
Precautionary Pulp: *Pulp Mills* and the Evolving Dispute between International Tribunals over the Reach of the Precautionary Principle

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While the term “precautionary principle” is much used, its status, its applicability, and even its definition are not clear. The International Tribunal for the Law of the Sea has applied the precautionary principle in environmental cases. The World Trade Organization has refused to apply the principle, but, in dicta, has suggested that it should be applied in environmental cases. The International Court of Justice has traditionally been reticent on the issue. However, in its recent Pulp Mills decision, the court strongly limited, if not eviscerated, the principle. The court did not allow the precautionary principle to reverse the burden of proof or even to affect the standards of proof.

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INTRODUCTION

Pulp Mills on the River Uruguay (Argentina v. Uruguay),¹ decided in 2010 by the International Court of Justice (ICJ),² reversed a trend within international environmental law of reading the precautionary principle broadly. The precautionary principle first became prominent in discussions of environmental law in 1992,³ and until 2010 was frequently read as implying that precautions must be taken when a risk of environmental harm exists, even if conclusive scientific evidence is lacking.⁴ When invoking this principle, other tribunals had called for a lower standard of proof of environmental harm or, more radically, argued that the burden of proof in environmental cases lay with the defendants rather than the plaintiffs.⁵ *Pulp Mills* rejected both of these readings, leaving only a vaguely defined and weak precautionary principle.

Pulp Mills decided a conflict between Argentina and Uruguay: Argentina accused Uruguay of authorizing construction of a pulp mill that polluted the Uruguay River, violating the countries' treaty regarding the protection of the river.⁶ Argentina argued that under the precautionary principle, Uruguay, the defendant, was responsible for proving that the mill would not cause significant harm to the environment.⁷ The ICJ explicitly rejected Argentina's use of the precautionary principle to shift the burden of proof,⁸ and more subtly rejected the more conservative proposition that the precautionary principle lowered the standard of proof required of Argentina to show environmental harm.⁹

To provide background for this Note's analysis, Part I analyzes various definitions of the precautionary principle invoked both by tribunals and by scholars. Part II argues that tribunals other than the ICJ have increasingly accepted broad definitions of the principle. Finally, Part III contends that the ICJ has historically avoided applying the precautionary principle. When, in *Pulp Mills*, the court finally did address the principle, the ICJ eviscerated it.

1. *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, (Apr. 20, 2010), available at <http://www.icj-cij.org/docket/files/135/15877.pdf>.

2. The ICJ is the judicial organ of the U.N. See U.N. Charter arts. 92–96, available at <http://www.un.org/en/documents/charter/chapter14.shtml>. The treaty came into force in 1945. See *Charter of the United Nations: Introductory Note*, UNITED NATIONS, <http://www.un.org/en/documents/charter/intro.shtml> (last visited Mar. 10, 2011).

3. See *infra* Part II.

4. See ARIE TROUWBORST, PRECAUTIONARY RIGHTS AND DUTIES OF STATES 31 (2006).

5. See discussion *infra* Part II.

6. See *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, ¶ 1 (Apr. 20, 2010), available at <http://www.icj-cij.org/docket/files/135/15877.pdf>.

7. See *id.* ¶ 160.

8. See *id.* ¶ 164.

9. See discussion *infra* Part III.c.

I. PITFALLS IN DEFINING THE PRECAUTIONARY PRINCIPLE

While frequently mentioned by courts, the “precautionary principle” has no clear, commonly agreed-upon definition; it has been applied in many different ways to very different situations.¹⁰ At the most basic level, the principle mandates some response even when threat of harm is uncertain.¹¹ But the threshold degree of uncertainty, the magnitude of harm threatened, and the type of response necessary are all much debated.¹² Invocation of the precautionary principle requires proving a threshold level of harm. According to some sources, the risk of harm must be “serious and irreversible,”¹³ according to others “serious or irreversible,”¹⁴ while still others require only “reasonable grounds for concern.”¹⁵ There is also no uniform definition of what constitutes “serious”¹⁶ harm, although the duration and geographic scope of the damage are certainly considerations.¹⁷ Once this threshold is met, precaution is legally required.¹⁸

10. See KERRY H. WHITESIDE, *PRECAUTIONARY POLITICS* 150 (2006).

11. See TROUWBORST, *supra* note 4, at 30.

12. See *id.*

13. See *id.* at 56 (citing sources).

14. *E.g.*, United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/ (Vol. I), Annex I, princ.15 (Aug. 12, 1992); Framework Convention for the Protection of the Marine Environment of the Caspian Sea, art. 5(a), Nov. 4, 2003 (entered into force Aug. 12, 2006), <http://www.caspianenvironment.org/NewSite/Convention-FrameworkConventionText.htm>. The parties to the Convention are Azerbaijan, Iran, Kazakhstan, the Russian Federation, and Turkmenistan. See generally TROUWBORST, *supra* note 4, at 47–50 (collecting many treaties that apply precaution only when the risk is “significant”).

