

# The Environmental Jurisprudence of the International Tribunal for the Law of the Sea\*

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## ABSTRACT

This presentation starts out with an overview of the environmental jurisprudence of international tribunals and courts in the last decade. The author then examines the jurisprudence of the ITLOS and considers four issues that have arisen: the precautionary principle; environmental impact assessment; environmental co-operation; and jurisdiction over marine environmental disputes. Concluding, he asks what the jurisprudence tells us about the Tribunal's role in the LOSC dispute settlement system. First, the Tribunal's provisional measures cases have established the utility of the Article 290 procedure as a means of protecting the rights of other States but also the marine environment in general. Second, there is evidence in the case law of a desire to settle disputes between the parties in a way that contributes to the development of a consistent jurisprudence and of a willingness to interpret and apply Part XII of the Convention in accordance with the contemporary state of international environmental law. The Tribunal's record on marine environmental disputes is a positive one.

## A decade of environmental jurisprudence

The past decade has seen an unparalleled growth in the environmental jurisprudence of international tribunals. No longer is it necessary to squeeze every drop of life out of the immortal trio of arbitrations—*Bering Sea Fur Seals*, *Trail Smelter* and *Lac Lanoux*—which have sustained international environmental law throughout most of its existence. Since the Rio Conference in 1992, the subject as a whole has come of age. A modern account of international environmental law would have nearly twenty cases decided since 1996 on which to draw. By any measure this is a substantial jurisprudence. Equally remarkable is the number of courts and tribunals which have contributed to

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the jurisprudence, as well as the range and eclecticism of the issues that have arisen. Its gestation may have been slow, but international environmental law has proved a very vigorous plant.

Moreover, the growing case law affords little comfort for those who sometimes doubt the very existence of general international law dealing with the environment, or who tend to see it all as soft law or comprised only of specific treaty regimes. States have not sought to argue that general international law does not require them to control transboundary pollution, or to carry out environmental impact assessments (EIA), or to co-operate in the management of environmental risks. They have not challenged the standard textbook accounts of the subject or the International Law Commission's (ILC) codification of the law relating to transboundary harm.<sup>1</sup> Rather, the focus of most of the litigation has been on the adequacy or inadequacy of the measures States have taken, or failed to take—on whether, for example, an appropriate EIA has been carried out, or diligent pollution control laws exist, not on whether they are necessary at all. Only in one area has judicial activity been noticeably absent: liability for damage to the environment. On this topic many treaties have been negotiated—including most recently an annex to the Antarctic Environmental Protocol<sup>2</sup>—but the case law remains little further advanced today than when the *Trail Smelter* case was decided over sixty years ago. The ILC has made only limited progress in addressing this deficiency in its codification work.<sup>3</sup> There is nevertheless no shortage of material on which to draw in any future litigation on this subject,<sup>4</sup> including the final award of the United Nations Compensation Commission (UNCC) on environmental damage claims arising under UN Security Council Resolution 687.<sup>5</sup> This award is the first

<sup>1</sup> ILC, 'Draft Articles on Prevention of Transboundary Harm from Hazardous Activities', UN GAOR 56th Session Supplement No. 10 UN Doc A/56/10 (2001). See *MOX Plant case (Ireland v. United Kingdom)* (Provisional Measures, Order of 3 December 2001) ITLOS No. 10 and *MOX Plant Arbitration (Jurisdiction)* (2003) PCA ([www.pca-cpa.org](http://www.pca-cpa.org)); *Case concerning the Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Request for the Indication of Provisional Measures: Order of 13 July 2006) General List No. 135 [2006] ICJ Reports; *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)* (Provisional Measures, Order of 8 October 2003) ITLOS No. 12.

<sup>2</sup> Annex VI to the 1991 Protocol on Antarctic Environmental Protection, adopted 2005. See D J Bederman and S P Keskar, 'Antarctic Environmental Liability: The Stockholm Annex and Beyond' (2005) 19 *Emory Int. L.Rev.* 1383-1406.

<sup>3</sup> See ILC, 'Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities' UN GAOR 61st Session Supplement No. 10 UN Doc A/61/10 (2006).

