International biodiversity litigation: The increasing emphasis on biodiversity law before international courts and tribunals

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1. Introduction

This chapter is devoted to biodiversity litigation before international courts and tribunals. It will start by reflecting on the idiosyncrasies in this area of international law and defining the scope of the study (Second Part). The Third Part will assess the level of influence of international biodiversity law on international courts and tribunals, with a view to analysing the contribution of international litigation to the effectiveness of international biodiversity law. The Fourth Part will synthetise our key findings. The Fifth Part will conclude by identifying possible ways forward.

2. The idiosyncrasies of the international context and scope of the chapter

In matters relating to the environment, and in particular to biodiversity, States have long shown reluctance towards engaging with international dispute-resolution mechanisms. This is even more marked in this field, because the obligations, even those defined in treaties, are often vague, many elements of the environment are perceived as having no market value or a low market value, and also because of the specific nature of environmental damage, which can discourage the initiation of such proceedings.[1] Regarding States' own responsibility, it is worth recalling that the 1996 proposals of the International Law Commission (ILC) for making States strictly liable for significant transboundary harm proved to be too progressive and that the codification process remains, to this day, partial.[2] Hence, apart for a few cases in which liability can arise from a damage,[3] the international responsibility of a State may only be incurred on the basis of an internationally wrongful act (a breach of treaty or customary international law that may be committed through an act or omission). Indeed, States have sought to avoid litigation by laying down rules channelling liability to operators under their jurisdiction (mainly private corporations).[4] This was one of the objectives during the negotiations of the Kuala Lumpur-Nagoya Supplementary Protocol to the Cartagena Protocol to the Convention on

[1] Sandrine Maljean-Dubois and Lavanya Rajamani, 'The present state of Research Carried out by the English-speaking and the French-speaking Sections – Report of the Directors of Studies' in Sandrine Maljean-Dubois, Lavanya Rajamani (eds), *Implementation of International Environmental Law* (Martinus Nijhoff 2011) 3.

[2] Title and texts of the preamble and the draft principles on the allocation of loss arising out of hazardous activities adopted by the Drafting Committee on second reading, 2006, 1. See the UNGA resolution 61/36 (4 December 2006), Allocation of loss in the case of transboundary harm arising out of hazardous activities, commending the Principles to the attention of Governments.

[3] For instance, the Convention on International Liability for Damage Caused by Space Objects [1972] *UNTS* 961–187.

[4] Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment [1993] ILM 32–1228 (not yet entered into force).

Biological Diversity.[5] But the result is rather disappointing from this point of view. The Protocol only addresses responsibility incurred through the transboundary movement of living modified organisms between the 49 States that are Parties to the Protocol.[6] States have also opted for the implementation of compliance procedures, which can help resolve disputes, but in a non-adversarial way. Several mechanisms of this kind have been set up by the conferences of the Parties of biodiversity-related conventions with a view to promoting implementation and responding to the underlying causes of delays or non-compliance with international obligations.[7] Compliance procedures tend to marginalise traditional dispute resolution mechanisms, but they do not exclude them, at least in theory.[8]
However, as a result of the growth of international environmental law and the growing awareness of the threats to biodiversity, international case-law addressing biodiversity issues has progressively emerged before the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), the Dispute Settlement Body of the World Trade Organization (WTO DSB), as well as before arbitral tribunals.[9] There are also relevant international disputes in the fields of human rights and investment protection.

Against this background, this chapter deals with a number of judicial bodies, both international and regional, permanent or *ad hoc*, new and old, with general or specialized jurisdiction, with different judicial authority. Thus, the context of claims and remit to adjudicate disputes are different. However, even if sometimes the dataset is too small to draw any final conclusion, we believe that a comparative analysis of this set of cases and decisions shed light on the relevance of international biodiversity law in international adjudication, including with reference to the complexity and fragmentation of this field of international law.[10] Better understanding of international case law concerning biodiversity could guide domestic courts in their interpretation of international biodiversity law. Even if in principle, international judgments

[5] Kuala Lumpur-Nagoya Supplementary Protocol to the Cartagena Protocol to the Convention on Biological Diversity [2010], *UNTS* A-30619.
[6] Sandrine Maljean-Dubois, *Le droit international de la biodiversité* (Brill, 2021) 404; Dire Tladi, 'Civil liability in the context of the Cartagena Protocol: To be or not to be (binding)?' *(*2010) 10 International Environmental Agreements 15.
[7] See for instance, under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (Resolution Conf. 14.3 (Rev. CoP18) CITES compliance procedures); the Ramsar Convention on Wetlands of International Importance (Recommendation 4.7: Mechanisms for improved application of the Ramsar Convention; Resolution XIII.11 Ramsar Advisory Missions); the Protocol on Biosafety to the Convention on Biological Diversity (MOP 1 Decision BS-I/7 Establishment of procedures and mechanisms on compliance under the Cartagena Protocol on Biosafety); the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (NP MOP 1 Decision NP-1/4 Cooperative procedures and institutional mechanisms to promote compliance with the Nagoya Protocol and to address cases of non-compliance); the International Treaty on Plant Genetic Resources for Food and Agriculture (Governing body, Resolution 2/2011 Procedures and operational mechanisms to promote compliance and address issues of non-compliance); the Bern Convention on the conservation of European wildlife and natural habitats (28th meeting of the Standing Committee - Strasbourg, 24-27 November 2008 - Application of the Convention - Summary of Case files and complaints - Reminder on the processing of complaints and new on-line form, T-PVS(2008)7); the Alpine Convention (COP decision VII/4 Mécanisme de vérification du respect de la Convention alpine et de ses protocoles d'application); the Barcelona Convention for the Protection of the Marine Environment and the Coastal region of the Mediterranean (COP Decision IG 17/2: Procedures and mechanisms on compliance under the Barcelona Convention and its Protocols).
[8] Martti Koskenniemi, 'Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol' (1992) 3 Yearbook of International Environmental Law 1, 129.
[9] For an earlier assessment, see Braulio Ferreira de Souza Dias and Kathryn Garforth, 'Historical Perspectives on the Challenge of Biodiversity Conservation' in Elisa Morgera and Jona Razzaque (eds), *Edward Encyclopedia of Environmental Law: Biodiversity and Nature Protection* (Edward Elgar 2017) 13-30.
[10] See the Introduction of this book.

only have the relative authority of *res judicata*,[11] in practice they have a particular weight. This is especially the case of universal courts, like the ICJ or the ITLOS, but also to some extent of arbitral tribunals. As the International Court of Justice has said, a court "states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend".[12] The Court has thus recognized that it has a certain margin of appreciation to participate in the development of international law.

For the purposes of this chapter, due to the still low number of international cases addressing biodiversity, we have reviewed the interstate case-law and have been able to include all the cases dealing with biodiversity conservation or sustainable use. We have also included in the scope of our study the decisions from regional (African, mmerican and European) human rights courts and international investment arbitrations that address matters relating to biodiversity conservation or sustainable use.

3. Analysis of international case law

Our comparative study of international case law shows that (1) international biodiversity law has been increasingly invoked before international courts and tribunals and that (2) courts and tribunals' decisions demonstrate a gradual opening-up to science and uncertainty related to biodiversity conservation and sustainable use. However, despite this openness and the fact that the sources on which decisions are based are various (treaties, customary rules, decisions of Conference of Parties and other secondary law of international organisations), (3) the observable influence of international biodiversity law is still quite limited, even if (4) the possible forms of reparation for harm to biodiversity could permit different litigation strategies at the international level.

