fauna and Flora (Geneva, 3 March 1975, in force 1 July 1975) 993 UNTS 243.
[122] *South China Sea Arbitration* (n 2), p. 380; CITES Article II(1)
[123] *South China Sea Arbitration* (n 2), p. 381; CITES Article II(2).
[124] CITES Article II is the basis for the appendices, while Article III-V contains trade restrictions.
[125] *South China Sea Arbitration* (n 2), at p. 376.

environment interacting as a functional unit', and the Tribunal cited this as an 'internationally accepted' definition. The Tribunal noted that the term was not defined in the LOSC itself.[126]

The Tribunal had earlier noted that the South China Sea 'includes highly productive fisheries and extensive coral reef ecosystems, which are among the most biodiverse in the world'.[127] In light of the scientific evidence, the Tribunal found that 'the marine environments where the allegedly harmful activities took place in the present dispute constitute "rare or fragile ecosystems"', in addition to being 'the habitats of "depleted, threatened or endangered species" including giant clams and sea turtles.[128]

The Tribunal thus drew a connection between the law of the sea, the conservation of endangered species and the protection of biological diversity, and 'found that China had failed to protect coral reefs, endangered species and biodiversity'.[129] Harvesting endangered species should in itself be considered a major threat to biodiversity.[130] It 'read' the LOSC Article 192 and 194 'against the background of other applicable international law',[131] more specifically the CITES and the CBD.[132] The result was that the LOSC Article 192 imposed a 'duty to prevent the harvest of endangered species', such as those listed in the CITES.[133] This duty was 'given particular shape in the context of fragile ecosystems by Article 194(5)',[134] as interpreted in light of the CBD. The Tribunal found that the duties in Article 192 and 194(5) extended to all 'activities within' States' 'jurisdiction and control' and were not limited to particular maritime zones.[135]

The PRC's harvesting of sea turtles was, according to the Tribunal, 'a harm to the marine environment as such'.[136] The harvesting of giant clams at a large scale also had 'a harmful impact on the fragile marine environment'.[137] The PRC had therefore breached its obligations under the LOSC.[138] That this part of the LOSC 'is not solely concerned with controlling marine pollution' but 'extends to the conservation of living resources' was a 'significant' finding.[139] The Convention's conservation obligations were thus not limited to traditional fisheries resources, but included other marine life.[140]

The Tribunal interpreted the LOSC in light of the CITES and the CBD, which were external sources of law. The *South China Sea* award is therefore a clear example of a tribunal interpreting a treaty in light of external sources of law.

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[126] *Ibid*.
[127] *Ibid.*, at p. 321. See also Amrisha Pandey and Surya P. Subedi, 'Enhancing State Responsibility from Environmental Implications of the South China Sea Dispute' in Richard Barnes and Ronán Long (eds.), *International Environmental Law: Oceans and Climate Challenges: Essays in Honour of David Freestone* (Brill, Leiden 2021) 339-367, at p. 346-347; Alfredo C. Robles , *Endangered Species and Fragile Ecosystems in the South China Sea: The Philippines* v. *China Arbitration* (Springer, Berlin, 2020), at p. 254.
[128] *South China Sea Arbitration* (n 2), at p. 376.
[129] Boyle and Redgwell (n 53), at p. 732.
[130] Pandey and Subedi (n 128), at p. 350.
[131] *South China Sea Arbitration* (n 2), at p. 381.
[132] Robles (n 128), at p. 281.
[133] *South China Sea Arbitration* (n 2), at p. 381.
[134] *Ibid*.
[135] *South China Sea Arbitration* (n 2), p. 375; Robles (n 128), p. 203; Stephen Fietta, Jiries Saadeh, and Laura Rees-Evans, 'The South China Sea Award: A Milestone for International Environmental Law, the Duty of Due Diligence and the Litigation of Maritime Environmental Disputes' (2017) 29 *Georgetown Environmental Law Review* 711-746, at p. 735.
[136] *Ibid.*, at p. 382.
[137] *Ibid*.
[138] *Ibid.*, at p. 384.
[139] Fabra (n 10), at p. 545.
[140] *South China Sea Arbitration* (n 2), p. 376; Chie Kojima, 'South China Sea Arbitration and the Protection of the Marine Environment: Evolution of UNCLOS Part XII Through Interpretation and the Duty to Cooperate' (2015) 21 *Asian Yearbook of International Law* 166-180, at p. 180.

The adoption of the CITES was part of the early development of international environmental law in the 1970s. However, the CITES predates the LOSC, which means that situation was reversed compared to that in *US–Shrimp*, where the older GATT was interpreted in light of more recent environmental law-oriented instruments. The CBD, by contrast, was adopted after the LOSC, in 1993. The LOSC also contains numerous environmental provisions itself, such as Article 192 and 194 (which is why the LOSC among the environmental law instruments cited in *US–Shrimp*). Therefore, compared to *US–Shrimp*, the *South China Sea* award is a somewhat less clear-cut example of a tribunal being influenced by broad developments in international environmental law.