<sup>4</sup> See Toronto Rules on Transnational Enforcement of Environmental Law in International Law Association (ILA) Report of the 72nd Conference (Toronto 2006) (ILA, London 2006); L A de La Fayette, 'New Approaches to Addressing Damage to the Marine Environment' (2005) 2 *IJMCL* 167; J Brunnée, 'Of Sense and Sensibility: Reflections on International Liability Regimes as Tools for Environmental Protection' (2004) 53 *ICLQ* 351; R R Churchill, 'Civil Liability Litigation for Environmental Damage by Means of Treaties: Progress, Problems and Prospects' (2001) 12 *YbIEL* 3.

<sup>5</sup> UN Compensation Commission, 'Report and Recommendations Concerning 5th Instalment of "F4" Claims' (2006) paras. 4-58.

ever given by an international tribunal on compensation for environmental monitoring, cleanup and reinstatement costs.

Of the decade's environmental cases, only three have been decisions of the International Tribunal for the Law of the Sea (ITLOS) dealing directly with protection of the marine environment.<sup>6</sup> At this stage of the Tribunal's life that is not an unhealthy record when compared to other courts and tribunals. It is certainly no reason for undue modesty about the role of the Tribunal. In its first ten years, the International Court of Justice (ICJ) decided only one case with even tangential relevance to environmental matters—*Corfu Channel*<sup>7</sup>—and quite what that case decides is uncertain even today. Not until 1974 did the ICJ hear its first cases with a genuine environmental element—*Icelandic Fisheries* and *Nuclear Tests*.<sup>8</sup> Although both were pregnant with possibilities, neither decision contributed much to the subsequent evolution of international law on the environment. Thereafter, it was the *Nuclear Weapons Advisory Opinion*<sup>9</sup> which gave the ICJ its first real opportunity to say something of elementary importance about environmental matters. Two more cases complete the ICJ's record of environmental jurisprudence in the last ten years—*Gabčíkovo-Nagymaros*<sup>10</sup> and *Pulp Mills Provisional Measures*<sup>11</sup>—both cases about equitable utilisation of rivers, sustainable development and environmental impact assessment. These are important decisions; nevertheless, within the lifespan of the ITLOS, the ICJ has decided a mere three environmental cases in total, only two on the merits.

Nor is the record of *ad hoc* arbitrations noticeably stronger. The *Southern Bluefin Tuna*<sup>12</sup> and *MOX Plant*<sup>13</sup> arbitrations did not result in awards on the merits, but both show how difficult it can be to engage LOSC compulsory jurisdiction even in environmental disputes. *OSPAR*<sup>14</sup> is confined to a very narrow point about access to commercially sensitive information, while *Land Reclamation*<sup>15</sup> simply endorses an agreement between the parties to settle the dispute. All four of these arbitrations are more interesting for what they do not decide about international environmental law than for what they do decide, although procedurally they have all been challenging to the coherence

<sup>6</sup> *Southern Bluefin Tuna (Provisional Measures)* (1999) ITLOS Nos. 3 & 4; *MOX Plant (Provisional Measures)* (2001) ITLOS No. 10; *Land Reclamation (Provisional Measures)* (2003) (n 1).

<sup>7</sup> *Corfu Channel Case (UK v. Albania)* (Merits) [1949] ICJ Rep 1.

<sup>8</sup> *Icelandic Fisheries Cases* [1974] ICJ Rep 3 and 175; *Nuclear Tests Cases* [1974] ICJ Rep 253 and 457.

<sup>9</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226.

<sup>10</sup> *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* [1997] ICJ Rep 7.

<sup>11</sup> *Pulp Mills on the River Uruguay* (Provisional Measures) (2006) (n 1).

<sup>12</sup> *Southern Bluefin Tuna Arbitration* (2000) 39 ILM 1359.

<sup>13</sup> *MOX Plant Arbitration* (2003) (n 1).

<sup>14</sup> *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention (Ireland v. UK)* (2003) PCA, 42 ILM 1118.

<sup>15</sup> *Case Concerning Land Reclamation By Singapore in and around the Straits of Johor (Malaysia v. Singapore)* (2005) PCA.

of international law and the availability of compulsory jurisdiction under the United Nations Convention on the Law of the Sea (LOSC).