3.1 An increasing reference to international biodiversity law before international courts and tribunals

In the last twenty years, biodiversity issues have been at the heart of various international disputes, and international biodiversity law has been increasingly invoked, whether in terms of treaty obligations or soft law instruments. Two exceptions, however, should be mentioned at the outset. In two cases before ITLOS, one could have expected references to international biodiversity law, but that was not the case. In the *Land Reclamation in and around the Straits of Johor*,[13] there were surprisingly no mention of biodiversity, fauna, flora or ecosystems, even if the "significant effects" of the works on the marine environment mentioned were excessive sedimentation, seabed level changes and coastal erosion. In the same way, in the *Mox Plant* case, the ITLOS's order on provisional measures only referred to the protection of the marine environment in general, without mentioning biodiversity, fauna, flora or ecosystems.[14]

3.1.1 Reference to international biodiversity conventions

In conjunction with customary due diligence obligations, international biodiversity treaty law has been increasingly invoked before several international courts and tribunals. For instance, in

[11] See for instance Article 59 of the Statute of the International Court of Justice (1945).
[12] Legality of the Threat or Use of Nuclear Weapons: Advisory Opinion [1996] ICJ Reports 226 para 18.
[13] Land Reclamation in and around the Straits of Johor *(Malaysia v Singapore),* Provisional Measures, Order of 8 October 2003, [2003] ITLOS Reports 10.
[14] MOX Plant *(Ireland v United Kingdom)*, Provisional Measures, Order of 3 December 2001 [2001] ITLOS Reports 95.

the *Gabcikovo-Nagymaros Project* case,[15] before the ICJ, Hungary claimed in its written proceedings a breach of the CBD (preamble, articles 3, 5, 14 and 22), but mentioned also the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution (1978), the ASEAN Agreement on the Conservation of Nature and Natural Ressources (1985), the African Convention on the Conservation of Nature and Natural Ressources (1968) or even the UNESCO World Heritage Convention (1972). [16] For its part, Slovakia alleged that Hungary infringed CBD article 8 on conservation *in situ*.[17] In the *Aerial Herbicide Spraying* (Ecuador v. Colombia) case, Ecuador's memorial referred to the CBD (preamble, article 14) and its Cartagena Protocol, among others.[18] In the *Pulp Mills* case, Argentina alleged breaches of the CITES, the Ramsar Convention and the CBD.[19] In the *Road* case, also before the ICJ, Nicaragua and Costa Rica made cross-allegations of breaches of several biodiversity conventions to which both States were parties: in addition to the CBD (articles 3,8, 14), also the Ramsar Convention, the 1992 Convention for the Conservation of the Biodiversity and Protection of Priority Wilderness Areas in Central America, the Central American Convention for the Protection of the Environment, the Tegucigalpa Protocol to the Charter of the Organization of Central American States and the 1990 Agreement over the Border Protected Areas between Nicaragua and Costa Rica (International System of Protected Areas for Peace [SI-A-PAZ] Agreement).[20] Finally, the *Whaling* case before the ICJ was focused on the interpretation and implementation of the International Convention for the Regulation of Whaling 1946,[21] with Parties extensively referring to international biodiversity conventions in their written proceedings (1995 UN Fish Stocks Agreement, CBD, CITES, Convention on the conservation of Antarctic marine living resources…).[22]

Regarding interstate arbitration, it is worth mentioning the *South China Sea* arbitration,[23] in which the Philippines alleged breaches of several international treaties by China, namely, the 1982 United Nations Convention on the Law of the Sea, the CBD, the Ramsar Convention and CITES.[24] The tribunal recalled that China itself had officially stated that, as a State party to the CBD and to CITES, it "will strictly observe provisions of the conventions and honour her obligations in good faith."[25]

Before WTO DSB, the CBD and the Convention on Migratory Species (CMS) were invoked, as well as the Protocol concerning Specially Protected Areas and Wildlife to the Convention

[15] Gabcikovo-Nagymaros Project (*Hungary/Slovakia*) (Judgment) [1997] ICJ Reports 7.
[16] Memorial of the Republic of Hungary, 2 May1995 <hhttps://www.icj-cij.org/en/case/92/written-proceedings> accessed 12 March 2022.
[17] Reply submitted by the Slovak Republic, 20 June 1995, <https://www.icj-cij.org/en/case/92/written-proceedings> accessed 12 March 2022.
[18] Memorial of Ecuador, 28 April 2009, Footnote, 276, see also 283; Reply of Ecuador, 31 January 2011, 20, <https://www.icj-cij.org/en/case/138/written-proceedings> accessed 12 March 2022.
[19] Pulp Mills on the River Uruguay *(Argentina v Uruguay)* (Judgment) [2010] ICJ Reports 14 paras 56, 191.
[20] 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)* (Judgment) [2015] ICJ Reports 665.
[21] Whaling in the Antarctic *(Australia v Japan: New Zealand intervening)* (Judgment) [2014] ICJ Reports 226.
[22] See Australia's memorial [4.85 ff], Japan's counter-memorial, [6.19 ff] <https://www.icj-cij.org/en/case/148/written-proceedings> accessed 12 March 2022.
[23] Arbitral tribunal constituted under annex VII to the 1982 United Nations Convention on the Law of the Sea between the Republic of the Philippines and the People's Republic of China, Award, 12 July 2016, Permanent Court of Arbitration [3.10] <https://docs.pca-cpa.org/2016/07/PH-CN-20160712-Award.pdf> accessed 12 March 2022.
[24] ibid para 828.
[25] ibid para 915.

for the Protection and Development of the Marine Environment of the Wider Caribbean Region in the *Shrimps Turtles* case.[26] The CBD and its Cartagena Protocol on Biosafety were invoked in the *Biotech* case.[27] A combination of conventions on the protection of animals was mentioned in the *Seals* case.[28]

Before the ITLOS, several conventions on marine biological resources have been invoked in addition to the Montego Bay Convention, like the UN Fish Stocks Agreement and 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 Sub-Regional Fisheries Commission.[29]

Furthermore, international biodiversity law was addressed before international investment tribunals. In the international investment arbitration *David Aven v Costa Rica*, the Tribunal found that Costa Rica's actions to protect wetlands in an investment area in line with the Ramsar Convention and the CBD were neither arbitrary nor in breach of the investment agreement and obligations to ensure fair and equitable treatment, as environmental damage had been caused by the investor and the host State had acted in accordance with domestic laws and international law.[30] In another investor-State arbitration, an international investor running a nature sanctuary in Barbados lodged a complaint against the government of Barbados for failing to implement its international obligations under the Ramsar Convention and the CBD, which had negatively affected the value of the investment in the sanctuary.[31]

In addition, in its Advisory Opinion on the human right to a healthy environment, the Inter-American Court of Human Rights has relied on the CBD to confirm the existence of a treaty obligation to prevent environmental damage and to subject this obligation to a certain degree of severity of the harm that could be caused, by reference to CBD language on "significant adverse effects on biodiversity",[32] as well as to reaffirm the precautionary principle.[33]

3.1.2 Reference to soft law instruments

In addition to hard law obligations, soft law instruments, or legal tools which normativity is uncertain or contested (like Conference of the Parties' "decisions"), have also been invoked several times. For instance, in the *Seals* case before WTO DSB, the European Union and the panel relied on some recommendations of the Office International des Epizooties, in particular its Guiding Principles for Animal Welfare.[34] Before the ICJ, the *Whaling* case is exemplary of the