15. *E.g.*, Convention for the Protection of the Marine Environment of the North-East Atlantic, art. 2, Sept. 22, 1992, 32 I.L.M. 1069; Nordic Council’s International Conference on the Pollution of the Seas: Final Document Agreed To, Oct. 18, 1989, in *Nordic Action Plan on Pollution of the Seas*, 99 app. V (1990) (requiring “reason to believe that damage or harmful effects are likely to be caused”); Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention) art. 3, Jan. 17, 2000 *available at* http://www.helcom.fi/Convention/en_GB/text/ (requiring “reason to assume that substances or energy introduced . . . may create hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea”). See generally TROUWBORST, *supra* note 4, at 45–47, 62–64 (collecting treaties that apply precaution without mention of “significant risk” and arguing that the majority view is if damage is serious *or* irreversible, there is a duty to take precautionary measures).

16. See Int’l Law Comm’n, Report of the Commission to the General Assembly on the Work of Its Fifty-Third Session, at 152, U.N. Doc. A/56/10 (April 23–June 1, July 2–August 10, 2001), *available at* [http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC_2001_v2_p2_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_2001_v2_p2_e.pdf) (saying the harm must be “significant,” but noting “[t]he term “significant” is not without ambiguity and a determination has to be made in each specific case”).

17. See TROUWBORST, *supra* note 4, at 56–57; Andreas Klinké & Ortwin Renn, *Prometheus Unbound: Challenges of Risk Evaluation, Risk Classification & Risk Mgmt.* 12 (Akademie für Technikfolgenabschätzung [Ctr. for Tech. Assessment], Working Paper No. 153, 1999), *available at* <http://elib.uni-stuttgart.de/opus/volltexte/2004/1712/pdf/ab153.pdf>.

18. See, *e.g.*, TROUWBORST, *supra* note 4, at 121 (arguing that countries are only required to take precautionary measures if the anticipated harm is significant and either serious or irreversible. If it is only significant, he argues, countries may take precautionary measures, but they are not required to do so.).

Furthermore, even when harm is severe, there is no agreement regarding who bears the burden of proof that harm will or will not occur and what the standard of proof is. Some authorities argue that if the threshold of harm is met, the burden of proof should shift to the party claiming that the harm will be insubstantial.¹⁹ Others argue that precaution merely reduces the standard of proof required of the side claiming harm.²⁰ Finally, a minority believes that precaution should not affect the standard or burden of proof.²¹ Instead, precaution should affect how a court responds to claims of potential harm, such as whether to impose an injunction or less severe restrictions on actions.²²

The lack of a clear, consistent definition complicates efforts to compare the holdings of international tribunals on precaution. While many courts and litigants invoke the principle, how they understand the principle may differ.

19. See, e.g., The MOX Plant Case (Ir. v. U.K.) (*ITLOS MOX Case*), Provisional Measures, INT'L TRIB. L. OF THE SEA, <http://www.itlos.org> (last visited Mar. 10, 2011) (follow "Proceedings & Cases" hyperlink, then follow "List of Cases" hyperlink, then "Case No. 10" hyperlink) (separate opinion of Judge Wolfrum); U.N. Fisheries and Agric. Dep't, *The Precautionary Approach to Fisheries with Reference to Straddling Fish Stocks and Highly Migratory Stocks*, U.N. Doc A/Conf.164/INF/8 at 7 (Aug. 4, 1995); Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention (Ir. v. U.K.), Final Award (Perm. Ct. Arb. July 2, 2003) ¶ 72, available at <http://www.pca-cpa.org/upload/files/OSPAR%20Award.pdf> (Griffith, dissenting).

20. See TROUWBORST, *supra* note 4, at 222–26.

21. See James Cameron & Juli Abouchar, *The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment*, 14 B.C. INT'L & COMP. L. REV. 1, 8 (1991) (explaining that Belgium's version of the precautionary principle requires proof that effects of an action are damaging); see also TROUWBORST, *supra* note 4, at 109–110; WHITESIDE, *supra* note 10, at 52–57.