Compared to the ITLOS, the World Trade Organization (WTO) Appellate Body has been overwhelmed with litigation in its similarly short lifespan—not necessarily a very good health indicator—but even it has decided no more than three environmental cases within the decade. Apart from *Shrimp-Turtle*<sup>16</sup>—its most important decision on an environmental question so far—the only other environmental cases of real note at the time of writing are *Asbestos*<sup>17</sup> and *Beef Hormones*.<sup>18</sup> Finally, the European Court of Human Rights (ECHR) has made an outstanding contribution to environmental rights jurisprudence, but there are still only six notable cases in the past decade.<sup>19</sup> The *Ogoniland* case<sup>20</sup> decided by the African Commission on Human and Peoples' Rights is arguably the most important environmental decision of any international tribunal in the same period. This is not the only environmental case decided by a regional body in the developing world,<sup>21</sup> but if the ITLOS can claim to have decided nothing of comparable significance, neither can any other court or tribunal.

So although there has been a very great increase in environmental litigation, no court has either monopolised or dominated the field. Thanks to the proliferation of international tribunals, the large number of cases has been widely—perhaps thinly—spread. Seen from that angle, the ITLOS record is as good as any other tribunal's. Moreover, apart from ITLOS, only the WTO in *Shrimp-Turtle* has decided anything relevant to the protection of the marine environment. Of the three ITLOS cases, all are provisional measures applications. *MOX Plant* and *Land Reclamation* are both concerned with interpretation and application of Part XII LOSC, including its provisions on prevention of pollution, environmental impact assessment, co-operation and consultation, and in the latter case also liability for possible damage. *Southern Bluefin Tuna* is of course a fisheries dispute, concerned with Part VII of the Convention, rather

<sup>16</sup> WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products—Report of the Appellate Body* (1998) WT/DS58/AB/R and *Art 21.5 Report* (2001) WT/DS58/AB/RW.

<sup>17</sup> WTO, *EC: Measures Affecting Asbestos, etc.—Report of the Appellate Body* (2001) WT/DS135/AB/R.

<sup>18</sup> WTO, *EC: Measures Concerning Meat And Meat Products (Beef Hormones)—Report of the Appellate Body* (1997) WT/DS26/AB/R.

<sup>19</sup> *Hatton v. UK* (2003) 37 EHRR 611; *Guerra v. Italy* (1998) 26 EHRR 357; *Kyrtatos v. Greece* (2003) ECHR 242; *Taskin v. Turkey* (2004) ECHR; *Öneryıldız v. Turkey* [2004] ECHR 657; *Fadeyeva v. Russia* (2005) ECHR 376. See L G Loucaides, 'Environmental Protection through the Jurisprudence of the European Convention on Human Rights' 75 BYIL (2005) 249. There are other less notable cases which focus essentially on failure to enforce the law and which I have discounted.

<sup>20</sup> African Commission on Human and Peoples' Rights, *Social and Economic Rights Action Centre (SERAC) and The Centre for Economic and Social Rights (CESR) v. Nigeria* (2001) Communication No. 155/96.

<sup>21</sup> See also *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001), Inter-Am C.H.R. Ser. C, No. 20; *Maya indigenous community of the Toledo District v. Belize*, Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004).

than Part XII, but the Tribunal expressly regarded the conservation of the living resources of the sea as an element in the protection and preservation of the marine environment, and its references to the precautionary principle or approach are relevant in general terms to the interpretation and application of Part XII.

Perhaps the first point to make about the Tribunal's jurisprudence therefore is that it has not taken a narrow view of what is meant by 'the marine environment'. In this respect it is surely correct: it is clear from the totality of Articles 192–196 that Part XII was never intended to be simply about pollution, and that it encompasses protection of ecosystems, conservation of depleted or endangered species of marine life, and control of alien species. Moreover, Agenda 21 of the Rio Conference, the Convention on Biological Diversity and the UN Fish Stocks Agreement all give a broad reading to the responsibilities of States with regard to protection of the marine environment. In this context conservation and sustainable use of marine living resources, ecosystems and biological diversity are important elements, and the 1982 LOSC must be interpreted and applied accordingly.

Let me then turn to examine the jurisprudence. Four issues that have arisen in the ITLOS cases will be considered here: the precautionary principle, environmental impact assessment, environmental co-operation, and jurisdiction over marine environmental disputes. The paper will conclude by asking what the jurisprudence tells us about the Tribunal's role in LOSC dispute settlement.