[26] WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* – AB-1998-4 – Report of the Appellate Body [1998] WT/DS58/AB/R.
[27] WTO, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products,* Reports of the Panel [2006] WT/DS291/R WT/DS292/R WT/DS293/R.
[28] European Convention for the protection of animals during transport, Paris [1968] ETS No 65; European Convention for the protection of animals kept for farming purposes, Strasbourg [1976] ETS No 87; European Convention for the protection of animals for slaughter, Strasbourg [1979] ETS No 102; European Convention for the protection of vertebrate animals used for experimental and other scientific purposes, Strasbourg [1986] ETS No 123; European Convention for the protection of pet animals, Strasbourg [1986] ETS No 125.
[29] Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, [2015] ITLOS Reports 4.
[30] *David Aven et al v Republic of Costa Rica*, ICSID Case No UNCT/15/3, (Award) (18 September 2018) [423, 708] <https://www.italaw.com/sites/default/files/case-documents/italaw9955_0.pdf> accessed 12 March 2022.
[31] *Peter Allard v Barbados*, PCA Case No. 2012-06, Final Award (27 June 2016) [178] <https://www.italaw.com/sites/default/files/case-documents/italaw7594.pdf> accessed 12 March 2022.
[32] Inter-American Court, Advisory Opinion Oc-23/17 of November 15, 2017 Requested by The Republic Of Colombia: The Environment And Human Rights para 134.
[33] ibid para 176.
[34] WTO, *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products - Reports*

importance attributed to international soft law, such as the resolutions adopted by the International Commission on the Regulation of Whaling, the importance of which was extensively discussed by the Parties.[35] Even if they are not formally binding, the ICJ has explicitly accepted to take them into consideration in interpreting the 1946 Convention. It considered that

> "Article VI of the Convention states that '[t]he Commission may from time to time make recommendations to any or all Contracting Governments on any matters which relate to whales or whaling and to the objectives and purposes of this Convention'. These recommendations, which take the form of resolutions, are not binding. However, when they are adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention or its Schedule."[36]

Japan also made reference to CBD COP decisions, and in particular the Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity (2004) as well as the Plan of Implementation of the World Summit on Sustainable Development,[37] but the Court did not refer to any of them, nor to the CBD.

The Inter-American Court of Human Rights has increasingly engaged with the CBD and its COP decisions to support a mutually supportive interpretation of the international human rights of indigenous peoples and international biodiversity law, notably with regard to three safeguards for the indigenous peoples' rights to land and natural resources (impact assessment, consent and benefit-sharing).[38] This started with the seminal *Saramaka* case,[39] where the Inter-American Court could only rely on very limited legal bases in international human rights law[40] and therefore relied on the CBD Akwé: Kon Guidelines on socio-cultural and environmental impact assessments.[41] Similar is the case of benefit-sharing guidance included in CBD decisions on protected areas,[42] that have been identified as relevant by human rights bodies, such as the Committee on the Elimination of Racial Discrimination,[43] to prevent negative impacts from conservation activities on indigenous and tribal peoples' territories. In the 2015 *Kaliña and Lokono* decision, the Inter-American Court has been particularly explicit about the need for,

of the Panel (2013) WT/DS400/R, WT/DS401/R, 25 November 7.408.

[35] Whaling in the Antarctic *(Australia v Japan: New Zealand intervening)* (Judgment) [2014] ICJ Reports 226 (n 21).

[36] ibid para 46.

[37] Japan's Counter-Memorial [6.19 ff] (n 22).

[38] Inter-American Court, Advisory Opinion (n 32) para 44. For A Discussion, Elisa Morgera, 'Under the Radar: Fair and Equitable Benefit-sharing and the Human Rights of Indigenous Peoples and Local Communities Connected to Natural Resources' (2019) 23 International Journal of Human Rights1098-1139.

[39] Inter-American Court of Human Rights (IACtHR), Case of the *Saramaka People v Suriname* (Judgment) (Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs), 12 August 2008 [41]. See more recently, the case of *The Indigenous Communities of The Lhaka Honhat (Our Land) Association v Argentina* (Judgment of February 6, 2020) (Merits, reparations and costs) [fn 248 and 251].

[40] IACtHR, Case of *the Saramaka People v Suriname* (Judgment) (Preliminary Objections, Merits, Reparations and Costs), 28 November 2007*)* [130 and fn 128], [138 and fn 137] (n 39).

[41] Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities (CBD Decision VII/16C (2004), Annex), [46, 56].

[42] Work programme on protected areas (CBD Decision VII/28 (2004), Annex) [2(1), 2(1)(4)] (while the latter refers to both benefit- and cost-sharing, the focus on benefit-sharing is clarified in CBD Decision IX/18 (2008), preamble para 5).

[43] CERD, Concluding observations on the combined thirteenth to fifteenth periodic reports of Suriname, (2015) UN Doc. CERD/C/SUR/CO/13-15 para 26.

and merits of, mutual supportiveness with CBD COP decisions such as the Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity and the CBD work programme on protected areas.[44]

3.2 An increasing openness to science and uncertainty

With biodiversity issues, international courts inevitably have to weigh and adjudicate upon complex scientific and technical issues and to "focus on the best legal tools to tackle" them,[45] which is quite challenging. Our analysis shows the extent to which international case law has evolved in the last twenty years in this respect.

In its first explicit environmental case, the *Danube dam* case in 1997, the ICJ appeared quite reluctant to enter into scientific considerations. It did not use the term biodiversity, whereas Hungary had extensively referred to it in its written proceedings.[46] The Court kept referring instead to "natural resources" "environment", "natural environment", "natural processes", or "nature", in line with the terms of the bilateral treaty concluded by the two States in 1977. In contrast, in the 2015 *Pulp Mills* Judgment, the word *biodiversity* is mentioned twelve times.[47]

In its 1997 Judgment, the Court did not mention either the precautionary principle, on which the Parties were disagreeing. It admitted the possibility of a "grave peril" for the environment in the long term, but, relying on a report from the Hungarian Academy of Sciences, it noted that "Because of the complexity of the ecological processes and lack of the measured data and the relevant calculations the environmental impacts cannot be evaluated."[48] Then "the dangers ascribed to the upstream reservoir were mostly of a long-term nature and, above all, that they remained uncertain."[49] From this point of view, its conception of risk appeared to be quite outdated, practically leaving no room to uncertainty.[50] Furthermore, when it came to the appreciation of the ecological consequences of the project, it considered completely opposing views of the Parties, and noted that "Both Parties have placed on record an impressive amount of scientific material aimed at reinforcing their respective arguments."[51] However, the Court found a way not to rule on this point: it stated that, "The Court has given most careful attention to this material" but "concludes, however, that (…) it is not necessary (…) for it to determine which of those points of view is scientifically better founded." [52]

On the contrary, in the *Pulp Mills* case, the Court did not hesitate to go into very technical considerations, for instance on the relationship between the discharges from the Orion mill and the malformations of rotifers, or the dioxin found in the sábalo fish or the loss of fat by clams reported in the findings of the Argentine River Uruguay Environmental Surveillance programme.[53]

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[44] IACtHR, Case of *Kaliña and Lokono Peoples v Suriname*, Judgment (Merits, Reparations and Costs), 25 November 201, paras 173-174, 177-178, 181 and 214 fn 247.
[45] Makane Moïse Mbengue and Rukmini Das, 'The ICJ's Engagement with Science: To Interpret or not to Interpret?' (2015) 6 Journal of International Dispute Settlement 3, 568.
[46] See for instance Hungary's Memorial, 2 May 1994, Vol. 1, 153, 161-163, 201, 205, 221, 292, 224, 293, 364, 366 <https://www.icj-cij.org/en/case/92/written-proceedings> accessed 12 March 2022.
[47] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (n 19).
[48] ibid para [56] 44.
[49] Gabcikovo-Nagymaros Project *(Hungary/Slovakia)* (Judgment) [1997] 1CI Reports 39, 7.
[50] Pierre-Marie Dupuy, Verbatim Record 97/6, 69 <https://www.icj-cij.org/en/case/92/oral-proceedings> accessed 12 March 2022.
[51] Judgment [54], 42 (n 49).
[52] ibid [54] 42.
[53] ibid [262].