22. See COMM'N OF THE EUROPEAN CMTYS, COMMUNICATION ON THE PRECAUTIONARY PRINCIPLE 1, ¶ 6.3.1 (2000), available at http://ec.europa.eu/dgs/health_consumer/library/pub/pub07_en.pdf. Indeed, the U.S. common law development of a strict liability standard for abnormally dangerous activities can be seen as an early form of the precautionary principle. See RESTATEMENT (SECOND) OF TORTS § 519(1) (1977) (citing cases dating back to the nineteenth century to this effect). Strict liability is only imposed if the degree of risk is high, and the possible harm is great. See *id.* § 520(a), (b); see also *Ind. Harbor Belt R.R. Co. v. American Cyanamid Co.*, 916 F.2d 1174, 1177 (7th Cir. 1990) (stating that the purpose of strict liability is to "give [the actor] an incentive . . . to experiment with methods of preventing accidents [by] relocating, changing, or reducing (perhaps to the vanishing point) the activity"). Thus, the purpose of strict liability ranges from shifting the way an act is performed to effectively enjoining it—just like the forms of the precautionary principle advocated by the COMM'N OF THE EUROPEAN CMTYS., COMMUNICATION ON THE PRECAUTIONARY PRINCIPLE 1, ¶ 6.3.1 (2000) ("In some cases a total ban may not be a proportional response to a potential risk. In other cases, it may be the sole possible response to a potential risk."). I would further suggest that a reason for strict liability for ultrahazardous activities is that the extent of the possible harm, while certainly great, may often be uncertain. Strict liability reverses the burden of paying for this risk, thus forcing the actor to take precautionary measures despite uncertain harm (as opposed to the negligence regime where if an action is not deemed unsafe then the actor does not pay for harm that arises). The distinction between strict liability and the precautionary principle is that strict liability relies on market forces to determine the appropriate amount of risks whereas the precautionary principle uses governmental oversight. For discussion of the costs and benefits of these two forms of regulation, see generally James A. Swaney, *Market versus Command and Control Environmental Policies*, 26 J. ECON. ISSUES 623 (1992); Nathaniel O. Keohane, Richard L. Revesz, & Robert N. Stavins, *The Choice of Regulatory Instruments in Environmental Policy*, 22 HARV. ENV'T'L. L. REV. 313 (1998).

Further, some authorities refer to the precautionary principle,²³ while others refer to a precautionary approach,²⁴ and it is not clear whether the two terms are intended to refer to the same concept.²⁵ This Note interprets various references to the precautionary principle within the context of specific judicial decisions, without assuming the precautionary principle carries a singular meaning. Thus, the term a court employs—“precautionary principle,” “precautionary approach,” “caution,” or some other term—is irrelevant. What matters is how the court understands how precaution affects legal obligations.

II. PRECAUTIONARY PRINCIPLE IN THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA AND THE WORLD TRADE ORGANIZATION

One source of international law is custom accepted by many countries.²⁶ Custom can be identified by examining “judicial decisions and the teachings of the most highly qualified publicists of the various nations.”²⁷ While the opinions of these authorities are not binding, they help define customary international law.²⁸ This is especially true of international tribunals, whose

23. See, e.g., Convention for the Protection of the Marine Environment of the North-East Atlantic, art. 2, Sept. 22, 1992, 32 I.L.M. 1069; Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, ¶ 55 (Apr. 20, 2010), available at <http://www.icj-cij.org/docket/files/135/15877.pdf>; Pulp Mills on the River Uruguay (Arg. v. Uru.), Memorial, ¶ 5.15 (Jan. 15, 2007), available at <http://www.icj-cij.org/docket/files/135/15425.pdf>; Pulp Mills on the River Uruguay (Arg. v. Uru.), Reply, ¶¶ 4.54–55 (Jan. 29, 2008), available at <http://www.icj-cij.org/docket/files/135/15429.pdf>; *The OSPAR Convention*, OSPAR COMM’N, http://www.ospar.org/content/content.asp?menu=00310108000007_000000_000000 (last visited Mar. 2, 2011).

24. See, e.g., United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/ (Vol. I), Annex I, princ.15 (Aug. 12, 1992); Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, ¶¶ 160–64; Pulp Mills on the River Uruguay (Arg. v. Uru.), Counter-Memorial, ¶ 4.85 (July 20, 2007), available at <http://www.icj-cij.org/docket/files/135/15427.pdf>; Pulp Mills on the River Uruguay (Arg. v. Uru.), Rejoinder, ¶¶ 5.56–58, 5.61–62, 5.64, 5.66–67 (July 29, 2008), available at <http://www.icj-cij.org/docket/files/135/15432.pdf>.

25. Compare U.N. Fisheries and Agric. Dep’t, *The Precautionary Approach to Fisheries with Reference to Straddling Fish Stocks and Highly Migratory Stocks*, U.N. Doc A/Conf.164/INF/8 at 6–7 (Aug. 4, 1995) (“The [precautionary approach] is apparently more generally acceptable [than the precautionary principle] because it implies more flexibility, admitting the possibility of adapting technology, consistent with the requirement for sustainability.”), with PATRICIA BIRNIE, ALAN BOYLE & CATHERINE REDGWELL, *INTERNATIONAL LAW AND THE ENVIRONMENT* 155 (3rd ed. 2008) (“Few commentators regard the difference in terminology as significant.”); TROUWBORST, *supra* note 4, at 11–12 (same).

