Chapter 3
International Tribunal for the Law of the Sea

Lan Ngoc Nguyen

Contents

Abstract While the United Nations Convention on the Law of the Sea (UNCLOS) places significant emphasis on the protection of the marine environment, the interpretation of the relevant rules under UNCLOS and the application of general environmental principles to the marine environment are not always straightforward. The role of judicial bodies in clarifying these rules to protect and preserve the marine environment is therefore especially important. This chapter aims to examine the contribution of the International Tribunal for the Law of the Sea ('ITLOS' or 'the Tribunal') to the protection of the marine environment. To that end, the chapter first examines the procedural rules that are relevant to disputes relating to the marine environment. It then analyses how ITLOS has interpreted and applied important principles of environmental law in the context of the marine environment in its jurisprudence. Based on these findings, the chapter assesses the strengths and weaknesses of ITLOS in contributing to the protection of the marine environment. The chapter concludes that

L. N. Nguyen (✉)
Faculty of Law, Economics and Governance, Utrecht University School of Law, Netherlands
Institute for the Law of the Sea, Utrecht, The Netherlands
e-mail: l.n.nguyen@uu.nl

Centre for Water, Oceans and Sustainability Law, Utrecht University, Newtonlaan 201, 3584 BH Utrecht, The Netherlands

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the Tribunal's examination of important environmental principles lends an authoritative voice to endorsing their importance in the context of the marine environment and helps to enrich the case law that deals with them, thus providing guidance for States in the implementation of the principles. At the same time, one should be reasonable in what can be expected of ITLOS in terms of its contributions to the protection of the marine environment due to the inherent jurisdictional limitations upon dispute settlement bodies.

Keywords International Tribunal for the Law of the Sea (ITLOS) · marine environment · arovisional measures · advisory proceedings · precautionary principle · duty to cooperate · duty to conduct environmental impact assessment

3.1 Introduction

The protection of the marine environment assumes a special place under the United Nations Convention on the Law of the Sea ('UNCLOS' or 'the Convention'). Not only does the Convention prescribe States' rights and obligations regarding the conservation of marine resources in the maritime zones falling under their jurisdiction, it also devotes an entire Part XII to the 'Protection and Preservation of the Marine Environment'. However, while innovative, Part XII provides a general framework for the protection of the marine environment, and focuses primarily on prevention of marine pollution. Due to the zonal approach to maritime regulation that UNCLOS adopts, other aspects of the protection of the marine environment are not contained in Part XII but found in other parts of the Convention, for example, the conservation of marine resources in Part V on Exclusive Economic Zone (EEZ) or protection of the marine environment in the seabed in areas beyond national jurisdiction in Part XI on the Area. As a result, while UNCLOS gives considerable attention to the protection of the marine environment, the application of the relevant rules is not always straightforward. Against that background, the role of judicial bodies in clarifying these rules in order to ensure and promote the goal of UNCLOS to protect and preserve the marine environment is especially important. As stated by the President of the Third Conference on the Law of the Sea, '[e]ffective dispute settlement would also be the guarantee that the substance and intention within the legislative and language of the convention will be interpreted both consistently and equitably.'[1]

This chapter aims to examine the contribution of the International Tribunal for the Law of the Sea ('ITLOS' or 'the Tribunal') to the protection of the marine environment. The chapter is structured as follows. Section 3.2 provides a brief overview of the position of ITLOS within the dispute settlement system of UNCLOS and of the relevant procedural rules that may have a bearing on the ability of ITLOS to hear and decide on disputes relating to the marine environment. Section 3.3 then analyses the cases decided by ITLOS that relate to different aspects of marine environmental

[1] Nordquist 1985, p. 10.

protection—focusing particularly on how ITLOS has interpreted and applied important principles of environmental law in the context of the marine environment, then offers some observations regarding the Tribunal's interpretation and application of these principles. Section 3.4 takes stock of the ITLOS' jurisprudence and assesses its strengths and weaknesses in dealing with environmental disputes. Section 3.5 concludes.

3.2 The Relevant Procedural Rules of ITLOS

Article 287 of UNCLOS provides for the competence of four dispute settlement bodies, namely the International Court of Justice (ICJ), ITLOS and two ad hoc tribunals, one constituted under Annex VII and one under Annex VIII. ITLOS is thus only one of the choice of procedures available for dispute settlement under UNCLOS. Similar to the tribunals mentioned, under Article 288(1), ITLOS has the jurisdiction to settle disputes that 'concern the interpretation and application of the Convention'. This article thus sets the parameters, in terms of the subject-matter (jurisdiction *rationae materiae)*, within which UNCLOS tribunals are to operate. However, ITLOS's compulsory jurisdiction comes only in Section 2 of Part XV, following Section 1 which allows States to adopt other means of dispute settlement of their choice. It is also subjected to the limitations and exclusions included in Section 3. Space does not allow for a detailed elaboration of all the conditions contained in these two sections. Section 3.2.1 will therefore only highlight those provisions that may impact ITLOS' ability to deal with issues relating to the protection of the marine environment. Furthermore, although ITLOS is only one of the options which State parties can select under UNCLOS, it still has a special place in the Convention for several reasons. In the context of marine environmental protection, ITLOS' residual jurisdiction for provisional measures and its power to give advisory opinions are of particular relevance. The rules regarding ITLOS' jurisdiction in these two types of proceedings will thus be examined in Sect. 3.2.2. Finally, Sect. 3.2.3 provides some remarks relating to applicable law.

3.2.1 Jurisdiction in Contentious Proceedings

As mentioned, the compulsory jurisdiction of ITLOS is restricted by the conditions contained in Section 1 and Section 3 of Part XV of UNCLOS. The most relevant articles for the purposes of this chapter are Article 281 under Section 1 and Article 297(3) under Section 3. It should be noted that ITLOS has not had the opportunity to examine these articles in great detail in its case law. Instead, it is Annex VII arbitral tribunals that have shed light on their interpretation and application. Similarly, as will become clear below, ITLOS has not specifically dealt with the protection of the marine environment in any contentious proceedings. Thus, the impact of the

procedural rules analysed below on the way ITLOS deals with marine environmental protection cannot be verified in practice. However, because the tribunals under Article 287 all operate under the same jurisdictional framework of Part XV, an exposition of the relevant procedural rules is still pertinent as the interpretation of this article may have important implications for ITLOS.

Article 281 essentially provides that, when the parties have agreed to another means of dispute settlement, UNCLOS tribunals can only exercise jurisdiction if the parties have not been able to settle the dispute between them using the means agreed *and* the parties have not agreed to exclude further procedures, including recourse to the UNCLOS dispute settlement procedures. This second requirement of Article 281 was at issue in the *Southern Bluefin Tuna* arbitration.[2] Japan in this case argued that the jurisdiction of the Annex VII tribunal could not be triggered because the parties had already agreed to use the dispute settlement procedures under Article 16 of the Convention on the Conservation of Southern Bluefin Tuna (CCSBT) which excluded recourse to UNCLOS dispute settlement procedures.[3] The majority in *Southern Bluefin Tuna* agreed with Japan, holding that although Article 16 of the CCSBT did not expressly exclude the applicability of the procedures of Section 2 Part XV of UNCLOS, 'the absence of an express exclusion of any procedures in Article 16 is not decisive'.[4] What was important in the tribunal's view was the existence of an express obligation to continue to seek resolution of the dispute in paragraph 2 of Article 16 by the means listed in para 1.[5] This meant that the existence of any list of dispute settlement methods and a commitment to resolving the dispute by peaceful means would suffice as an agreement to exclude resort to UNCLOS procedures under Article 281.[6]

In 2016, the majority's interpretation of Article 281 in *Southern Bluefin Tuna* was explicitly rejected by the *South China Sea* arbitral tribunal when deciding whether Article 281 applied to exclude the tribunal's jurisdiction to hear the dispute brought by the Philippines against China concerning the South China Sea, given that there were several instruments containing the parties' agreement to settle their disputes by a variety of peaceful means.[7] The tribunal concluded that 'Article 281 requires some clear statement of exclusion of further procedures'.[8] The *South China Sea* tribunal's decision meant that the bar for the invocation of Article 281 to exclude the jurisdiction of UNCLOS tribunals has now been set relatively high—an explicit exclusion of resort to UNCLOS procedures would be needed.