### **The precautionary principle or approach**

The precautionary principle or precautionary approach has been pleaded in several cases before various international tribunals,<sup>22</sup> but the ITLOS ruling in *Southern Bluefin Tuna* remains the only one that comes close to applying the concept.<sup>23</sup> Although the Judgment studiously avoids using the term 'precautionary,' the Tribunal's references to scientific uncertainty focus directly on the core element of the precautionary approach as set out in Principle 15 of the Rio Declaration. Calling on the parties to act 'with prudence and caution' can be seen as an application of the precautionary approach, and as a 'logical consequence' of the need to ensure effective conservation and avoid further serious harm to the fish stock in advance of the arbitration award. In this sense, as Judge Treves observes, a precautionary approach recognising the uncertainties involved is "inherent in the very notion of provisional measures."

Despite the limited context of a provisional measures application, we can probably read this Judgment as supporting a more general point identified by Judges Laing and Treves: that the Convention should be interpreted and

<sup>22</sup> Including *Gabcikovo, MOX Plant and Pulp Mills*.

<sup>23</sup> See *Southern Bluefin Tuna* (n 6) paras. 77–79. See also the WTO Appellate Body in *Beef Hormones* (n 18).

applied taking account of the precautionary principle.<sup>24</sup> It is not only the fisheries conservation Articles of the 1982 LOSC which may have been modified by the precautionary principle. The definition of pollution in Article 1, the obligation to do an environmental impact assessment in Article 206, the general obligation to take measures to prevent, reduce and control pollution under Article 194, and the responsibility of States for protection and preservation of the marine environment under Article 235 are also potentially affected by the more liberal approach to proof of environmental risk envisaged by Rio Principle 15.

Some writers and governments have argued that the precautionary principle or approach is a rule of customary international law.<sup>25</sup> Like other international tribunals considering the matter,<sup>26</sup> as well as most governments, the ITLOS has rightly been hesitant to accept this characterisation. The ICJ has so far said nothing about the precautionary principle, although it was pleaded in *Gabčíkovo and Pulp Mills*. However, in the *North Sea Continental Shelf Case* the ICJ referred to the need for allegedly law-making instruments to have “a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law.”<sup>27</sup> It is far from evident that the precautionary approach as articulated in Principle 15 of the Rio Declaration either has or could have the necessary normative character to constitute a rule of law. It is phrased in very general terms and says only that scientific uncertainty is not to be used as a reason for postponing cost-effective measures; it does not say anything about what those measures should be. Of course, a pattern of treaty provisions elaborating ‘precautionary measures’ might enable a new and more specific customary rule to emerge. A number of treaties dealing with the marine environment do have such provisions, including the OSPAR Convention<sup>28</sup> and the POPs Convention,<sup>29</sup> but in essence these agreements simply strengthen the existing obligation to take preventive measures. Others, including the London Dumping Convention,<sup>30</sup> take a stronger approach by prohibiting a potentially harmful activity unless the proponent State can show that

<sup>24</sup> Judges Laing at paras. 16–19 and Treves at para. 9. See also M Nordquist (ed), *UNCLOS Commentary*, vol. III, p. 288, and D Freestone, in A Boyle and D Freestone (eds), *International Law and Sustainable Development* (Oxford University Press, Oxford 1999) 140.

<sup>25</sup> See, e.g., the EU’s argument in the WTO *Asbestos* case and A Trouwborst, *Evolution and Status of the Precautionary Principle in International Law* (The Hague 2001) 284. Trouwborst sees the principle as the basis for comprehensive environmental protection both nationally and internationally.

<sup>26</sup> See WTO Appellate Body in *Beef Hormones* (n 18) at paras. 120–125.

<sup>27</sup> *North Sea Continental Shelf Case (Germany v. Netherlands)* [1969] ICJ Rep 3, at para. 72.

<sup>28</sup> 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic, Article 2 (2) (a). See also the 1995 Revised Convention for the Protection of the Mediterranean Sea Against Pollution, Article 4 (3) (a); 1996 Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources and Activities, Preamble.

<sup>29</sup> 2001 Stockholm Convention on Persistent Organic Pollutants, Article 1.

<sup>30</sup> 1972 Convention for the Prevention of Marine Pollution by Dumping, Article IV(1)(a) and Annex I as amended, 1993. See also the moratorium in force under the 1946 Whaling Convention.

no harm is likely, but this reversal of the burden of proof is exceptional. It was quite deliberately not adopted when a precautionary approach to fisheries conservation was elaborated in some detail by Article 6 of the 1995 UN Fish Stocks Agreement.<sup>31</sup> However, as Judge Treves observed in *Southern Bluefin Tuna*, it was not necessary in that case to decide whether the precautionary principle has customary law status or if so what it might then require.