26. See *Statute of the Int’l Ct. of Justice: Article 38*, INT’L CT. OF JUSTICE, <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> (last visited Mar. 2, 2011); see also HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 366 (Anders Wedberg trans., Harvard Univ. Press 1945) (claiming that customary international law is the axiomatic source for international law). But see Onuma Yasuaki, *Is the International Court of Justice an Emperor Without Clothes?*, 8 INT’L LEGAL THEORY 1, 8 (2002) (questioning usage of Article 38 as a source for sources of international law).

27. *Statute of the Int’l Ct. of Justice: Article 38*, INT’L CT. OF JUSTICE, <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> (last visited Mar. 2, 2011).

28. This could also be evidence of another source of international law: “general principles of the law recognized by civilized nations.” *Id.*

decisions, as a practical matter, “acquire quasi-legislative value.”²⁹ This Note will examine the decisions of select tribunals to help clarify the overall status of the precautionary principle within international law, although use of the precautionary principle is by no means limited to these tribunals.

The *Trail Smelter Case*³⁰ offers an example of the how international environmental law approached questions of burden and standard of proof before the development of the precautionary principle. In the 1920s, two smelter plants built near the U.S. border, in Trail, Canada, were emitting large amounts of sulfur that passed into the United States.³¹ When the United States complained, Canada agreed to submit the case to arbitration.³² The parties agreed to be bound by the law of “the United States of America as well as international law and practice.”³³ In 1941, the tribunal granted monetary damages to the United States³⁴ and also enjoined the smelters from causing future damage.³⁵ As part of its decision, the tribunal placed the burden of proof on the United States (the plaintiff),³⁶ and explained that the standard of proof “under the principles of international law [was] clear and convincing evidence.”³⁷ That the case was “of serious consequence”³⁸ did not lower the standard or shift the burden of proof, as it might have after the development of the precautionary principle.

The thinking shifted in 1992, when the United Nations Conference on Environment and Development issued the Rio Declaration on Environment and Development (Rio Declaration).³⁹ While the Rio Declaration was not legally binding,⁴⁰ it is the most cited international agreement regarding the precautionary principle,⁴¹ and many environmental cases after 1992 invoke the

29. *Asylum Case (Colom. v. Peru)*, 1950 I.C.J. 266, 332 (Nov. 20) (Azevedo, J., dissenting); see also *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 383–84 (2006) (Breyer, J., dissenting) (citing L. Henkin, R. Pugh, O. Schachter & H. Smit, *International Law: Cases and Materials* 120 (3d ed. 1993) (“[T]he decisions of the ICJ are, on the whole, regarded by international lawyers as highly persuasive authority of existing international law.” (internal brackets omitted))).

30. 3 R.I.A.A. 1905 (1941), available at http://untreaty.un.org/cod/riaa/cases/vol_III/1905-1982.pdf.

31. See *id.* at 1945.

32. See *id.* at 1938.

33. *Id.* at 1950.

34. See *id.* at 1949.

35. See *id.* at 1966.

36. See *id.* at 1964.

37. *Id.* at 1965 (internal citations removed).

38. *Id.*

39. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/5/Rev.1 (Vol. I), Annex 1 princ. 15 (Aug. 12, 1992).

40. See DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAELEKE, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 189 (3rd ed. 2007).

41. See John S. Applegate, *The Taming of the Precautionary Principle*, 27 WM. & MARY ENVTL. L. & POL’Y REV. 13, 16–17 (2002) (“[T]he Rio version . . . is as . . . authoritative a single text as there is . . .”). Indeed, a Westlaw search of “precautionary approach” within the International Legal Materials

precautionary principle.⁴² From this point on, international tribunals began to invoke precaution to reshape standards and burdens of proof in determining matters of international environmental law. In particular, the International Tribunal for the Law of the Sea and the World Trade Organization have embraced the use of the precautionary principle in their cases.

A. *International Tribunal for the Law of the Sea*

The International Tribunal for the Law of the Sea (ITLOS)⁴³ has treated the precautionary principle as customary international law. Therefore, in such cases ITLOS has lowered standards of proof and potentially even shifted the burden of proof.