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[2] *Southern Bluefin Tuna Case (Australia and New Zealand v Japan),* Award on Jurisdiction and Admissibility, 4 August 2000, 39 ILM 1359.

[3] Ibid., para 34.

[4] Ibid., para 57.

[5] Ibid.

[6] Churchill 2006, p. 403.

[7] *South China Sea Arbitration (Philippines v China)*, Award on Jurisdiction and Admissibility, 27 August 2013, PCA Case No 2013–19.

[8] Ibid., para 223.

It is clear that in the aftermath of the two arbitrations, there exists a divergence in the interpretation of Article 281. This divergence results in a lack of clarity regarding the effect of Article 281 on the jurisdiction of UNCLOS tribunals, including ITLOS, to deal with issues relating to marine environmental protection which are also regulated in other conventions or treaties that contain their own dispute settlement provisions. Given the existence of various international treaties besides UNCLOS which meet these two requirements, it is open to question the extent to which Article 281 will limit the competence of ITLOS to deal with disputes concerning the protection of the marine environment that may also arise under other international treaties.

Turning to Article 297(3) which excludes disputes concerning coastal States' sovereign rights over living resources in the EEZ from the compulsory jurisdiction of UNCLOS tribunals, the complicated design of UNCLOS regarding fisheries competences means that the scope of application of Article 297(3) is not always clear. The decisions of Annex VII arbitral tribunals have clarified several aspects of this provision, two of which are worth mentioning. First, according to the arbitral tribunal in *Chagos MPA*, Article 297(3) excludes disputes relating to procedural obligations, including the obligations to consult and coordinate pursuant to Articles 63, 64 and 194 of UNCLOS and Article 7 of the 1995 UN Fish Stocks Agreement.[9] Second, the tribunal in *Chagos MPA* confirmed that the limitations contained in Article 297(3) still applied to the straddling fish stocks that were found in the EEZ of the coastal State.[10] While the tribunal acknowledged the shortcomings of a jurisdictional separation of disputes relating to fisheries in the EEZ and those in the high seas, this was the approach adopted by the State Parties, to which the tribunal stayed faithful. This firm statement on the applicability of Article 297(3) to straddling stocks may have important implications for disputes arising from the UN Fish Stocks Agreement, for example from Article 7 on the compatibility between conservation and management measures for areas under national jurisdiction and beyond.

The interpretation of Article 297(3) in case law shows that it has the potential to restrict the ability of ITLOS to deal with issues relating to the protection of marine living resources found in the EEZ. In particular, ITLOS will not have the competence to examine whether procedural obligations relating to the conservation of marine living resources insofar as they are found in the EEZ. ITLOS will also not be able to deal with disputes relating to straddling stocks.

3.2.2 Provisional Measures and Advisory Proceedings

With regards to the jurisdiction of ITLOS in provisional measures proceedings, the requirements for prescribing provisional measures stipulated under Article 290 do not in general differ to a great extent from those of the ICJ or other courts, with two noteworthy exceptions. First, under Article 290(1), ITLOS may prescribe provisional

[9] *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, Award, 18 March 2015, PCA Case No 2011-03, 21 RIAA 359, para 534.

[10] Ibid., para 301.

measures not only to preserve the rights of the parties as normally seen in other courts, but also to 'prevent serious harm to the marine environment'. This second basis for ITLOS to prescribe provisional measures is quite unique, and offers the Tribunal the opportunity to contribute to the protection of the environment already from an earlier phase of the proceedings. Second, whereas for most other courts, a request for provisional measures would normally be brought before the body which will eventually hear the merits of the case, under Article 290(5), ITLOS has the competence to prescribe provisional measures for cases for which the parties have chosen an Annex VII Arbitral Tribunal to hear the case, pending the latter's constitution. This residual jurisdiction again allows ITLOS to play a greater role in provisional measures proceedings, particularly those concerned with 'preventing serious harm to the marine environment' as mentioned above.

Turning to its advisory jurisdiction, ITLOS as the permanent court established under UNCLOS has the jurisdiction to give advisory opinions. However, unlike the ICJ, the advisory function is not explicitly conferred upon ITLOS as a whole but only on the Seabed Dispute Chamber ('SDC' or 'the Chamber'). According to Article 191 of UNCLOS, the SDC is mandated to 'give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities'. The SDC has indeed exercised this advisory jurisdiction in one instance in the *Advisory Opinion on Activities in the Area*.[11]

More controversial has been the question regarding whether ITLOS as a full tribunal also has jurisdiction to give advisory opinions. This had been a topic of much debate in the scholarly community as UNCLOS does not explicitly provide for such jurisdiction as in the case of the SDC.[12] ITLOS finally resolved this issue in 2015 in the *Advisory Opinion on IUU Fishing*.[13] The request for the Advisory Opinion was brought by the Sub-Regional Fisheries Commission (SRFC) on the basis of the Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the SRFC (MCA Convention). ITLOS founded its advisory jurisdiction on the basis of a combined reading of Article 288(1) of UNCLOS, Article 21 of ITLOS Statute and Article 138 of the Rules of Procedure of ITLOS. More specifically, ITLOS held that Article 21 of the ITLOS Statute, existing independently of Article 288 of the Convention,[14] allows the tribunals to exercise jurisdiction over not only 'disputes' and 'applications' but also 'all matters provided for in any other agreement which confers jurisdiction on the Tribunal'.[15] The words 'all matters' in ITLOS's view, 'must mean something more than only "disputes"' and

[11] ITLOS, *Responsibilities and obligations of States with respect to Activities in the Area,* Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10.

[12] See for example Kim 2010, p. 1; Jesus 2006, p. 39; Rosenne 1998, p. 487; You 2008, p. 360; Ndiaye 2010, p. 565.

[13] ITLOS, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission,* Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4.

[14] Ibid., para 52.

[15] Ibid., para 4.

'that something more must include advisory opinions if specifically provided for in any other agreement'.[16] ITLOS also found that 'the prerequisites that need to be satisfied before the Tribunal can exercise its advisory jurisdiction' under Article 138 of the Rules were further met in that instance.[17]

ITLOS' decision to establish advisory jurisdiction despite the lack of express authorisation under UNCLOS has faced much opposition from States—as evident in the proceedings of the Advisory Opinion on IUU Fishing, and scholarly criticism.[18] However, establishment of the full ITLOS tribunal's advisory jurisdiction has certainly opened a wider door for ITLOS to play a more active role in developing the law of the sea, including issues relating to the protection of the marine environment. It is worth noting that as ITLOS' power to render advisory opinions is dependent on the authorisation of 'any other agreement', it is possible that ITLOS may be requested to address questions that go beyond the scope of UNCLOS. In fact, on 31 October 2021, Antigua and Barbuda and Tuvalu signed an agreement which establishes a Commission of Small Island Developing States on Climate Change and International Law. This Commission is authorised to request an advisory opinion from ITLOS on the legal responsibility of States for carbon emissions, marine pollution, and rising sea levels. It is yet unclear how the specific questions will be formulated, but the first issue, for example, may well touch upon legal questions that are beyond the scope of UNCLOS. It remains to be seen whether and to what extent ITLOS will deal with them.

3.2.3 Applicable Law

While ITLOS' jurisdiction is limited to disputes that arise under the Convention, it must be acknowledged that there are tools available under UNCLOS that allow ITLOS to resort to other rules of international environmental law in interpreting UNCLOS provisions. Two provisions are worth highlighting.