In *US–Shrimp* the Appellate Body also cited the CITES, when assessing whether the sea turtles targeted by the US measure were 'exhaustible'. They were listed in Appendix 1 to the CITES Convention, which means they were 'threatened with extinction'.[141] Therefore it was 'very difficult to controvert' the conclusion that they were indeed 'exhaustible'.[142] Here the CITES was used to establish a fact rather than as a source of law,[143] in contrast with the *South China Sea* award.

Contested Legal Principles and Contemporaneous Debates

In some cases, courts and tribunals have applied contested legal principles, where they may have been influenced by contemporaneous scholarly debates.

In the *Southern Bluefin Tuna* order the ITLOS' view was that the parties should 'act with prudence and caution', in order 'to ensure that effective conservation measures are taken' with the aim 'to prevent serious harm to the stock of southern bluefin tuna'.[144] This should be seen as an application of the precautionary principle, even though the Tribunal did not use the specific term.[145] This made the ITLOS the first international tribunal to apply the principle.[146] The precautionary principle is most accurately reflected Principle 15 of the 1992 Rio Declaration,[147] which states that in cases of 'threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation'.[148]

At the time the case was decided it was 'disputed' if the precautionary principle was a general obligation under customary international law.[149] Even so the principle had already then

[141] *US – Shrimp* (n 3), at p. 50.
[142] *Ibid*.
[143] van Asselt (n 115), at p. 759.
[144] *Southern Bluefin Tuna* (n 4), at p. 296.
[145] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, at p. 46-47; *Southern Bluefin Tuna* (n 4), Separate opinion of Judge Treves, at p. 318; Simon Marr, 'The Southern Bluefin Tuna Cases' (2000) 11 *European Journal of International Law* 815-831, at p. 816; Alan Boyle, 'The Environmental Jurisprudence of the ITLOS' (2007) 22 *International Journal of Marine Coastal Law* 369-381, at p. 373.
[146] Nguyen, (n 83), at p. 83.
[147] E.g. Marr (n 146), at p. 820; Edgardo Sobenes and John Devaney, 'The Principles of International Environmental Law Through the Lens of International Courts and Tribunals', in Edgardo Sobenes, Sarah Mead, Benjamin Samson (eds), *The Environment Through the Lens of International Courts and Tribunals* (Springer, Berlin, 2022) 543-577, at p. 559; Gwenaele Rashbrooke, 'The International Tribunal for the Law of the Sea: A Forum for the Development of Principles of International Environmental Law?' (2004) 19 *International Journal of Marine and Coastal Law* 515-536, at p. 521.
[148] Annex 1 of *Report of the United Nations Conference on Environment and Development* (Rio de Janeiro, 3-14 June 1992), *Rio Declaration on Environment and Development*, A/CONF.151/26/Rev.l (Vol. l).
[149] Marr (n 146), at p. 816 and 821; Meinhard Schröder, 'Precautionary Approach/Principle', in Anne Peters (ed), *Max Planck Encyclopedia of International Law* (Oxford University Press, Oxford, 2014), at para 16; Boyle (n 146), at p. 374.

'significantly influenced' the law of the sea,[150] and it has been called 'a guiding principle of modern international law'.[151] The ITLOS thus applied a relatively novel and still contentious principle in order to justify its ruling. The Tribunal took a 'progressive stance' on a difficult question.[152] Therefore the *Southern Bluefin Tuna* order has been called 'one of the most important judicial decisions in international environmental law'.[153]

By contrast the ICJ has not attempted to apply the principle, even though it was pleaded in both *Gabčíkovo-Nagymaros* and *Pulp Mills*.[154] The ITLOS later refrained from applying the principle in a case where it would have been highly suitable, in the *MOX Plant* provisional measures order.[155] The *Southern Bluefin Tuna* order stands out as a case where the ITLOS made use of its judicial discretion in favour of the conservation of marine life.

The ITLOS has never cited the teachings of publicists in its majority opinions.[156] Citations are nonetheless available in individual opinions.[157] The individual opinions in the *Southern Bluefin Tuna* case that do contain references to the teachings of publicists do so disproportionally where the precautionary principle is discussed. This can be seen in the individual opinions of Judge Laing and Judge *ad hoc* Shearer.[158] This may indicate that the Court as a whole had read, and perhaps was influenced by, the teachings of publicists when they decided to apply the precautionary principle.

In the *US–Shrimp* report the Appellate Body argued that the term 'natural resources' is 'evolutionary', as noted in Section 3.2 above. An evolutionary interpretation is one where the meaning of a term changes over time.[159] This too is a concept that has been much debated in the literature.[160] The Appellate Body cited the teachings of publicists to support the application of this debated principle.[161] This is similar to what Judges Laing and Shearer did in the ITLOS' *Southern Bluefin Tuna* order.