In 1999, ITLOS decided the *Bluefin Tuna Cases*⁴⁴ and based part of its decisions on this reading of precaution. The cases grew out of the Convention for the Conservation of Southern Bluefin Tuna, a 1993 treaty between Australia, Japan, and New Zealand.⁴⁵ This treaty granted a total allowable catch for the member states.⁴⁶ In 1998, Japan unilaterally increased the number of southern bluefin tuna it caught, claiming the additional catch was experimental.⁴⁷ Australia and New Zealand sued Japan in ITLOS,⁴⁸ explicitly invoking the precautionary principle.⁴⁹ ITLOS ultimately enjoined Japan from increasing its total allowable catch and from claiming that its catch was experimental and therefore not subject to the limitations of the agreement.⁵⁰

Although ITLOS did not explicitly mention the precautionary principle in its decisions, many commentators have noted that the decision relied heavily on

database shows twenty-four documents, twelve of which cite the Rio Declaration. A similar search of “precautionary principle” shows twenty-one documents, nine of which cite the Rio Declaration.

42. *See id.*

43. ITLOS is a tribunal created under the U.N. Convention for the Law of the Sea. *See* Third United Nations Conference on the Law of the Sea, Montego Bay, Jam., Dec. 10, 1982, *United Nations Convention for the Law of the Sea*, U.N. Doc. A/CONF.62/122 (Vol. I) (Oct. 7, 1982). This treaty came into force in 1994. *See The U.N. Convention on the Law of the Sea (A Historical Perspective)*, OCEAN & LAW OF THE SEA, http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm (last visited Mar. 2, 2011).

44. *S. Bluefin Tuna Cases (N.Z. v. Japan, Austl. v. Japan)*, Provisional Measures, INT’L TRIB. L. OF THE SEA, <http://www.itlos.org> (last visited Mar. 2, 2011) (follow “Proceedings & Cases” hyperlink, then follow “List of Cases” hyperlink, then “Cases Nos. 3 and 4” hyperlink), Order of 27 August 1999.

45. *See id.* ¶ 45.

46. *See id.* (declaration by Judge Warioba).

47. *See id.* ¶ 73 (Order of 27 August 1999). The point of the experiments was to eliminate “the uncertainty within the scientific community over the state of the SBT stock.” *Southern Bluefin Tuna Cases (N.Z. v. Japan, Austl. v. Japan)*, Provisional Measures, at 14, INT’L TRIB. L. OF THE SEA, <http://www.itlos.org> (last visited Mar. 2, 2011) (follow “Proceedings & Cases” hyperlink, then follow “List of Cases” hyperlink, then “Cases Nos. 3 and 4” hyperlink), Transcript of Oral Argument (Aug. 19, 1999, 10:00 a.m.).

48. *Southern Bluefin Tuna Cases*, Provisional Measures ¶ 2, INT’L TRIB. L. OF THE SEA, <http://www.itlos.org> (last visited Mar. 2, 2011) (follow “Proceedings & Cases” hyperlink, then follow “List of Cases” hyperlink, then “Cases Nos. 3 and 4” hyperlink), Order of 27 August 1999.

49. *Id.* ¶ 28.

50. *See id.* ¶ 89.

it.⁵¹ ITLOS explicitly referred to the “scientific uncertainty regarding measures to be taken to conserve the stock of southern bluefin tuna,”⁵² which, combined with the risk of “deterioration of the southern bluefin tuna stock”⁵³ and the risk of “serious harm” to the bluefin tuna,⁵⁴ led the tribunal to grant provisional measures.⁵⁵ Indeed, in a recent opinion, ITLOS declared that the *Bluefin Tuna Cases* implicitly adopted the precautionary principle.⁵⁶ Based on the idea of precaution, the tribunal thus decided in favor of New Zealand and Australia, despite scientific uncertainty.⁵⁷ This suggests that the precautionary principle had either lowered the burden of proof for the plaintiffs or shifted the burden of proof onto the defendants.⁵⁸ Moreover, the remedy—an injunction on increased fishing⁵⁹—was precautionary as well.

51. See, e.g., *id.* ¶ 19 (separate opinion of Judge Laing) (“[I]t becomes evident that the Tribunal has adopted the precautionary approach for the purposes of provisional measures in such a case as the present.”); Simon Marr, *The Southern Bluefin Tuna Cases: The Precautionary Approach and Conservation and Management of Fish Resources*, 11 EUR. J. INT’L L. 815, 826–27 (2000); Adriana Fabra, *The LOSC and the Precautionary Principle*, 10 Y.B. INT’L ENVTL. L. 15, 17 (1999); David Freestone, *Caution or Precaution; “A Rose by Any Other Name . . .”?*, 10 Y.B. INT’L ENVTL. L. 25 (1999). But see Douglas M. Johnston, *Fishery Diplomacy and Science and the Judicial Function*, 10 Y.B. INT’L ENV. L. 33, 35 (1999) (finding the majority decision unclear on this point).