If the precautionary principle is viewed not as a customary law rule but simply as a general principle then its use by national and international courts and by international organisations is easier to explain.<sup>32</sup> General principles can become especially influential when like the precautionary approach they are adopted in a globally endorsed instrument such as the 1992 Rio Declaration on Environment and Development.<sup>33</sup> General principles of this kind do not have to create rules of customary law to have legal effect. Rather, their importance derives from the general influence they can exert on the interpretation, application, and development of other rules of law. Decision-makers and courts may rely on them when deciding cases and interpreting treaties, an argument which appears to be supported by Article 31 (3) of the 1969 Vienna Convention on the Law of Treaties<sup>34</sup> and by the *Southern Bluefin Tuna* provisional measures decision discussed earlier. Moreover, the interpretation and application of customary international law may also be affected. Thus, referring to the precautionary principle, Brownlie observes that “The point which stands out is that some applications of the principle, which is based on the concept of foreseeable risk to other States, are encompassed within existing concepts of State responsibility”.<sup>35</sup> The ILC Special Rapporteur on transboundary harm has taken the same view, concluding that the precautionary principle is already a component of customary rules on prevention of harm and environmental impact assessment, ‘and could not be divorced therefrom’.<sup>36</sup>

From this perspective, the real importance of the precautionary principle is that it redefines existing rules of international law on control of environmental risks and conservation of natural resources and brings them into play at an earlier stage than before. No longer is it necessary to show that significant or irreversible harm is certain or likely before requiring that appropriate

<sup>31</sup> See Freestone, ‘International Fisheries Law Since Rio: the Continued Rise of the Precautionary Principle’, in Boyle and Freestone (n 23) ch. 7.

<sup>32</sup> See A Nollkaemper, ‘What You Risk Reveals What You Value’, in Freestone and Hey (eds), *The Precautionary Principle and International Law: The Challenge of Implementation* (The Hague 1996) 80.

<sup>33</sup> See Principle 15.

<sup>34</sup> See ILC, ‘Report of the International Law Commission on the work of its 57th Session’ (2 May to 3 June and 11 July to 5 August 2005) UN Doc A/60/10 (2005) para. 477, and ECHR, *Golder v. UK* (1975) 1 EHRR 524, paras. 10–36.

<sup>35</sup> I Brownlie, *Principles of Public International Law* (6th ed., Oxford University Press, Oxford 2003) 276.

<sup>36</sup> ILC, ‘Report of the International Law Commission on the work of its 52nd Session’ (1 May to 9 June and 10 July to 18 August 2000) UN Doc A/55/10 (2000) para. 716.

preventive measures be taken. Evidence that such harm is possible will be enough to trigger an obligation to act. Like the UN Fish Stocks Agreement or the POPS Convention, however, *Southern Bluefin Tuna* also shows that a precautionary approach does not reverse the burden of proof of harm in any of these instances, even if the position with regard to dumping, whaling, or trade in hazardous waste is to ban such activities unless they can be shown to pose no risk of harm. Whatever the theoretical merits of a 'no harm' approach to environmental protection may be, we should not forget that Article 193 of the 1982 LOSC carefully balances the sovereign right of States to exploit their natural resources with their responsibility for protecting the marine environment. It does not give the latter priority over the former, and to that extent does not prohibit all risk of harm.<sup>37</sup>

### Environmental Impact Assessment (EIA)

Although at least five cases have involved alleged failures to undertake an EIA,<sup>38</sup> no court or tribunal has yet given a ruling which says anything very useful about EIA in international law. In part this is because only the *Gabčíkovo-Nagymaros* case reached the merits stage, and here it was manifestly too late to do an EIA after the event. More importantly, States generally have not contested the existence of a duty to undertake environmental impact assessment. Typically, as in *MOX Plant*, *Land Reclamation* or *Pulp Mills*, they argue about whether an appropriate EIA took place, not about whether one is necessary at all. If any of these cases were ever to reach the merits stage, the argument would thus focus on the adequacy of what was done and the standard to be met. Even if the cases decide nothing about EIA, they provide important evidence of State practice which points consistently in the direction of recognising that where proposed activities are likely to harm the environment, an EIA directed at transboundary impacts is a necessary preliminary to consultation and co-operation with other potentially affected States. In *Gabčíkovo-Nagymaros* the parties seem to have agreed on the necessity for monitoring in accordance with international law and the court itself referred to the need to 'look afresh' at the effects of activities begun in the past.<sup>39</sup> In these circumstances it should not be surprising that there has been no need to affirm judicially what States say they already practice.