The first is Article 293 on Applicable Law which allows the Tribunal to apply 'other rules of international law not incompatible with this Convention' in deciding cases before it. Article 293 has been used by ITLOS, for example in *M/V Saiga (No 2),* to expand its jurisdictional scope by bringing issues which were not provided for under UNCLOS into its jurisdictional ambit.[19] However, the arbitral tribunal in *MOX Plant* adopted an opposite understanding of the relationship between Articles 288(1) and 293. It held that 'there is a cardinal distinction between the scope of its jurisdiction under Article 288, para 1 of the Convention, on the one hand, and the law to be applied

[16] Ibid., para 56.

[17] Ibid., para 59.

[18] See for example Ruys and Soete 2016, p. 155; Lando 2016, p. 441.

[19] *M/V 'SAIGA' (No. 2) (Saint Vincent and the Grenadines v Guinea),* Judgment, 1 July 1999, ITLOS Reports 1999, p. 10, para 155.

by the Tribunal under Article 293 of the Convention on the other hand.'[20] The use of Article 293 is sometimes accompanied by reference to Article 31(3) of the Vienna Convention on the Law of Treaties (VCLT). In the *South China Sea Jurisdiction and Admissibility Award*, for example, the arbitral tribunal stated that although it did not have jurisdiction to decide on violations of the Convention on Biodiversity (CBD), it could consider the relevant provisions of the CBD for the purposes of interpreting the content and standard of Articles 192 and 194 of UNCLOS. The use of standards contained in external treaties for the purposes of interpreting provisions of UNCLOS, according to the tribunal, was made possible thanks to Article 293(1) UNCLOS on Applicable Law and Article 31(3) of the VCLT.[21]

The second provision related specifically to environmental issues is Article 297(1). The arbitral tribunal in *Chagos MPA* interpreted Article 297(1)(c) to allow UNCLOS tribunals to deal with disputes relating to international rules and standards for the protection and preservation of the marine environment that involve 'the contravention of legal instruments beyond the four corners of the Convention itself.'[22] According to the tribunal, this article thus serves as a *renvoi* to the sources of law beyond UNCLOS itself.[23]

The interpretation of the abovementioned articles potentially allows ITLOS to play an important role not only in the protection of the marine environment under UNCLOS, but also in ensuring that UNCLOS provisions relating to the protection of the environment develop in tandem with other rules of international law.

3.3 ITLOS Jurisprudence Concerning Marine Environmental Protection

To date, ITLOS has not had the opportunity to deal with the protection of the marine environment in any contentious proceedings, only in provisional measures and advisory opinion proceedings. Despite the limited number of cases, ITLOS' decisions have contributed to clarifying important principles under international environmental law, namely the precautionary principle, the duty to cooperate, and the obligation to conduct environmental impact assessment. This section will examine the ways in which ITLOS dealt with each of these principles and offer some observations concerning its interpretation and application of the principles.

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[20] *The MOX Plant case (Ireland v United Kingdom)*, Order No. 3: Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures, 24 June 2003, para 19.

[21] *South China Sea (Philippines v China)*, above n 7, para 176.

[22] *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, above n 9, para 316.

[23] Ibid.

3.3.1 The Precautionary Principle

3.3.1.1 The Relevant Cases

The *Southern Bluefin Tuna* case was the first instance in which the precautionary principle was invoked before ITLOS. In this case, Australia and New Zealand alleged that Japan, by unilaterally designing and undertaking an experimental fishing programme, failed to comply with obligations to conserve and cooperate in the conservation of the Southern Bluefin Tuna (SBT) stock in accordance with, inter alia, the precautionary principle.[24] Pending the constitution of Annex VII arbitral tribunal, the Applicants requested that ITLOS prescribe provisional measures to ensure that 'the parties act consistently with the precautionary principle in fishing for SBT pending a final settlement of the dispute'.[25]

While the Applicants did not base their claims on any provisions of Part XII, ITLOS confirmed in the Order for provisional measures that 'the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment'.[26] This paved the way for ITLOS to take into account environmental principles to deal with the conservation of living resources. The tribunal acknowledged that the SBT 'is severely depleted and is at its historically lowest levels and that this is a cause for serious biological concern'. [27] On this basis, it held that 'the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of SBT'.[28] Most importantly, ITLOS held in paras 79 and 80, which deserve to be quoted in full, that:

> 79. Considering that there is scientific uncertainty regarding measures to be taken to conserve the stock of southern bluefin tuna and that there is no agreement among the parties as to whether the conservation measures taken so far have led to the improvement in the stock of southern bluefin tuna;
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> 80. Considering that, although the Tribunal cannot conclusively assess the scientific evidence presented by the parties, it finds that measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the southern bluefin tuna stock.[29]

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[24] Australia and New Zealand asked ITLOS in their written pleadings to take into account 'the parties' obligations under general international law, in particular the precautionary principle'. See Request for the Prescription of Provisional Measures Submitted by New Zealand, para 1: www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/request_new_zealand_eng.pdf Accessed 24 February 2020; Request for the Prescription of Provisional Measures Submitted by Australia, para 1: www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/request_australia_eng.pdf Accessed 24 February 2020.

[25] *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan)*, Provisional Measures, 27 August 1999, ITLOS Reports 1999, p. 280, para 34.

[26] Ibid., para 70.

[27] Ibid., para 71.

[28] Ibid., para 77.

[29] Ibid., paras 79 and 80.

Although ITLOS did not explicitly refer to the precautionary principle, there are elements in these two paragraphs which signalled the application of this principle.[30] ITLOS highlighted the lack of scientific certainty regarding the measures to be taken and their effectiveness in conserving the stock, but nonetheless still decided to prescribe measures in order to prevent further deterioration to the stock. Coupled with the reference to 'caution and prudence', it does not seem difficult to conclude that ITLOS intended to apply the precautionary principle. In fact, the two paragraphs cited above show that the precautionary principle served as the main basis for the prescription of provisional measures in this case.

ITLOS, however, did not confirm the status of the precautionary principle as a rule of customary international law as contended by the Applicants. It is interesting to note that in Judge Treves' Separate Opinion, he argued that such a confirmation was not necessary,[31] as 'a precautionary approach seems to be inherent in the very notion of provisional measures.'[32] Judge Treves' reasoning implied that, in his view, the basis for the application of the precautionary principle was found in the Convention itself, particularly in the requirement of 'urgency' under Article 290(5). This view has received support from another scholar, who argues that the inclusion of the 'serious harm to the marine environment' as a basis for the prescription of provisional measures enhances the precautionary aspect of provisional measures.[33]

The precautionary principle also arose in *MOX Plant* concerning Ireland's challenge to the commission and operation of the MOX Plant by the UK.[34] In its Written Request, Ireland contended that the precautionary principle had attained the status of a customary international rule and, as such, it was binding on both parties.[35] In the context of a provisional measures proceeding before ITLOS, Ireland argued that the precautionary principle should inform the tribunal's assessment of the urgency of the measures that it was required to take in respect of the operation of the MOX plant.[36] The UK, on the other hand, maintained that due to the lack of proof and on the facts of this case, the precautionary principle had no application.[37]

ITLOS in this case adopted a more cautious approach when dealing with the precautionary principle than in *Southern Bluefin Tuna.* Despite both parties' reference to the legal status of the principle and to the insufficiency of scientific data, ITLOS

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[30] Several judges confirmed in their separate and dissenting opinions that the prescription of the provisional measure was based upon the considerations of the precautionary principle. See *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan)* , above n 25, Sep. Op. Treves, para 8; Sep. Op. Laing, para 19; Sep. Op. Shearer, para 6.

[31] Ibid., Sep. Op. Judge Treves, para 9.

[32] Ibid.

[33] Foster 2013, p. 268.

[34] ITLOS, *MOX Plant (Ireland v United Kingdom),* Provisional Measures, 3 December 2001, ITLOS Reports 2001, p. 95.