52. Southern Bluefin Tuna Cases (N.Z. v. Japan, Austl. v. Japan), Provisional Measures ¶ 79, INT’L TRIB. L. OF THE SEA, <http://www.itlos.org> (last visited Mar. 2, 2011) (follow “Proceedings & Cases” hyperlink, then follow “List of Cases” hyperlink, then “Cases Nos. 3 and 4” hyperlink), Order of 27 August 1999 (“[T]here is scientific uncertainty regarding measures to be taken to conserve the stock of southern bluefin tuna and . . . 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.”).

53. *Id.* ¶ 80.

54. *Id.* ¶ 77.

55. See *id.* ¶ 89.

56. See Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area: Advisory Opinion, ¶¶ 132–33, INT’L TRIB. L. OF THE SEA, <http://www.itlos.org> (last visited Mar. 9, 2011) (follow “Proceedings & Cases” hyperlink, then follow “list of cases” hyperlink, then “Case No. 17” hyperlink) (Advisory Opinion of 1 February 2011). It seems that Judge Wolfrum, one of the judges in the 2011 advisory opinion, changed his opinion of the status of the precautionary principle from his earlier decision in the *ITLOS MOX Case*. See *The MOX Plant Case* (Ir. v. U.K.), Provisional Measures, INT’L TRIB. L. OF THE SEA, <http://www.itlos.org> (last visited Mar. 10, 2011) (follow “Proceedings & Cases” hyperlink, then follow “List of Cases” hyperlink, then “Case No. 10” hyperlink) (separate opinion of Judge Wolfrum) (“It is still a matter of discussion whether the precautionary principle or the precautionary approach in international environmental law has become part of customary international law. The Tribunal did not speak of the precautionary principle or approach in its Order in the Southern Bluefin Tuna Cases.”).

57. See Southern Bluefin Tuna Cases (N.Z. v. Japan, Austl. v. Japan), Provisional Measures ¶ 89, INT’L TRIB. L. OF THE SEA, <http://www.itlos.org> (last visited Mar. 2, 2011) (follow “Proceedings & Cases” hyperlink, then follow “List of Cases” hyperlink, then “Cases Nos. 3 and 4” hyperlink), Order of 27 August 1999.

58. See *id.* ¶ 21 (separate opinion of Judge Laing) (“[T]he Tribunal has drawn its conclusions and based its prescriptions in the face of scientific uncertainty, [but] it has not, per se, engaged in an explicit reversal of the burden of proof.”).

59. See *id.* ¶ 89 (opinion of the tribunal).

Three years later, ITLOS decided the *MOX Plant Case (Ireland v. United Kingdom)*,⁶⁰ which on the surface suggested a different approach to precaution. In 2001, Britain authorized the commission of a mixed oxide fuel (MOX) plant—a plant that processes spent nuclear fuel for the purpose of producing energy—next to a nuclear processing site.⁶¹ Concerned with the possible pollution in the Irish Sea, Ireland submitted the case for arbitration to the Permanent Court of Arbitration.⁶² At the same time, it requested that ITLOS provisionally enjoin the United Kingdom from opening the mill until the arbitration panel decided the case.⁶³ Ireland claimed a risk of irreparable harm, as even the temporary operation of the plant would discharge plutonium into the Irish Sea.⁶⁴ In addition, if the tribunal waited to consider remedies until the plant began operating, the Permanent Court of Arbitration would be less likely to mandate its closure because of the existing investment.⁶⁵ Ireland also argued, basing itself on the precautionary principle, that the United Kingdom should bear the burden of proving the safety of the MOX plant.⁶⁶ The United Kingdom, on the other hand, claimed that the risk of pollution from the MOX plant was at most “infinitesimally small,” especially between the time of commission and the time the arbitration panel ruled.⁶⁷ At the same time, the United Kingdom agreed not to increase the amount of nuclear waste transported to or from the original plant and to postpone any import of MOX fuel for several months, under the assumption that by that time the Permanent Court of Arbitration would rule on the merits.⁶⁸ ITLOS agreed with the United

60. The MOX Plant Case (Ir. v. U.K.), Provisional Measures, INT’L TRIB. L. OF THE SEA, <http://www.itlos.org> (last visited Mar. 10, 2011) (follow “Proceedings & Cases” hyperlink, then follow “List of Cases” hyperlink, then “Case No. 10” hyperlink) (Order of 3 December 2001).

61. See M. Bruce Volbeda, *The MOX Plant Case: The Question of “Supplemental Jurisdiction” for International Environmental Claims Under UNCLOS*, 42 TEX. INT’L L.J. 211, 213–14 (2006).