In principle an EIA of planned activities is required by Article 206 of the 1982 LOS Convention when States have 'reasonable grounds for believing'

<sup>37</sup> See also the carefully balanced formulation reiterated in Principle 2 of the Rio Declaration and the ICJ's references to the right of states to pursue sustainable development in *Pulp Mills (Provisional Measures)* (n 1) para. 80.

<sup>38</sup> *Nuclear Tests Case* [1995] ICJ Rep 288; *Gabčíkovo-Nagymaros* (n 10); *MOX Plant Arbitration* (n 1); *Land Reclamation (Provisional Measures)* (n 1); *Pulp Mills (Provisional Measures)* (n 1).

<sup>39</sup> *Gabčíkovo-Nagymaros* (n 10) para. 140.

that substantial pollution or significant harm to the marine environment may result. This Article was pleaded in both *MOX Plant* and *Land Reclamation*. Three significant questions remain unanswered: when does Article 206 apply, how can potentially affected States ensure that an EIA takes place, and can a court review the adequacy of an EIA? The evidential standard for showing the 'reasonable grounds' required for the application of Article 206 is unlikely to be an onerous one—it would be self-defeating to demand proof of a risk of harm as a pre-condition for doing an EIA, the purpose of which is to establish exactly that. The practice of the parties in *MOX Plant* and *Pulp Mills* suggests that where large-scale industrial activities with a known risk of potentially serious pollution are involved, the necessity of an EIA can be presumed, even if the likely risk is a small one. This would be consistent with many national EIA laws and with more detailed regional EIA treaties such as the ESPOO Convention<sup>40</sup> and the Antarctic Environmental Protocol.<sup>41</sup> Where the nature of the risk is less certain than it was in *MOX Plant* or *Pulp Mills*, interpretation in accordance with the precautionary principle would still suggest a low evidential threshold for the application of Article 206. This conclusion is supported by the decision to order provisional measures in *Southern Bluefin Tuna* and *Land Reclamation*—the measures amounting in effect to a form of EIA insofar as expert studies were initiated into the risks involved.

The question whether an international court can review the adequacy of an EIA is posed by the pleadings in *MOX Plant* and *Pulp Mills*. In both cases the complainant State advanced arguments in favour of a prescriptive approach, drawing on detailed standards from national or regional law, and arguing that the EIA in fact undertaken was inadequate. Both applicants seek to challenge the conclusion that no significant harm is likely to affect other States or the marine or riparian environment. Article 206 LOSC is silent on the question of what is required in an EIA, and in contrast to Articles 207–211 it makes no reference to internationally agreed rules and standards. In both *MOX Plant* and *Pulp Mills* the respondent States argue that their EIA already meets the highest international standards and they rely on scientific evidence and the judgment of independent bodies to justify the conclusion that the other State is not at risk. Using litigation to challenge the standards and conclusions of an EIA is not unknown in national law; there are American precedents, but it remains to be seen how far an international court may be prepared to set aside an EIA made in good faith on the basis of substantial scientific and technical evidence. We will have to await a judgment on the merits to provide an answer to any of these questions.

<sup>40</sup> 1991 Convention on Environmental Impact Assessment in a Transboundary Context. This Convention lists activities in respect of which an EIA is required if they are likely to have a significant adverse transboundary impact. In disputed cases there is an inquiry procedure.

<sup>41</sup> 1991 Protocol to the Antarctic Treaty on Environmental Protection, Annex 1. This agreement requires at least an initial examination of all activities covered by the Protocol.

What we can observe from *Southern Bluefin Tuna* and *Land Reclamation* is that provisional measures applications may afford a useful method for tackling failure to do an EIA. In both cases the Tribunal found that the risk of harm to the marine environment could not be excluded.<sup>42</sup> In *Land Reclamation* it expressly ordered the parties to assess the risks and effects of the works, while in *Southern Bluefin Tuna* the effect of its order was that catch quotas could only be increased by agreement after further studies of the state of the stock. In *Pulp Mills* and *MOX Plant*, however, no such orders were made; not only did the respondents' EIAs show that there was no risk of significant or imminent harm to the environment, but this was evidence which, crucially, the applicants respectively failed to rebut or which they accepted in the oral hearings. The contrasting outcomes in these four cases suggest that if an EIA has not been undertaken and there is some evidence of a risk of serious harm to the marine environment—even if the risk is uncertain and the potential harm not necessarily irreparable—an order requiring the parties to co-operate in prior assessment is likely to result even at the provisional measures stage. If that is correct then a provisional measures application may be the best remedy available to a potentially affected State seeking to enforce Article 206 LOSC.