In the *Whales* case, the ICJ remained cautious, noting for instance that "in applying the above standard of review, it is not called upon to resolve matters of scientific or whaling policy. The Court is aware that members of the international community hold divergent views about the appropriate policy towards whales and whaling, but it is not for the Court to settle these differences."[54] But, in actual fact, it did consider advanced scientific and technical considerations, for instance to assess if the sample size for statistical examination was reasonable, or if the use of lethal methods responds to a strict scientific necessity.[55] Aware of the fact that it had "to avoid two main hurdles: limiting its assessment to legal aspects or becoming a judge of science by itself performing the technical analyses", the Court initiated an original approach, adopting a proactive attitude during the cross-examination of experts and explicitly articulating a "standard of review characterized as 'objective' and involving the use of a reasonableness test".[56] Nonetheless, it has been argued that the Court's method of establishing facts and handling technical and scientific matters could be "improved, whether through strategic use of existing rules, amendments to those rules or a deeper engagement with fact-finding at the deliberation phase".[57]

Regarding biotech products and biosafety, the WTO DSB has proven to be unwilling to apply the precautionary principle as an international customary rule, considering that "Since the legal status of the precautionary principle remains unsettled, like the Appellate Body before us, we consider that prudence suggests that we not attempt to resolve this complex issue, particularly if it is not necessary to do so."[58]

On the contrary, the ITLOS has shown itself to be a pioneer in acknowledging the status of the precautionary principle.[59] The Tribunal's Rules contain provisions to enable the Tribunal to play a proactive role in dealing with expert evidence.[60] In effect, ITLOS did not hesitate to refer to "best scientific evidence", "precautionary approach" or even to the "the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special needs of the SRFC Member States, taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global."[61] Indeed the ITLOS is developing into a "transparent, consistent and speedy forum" to adjudicate marine wildlife disputes arising from UNCLOS.[62]

3.3 The limited influence of international biodiversity law on courts' decisions

[54] ibid [69].
[55] ibid [172, 211].
[56] Guillaume Gros, 'The ICJ's Handling of Science in the Whaling in the Antarctic Case: A Whale of a Case?' (2015) 6 Journal of International Dispute Settlement 3, 578.
[57] Loretta Malintoppi, 'Fact Finding and Evidence Before the International Court of Justice (Notably in Scientific-Related Disputes)' Journal of International Dispute Settlement 7 (2016) 2, 421.
[58] Biotech, [7.89] (n 27).
[59] See in particular *Southern Bluefin Tuna (New Zealand v Japan; Australia v Iapan),* Provisional Measures, Order of 27 August 1999, [1999] ITLOS Reports 280 [79].
[60] Philippe Gautier, 'Experts before ITLOS: An Overview of the Tribunal's Practice' (2018) 9 Journal of International Dispute Settlement 3, 433.
[61] Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, [2015] ITLOS Reports 4; see also Separate Opinion of Judge Paik, referring to ecosystem-based approach, 118.
[62] Howard Schiffman, 'UNCLOS and Marine Wildlife Disputes: Big Splash or Barely a Ripple?' (2001) 4 Journal of International Wildlife Law and Policy 257.

In international litigation, international biodiversity law has not been relied on directly, but rather it has been used to interpret other rules and obligations. Hence, it has exercised an increasing, indirect yet significant influence on courts' decisions.

3.3.1 A limited direct influence

International case law shows no direct influence of international biodiversity law. There are two main reasons for this finding. In some cases, international biodiversity obligations have been considered too vague. In others, they have been set aside as not applicable. In either case, it may not necessarily be due to judges' reluctance, but it may be ascribed to the limitations of international biodiversity law (too vague) or of international law (fragmented). Because of the small dataset, it is certainly difficult to draw a definite conclusion. This trend could be reversed in the future, in particular if arguments could be developed about interpretations that narrow the scope and clarify the content of international open-ended obligations (as discussed in the final section).

3.3.1.1 International biodiversity obligations as too vague

The best example is probably given by the *Road* case, in which the ICJ dismissed several allegations of breaches of international biodiversity-related conventions considering that it considered were too general in their wording. This was the case with the Article 5 of the Ramsar Convention which provides that "The Contracting Parties shall consult with each other about implementing obligations arising from the Convention especially in the case of a wetland extending over the territories of more than one Contracting Party or where a water system is shared by Contracting Parties. They shall at the same time endeavour to co-ordinate and support present and future policies and regulations concerning the conservation of wetlands and their flora and fauna."[63] According to the Court, "While this provision contains a general obligation to consult 'about implementing obligations arising from the Convention', it does not create an obligation on Nicaragua to consult with Costa Rica concerning a particular project that it is undertaking, in this case the dredging of the Lower San Juan River. In light of the above, Nicaragua was not required under the Ramsar Convention to notify, or consult with, Costa Rica prior to commencing its dredging project."[64]

In the same direction, "As to the Convention for the Conservation of the Biodiversity and Protection of Priority Wilderness Areas in Central America, the Court sees no need to take its enquiry further, as neither of the two provisions invoked by Costa Rica contains a binding obligation to notify or consult."[65]

Nicaragua also claimed that Costa Rica was required to carry out an environmental impact assessment under CBD Article 14. Here the Court recalled the content of this provision: "Each Contracting Party, as far as possible and as appropriate, shall: (a) Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures."[66] Then the Court, without any further explanation, "consider[ed] that the provision at issue *does not create an obligation* to carry out an environmental impact assessment before undertaking an

[63] *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)* (Judgment) [2015] ICJ Reports paras 48, 665 (n 20).
[64] Ibid [110 and see also 172] (n 63).
[65] ibid [111].
[66] Ibid [62].

activity that may have significant adverse effects on biological diversity. Therefore, the Court did not establish that Costa Rica breached CBD Article 14 by failing to conduct an environmental impact assessment for its road project."[67] Admittedly, the obligation contained in CBD Article 14 ("shall") is qualified by the expression "as far as possible and as appropriate." But it has been argued that these qualifications, which are quite common to other international biodiversity-related conventions,[68] should not be interpreted as putting into question the existence of an international obligation, but only as opening up the margin of discretion for different Parties to choose different ways to implement the obligation.[69] In addition, it has been argued that the recognition of a customary rule to conduct EIAs implies that a state is under a positive obligation towards potentially affected states to assess harm to biodiversity where that harm extends beyond national borders in relation to impacts on biodiversity, despite the qualified language of the environmental impact assessment obligation under the CBD.[70]

Along similar lines, the statement by the ICJ in the *Pulp Mills case*[71] that "general international law [does not] specify the scope and content of an environmental impact assessment" demonstrates the Court's disregard for the series of guidelines adopted under the CBD by consensus by 196 Parties that detail the content and scope of environmental impact assessments when biodiversity may be at risk. [72]

3.3.1.2 International biodiversity obligations as non-applicable

The best example is given here by the *Biotech* case before a WTO panel. In 2003, the United States, Canada and Argentina requested consultations with the European Communities (EC) on certain measures affecting the approval and marketing of products containing, consisting of or produced from genetically modified organisms. In the absence of a regulation considered mutually satisfactory, the three countries requested the establishment of a panel to examine the issue. The Panel issued its report in 2006, which was not appealed.[73] The question of particular interest for present purposes was how much weight the Cartagena Protocol, extensively invoked by the EC, would carry in such a configuration. The CBD was also invoked. Would WTO law be interpreted in "clinical isolation" from these widely ratified texts of international environmental law?