[35] Request for Provisional Measures and Statement of Case Submitted on Behalf of Ireland, para 97: www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/request_ireland_e.pdf Accessed 24 February 2020.

[36] Ibid.

[37] *MOX Plant (Ireland v United Kingdom),* above n 34, para 75.

did not address any of these issues in its Order. ITLOS rejected Ireland's request for provisional measures due to the lack of urgency of the situation required for provisional measures under Article 290(5).[38] However, in the Provisional Measures Order, the Tribunal still used the term 'prudence and caution' seen in *Southern Bluefin Tuna* in order to require the parties to cooperate 'in exchanging information concerning risks or effects of the operation of the MOX plant and in devising ways to deal with them'.[39] The use of 'prudence and caution' was not supported by any discussion, particularly on scientific uncertainty or risk of harm, thus it is unclear as to whether ITLOS actually intended to invoke the precautionary principle in this case. In any event, ITLOS' refusal to apply the precautionary principle to grant Ireland the requested provisional measures could be seen as a retreat from the strong endorsement that ITLOS had shown for the principle in *Southern Bluefin Tuna*. As argued by one commentator, the characteristics of the MOX Plant dispute suggested that it was a 'text book' example of a situation that would require the precautionary principle.[40] ITLOS, therefore, would seem to have missed an important opportunity to make a meaningful contribution to clarifying this increasingly important but still rather vague principle of environmental law.

In the *Land Reclamation* case concerning Malaysia's allegations that Singapore had violated UNCLOS by conducting land reclamation activities in the Straits of Johor, Malaysia also invoked the precautionary principle when requesting provisional measures.[41] Singapore, on the other hand, argued that there was no room to apply the precautionary principle in the case in question.[42] Similar to the approach taken in the *MOX Plant* case, ITLOS did not discuss the precautionary principle when considering Malaysia's allegations that Singapore's activities in the Straits of Johor could cause irreparable prejudice to Malaysia's rights or serious harm to the marine environment. Instead, ITLOS only recalled the familiar phrase 'prudence and caution' to require the parties to 'establish mechanisms for exchanging information and assessing the risks or effects of land reclamation works and devising ways to deal with them in the areas concerned'.[43] The use of the phrase 'prudence and caution' bore resemblance to that used in *MOX Plant*.

Finally, the *Advisory Opinion on Responsibilities and Obligations of States with respect to Activities in the Area* presented the occasion in which ITLOS came the closest to endorsing the status of the precautionary principle. The SDC was requested to answer three questions submitted by the International Seabed Authority (ISA) concerning the responsibilities, obligations and liability of UNCLOS States Parties with respect to the sponsorship of activities in the Area. Unlike previous cases in which the precautionary principle was invoked as a matter of customary international

[38] Ibid., para 81.

[39] Ibid., para 84.

[40] Stephens 2009, p. 234; McDorman 2001, p. 531.

[41] ITLOS, *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore)*, Provisional Measures, 8 October 2003, ITLOS Reports 2003, p. 10.

[42] Ibid., para 75.

[43] Ibid., para 99.

law, the precautionary principle is clearly stipulated in the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (Nodules Regulations), and the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area (Sulphides Regulations). These are binding instruments and are applicable to exploration activities in the Area.[44] As a result, the SDC in the *Advisory Opinion on Activities in the Area* found that the implementation of the precautionary approach as defined in these Regulations was a binding obligation on sponsoring States. [45] Although the general obligation to implement the precautionary principle already exists in the Sulphides Regulation, the SDC, in what could be described as an *obiter dictum*, went on to say that:

> [T]he precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law.[46]

Even though the SDC did not explicitly state that the principle was a customary rule, this statement came closer to accepting the customary nature of the principle than any other tribunals had, and have, to date.

The SDC also took the opportunity to shed some light on the meaning and application of this principle, albeit only in relation to the activities provided for in the Regulations. The Chamber explained that Principle 15 of the Rio Declaration contained two sentences, of which the second specified the scope of application of the precautionary principle. In particular, the second sentence of Principle 15 of the Rio Declaration set the scale of harm to 'serious or irreversible damage' and limited the measures to be taken to only 'cost-effective measures'.[47] Moreover, the Chamber also noted that the Rio Declaration also allowed for certain flexibility in the application of the principle, in light of the phrase 'applied by States according to their capabilities'.[48] The SDC interpreted this to mean that, in the context of the Advisory Opinion, 'the requirements for complying with the obligation to apply the precautionary approach may be stricter for the developed than for the developing sponsoring States'.[49] This statement created a link between the precautionary principle and the principle of 'common but differentiated responsibility' widely recognised under international environmental

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[44] Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISBA/19/C/17 (amended) (22 July 2013); Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISBA/16/C/L.5 (6 May 2010). Regulation 31, para 2 of the Nodules Regulations and Regulation 33, para 2 of the Sulphides Regulations require sponsoring States as well as the Authority to 'apply a precautionary approach, as reflected in Principle 15 of the Rio Declaration' in order 'to ensure effective protection for the marine environment from harmful effects which may arise from activities in the Area'. See *Responsibilities and obligations of States with respect to Activities in the Area,* above n 11, para 125.

[45] Ibid., para 127.

[46] Ibid., para 135.

[47] Ibid., para 128.

[48] Ibid., para 129.

[49] Ibid., para 161.

law.[50] In addition, the SDC also stated that 'the precautionary approach is also an integral part of the general obligation of due diligence of sponsoring States'.[51] This was the first time in which an international tribunal analysed the structure and meaning of the precautionary principle as contained in Principle 15 of the Rio Declaration in any detail, providing an important clarification of the meaning and application of this principle.

3.3.1.2 Some Observations Regarding the Precautionary Principle

A perusal of ITLOS' cases shows that ITLOS was the first tribunal to have applied the precautionary principle in *Southern Bluefin Tuna* in 1999, albeit without calling it by name. It should be noted that the precautionary principle is recognised in almost all fisheries instruments post-UNCLOS.[52] Such widespread recognition perhaps gave ITLOS the incentive to be more readily accepting of the precautionary principle in fisheries conservation cases, such as *Southern Bluefin Tuna,* as compared to marine pollution cases, such as *MOX Plant* or *Land Reclamation*. Even though ITLOS did not explicitly state that the precautionary principle had become part of customary international law, the SDC's view that there was now a trend towards making this approach part of customary law was the boldest acknowledgement of the principle by any international tribunal. ITLOS, therefore, can be said to be the forerunner in the adoption of the precautionary principle.

Notwithstanding ITLOS' acknowledgment of the precautionary principle, due to the fact that the principle has been dealt with mostly in provisional measure proceedings, the application of the precautionary principle seems to have been informed by the nature of these types of proceeding. In terms of the threshold for the severity of harm, ITLOS in *Southern Bluefin Tuna* read the gravity of harm contained in Article 290, i.e. 'serious harm', as the triggering point for the application of the precautionary principle. With regards to the burden of proof, the provisional measures cases all seem to indicate that ITLOS did not reverse the burden of proof. The applicants still bore the obligation to prove 'serious harm' to the environment when requesting precautionary measures from the respondents. However, it is arguable that, as Judge Wolfrum acknowledged in *MOX Plant*,[53] the reversal of the burden of proof was not undertaken in the case because ITLOS was only required to establish *prima facie* jurisdiction in provisional measures. Therefore, the refusal to reverse the burden

[50] Cullet 2015, p. 229.

[51] *Advisory Opinion on Activities in the Area,* above n 11, para 131.

[52] This has prompted the argument that even though precaution in fisheries management has yet to reach the status of customary international law, a new norm of marine living resources management is emerging. See Kaye 2001, p. 261.