62. See The MOX Plant Case (Ir. v. U.K.), Provisional Measures ¶ 31, INT’L TRIB. L. OF THE SEA, <http://www.itlos.org> (last visited Mar. 10, 2011) (follow “Proceedings & Cases” hyperlink, then follow “List of Cases” hyperlink, then “Case No. 10” hyperlink) (Order of 3 December 2001), ¶ 31; The MOX Plant Case (Ir. v. U.K.) (Perm. Ct. Arb. June 24, 2003), available at <http://www.pca-cpa.org/upload/files/MOX%20Order%20no3.pdf>. The Permanent Court of Arbitration is an international organization, founded in 1899, *About Us*, PERMANENT CT. ARBITRATION http://www.pca-cpa.org/showpage.asp?pag_id=1027 (last visited Mar. 20, 2011), that helps arbitrate international disputes. See generally Permanent Court of Arbitration Rules of Procedure, http://www.pca-cpa.org/showpage.asp?pag_id=1188.

63. See The MOX Plant Case (Ir. v. U.K.), Provisional Measures ¶ 2, INT’L TRIB. L. OF THE SEA, <http://www.itlos.org> (last visited Mar. 10, 2011) (follow “Proceedings & Cases” hyperlink, then follow “List of Cases” hyperlink, then “Case No. 10” hyperlink) (Order of 3 December 2001).

64. See *id.* ¶ 68.

65. See *id.* ¶ 70.

66. See *id.* ¶ 71.

67. See *id.* ¶ 72.

68. See *id.* ¶ 79. As it turns out, no court or tribunal ever ruled on the merits of the case. The case went from ITLOS to the Permanent Court of Arbitration. The Permanent Court of Arbitration ruled that it did not have jurisdiction. See The MOX Plant Case (Ir. v. U.K.) (Perm. Ct. Arb. Nov. 14, 2003), available at <http://www.pca-cpa.org/upload/files/MOX%20Order%20No4.pdf>. Ultimately, the European Commission successfully sued Ireland for not bringing the case to the Court of Justice of the European Commissions. See *Comm’n of the European Cmty. v. Ireland* (Eur. Ct. J., May 30, 2006), available at

Kingdom and ruled that there was insufficient urgency to grant the preliminary injunction that Ireland requested.⁶⁹

The procedural posture in the *MOX Plant Case* was similar to that in the *Bluefin Tuna Cases*. In both cases, the plaintiff requested a preliminary injunction so that the defendant would not endanger the environment. Yet only in the *Bluefin Tuna Cases* did ITLOS grant an injunction. Nonetheless, the *MOX Plant Case* does not reflect a changing position on the precautionary principle. The unanimous tribunal⁷⁰ declared that the case lacked urgency, in part because the Permanent Court of Arbitration would rule on this issue soon thereafter, and thus rejected Ireland's request for precaution.⁷¹ The tribunal's decision is unclear on the issue of whether precaution was relevant at all. However, the concurrences of ten of the judges indicate that this denial of Ireland's request was not a rejection of precaution more broadly.⁷² Thus, when *Pulp Mills* was decided, the *Bluefin Tuna Cases* represented ITLOS's position on issues of precaution.

B. World Trade Organization

While the World Trade Organization (WTO) has not had the opportunity to rule on precaution in environmental cases, dicta in its rulings in non-environmental cases offer support for use of the precautionary principle in international environmental law.

Increasingly, the WTO has lent credence to the precautionary principle in rulings on suits between the United States and countries that have attempted to block U.S. imports.⁷³ In 1988, the European Union began banning the use of growth hormones on livestock and the import of such livestock while the

http://curia.europa.eu/jcms/jcms/j_6/ (Case No. "C-459/03" and follow the hyperlink "Judgment C-459/03"). Eventually, Ireland simply withdrew its claim. See Nikolaos Lavranos, *The Epilogue in the MOX Plant Dispute: An End Without Findings*, 2009 EUR. ENERGY & ENVTL. L. REV. 180 (2009).

69. See *The MOX Plant Case (Ir. v. U.K.)*, Provisional Measures ¶ 89, INT'L TRIB. L. OF THE SEA, <http://www.itlos.org> (last visited Mar. 10, 2011) (follow "Proceedings & Cases" hyperlink, then follow "List of Cases" hyperlink, then "Case No. 10" hyperlink) (Order of 3 December 2001).

70. See *id.* ¶ 81.

71. See *id.* ¶ 89.

72. Eight judges explicitly contrasted the facts of this case with the *Bluefin Tuna Cases*. See *id.* (joint declaration of Judges Caminos, Yamamoto, Park, Akl, Marsit, Eiriksson and Jesus) (explaining that unlike the *ITLOS Bluefin Tuna Cases*, in the *ITLOS MOX Case*, "the urgency of the situation did not require it to lay down, as binding legal obligations, the measures requested by Ireland"); *id.* (separate opinion of Judge Wolfrum) (explaining why the precautionary principle was inapposite here). Judge Treves explained that had Ireland shown more urgency, "precautionary considerations" would have been warranted. See *id.* (separate opinion of Judge Treves). Judge ad hoc Székely would have granted Ireland's motion for provisional measures. See *id.* (separate opinion of Judge ad hoc Székely).