Quite a lot remains to be decided about EIA in international law, and more specifically about the scope and implications of Article 206 LOSC. So far, the case law has barely scratched the surface.

## Co-operation

In what may become the best-known passage from an ITLOS judgment, the Tribunal has twice said that “the duty to co-operate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law and that rights arise therefrom which the Tribunal may consider appropriate to preserve under Article 290 of the Convention”.<sup>43</sup> In *MOX Plant* and *Land Reclamation* the parties were thus ordered to improve their co-operation, and to consult, exchange information, monitor or assess the risks and effects of their activities, and devise measures to prevent pollution. Similarly, in *Southern Bluefin Tuna* the Tribunal emphasised the need for greater co-operation to ensure conservation and optimum utilisation, and it ordered the parties to resume negotiations for that purpose “without delay”.<sup>44</sup> Moreover, in *MOX Plant* and *Land Reclamation*, as we have seen, these co-operation orders were made notwithstanding findings that the evidence did not show that irreparable harm was either imminent or likely.

<sup>42</sup> *Southern Bluefin Tuna (Provisional Measures)* (n 6) para. 79; *Land Reclamation (Provisional Measures)* (n 1) para. 96.

<sup>43</sup> *Mox Plant case (Provisional Measures)* (n 1) para. 82; *Land Reclamation (Provisional Measures)* (n 1) para. 92.

<sup>44</sup> *Southern Bluefin Tuna (Provisional Measures)* (n 6) para. 78 and operative para. (e).

It is undoubtedly true that co-operation in the control of environmental risks is one of the central elements of general international law on environmental protection. The obligation of States to notify, consult and negotiate permeates the ILC's draft Articles on transboundary harm<sup>45</sup> and the 1992 Rio Declaration on Environment and Development;<sup>46</sup> it is also very clearly articulated in our 'old friend' the *Lac Lanoux Arbitration*,<sup>47</sup> as well as in *Gabčíkovo-Nagymaros* and in various regional treaties, including the River Uruguay Treaty<sup>48</sup> at issue in the *Pulp Mills Case*. An obligation to co-operate is rather less clearly set out in the 1982 LOSC. Article 123 somewhat weakly says that States bordering enclosed or semi-enclosed seas "should" co-operate with each other, while Part XII requires States to co-operate but mainly in the task of adopting global and regional rules and standards. Articles 204 and 206 on monitoring and environmental impact assessment notably do not mention an obligation to co-operate,<sup>49</sup> although they require reports to be communicated to competent international organisations. It may thus be significant that in its judgments the Tribunal has referred to co-operation both under the LOSC and in general international law, implying that in this respect the Convention has been given a broader reading than its express terms by themselves would suggest. This is an important conclusion, because it shows how the Convention can in appropriate cases be interpreted and applied taking general international law into account. The idea that treaties can have a dynamic or living interpretation is an important contribution to the process of evolutionary change in international law. However, in this instance it is arguable that the Tribunal is merely interpreting the Convention in accordance with general international law as it already existed in 1982,<sup>50</sup> rather than incorporating some wholly novel developments.

The *Land Reclamation* case shows particularly clearly how obligations of transboundary co-operation can be enforced using provisional measures. In addition to ordering the parties to co-operate in establishing an independent study, exchanging information and assessing the risks, the Tribunal also noted that in the course of the hearing Singapore had given assurances that it would notify, consult and negotiate with Malaysia before proceeding with further works, while giving it the opportunity to comment and produce new evidence. Without any decision on the merits, Malaysia thus secured commitments that in substance addressed all of its rights to co-operation under the LOSC and

<sup>45</sup> See n 1 above.

<sup>46</sup> See Principles 7, 9, 12, 13, 14, 18, 19, 27.

<sup>47</sup> *Lac Lanoux Arbitration (France v. Spain)* (1957) 24 ILR 101.

<sup>48</sup> 1975 Statute of the River Uruguay.

<sup>49</sup> Nor does Principle 17 of the Rio Declaration, which refers only to EIA "as a national instrument . . ."