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[67] ibid [164]. Emphasis added.

[68] High Court of Australia (1983) looked at similarly qualified language in the Word Heritage Convention than the CBD. The Court, in that case, held that: "these articles impose a legally binding obligation that is 'real' and 'substantive' and could not be read as a mere statement of intention: it was expressed in the form of a command requiring each party to endeavour to bring about the matters dealt with — although there is an element of discretion and value judgment on the part of the State to decide what measures are necessary and appropriate, the discretion only concerns the manner of performance — not the issue of whether to perform or not". The argument that these qualifications pertain to how the obligations will be implemented, not whether or not they need to be implemented can be applied by analogy also to the CBD and other international biodiversity-related treaties.

[69] Elisa Morgera, 'Biodiversity as a Human Right and its Implications for the EU's External Action' (2020) Report to the European Parliament <https://www.europarl.europa.eu/RegData/etudes/STUD/2020/603491/EXPO_STU(2020)603491_EN.pdf> accessed 12 March 2022.

[70] Neil Craik, 'Biodiversity-inclusive Impact Assessments' in Elisa Morgera and Jona Razzaque (eds), *Encyclopedia of Environmental Law: Biodiversity and Nature Protection Law* (Edward Elgar 2017) 431-444.

[71] [205] (n 19).

[72] See for instance COP Decision VIII/28 (2006), Impact assessment: Voluntary Guidelines on Biodiversity-inclusive Impact Assessment.

[73] *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*, Reports of the Panel (n 27).

The rejection of the notion of interpretation in "clinical isolation", as early as the first report of the Appellate Body in the *Gasoline* case,[74] thus showed an openness to external rules. It established that WTO law was not a self-sufficient or self-contained regime, assuming that such regimes exist: WTO law is part of international law - it is not clinically isolated from it - and it is to be interpreted and construed through customary rules of interpretation of international law. However, Article 3:2 of the WTO Understanding on rules and procedures governing the settlement of disputes in itself directly refers only to the rules of interpretation of public international law.[75] It is only indirectly or by reference also allows substantial rules to be taken into account. As to the latter, the rules of interpretation of international law, in particular Articles 31 and 32 of the Vienna Convention on the Law of Treaties,[76] which the Appellate Body has very quickly considered as setting out customary rules, provide for the taking into account of substantive public international law. WTO judge's interpretation must therefore be "controlled by the normative environment."[77]

This is the thread of a line of reasoning that the Appellate Body will unwind little by little, not without boldness, in the light of the many markers that the DSU places on its power to develop the law. In fact, its case law has evolved, gradually but clearly, towards taking into account non-WTO rules. Such an evolution started from the GATT 1947, which was much more "clinically isolated" than WTO law is in terms of interpretative practices. For example, it is now established that the WTO agreements are the primary source of law when considering an international trade dispute, but not the sole source.[78]

But how far should we go in taking into account exogenous rules, other international instruments and principles? The relationship between WTO rules and other international instruments and principles was one of the key issues raised in the *Biotech* case. Indeed, the European Communities relied extensively in their defence on other international rules and instruments belonging to the sphere of international environmental and health law, in particular the Cartagena Protocol. For their part, the complainants categorically rejected the relevance of the other international rules and instruments invoked to resolve the dispute, calling on the Panel to stick to the "covered agreements", i.e. WTO law, internal rules.[79]

In this connection, the principle of systemic integration referred to in Article 31(3) c) of the 1969 Vienna Convention on the Law of Treaties must lead the interpreter to take "into account, together with the context (...) any relevant rules of international law applicable in the relations between the parties." In the *Biotech* case, however, the Panel declined to apply it. It considers that, in order for a treaty rule to be interpreted in the light of another treaty rule, the latter (the Cartagena Protocol) must be applicable to all parties to the former (WTO law).[80] This requirement, which was not met and is only rarely met, arguably means that Article 31(3)(c)

[74] WTO, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Appellate Body Report, 29 April 1996.
[75] WTO, Understanding on rules and procedures governing the settlement of disputes, <https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm> accessed 12 March 2022.
[76] Vienna Convention on the Law of Treaties [1969], UNTS Vol. 1155,1-18232 [332].
[77] ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi, A/CN.4/L.682 (2006), 30.
[78] Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) The American Journal of International Law 577.
[79] *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*, Reports of the Panel (n 27).
[80] Joost Pauwelyn, *Conflict of Norms in Public International Law, How WTO Law Relates to other Rules of International Law* (CUP 2003) 257.

essentially allows, in practice, a (WTO) treaty rule to be interpreted in the light of a customary rule. In the Panel's view, "it is not apparent why a sovereign State would agree to a mandatory rule of treaty interpretation which could have as a consequence that the interpretation of a treaty to which that State is a party is affected by other rules of international law which that State has decided not to accept."[81] Acknowledging the contrary would represent a great danger to legal certainty. Could it be acceptable for the European Communities to unravel WTO law by negotiating and concluding the Cartagena Protocol, to which the US refuses to accede? That would not be "reasonable", the Panel said.[82] Its report was neither overturned nor subsequently upheld by the Appellate Body.[83] The attempt by the European Union and developing countries to light a counterfire to WTO law by adopting the Biosafety Protocol was therefore futile.[84] Nevertheless, this interpretation is very much criticized in the literature and has been nuanced in other WTO cases.[85]

3.3.2 A clear indirect influence

In its first environmental case, the *Danube dam*, the ICJ evoked the "new norms and standards" that "have been developed, set forth in a great number of instruments during the last two decades."[86] It specified that "such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past."[87] In other words, these new norms and standards were to be taken into account in the interpretation of the 1977 Treaty, since the Treaty itself prescribes an evolutionary interpretation of its own provisions.[88] However the Court was not explicit at all on what these "new norms and standards" actually were. It did not mention the CBD or other biodiversity-related conventions (except the Convention concerning Fishing in the Waters of the Danube, signed at Bucharest on 29 January 1958[89]). But it did refer in its reasoning to the "existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment."[90] This obligation relates to the environment in general, but it applies *a fortiori* to biodiversity (as an element of the environment). Thus, even if the wording of the Court is vague and not explicit, it uses indirectly international biodiversity law in order to interpret in an evolving way the 1977 Treaty, thus fostering the protection of the environment.

Factual elements and definitions provided by biodiversity regimes are also frequently used by international courts and tribunals. For instance, in the *Road* case, the ICJ considered that the fact that a Costa Rican wetland is on the list of wetlands of international importance of the

[81] Panel report [7.71] 335 (n 27).
[82] ibid.
[83] European Communities and Certain member States – Measures Affecting Trade in Large Civil Aircraft, Report of the Apellate Body, WT/DS316/AB/R, 18 May 2011, 406. However, the Appellate Body urges caution in such a situation.
[84] According to Hélène Ruiz Fabri, 'Concurrence ou complémentarité entre les mécanismes de règlement des différends du Protocole de Carthagène et ceux de l'OMC ?' Jacques Bourrinet and Sandrine Maljean-Dubois (eds), *Le commerce international des organismes génétiquement modifiés* (Documentation française, 2002), 149.
[85] ILC, *Fragmentation of international law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi, A/CN.4/L.682 (2006), 90 (n 77).
[86] Danube Dam Judgment [78] (n 15).
[87] ibid [78].
[88] ibid [140].
[89] ibid [19].
[90] ibid [53], quoting itself in Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Reports 241-242 [29].