[53] *MOX Plant (Ireland v United Kingdom*), above n 34, Separate Opinion of Judge Wolfrum, para 3.

of proof in ITLOS case law was dictated by the exceptional nature of provisional proceedings.[54]

In the context of an advisory proceeding, the *Advisory Opinion on Activities in the Area* was among the first to clarify the link between the precautionary principle and several other environmental obligations. In earlier cases, namely *MOX Plant* and *Land Reclamation*, ITLOS already hinted at the link between the precautionary principle and procedural obligations, using 'prudence and caution' as the basis for prescribing provisional measures which were of a procedural nature, such as the duty to cooperate.[55] The SDC, however, expanded the relationship between the precautionary principle not only to the duty to cooperate, but also to the principle of 'common but differentiated responsibility' and due diligence. As ITLOS was only required to examine the precautionary principle in the abstract in an advisory proceeding, it did not elaborate more on the peculiarities of these links.

In short, ITLOS' decisions have added an authoritative voice to endorsing the status and applicability of the precautionary principle to marine environment protection under UNCLOS. ITLOS has also contributed to clarifying certain elements of the principle's normative content, although the contribution was limited by the nature of the proceedings in which the principle was examined.

3.3.2 Duty to Cooperate

3.3.2.1 The Relevant Cases

ITLOS had the opportunity to discuss the duty to cooperate in protecting the marine environment both in the context of prevention of marine pollution and conservation of marine living resources.

In relation to cooperation to prevent marine pollution, the duty to cooperate took centre stage in the *MOX Plant* and *Land Reclamation* cases. In *MOX Plant*, Ireland alleged that, inter alia, the UK breached its obligations under Articles 123 and 197.[56] Although ITLOS did not find that there was urgency requiring the provisional measure requested by Ireland, it still prescribed provisional measures requiring both parties to cooperate and enter into consultations regarding several issues. In one of the most important paragraphs of the Order, ITLOS stated that:

The duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international

[54] It should be noted that a refusal to reverse the burden of proof could also be seen in the *Pulp Mills* case by the ICJ in the context of a contentious proceeding. See ICJ, *Pulp Mills on the River Uruguay, (Argentina v Uruguay)*, Judgement, 20 April 2010, ICJ Reports 2010, p. 14, para 164.

[55] Note, however, that ITLOS' prescription of procedural measures not requested by the applicants, was not without criticism, both by the individual judges and some commentators. See Morgan 2001, p. 182.

[56] *MOX Plant (Ireland v United Kingdom)*, above n 34, para 26.

law and that rights arise therefrom which the Tribunal may consider appropriate to preserve under article 290 of the Convention.[57]

In saying so, ITLOS affirmed that the duty to cooperate existed beyond the confines of UNCLOS and had become part of general international law. Furthermore, ITLOS held that 'prudence and caution require that Ireland and the UK cooperate in exchanging information concerning risks or effects of the operation of the MOX plant and in devising ways to deal with them, as appropriate'.[58] As already mentioned, ITLOS used precaution as the basis for the need to cooperate, which in turn, required the exchange of information between the parties. In prescribing its provisional measure, ITLOS held that 'Ireland and the UK shall cooperate and shall, for this purpose, enter into consultations […]'[59] The duty to cooperate in this case, thus, included the obligation to exchange information and to enter into consultation.

ITLOS' approach in *MOX Plant* was subsequently adopted in *Land Reclamation*. It should be noted, however, that this case was not entirely similar to *MOX Plant*. Firstly, Malaysia when requesting provisional measure did not bring up the issue of cooperation, at least by name. In its Request, Malaysia asked the Tribunal to order Singapore to provide Malaysia with full information concerning the current and projected works, to afford Malaysia a full opportunity to comment upon the works and their potential impacts; and to agree to negotiate with Malaysia concerning any remaining unresolved issues.[60] All of these may be part of the duty to cooperate, as has been held in the *MOX Plant* case, but some of them also exist as independent obligations under UNCLOS. Secondly, in response to several of Malaysia's requests, Singapore gave assurances and undertakings which indicated Singapore's readiness and willingness to enter into negotiations, to give Malaysia a full opportunity to comment on the reclamation works and their potential impacts, and to notify and consult Malaysia before it proceeded to construct any transport links. Singapore also extended an explicit offer to share the information that Malaysia requested, and re-examine its works in the case that Malaysia was not convinced by the evidence supplied.[61] Despite placing Singapore's commitments on records, ITLOS still found the level of cooperation between the parties insufficient. ITLOS recalled the statement made in the *MOX Plant* case that 'the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law'.[62] In almost identical wording to the *MOX Plant* case, ITLOS then held that 'prudence and caution require that Malaysia and Singapore establish mechanisms for exchanging information and assessing the

[57] Ibid., para 82.

[58] Ibid., para 84.

[59] Ibid., operative para 1.

[60] Request for Provisional Measure Submitted by Malaysia, para 13: www.itlos.org/fileadmin/itlos/documents/cases/case_no_12/request_malaysia_eng.1.pdf. Accessed 24 February 2020.

[61] *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore)*, above n 41, para 76.

[62] Ibid., para 92.

risks or effects of land reclamation works and devising ways to deal with them in the areas concerned'.[63]

The provisional measures eventually prescribed echoed many of Singapore's commitments. ITLOS required Malaysia and Singapore to cooperate, for the purposes of which, to enter into consultations, exchange information, assess risks and most importantly, establish a group of independent experts with a mandate to conduct a study to determine the effects of Singapore's land reclamation, to propose measures to deal with any adverse effects of such land reclamation; and to prepare an interim report on the subject of infilling works in Area D at Pulau Tekong.[64] Although the duty to cooperate was not invoked by Malaysia in its submissions, the whole case in the end revolved around this duty.

Turning to cooperation in conserving marine living resources, ITLOS had the opportunity to deal with this issue most prominently in the *Advisory Opinion on IUU Fishing*. In this instance, in determining coastal States' obligation in ensuring the sustainable management of transboundary stocks, ITLOS held that both the duty to cooperate and the duty to seek to agree under Articles 63(1) and 64(1) were 'due diligence' obligations which required the States concerned to consult with one another in good faith, pursuant to Article 300 of the Convention.[65] These obligations were thus an obligation of conduct and State parties had to consult each other with a view to reaching an agreement on measures to conserve and develop the fish stocks. They were not, however, under an obligation to reach such an agreement. ITLOS only required that consultation be meaningful, in the sense that substantial effort should be made by all States concerned.[66] ITLOS also attempted to specify the conservation and management measures that coastal States should take to fulfil the obligation to cooperate. For example, ITLOS stated that the measures should ensure that the shared stocks would not be endangered by over-exploitation or that they should be designed to maintain and restore stocks at levels which can produce maximum sustainable yield.[67] These requirements, however, were more focused on the objectives that conservation and management measures should achieve, rather than on what the measures should be. They were, moreover, just repeating what was already provided for more generally under the Articles 61 and 62 on conservation and utilisation of marine sources. Lastly, with regard to migratory stocks, particularly tuna in this case—a highly migratory species under Annex I of UNCLOS, ITLOS held that the Member States of the regional fisheries organisation had the obligation under Article 64(1) to seek to agree upon the conservation and management measures in regard to stocks that occur both within the EEZ of other Member States and in an area beyond and adjacent to these zones.[68] ITLOS required the measures to be taken pursuant to the obligation under Article 64(1) to be consistent and compatible with

[63] Ibid., para 99.

[64] Ibid., para 106.

[65] Ibid., para 210.

[66] Ibid.

[67] Ibid., para 208.

[68] *Advisory Opinion on IUU Fishing,* above n 13, para 215.

those taken by the appropriate regional organisation, for example the International Commission for the Conservation of Atlantic Tunas in the case of tuna.