<sup>50</sup> See, e.g., 1972 Stockholm Declaration on the Human Environment, Principle 24; UNGA Resolutions 3129 XXVIII (1973) and 3281 XXIX (1974); UNEP, Principles of Conduct for Natural Resources Shared by Two or More States (1978).

general international law. This is perhaps not the Tribunal's most exciting judgment—but it is nevertheless a very remarkable outcome for a provisional measures case—and one which effectively resolved the dispute without further proceedings on the merits.

### **Some Conclusions on the Tribunal's Jurisprudence**

What conclusions can we draw from all this? First, the Tribunal's provisional measures cases have established the utility of the Article 290 procedure as a means of protecting not only the rights of other States but also the marine environment in general. Second, there is evidence in the case law of a desire to settle disputes between the parties in a way that contributes to the development of a consistent jurisprudence. Third, the Tribunal has demonstrated its willingness to interpret and apply Part XII of the Convention consistently with the contemporary state of international environmental law, while avoiding particularly radical outcomes. These are the conclusions we should expect to draw from the jurisprudence of an international court, remembering that the principal purposes of the Convention's provisions on dispute settlement are to provide authoritative mechanisms for determining questions relating to the interpretation or application of the treaty, to guarantee the integrity of the text, and to control its implementation and development by States parties. From this point of view compulsory dispute settlement is designed to prevent fragmentation of the conventional law of the sea, while at the same time allowing for its continued evolution in a coherent manner that reflects the consensus/package deal character of the Convention. Nevertheless, Part XII is a product of the early 1970s. The challenge facing any court which is called on to interpret and apply it should not be underestimated, because in several important respects the law has moved on, and will continue to do so. The Convention was intended to have the flexibility to respond to change and within the above limits the ITLOS has shown itself to be one of the mechanisms for enabling it to do so.

The Tribunal's record on marine environmental disputes is thus a positive one, despite the absence of any opportunity to decide such a case on its merits. However, it is clear that two problems of larger significance remain. First, given that Annex VII arbitration has emerged as the principal forum for hearing the merits of LOSC disputes, the task of ensuring consistent and coherent interpretation and application of Part XII is made harder than it would be if ITLOS were the default forum—unless of course Annex VII arbitrators continue to refuse jurisdiction in environmental cases. That is the second problem. What might have seemed a relatively comprehensive system of compulsory settlement of disputes concerning the marine environment has become a minefield of jurisdictional complexity, revealed most plainly in *MOX Plant* and *Southern Bluefin Tuna*. The most difficult aspect of this problem concerns the relationship between the LOSC and regional treaties. Regional environ-

mental and fisheries treaties often amplify the framework provisions of the LOSC; only rarely do they mirror its dispute settlement provisions. How should a LOSC tribunal respond to a dispute which straddles both the LOSC and a regional implementation treaty? The answers are confused. In *Southern Bluefin Tuna* the arbitrators chose to integrate the application of the LOSC and the 1993 Convention on the Conservation of Southern Bluefin Tuna, but in doing so they concluded that the latter treaty had deprived them of jurisdiction to decide the dispute under the former. Logically, on this basis ITLOS no longer has *prima facie* jurisdiction even for provisional measures in such cases. In *MOX Plant*, neither the ITLOS nor the arbitrators took an integrated view of the LOSC and the 1992 OSPAR Convention, preferring to see them as parallel but separate regimes. However, by keeping the treaties separate they deprived themselves of jurisdiction to apply OSPAR in an LOSC dispute. On this approach both ITLOS and the Annex VII tribunal retain *prima facie* LOSC jurisdiction for the purpose of granting provisional measures in such disputes.

It is not possible for both of these cases to be correct on this issue; the choice between them is essentially one of policy, but at some point a choice will have to be made. When we come to problems of this kind the drawbacks of relying on *ad hoc* arbitration as the main forum for LOSC dispute settlement stand out rather too starkly. Contrasting the record of ITLOS with that of Annex VII arbitrations on protection of the marine environment leaves this commentator in no doubt that the ITLOS has taken a more considered and consistent view of the Convention and the settlement of disputes. If there is one urgent need for amendment of the LOSC it would be to substitute an *ad hoc* chamber of the ITLOS as a default forum for Part XV jurisdiction in place of Annex VII arbitration. As things stand, there is a real risk that the present system will neither settle disputes nor develop the law in a coherent way—but that will be no fault of the Tribunal's.