Ramsar Convention "heightens the risk of significant damage because it denotes that the receiving environment is particularly sensitive." Consequently, it found "that the construction of the road by Costa Rica carried a risk of significant transboundary harm. Therefore, the threshold for triggering the obligation to evaluate the environmental impact of the road project was met."[91]

In 2015, in the *Kaliña and Lokono* decision, the Inter-American Court of Human Rights was particularly explicit about the need for, and merits of, mutual supportiveness with consensus decisions adopted under the CBD.[92] On that occasion, the Inter-American Court of Human Rights underscored States' obligations to protect, in a manner compatible with their international environmental obligations, indigenous peoples' rights to a dignified life and to cultural identity connected with natural resources on their traditional territories.[93] While all these case law developments concern one particular region, the Inter-American Court's line of reasoning has had visible indirect impact on the African framework on human rights,[94] as well as on global human rights processes.[95]

In the *Shrimps-Turtles* case, the WTO Appellate Body used several biodiversity conventions to interpret the notion of natural exhaustible resources in the GATT 1994:

> "The exhaustibility of sea turtles would in fact have been very difficult to controvert since all of the seven recognized species of sea turtles are today listed in Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ('CITES'). The list in Appendix 1 includes 'all species threatened with extinction which are or may be affected by trade'."[96]

The Appellate Body relied on international environmental conventions and declarations, recalling that they make "frequent references to natural resources as embracing both living and non-living resources" (quoting the UNCLOS, the CBD, the CMS, Agenda 21…) to consider that "exhaustible natural resources" covers not only non-living resources but also living

[91] Judgment [155-156] (n 20).

[92] CBD articles 8(j), 10 and 14: *Kaliña and Lokono* (n 44) [173-174, 177-178, 181 and 214], making reference to the Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity, CBD Decision VII/12 (2004), Annex II and the CBD work programme on protected areas (CBD Decision VII/28 (2004), Annex).

[93] *Kaliña and Lokono* (n 44) [181 and 193].

[94] Gaetano Pentassuglia, 'Indigenous Groups and the Developing Jurisprudence of the African Commission on Human and Peoples' Rights: Some Reflections' (2010) 3 UCL Human Rights Review 150, 158 with respect to the *Endorois* case. See also African Court on Human and Peoples' Rights, *African Commission of Human and Peoples' Rights v The Republic of Kenya* (26 May 2017) App. No 006/2012 [191].

[95] Independent Expert on Environment and Human Rights, John Knox, *Preliminary Report on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc. A/HRC/22/43 (2012) [41] and *Mapping Report*, UN Doc. A/HRC/25/53 (2013) [78]; UN Special Rapporteur on the Right to Food, Oliver de Schutter, *Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights challenge,* UN Doc. A/HRC/13/33/Add.2 (2009) [30-33]; Special Rapporteur Anaya, A/HRC/21/47 [52, 62]; UN Expert Mechanism, Indigenous Peoples and Human Rights, *Setting a Framework for Consultation, Benefit-Sharing and Dispute Resolution*, UN Doc. A/HRC/EMRIP/2009/5 (2008); and UN Expert Mechanism, *Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries,* UN Doc. A/HRC/EMRIP/2012/2 (2012) [40]. But it remains unclear whether the Human Rights Committee (HRC) relies upon the same notion of benefit-sharing found in *Saramaka*: note the lack of reference to benefit-sharing in Office of the UN High Commissioner for Human Rights (OHCHR), *Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Individual Report on the International Covenant on Civil and Political Rights* (2013).

[96] *United States - Import Prohibition of Certain Shrimp and Shrimp Products* - AB-1998-4 - Report of the Appellate Body, WT/DS58/AB/R, 12 October 1998, [132] (n 26).

resources.[97] According to the Appellate Body, "Given the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the WTO Agreement, we believe it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources."[98] In other words, the Appellate Body relied on international biodiversity law to justify an evolutionary interpretation of the GATT 1994. Furthermore, to consider that "the protection and conservation of highly migratory species of sea turtles, that is, the very policy objective of the measure, demands concerted and cooperative efforts on the part of the many countries whose waters are traversed in the course of recurrent sea turtle migrations", the Appellate Body highlighted that "[t]he need for, and the appropriateness of, such efforts have been recognized in the WTO itself as well as in a significant number of other international instruments and declarations."[99] Here, it mentioned some provisions of the CBD and the CMS.[100]

The *Biotech* Panel tried to clarify the reasoning of the Appellate Body in the *Shrimps* case. Indeed, the Panel wondered whether "other rules of international law could be considered by us in the interpretation of the WTO agreements at issue even if these rules are not applicable in the relations between the WTO Members and thus do not fall within the category of rules which is at issue in Article 31(3)(c)."[101] Indeed, in the *Shrimps* case, as recalled by the EC, the Appellate Body then interpreted the WTO rules (i.e. the concept of "exhaustible natural resources" in GATT Article XX) by referring to treaties that were not binding on all parties to the proceedings, including the CBD in support of the U.S. contentions, and although the U.S. was not a party to it. According to the Panel, the Appellate Body's approach then fell within the framework of Article 31(1) of the Vienna Convention, according to which a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[102] This "ordinary meaning" is "often determined on the basis of dictionaries." But, "in addition to dictionaries, other relevant rules of international law may in some cases aid a treaty interpreter in establishing, or confirming, the ordinary meaning of treaty terms in the specific context in which they are used."[103] This opens up the selection of instruments and rules to be considered relevant, including a simple declaration or a treaty not in force between the Parties to the dispute. This flexibility is due to the fact that external rules are no longer required "because they are legal rules, but rather because they may provide evidence of the ordinary meaning of terms in the same way that dictionaries do."[104] It does not matter if the rules in question are applicable in the relations between the WTO Members. What matters then is "their informative character." Consequently, "when a treaty interpreter does not consider another rule of international law to be informative, he or she need not rely on it." Consideration of other rules of international law is no longer mandatory - as in the case of article 31(3) c) - but optional.[105]

In the *Seal* case, the panel explained that it was persuaded that the evidence "as a whole sufficiently demonstrates that animal welfare is an issue of ethical or moral nature in the

[97] ibid [131].
[98] ibid [131].
[99] ibid [26].
[100] ibid [26].
[101] Biotech panel, [7.90] 341 (n 27).
[102] ibid [7.91], 341.
[103] ibid [7.92], 341.
[104] ibid [7.92], 341.
[105] ibid [7.90 ff] 341 ff.