Judge Paik was not impressed with the lack of clarification on the meaning and scope of the duty to cooperate in managing the shared resources laid down in the relevant provisions of the Convention.[69] Having established that it was unclear under UNCLOS how the obligation to cooperate was to be performed, Judge Paik commented that:

> In addressing the problem arising from the lack of cooperation in this case, simply emphasizing the obligation of cooperation or repeating the relevant provisions of the Convention would hardly be sufficient. In a sense, it begs the question what specifically is required to discharge that obligation, a question this Opinion does not answer satisfactorily.[70]

He instead turned to and sought guidance in the 1995 UN Fish Stocks Agreements, Article 7 of which contains several concrete obligations to give effect the duty to cooperate.[71]

The *Advisory Opinion on IUU Fishing* brought about a commendable development in that it confirmed that coastal States' obligations to conserve and manage living resources in the EEZ under Article 61 formed part of the sustainable development of ocean resources, placing UNCLOS firmly within the wider framework of sustainable development. However, the Advisory Opinion was limited on the substance of the two important obligations under Articles 63 and 64. Other than elucidating the nature and objectives of the obligations, it did not expand in any detail on what these obligations entail or what was expected of States to fulfil the obligation to cooperate in conserving and managing trans boundary stocks.[72]

3.3.2.2 Some Observations on the Duty to Cooperate

ITLOS' decisions on the duty to cooperate have made some important contributions to the status and content of the duty. The duty to cooperate is now acknowledged to be part of general international law, as held by ITLOS in *MOX Plant* and confirmed in *Land Reclamation*. The duty to cooperate is found to be applicable to all aspects of the protection of the marine environment, including the conservation of marine resources as affirmed in the *Southern Bluefin Tuna* case and the prevention of trans boundary pollution as in *MOX Plant* and *Land Reclamation*.

The scope of the duty to cooperate has also been clarified to a certain extent. The duty to cooperate, at least in the prevention of marine pollution, comprises more

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[69] ITLOS, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Separate Opinion of Judge Paik, 2 April 2015, ITLOS Reports 2015, para 31.

[70] Ibid., para 34.

[71] Ibid., para 36.

[72] Note that the ICJ also refused to read anything of substance into the duty to cooperate in *Whaling*. However, some of the separate and dissenting judges argued that the duty should be given a very significant substantive content. See ICJ, *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)*, Judgment, 31 March 2014, ICJ Reports 2014, p. 226, paras 13–17.

concrete obligations, namely, the obligations to exchange information, to consult with other States potentially affected by the planned activities, to jointly study the impacts of the activity on the marine environment, monitor risks or the effects of the operation, and devise measures to prevent pollution of the marine environment. When it comes to the conservation of marine resources, however, ITLOS has been less successful in defining the contours of the obligation to cooperate with regards to shared stocks. This also highlights the issue found in several of ITLOS decisions concerning the duty to cooperate. With the exception of *Land Reclamation* in which ITLOS prescribed at least one concrete measure to be taken by the parties to discharge the duty to cooperate, it was generally much more general or, in the words of Judge *ad hoc* Shearer in the *Southern Bluefin Tuna* case, too 'diplomatic', with regard to the measures to be taken so as to fulfil the duty to cooperate. States retain wide discretion as to the manner in which to fulfil their duty to cooperate.

3.3.3 Duty to Conduct EIA

3.3.3.1 The Relevant Cases

The obligation to carry out an environment impact assessment (EIA) is provided for in Article 206 of UNCLOS.[73] Beyond the Convention, the ICJ in *Pulp Mills* recognised that this obligation also existed under general international law 'where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource'.[74] The status of this obligation under international law is, therefore, no longer subject to debate. It is the content of the obligation that is still shrouded in uncertainty.

In *MOX Plant*, one of Ireland's allegations was that UK had refused to carry out a proper assessment of the impacts on the marine environment of the MOX plant and associated activities.[75] Ireland argued that even though the UK in 1993 had carried out an EIA on the basis of which the commission of the MOX Plant was authorised, the 1993 Impact Assessment Statement was not adequate as it did not address the potential harm of the MOX Plant to the marine environment of the Irish Sea.[76] Meanwhile, the UK contended that it had adduced evidence to establish that the risk of pollution from the operation of the MOX plant would be infinitely small and that the commissioning of the MOX plant would not cause serious harm to the

[73] Article 206 UNCLOS provides that: When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results.

[74] *Pulp Mills on the River Uruguay (Argentina v Uruguay),* above n 54, para 83.

[75] *MOX Plant (Ireland v United Kingdom)*, above n 34, para 26.

[76] Ibid.

marine environment or irreparable prejudice to the rights of Ireland.[77] ITLOS, for its part, did not address the adequacy or lack thereof of the 1993 Impact Assessment Statement in its Provisional Measure Order.

In *Land Reclamation*, Malaysia also alleged that Singapore had not, prior to commencing its current land reclamation activities, conducted and published an adequate assessment of their potential effects on the environment and on the affected coastal areas.[78] Even though Singapore argued that the land reclamation had not caused any adverse impact on Malaysia, the Tribunal found that an EIA had not been undertaken by Singapore.[79] This fact proved to be crucial in the granting of provisional measures as ITLOS held that in the absence of the EIA, it could not be excluded that the land reclamation works might have adverse effects on the marine environment.[80] Consequently, although ITLOS did not order Singapore to suspend its land reclamation activities as requested by Malaysia, it ordered the establishment of a group of experts whose mandate was to 'study the effects of Singapore's land reclamation and to propose, as appropriate, measures to deal with any adverse effects of such land reclamation'.[81] The task assigned to this group was in effect that of EIA, the results of which would form the basis for any actions as agreed by the two parties. Similar to *MOX Plant*, the lack of EIA did not prompt ITLOS to grant the applicant the provisional measures that the latter had requested. However, EIA formed the crux of the provisional measure that ITLOS eventually prescribed.

In the *Advisory Opinion on Activities in the Area*, ITLOS managed to shed further light on the obligation to conduct EIA. With regard to activities in the Area, the obligation to carry out an EIA, besides finding a basis in Article 206, is also found in the Annex to the 1994 Agreement as well as the Nodules Regulations and the Sulphides Regulations.[82] Notwithstanding this fact, the SDC still added that an obligation to conduct an EIA was a general obligation under customary international law.[83] It recalled the statement made by the ICJ concerning EIA in *Pulp Mills*, but stated that although EIA in that case was discussed in a transboundary context, the obligation to conduct an EIA:

> [M]ay also apply to activities with an impact on the environment in an area beyond the limits of national jurisdiction; and the Court's references to 'shared resources' may also apply to resources that are the common heritage of mankind.[84]

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[77] Ibid., paras 72–73.

[78] *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore),* above n 41, para 22.

[79] Ibid., para 95.

[80] Ibid., para 96.

[81] Ibid., para 106.

[82] The relevant provisions of these Regulations require the sponsoring States not only to individually ensure compliance by the sponsored contractor with this obligation but also to cooperate with the Authority in the establishment and implementation of impact assessments. *Responsibilities and obligations of States with respect to Activities in the Area*, above n 11, para 141.

[83] Ibid., para 145.

[84] Ibid., para 148.

With regard to the content of the obligation to conduct an EIA, the SDC did not leave it open as did the ICJ in *Pulp Mills*. In the specific context of activities in the Area, the SDC pointed out that the content of the obligation to conduct an EIA was specified in the Nodules Regulations, Sulphides Regulations and the Recommendations for the Guidance of the Contractors for the Assessment of the Possible Environmental Impacts Arising from Exploration for Polymetallic Nodules in the Area.[85] Furthermore, the SDC held that 'EIAs should be included in the system of consultations and prior notifications set out in article 142 of the Convention with respect to resource deposits in the Area which lie across limits of national jurisdiction.'[86] There has been uncertainty regarding the relationship between EIA and other procedural obligations, particularly consultation with and notification to the affected population.[87] The SDC's abovementioned statement confirmed that EIA under UNCLOS was part of the obligation to consult and notify, insofar as activities in areas beyond national jurisdiction are concerned. The ICJ in 2015 in fact confirmed this close relationship between the obligation to conduct EIA and the obligation to notify and consult in *Construction of a Road*.[88]

3.3.3.2 Some Remarks on the Obligation to Conduct EIA

Despite requiring the conduct of an EIA, Article 206 of UNCLOS does not elaborate on the content of this obligation. In their written submissions to the Annex VII arbitral tribunal in *MOX Plant*, Ireland was particularly mindful of the fact that Article 206 did not impose any specific obligations on the UK regarding EIA, but argued nonetheless that the arbitral tribunal, in interpreting and applying Article 206, 'should take into account the common standards of EIA in other instruments such as the UNEP EIA Principles or the Espoo Convention'.[89] The UK, for its part, argued that by virtue of the terms 'reasonable grounds' and 'as far as practicable' under Article 206, States retained the discretion as to the manner in which EIA should be carried out.[90] The disagreement between Ireland and the UK raises the question as

[85] Ibid., para 149.