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[150] Francisco Orrego Vicuña, *The Changing International Law of High Seas Fisheries* (Cambridge University Press, Cambridge, 1999), at p. 145-146.
[151] Schröder (n 150), at para 1.
[152] Makane Moïse Mbengue and Brian McGarry, 'General Principles of International Environmental Law in the Case Law of International Courts and Tribunals' in Mads Andenas and others (eds), *General Principles and the Coherence of International Law* (Brill, Leiden, 2019) 408-441, at p. 434.
[153] Stephens (n 11), at p. 227.
[154] *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 62; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at p. 71; Boyle (n 146), at p. 374.
[155] *MOX Plant (Irelandv. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, at p. 95, 108-109. See Nguyen (n 83), at p. 80-81; Stephens (n 11), at p. 235-236.
[156] Sondre Torp Helmersen, 'The Application of Teachings by the International Tribunal for the Law of the Sea' (2020) 11 *Journal of International Dispute Settlement* 20-46, at p. 25.
[157] Helmersen (n 157), at p. 27-28.
[158] *Southern Bluefin Tuna* (n 4), Separate opinion of Judge Laing, at p. 311; Separate opinion of Judge *ad hoc* Shearer, at p. 326. See Helmersen (n 157), at p. 30.
[159] Sondre Torp Helmersen, 'Evolutive treaty interpretation : legality, semantics and distinctions' (2013) 6 *European Journal of Legal Studies* 127-148, at p. 128.
[160] An overview is given e.g. by Eirik Bjørge, *The Evolutionary Interpretation of Treaties* (Oxford University Press, Oxford, 2014) , at p. 9-14.
[161] *US – Shrimp* (n 3), at p. 48.

Conclusion

The cases covered in this article have revealed a gradual shift in international jurisprudence towards a greater emphasis on the conservation of marine life. The earliest cases discussed, the ICJ's 1974 *Fisheries Jurisdiction* judgments, had a distinctly economic approach to marine life, where conservation was a tool to ensure future exploitation. The Appellate Body's *US – Shrimp* report and the ITLOS' *Southern Bluefin Tuna* order mark a shift toward an approach where conservation is an end in itself, while this type conservation is nonetheless balanced against economic exploitation. The ICJ's *Whaling in the Antarctic* decision and the *South China Sea* arbitration both take a more fully conservation-oriented approach to marine life and leave no room for the commercial exploitation of certain vulnerable species. The broad trend that may be seen these cases is part of a broader 'discernible shift from judicial ignorance of, and indifference to, environmental issues, to an increased awareness of problems of resource management and ecosystem protection' in the international judiciary.[162]

The cases also show that judges' choices matter. International judges have played 'a pivotal role' in setting the course for the development of international environmental law.[163] It was not given that the members of the Appellate Body in *US – Shrimp* would interpret the GATT in light of international environmental law instruments, or that the ITLOS would apply the precautionary principle in *Southern Bluefin Tuna* when moving to protect tuna stock in the Pacific, or that the arbitrators in *South China Sea* would interpret the LOSC Article 192 in light of the CITES. The approaches to marine life in these cases was not predetermined by the applicable law; they were choices that the judges made. Judges have used varying degrees of judicial discretion in order to shape the development of international law in disputes involving marine life.

These developments in international law and in the practice of international courts and tribunals reflect a broader societal shift.[164] Environmental protection has received gradually more attention and political support in the past decades. Societal changes influence legal frameworks, which in turn affect the outcomes of international disputes. At the same time developments in legal frameworks as well as the practices of international courts and tribunals may influence public opinion. International courts and tribunals also contribute to shaping the contents of international law, given the significant precedential value of their decisions.[165] The microcosm of international marine life disputes is part of a broader multi-faceted, continuous interaction between law, courts and society.

The article may also begin to suggest some cultural differences between institutions. The ICJ seems to have stuck most closely to the applicable law and related sources, while more specialised institutions have seemed more open towards external sources and influences. The institutions may be expected to follow similar patterns in future disputes.

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[162] Stephens (n 11), at p. 357.

[163] Simone Borg, 'The Influence of International Case Law on Aspects of International Law Relating to the Conservation of Living Marine Resources beyond National Jurisdiction' (2013) 23 *Yearbook of International Environmental Law* 44-79, at p. 79. Similarly Natalie Klein, 'International Environmental Law Disputes before International Courts and Tribunals', in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (2nd ed, Oxford University Press, Oxford, 2021) 1038-1053, at p. 1052.

[164] Chi (n 70), at p. 964; Vicuña (n 151), at p. 22.

[165] E.g. Gilbert Guillaume, 'The Use of Precedent by International Judges and Arbitrators' (2011) 2 *Journal of International Dispute Settlement* 5-23.