European Union." Yet, in this evidence as a "whole", the panel considered in particular "various pieces of legislation and conventions on animal welfare within the European Union and other countries, including Norway and Canada; and various international instruments."[106]

In the *Tuna* case, the panel determined that the US dolphin-safe labelling provisions pursued legitimate objectives but without using international biodiversity law (which had been poorly mentioned by the parties). However, the panel searched for factual information on bycatch in the instruments of regional fisheries organisations, like the Convention for the Establishment of an Inter-American Tropical Tuna Commission or the Western and Central Pacific Fisheries Commission. [107]

The Arbitral Tribunal went the same way in the *South China Sea* arbitration, since it used the definition of ecosystem of the CBD: "An 'ecosystem' is not defined in the Convention [CBD], but internationally accepted definitions include that in Article 2 of the CBD, which defines ecosystem to mean 'a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit'."[108] In the same way, the fact that some species are listed in CITES appendix I and II allowed the Tribunal to assert that they are threatened with extinction (case of all of the sea turtles found on board Chinese fishing vessels, listed under CITES Appendix I) or threatened (case of giant clams, listed in Appendix II to CITES and thus "unequivocally threatened" according to the Tribunal). The Tribunal explained that "CITES is the subject of nearly universal adherence, including by the Philippines and China, and in the Tribunal's view forms part of the general corpus of international law that informs the content of Article 192 and 194(5) of the Convention."[109]

In the same vein, international biodiversity law has started to be addressed in few international investment disputes. In the international investment arbitration *David Aven v Costa Rica*, the Tribunal found that it is possible (although not in this particular case) for governments to file counterclaims against foreign investors for breach of mandatory rules of environmental protection, including based on international biodiversity treaties which contain *erga omnes* obligations.[110] In the *Peter Allard v Barbado*s case, the arbitral tribunal did not find that Barbados' efforts to implement international biodiversity conventions amounted to a violation of the terms of the investment agreement, as the obligation of the State to provide the investment with full protection and security standard is of "due diligence" and "reasonable care" – not of strict liability.[111] The tribunal noted that the government took reasonable steps to protect the sanctuary, including by establishing a committee to develop plans for its preservation.[112] On the other hand, the decision has arguably opened the way for future cases in which environmentally-minded foreign investors could bring governments before international investment dispute-settlement bodies for not implementing sufficiently international

[106] See *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products - Reports of the Panel*, WT/DS400/R, WT/DS401/R, 25 November 2013, *§* 7.405, quoted by *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products,* Reports of the Appellate Body, WT/DS400/AB/R ; WT/DS401/AB/R, 22 May 2014 [5.138] (n 34).
[107] WTO, *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products,* Report of the Panel, WT/DS381/R, 16/05/2012 [4.237, 4.239].
[108] *PCA Case N° 2013-19 in the matter of the South China Sea Arbitration before an arbitral tribunal constituted under annex VII to the 1982 United Nations Convention on the law of the sea, between the Republic of the Philippines and the People's Republic of China*, Award of 12 July 2016 [140].
[109] ibid [956] 380.
[110] *David Aven et al v Republic of Costa Rica*, 390, 394, 418, 419, 423 [738-747] (n 30).
[111] *Peter Allard v Barbado*s (n 31) 178, 190, 198, 230, 238, 244 [243].
[112] ISDS BLOG: *Peter Allard v Canada*, 01/12/2020, <http://isdsblog.com/2016/10/13/just-published-peter-allard-v-canada/> accessed 12 March 2022.

biodiversity law.[113] Notably, the tribunal indicated that "consideration of the host States' international [biodiversity] obligations may well be relevant in the application of the standard [of full protection and security to the investor] to particular circumstances."[114]

Hence, the indirect use of international biodiversity law in order to interpret international rules and obligations has taken various forms in international case law and contributed to foster the protection of the environment.

3.4 A wide array of remedies

Litigation can pursue different – and sometimes complementary – strategic objectives, going from the reparation for harm to biodiversity to restoration of legality and prevention of future harm. A first consequence when a State is found responsible of a breach of international law is that the internationally wrongful act must cease, if it is still ongoing. Moreover, the responsible State is "under an obligation to make full reparation for the injury caused by the internationally wrongful act."[115] This reparation "takes the form of restitution, compensation and satisfaction, either singly or in combination."[116]

3.4.1 Repairing harm to biodiversity

Regarding harm to biodiversity, it might in fact be physically impossible to restore the situation *ex ante*. But the ICJ has confirmed that compensation, or satisfaction (or both) may be appropriate forms of reparation, particularly in cases regarding environmental harm where restitution is materially impossible or unduly burdensome.[117] However, it also held that, in order to award compensation, the Court has to determine "whether there is a sufficiently direct and certain causal nexus between the wrongful act … and the injury suffered by the Applicant."[118]

Meanwhile, it is worth noting that the ICJ has no difficulty with the notion of compensation for environmental damage. It considered in 2018 that "it is consistent with the principles of international law governing the consequences of internationally wrongful acts, including the principle of full reparation, to hold that compensation is due for damage caused to the environment, in and of itself, in addition to expenses incurred by an injured State as a consequence of such damage."[119] Moreover, the ICJ recalled that "the absence of adequate evidence as to the extent of material damage will not, in all situations, preclude an award of compensation for that damage" and that "in such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate."[120]

3.4.2 Restoring legality and preventing future harm

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[113] ibid.
[114] *Peter Allard v Barbado*s (n 31) [244].
[115] ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries, in Report of the ILC on its 53rd Session, UN Doc A/56/10 (2001) 31, 126 (article 31).
[116] ibid [article 34].
[117] *Pulp Mills* (n 19) 103-104 [273].
[118] Ahmadou Sadio Diallo *(Republic of Guinea* v *Democratic Republic of the Congo),* Compensation (Judgment) [2012] ICJ Reports 332 [14]. Quoted in Certain Activities Carried Out by Nicaragua in the Border Area *(Costa Rica* v *Nicaragua),* Compensation, Judgment [20e18] ICJ Reports 15 [32].
[119] Certain Activities Carried Out by Nicaragua in the Border Area *(Costa Rica* v *Nicaragua),* Compensation, Judgment [2018] ICJ Reports 15 [32, 41]. See in the same way IACtHR [72] (n 32).
[120] *Certain activities…* ibid [35], quoting the *Trail Smelter case (United States, Canada)* (1938 and 1941) 3 RIAA 1905, 1920.

In some cases, responsibility is not about compensation for a material prejudice but about restoring legality and preventing further harm. From this point of view, it is worth mentioning the decision of the ICJ in the *Road* case, in which the Court found that its "declaration that Costa Rica violated its obligation to conduct an environmental impact assessment is the appropriate measure of satisfaction for Nicaragua" since this violation of international law has not caused a specific damage.[121] An international court can also request the parties to find a solution to their dispute through negotiation and cooperation in good faith.

Admittedly, international biodiversity litigation pursues in general an objective of compensation – triggered *ex post* in relation to damage – but it could evolve in the future, to primarily aim to play a preventive role (*ex ante*), trying to push for concrete action, to press legislators and policymakers to be more ambitious in their approaches to biodiversity protection and sustainable use, and to fill the gaps left by legislative and regulatory inaction (as does climate litigation).[122] For instance, in the *Whales* case, the ICJ observed that "JARPA II is an ongoing programme. Under these circumstances, measures that go beyond declaratory relief are warranted. The Court therefore will order that Japan shall revoke any extant authorization, permit or licence to kill, take or treat whales in relation to JARPA II, and refrain from granting any further permits under Article VIII, paragraph 1, of the Convention, in pursuance of that programme."[123] And it added that "The Court sees no need to order the additional remedy requested by Australia, which would require Japan to refrain from authorizing or implementing any special permit whaling which is not for purposes of scientific research within the meaning of Article VIII. That obligation already applies to all States parties. It is to be expected that Japan will take account of the reasoning and conclusions contained in this Judgment as it evaluates the possibility of granting any future permits under Article VIII, paragraph 1, of the Convention."[124] However, the Court's decision essentially led Japan to withdraw from the Whaling Convention[125] and to resume commercial whaling.[126]

4. Synthesis of key findings

Our comparative study demonstrates that international biodiversity law plays a growing role in international litigation. Even if courts and tribunals are reluctant to address directly matters of compliance with international biodiversity law, they increasingly rely on it and no longer hesitate to get into scientific concepts, data and the controversies about biodiversity.