[86] Ibid., para 148. The Recommendations are issued by the Legal and Technical Commission which is mandated by the Regulations to provide recommendations of a technical or administrative nature to contractors to assist them in the implementation of the rules, regulations and procedures of the Authority. Despite having no binding effect, these Recommendations are to be taken into account by States. See: www.isa.org.jm/files/documents/EN/7Sess/LTC/isba_7ltc_1Rev1.pdf. Accessed 24 February 2020.

[87] See for example Dupuy and Viñuales 2015, p. 70; Okanawa 1997, p. 275; Birnie et al. 2009, p. 105.

[88] *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* [2015] ICJ Rep 665, para 10.

[89] *The MOX Plant case (Ireland v United Kingdom)*, above n 20, Memorial of Ireland, para 7.16: www.pca-cpa.org/Ireland%20Memorial%20Part%20II2340.pdf?fil_id=223. Accessed 24 February 2020.

[90] Ibid., paras 5.14–5.32.

to whether and to what extent Article 206 can be informed by existing standards of EIA found in other international instruments.[91] It is interesting to note that the SDC in its *Advisory Opinion on Activities in the Area* was willing to interpret the Nodules Regulations in light of the development of the law contained in the subsequent Sulphides Regulations. More specifically, the Nodules Regulations did not mention the precautionary principle and only contained a very general provision on 'best environmental practice'. Nevertheless, the SDC had no hesitation in reading the precautionary principle and the requirement to apply 'best environmental practices' found under the Sulphides Regulations into the Nodules Regulations.[92] This practice may signal the Tribunal's willingness to read existing international environmental standards into other instruments into UNCLOS.

In conclusion, the most significant contribution of UNCLOS tribunals to the development of the duty to conduct an EIA has been the strengthening of its status and importance in cases of transboundary harm. In terms of the normative content of the obligation, there are perhaps merits in the comments of one scholar that ITLOS case law on EIA 'has barely scratched the surface'.[93] ITLOS' decisions concerning EIA threw little new light on what the duty involves or the criteria based on which an EIA would be considered satisfactory. Both the *MOX Plant* and the *Land Reclamation* cases involved submissions requiring the interpretation and application of Article 206. In neither of the cases, however, was the alleged lack of EIA considered for the prescription of provisional measures. The only exception was the *Advisory Opinion on Activities in the Area*, in which the SDC was able to clarify the content of the duty to conduct an EIA thanks to the specific Rules and Regulations concerning the activities in the Area. These Rules and Regulations, however, contain criteria that are applicable in a very limited context with specific actors, and thus may not readily be extended to other instances in which the duty also arises.

3.4 Strengths and Weaknesses of ITLOS in Dealing with Environmental Protection

3.4.1 Strengths

All of the cases before ITLOS that relate to the protection of the marine environment were brought in the context of provisional measures and advisory proceedings. As mentioned, Article 290 requires ITLOS to prescribe provisional measures to either preserve the rights of the parties or prevent serious harm to the marine environment. However, one scholar has argued that it is States that bring the cases, not the

[91] Craik 2008, p. 120.

[92] *Responsibilities and obligations of States with respect to Activities in the Area,* above n 11, paras 136 and 137.

[93] Boyle 2007, p. 378.

marine environment, therefore, there is no guarantee that the marine environment may benefit from the measures prescribed or that the development of principles of marine environment protection may occur during the process of dispute resolution.[94] In fact, another commentator has observed that: 'The Tribunal has […] never granted such measures solely on that basis.'[95] However, as *Land Reclamation* shows, provisional measures requiring serious and meaningful cooperation played an important role in not only resolving disputes between the parties but also in the protection of the marine environment in the Straits of Johor.[96] It follows that the protection of the parties' interests and the goal of protecting the marine environment are not mutually exclusive. Provisional measures ordering the disputing parties to undertake a joint monitoring or EIA or requiring the parties to cooperate to ensure conservation and optimum utilisation of a fish stock and to devise measures to prevent land-based marine pollution 'can contribute to enforce community interests regarding marine environmental protection,[97] while at the same time, serving to protect the rights of the parties. ITLOS' decisions in provisional measures proceedings, therefore, have shown that, despite their limitations, they can still play an important role in advancing environmental interests. Moreover, in more recent cases such as *Ghana/Cote d'Ivoire*, ITLOS has been more explicit in citing the prevention of the serious harm to the environment as a basis for prescribing provisional measures.[98] This was despite of the fact that the Special Chamber was not convinced that Côte d'Ivoire had 'adduced sufficient evidence to support its allegations that the activities conducted by Ghana in the disputed area are such as to create an imminent risk of serious harm to the marine environment'.[99] The explicit reliance on preventing serious harm in the operative paragraphs buttressed the holding that 'the risk of serious harm to the marine environment is of great concern to the Special Chamber'.[100]

Second, in rendering its provisional orders, ITLOS has not adopted a narrow or fragmented interpretation of marine environment protection, but has instead opted for a more holistic understanding of what marine environmental protection comprises. ITLOS in *Southern Bluefin Tuna* regarded the conservation of marine living resources,[101] despite not explicitly provided for in Part XII, as a component of marine environment protection. As mentioned from the outset, the obligations concerning the conservation of marine resources and prevention of marine pollution are scattered in different parts of UNCLOS, primarily due to the zonal approach that the Convention adopts. By bringing them together, ITLOS confirmed that they

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[94] Rashbrooke 2004, p. 515.

[95] Proelss 2017, p. 1873.

[96] Treves 2006.

[97] Tanaka 2014, p. 365.

[98] ITLOS, *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Judgment, 23 September 2017, ITLOS Reports 2017, para 108.

[99] Ibid., para 67.

[100] Ibid., para 68.

[101] *Southern Bluefin Tuna Cases (New Zealand and Australia v Japan)*, above n 25, para 70.

are integral components of marine environmental protection. Such an approach has enabled ITLOS to extend obligations found under Part XII concerning primarily the prevention of marine pollution to the conservation of fisheries.[102]

Third, it has been argued that advisory proceedings are more likely to give international courts and tribunals leeway to develop the law. As the legal questions submitted for advisory opinions are usually formulated in a more abstract and general manner, and not confined to the facts of the case, the interpretation and clarification of the law in advisory proceedings have the potential to transcend the particular instance and have wider applicability. The same could arguably be said for ITLOS. As both advisory requests concerned different issues relating to the protection of the marine environment, ITLOS was able to examine in great detail, thereby clarifying several important principles relating to the protection of the marine environment in the two advisory opinions. While the conclusion of ITLOS to establish advisory power for the full tribunal was, as analysed in Sect. 3.2, not without controversy, it opens the door for ITLOS to play a more significant role in clarifying and developing principles to protect the marine environment. This advisory jurisdiction may allow State parties to an institutional body established under the currently-negotiated international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ ILBI), to request advisory opinions from ITLOS relating to the conservation of marine resources in areas beyond national jurisdiction. Moreover, it is interesting to note that in both advisory proceedings, ITLOS allowed not only States but also international organisations to make written statements, and in the Advisory Opinion on *IUU Fishing*, non-governmental organisations such as World Wild Fund International submitted amicus curiae briefs.[103] The advisory jurisdiction of ITLOS, therefore, also has the potential to allow for more inclusive participation of all actors in the protection of the marine environment.