This chapter shows also that international case law has contributed to clarify States' rights and obligations regarding international biodiversity law. This has been particularly significant with regard to the content and legal force of due diligence obligations and principles governing the management of shared natural resources.[127]

Another contribution of international case law has been linking rules with different legal force, from different regimes, favoring a synergistic interpretation of international law and

[121] *Certain Activities …* 2015, 665 [159, 217] (n 20).
[122] Regarding climate UNEP, *Global Climate Litigation Report 2020 Status Review* (UNEP 2020) 4.
[123] *Whaling*… [245] (n 21).
[124] ibid [246].
[125] Statement on Government of Japan withdrawal from the IWC, <https://iwc.int/statement-on-government-of-japan-withdrawal-from-t> accessed 12 March 2022.
[126] Sui Phang and Peter Bridgewater, 'Japan Resumes Commercial Whaling – Researchers on How the World should Respond' (2019) The Conversation <https://theconversation.com/japan-resumes-commercial-whaling-researchers-on-how-the-world-should-respond-119573> accessed 12 March 2022.
[127] See Section 3.3.2.

contributing to improve its consistency and arguably, through that, its effectiveness. While the *South China Sea* arbitration is a perfect illustration of the symbiosis between customary and treaty-based obligations,[128] relevant international case-law as a whole illustrates the willingness of international courts and tribunals to contribute to a systemic interpretation of international biodiversity law in itself and with other rules of international law (law of the sea, international trade law, treaty law…). The need to develop such an evolutionary interpretation was already clear with regard to the 1977 Treaty in the *Danube dam* case, or to clarify the duty to cooperate in the GATT 1994 in the *Shrimps* case, the duty to carry out impact assessment in the *Pulp Mills* or the *Road* cases, or the duty to control harvesting of species that are recognised internationally as being at risk of extinction and requiring international protection in the *Shrimps* case or in the *South Sea China* award.

The opinion of Judge Cancado Trindade in the *Whales* case illustrates very well this concern, and the willingness to participate in the ongoing – and very much needed –defragmentation of international law, emphasizing the positive role of international biodiversity-related conventions in this quest, when he notes that "With the growth in recent decades of international instruments related to conservation, not a single one of them is approached in isolation from the others; not surprisingly, the co-existence of international treaties of the kind has called for a systemic outlook, which has been pursued in recent years. (…) The systemic outlook seems to be flourishing in recent years." [129]

Furthermore, it is worth mentioning that the engagement with international biodiversity law of the Inter-American Court of Human Rights has led to the identification of minimum levels of protection for the human rights of indigenous peoples under international biodiversity law. These clarifications have been recognized of global relevance, beyond the geographical scope of application of the Inter-American regime, as summarized in the 2018 UN Framework Principles on Human Rights and the Environment.[130] For instance, the Inter-American Court indicated that prior environmental and socio-cultural assessments should be prepared by an independent, technically qualified entity with the "active participation of indigenous communities concerned."[131] In addition, these assessments must respect indigenous traditions and cultures.[132] This is a key clarification to ensure that indigenous peoples influence the terms of the debate, rather than participate in a process already framed around a predetermined set of development options. Thus conceived, these assessments are expected to contribute to realise indigenous peoples' right to participate in public affairs.[133]

In addition, the Inter-American Court emphasized States' obligation to deploy effective means to safeguard human rights through judicial organs, and provide the means to execute relevant decisions of public authorities and judgments.[134] Remedies offered by the State should provide a "real possibility" for indigenous and tribal peoples to defend their rights and exercise effective control over their territory,[135] including through the recognition of legal standing to file administrative, judicial or other type of action collectively, through their representatives, or

[128] *PCA Case …*, [941, 948] (n 108).
[129] Separate Opinion of Judge Cançado Trindade, [25 ff] 357 ff.
[130] Principle 15.
[131] *Kaliña and Lokono* (n 44) [214].
[132] *Saramaka (Interpretation)* [41]; *Kichwa* [206]; *Kaliña and Lokono* (n 44) [215]; also citing Principle 10 of the Rio Declaration on Environment and Development (1992) 'UN Doc A/CONF.151/26 vol 1, Annex 1 (n 39) (Saramaka); *Kaliña and Lokono* (n 44).
[133] *Kaliña and Lokono* (n 44) [197, 202-203].
[134] ibid [239-240].
[135] ibid.

individually, taking into account their customs and cultural characteristics. The Court made also reference to guarantees of access to justice that are accessible, simple and within reasonable timeframes; access to technical and legal assistance, ensuring the community members can be understood in and can understand legal proceedings; and facilitation of physical access to administrative and judicial institutions in light of geographical distance, elevated costs or other challenges.[136] Such measures are also expected to respect internal mechanisms for deciding disputes on indigenous issues, which are in harmony with human rights.[137]

5. An outlook

To conclude, we would like to underline that better understanding of the range of possible remedies under international law could pave the way for different litigation strategies in the future, including more "prospective" litigation aimed at inducing substantive compliance rather than providing reparation for injury.[138] The global trend in climate litigation (currently developing at the domestic level) has illustrated how litigation is becoming an emblematic element of contemporary environmental advocacy when the "weapon" of law is used by citizens and NGOs as a mode of action. Given the traditional reluctance of States to use international compulsory dispute resolution mechanisms, such a trend should not be expected to arise at the interstate level, for climate change, biodiversity or other global environmental threats. However, if States do not raise the level of ambition of their national contributions to the Paris Agreement or to the post-2020 global biodiversity framework, litigation could increase in the years to come, not only at the national but also at the international level.

In particular, this movement could take shape through the request of advisory opinions from the ICJ, or from ITLOS. This would constitute another pathway for an authoritative interpretation of States' rights and obligations. Advisory opinions have no binding force, yet provide an authoritative statement on questions of international law. Vanuatu and other Pacific Island states are exploring this avenue on climate ambition.[139] It appears to be the right time for the Court to clarify the rights and obligations of States on biodiversity as well, as the Inter-American Court of Human Rights has usefully done on the environment and human rights.[140] From a substantive perspective, the increasing understanding of the inter-dependence of international human rights law (not only about indigenous peoples, but also everyone's right to health, water and food, for instance) and international biodiversity law[141] can also be capitalized in future international litigation with a view to arguing the legally binding nature and the clear legal content of international biodiversity obligations that contribute to prevent negative human rights impacts,[142] such as environmental impact assessments.

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[136] ibid [251(3)].
[137] ibid [251(5)].
[138] Geraldo Vidigal, 'Targeting Compliance: Prospective Remedies in International Law' (2015) 6 (3) Journal of International Dispute Settlement 462-484.
[139] Tim Stephens, 'See You in Court? A Rising Tide of International Climate Litigation' The Interpreter (30 October 2019) <https://www.lowyinstitute.org/the-interpreter/see-you-court-rising-tide-international-climate-litigation> accessed 12 March 2022.
[140] IACHR (n 39).
[141] Morgera (n 69); Morgera (n 38).
[142] Elisa Morgera, 'Fair and Equitable Benefit-sharing' in E Orlando and L Krämer (eds), *Encyclopedia of Environmental Law: Principles of Environmental Law* (Edward Elgar 2018) 323-337; Elisa Morgera, 'Dawn of a New Day? The Evolving Relationship between the Convention on Biological Diversity and International Human Rights Law' (2018) 54 Wake Forest Law Review 691-712.