Finally, the most significant contribution of ITLOS towards the development of the law on marine environment protection is the clarification of the status of several principles of environmental law. In particular, ITLOS confirmed that the duty to cooperate and the obligation to conduct an EIA are now all part of general international law. With regard to the controversial precautionary principle, while not explicitly acknowledging its customary status, ITLOS is the only international tribunal to date which has given a green light to the precautionary principle belonging to the corpus of general international law, as demonstrated in the *Advisory Opinion on Activities in the Area*. ITLOS also shed light on the precautionary principle as provided for under Principle 15 of the Rio Declaration, establishing a connection between the precautionary principle and the principle of common but differentiated responsibility, and the principle of due diligence. All these aspects of the precautionary principle had

[102] *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, above n 13, paras 216 and 217.

[103] See ITLOS page for the Advisory Opinion on Activities in the Area: https://www.itlos.org/en/main/cases/list-of-cases/case-no-17/. Accessed 24 February 2020. For the Advisory Opinion on IUU Fishing: https://www.itlos.org/en/main/cases/list-of-cases/case-no-21/ Accessed 24 February 2020.

not been discussed to a great extent in international jurisprudence before and thus, mark an important contribution of ITLOS to the development of the principle. The keenness of UNCLOS bodies to accept emerging principles which are either still controversial or vague in their content and bring them into the corpus of UNCLOS shows that the tribunals are open to treating the Convention as having an evolving nature, and that they are willing to interpret UNCLOS in line with new developments in the field. This approach is highly welcome and reasonable, for UNCLOS came into being at a time when international environmental law was not yet fully developed and had only started to gather attention.

3.4.2 Weaknesses

The first weakness lies in the limited number of cases in which ITLOS has had the opportunity to deal with marine environmental protection. Its ability to make wide-ranging contributions is thus constrained. This can be explained by the jurisdictional constraints as specified in Sect. 3.2, placing limitations on what ITLOS can do. As ITLOS only has jurisdiction under the Convention pursuant to Article 288(1), it would be unable to deal with all marine environmental protection issues that arise, unless there is a sufficient link to one or more provision of the Convention. Moreover, as analysed in Sect. 3.2.1, Articles 281 and 297(3) may impose further restrictions on the jurisdictional scope of ITLOS. The interpretation of these articles in case law to date has created significant uncertainty regarding the extent to which ITLOS can have a say at all in certain environmental issues, including those that are regulated under other conventions other than UNCLOS and those that relate to the conservation of marine living resources in the coastal States' EEZ. It is worth mentioning that in the most revised draft text of the BBNJ ILBI, it has been proposed that 'the provisions relating to the settlement of disputes set out in Part XV of the Convention apply mutatis mutandis to any dispute between States Parties to this Agreement concerning the interpretation or application of this Agreement, whether or not they are also Parties to the Convention'.[104] As many of the issues regulated under the new agreement are likely to also be found under other international instruments, the conflicting interpretation of Article 281 casts serious doubt over the extent to which ITLOS may be able to play a role in protecting the marine environment beyond national jurisdictions under this new agreement. While, as mentioned in Sect. 3.3, there are tools that allow ITLOS to deal with issues beyond UNCLOS, the interpretations of articles such as Article 293 and Article 297(1) to expand the jurisdiction of the tribunals under Article 287 UNCLOS has not been without controversy.[105]

[104] Revised draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, Article 55: https://undocs.org/en/a/conf.232/2020/3. Accessed 24 February 2020.

[105] For critiques of the interpretation of Article 297(1), see for example Talmon 2016, para 927; Allen 2017, p. 313.

Consequently, caution would need to be exercised in using these articles just to give ITLOS more opportunities to hear environmental cases, so as not to circumvent the jurisdictional constraints that are imposed upon ITLOS under the Convention.

This may not be a weakness in a strict sense that can be blamed on ITLOS itself, as this was the decision of the drafters of the Convention to establish the dispute settlement system in such a way. However, these constraints should be taken into account in order to manage expectation regarding the role of ITLOS. In any case, it is worth remembering that the contribution of ITLOS—as a dispute settlement body—to the development of the law necessarily transpires through the decisions rendered in the course of settling disputes or issuing advisory opinions. The decision to bring cases or advisory requests to international courts and tribunals, in turn, rests entirely with States. It is impossible to predict with any degree of certainty when States are willing to do so, and the proceedings under Part XV of UNCLOS have indeed been rather haphazard in nature.

Second, looking at the cases that ITLOS has had the chance to deal with, there also exist certain weaknesses. The fact that international courts and tribunals acknowledge and confirm the existence of environmental principles may not necessarily mean they have meaningfully shed light on the normative content of these principles. International courts have had the tendency to pay lip-service to environmental principles, partly contributing to what one commentator terms as the 'myth system' of international environmental law—a set of ideas often considered part of customary international law but which do not reflect state practice, and instead are merely 'collective ideals of the international community' which 'have the quality of fictions or half-truth.'[106] Therefore, unless the normative content of the principles is clarified so as to expose clear obligations on States, the customary status or otherwise of the principles is of little meaning in practice.

The precautionary principle was applied in provisional measure proceedings in *Southern Bluefin Tuna.* However, given the nature of the proceedings (provisional), its normative content, such as the threshold to trigger the application of the precautionary principle under UNCLOS, was informed by Article 290. This may restrict the applicability of the conclusions to other cases. In respect of the obligation to cooperate, ITLOS confirmed the link between the duty to cooperate and other duties, such as the duty to conduct consultation, duty to exchange information, duty of prior notification, in the context of preventing marine pollution. In the conservation of marine resources, ITLOS however remains overly coy when it comes to specifying concrete measures for States to fulfil the duty to cooperate, leaving much room to be filled. Similarly, ITLOS did not manage to shed much light on the obligation to conduct an EIA. Except for the link between EIA and the duty to consult and notify relevant stakeholders, the content of the obligation to conduct an EIA under Article 206 of UNCLOS remains unclear, as is the question as to whether there is a common global minimum for the standards of EIA or whether it is at the discretion of States.

[106] Bodansky 1995, p. 105.

3.5 Conclusion

This chapter has sought to examine the contribution of ITLOS to the protection of the marine environment. By analysing the cases that ITLOS has dealt with to date, it has shown that ITLOS has had the opportunity to engage with various environmental principles in the context of the marine environment. In doing so, it has contributed to clarifying the legal status and normative content of several principles, such as the precautionary principle, the duty to cooperate and EIA. However, the case law has also shown that ITLOS has missed several opportunities to contribute further to developing these principles. That said, the Tribunal's examination of the principles, even when limited, lends an authoritative voice to endorsing their importance and helps to enrich the case law that deals with them, providing some guidance for States in the implementation of the principles. At the same time, one should be reasonable in what can be expected of ITLOS in terms of its contributions to the protection of the marine environment. There are inherent limitations upon dispute settlement bodies such as ITLOS, particularly in terms of jurisdictional scope, that will constrain them from playing a greater role in developing the law. ITLOS will have to strike a careful balance between seizing the opportunity to contribute to the development of environmental principles and staying within the limits of its jurisdiction in order to maintain its legitimacy and authority.

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Lan Ngoc Nguyen Assistant Professor, Utrecht University School of Law and Senior Associate Researcher, Netherlands Institute for the Law of the Sea, Utrecht Centre for Water, Oceans and Sustainability Law, Faculty of Law, Economics and Governance, Utrecht University, The Netherlands. This chapter was funded by the ERC Research Project 'Accommodating New Interests at Sea: Legal Tools for Sustainable Ocean Governance' (SUSTAINABLEOCEAN).