73. The WTO is a global organization dealing with the trade between nations. It was established in 1995. See WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Mar. 2, 2011).

United States permitted such use.⁷⁴ In 1996, the United States sued the European Union in the WTO for unfair trade practices.⁷⁵ The WTO panel ruled in favor of the United States and Europe appealed.⁷⁶ One of the European Union's arguments was that the precautionary principle affected the assessment of risk,⁷⁷ since there was scientific uncertainty about the safety of hormones, use of hormones should be forbidden either because of burden shifting or because of lowered standards of proof.⁷⁸ The United States argued the precautionary principle was not part of customary international law.⁷⁹ The appellate body said, "The status of the precautionary principle in international law . . . appear[ed] less than clear [and,] at least outside the field of international environmental law, still await[ed] authoritative formulation."⁸⁰ The words "at least" indicate that even within international environmental law the appellate panel found the status of the precautionary principle as applied to risk assessment unclear, but it considered it more likely that the precautionary principle was customary international law within environmental law than elsewhere.⁸¹ This statement was dictum, as the panel found that regardless the precautionary principle was inapplicable because the European Union failed to present sufficient evidence of possible harm.⁸²

In 2002, the WTO expressed clearer support for the concept of precaution in international environmental law in a case brought by the United States regarding Japan's restriction on United States' apples. Japan was concerned

74. See EURO. TRADE COMM'N, MEASURES CONCERNING MEAT AND MEAT PRODUCTS (HORMONES) (Mar. 13, 1998), available at http://trade.ec.europa.eu/doclib/docs/2003/november/tradoc_114726.pdf.

75. See Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, at 2, WT/DS26/AB/R & WT/DS48/AB/R (Jan. 16, 1998) (adopted Feb. 13, 1998).

76. See *id.* at 2.

77. See *id.* at 6.

78. See *id.* at 33.

79. See *id.* at 13.

80. *Id.* at 13.

81. See Agne Sirinskiene, *The Status of Precautionary Principle: Moving Towards a Rule of Customary Law*, 118 JURISPRUDENCIJA 349, 352-53 (2009), available at http://www.mruni.eu/lt/mokslo_darbai/jurisprudencija/archyvas/dwn.php?id=226667. While the distinction between applying the precautionary principle to environmental law as opposed to other areas of law is found in other sources, see, e.g., TROUWBORST, *supra* note 4, at 12-17 (2006), the logic behind the distinction is not immediately clear. One possible explanation is that many critics of the precautionary principle note that it is often unclear what it means to be cautious. See, e.g., Cass R. Sunstein, *The Paralyzing Principle*, 25 REGULATION 32, 34 (2003). For instance, in the present case, caution may suggest allowing meat grown with hormones so that less money and energy need to be spent on growing cows, or forbidding it so people do not risk diseases that are as yet unknown. By limiting the precautionary principle to environmental issues it is simpler to understand which side merits precautionary treatment. The logic behind such thinking is that environmental risks may be systematically underestimated, so the precautionary principle helps balance the scales. See HOLLY DOREMUS, ET AL., ENVIRONMENTAL POLICY LAW 18-19 (5th ed., 2008). See also *Entergy Corp. v. Riverkeeper, Inc.*, 129 S.Ct. 1498, 1516-17 (2009) (Stevens, J., dissenting) ("cost-benefit analysis often, if not always, yields a result that does not maximize environmental protection.").

82. See Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, at 18, WT/DS26/AB/R & WT/DS48/AB/R (Jan. 16, 1998) (adopted Feb. 13, 1998).

that the apples were infected with fire blight bacteria.⁸³ The United States argued that Japan's restrictions were too severe.⁸⁴ After the WTO panel ruled for the United States, Japan appealed,⁸⁵ invoking the precautionary principle to claim that the risk warranted more restrictive measures.⁸⁶ The United States again denied the status of the precautionary principle as customary international law.⁸⁷ The appellate body restated the result of the hormones case: "the 'precautionary principle' had not yet attained authoritative formulation outside the field of international environmental law."⁸⁸ This statement omitted the words "at least" that are found in the original quote.⁸⁹ The WTO thereby suggested more strongly that application of the precautionary principle to risk assessment might be part of customary international *environmental* law.

Recognition of the principle was strongest, however, in 2003 when the United States once again sued the European Union in the WTO.⁹⁰ The European Union had placed restrictions on the imports of plants that had been made through recombinant DNA technology,⁹¹ invoking the precautionary principle to defend its risk assessment.⁹² The panel again refused to decide whether the precautionary principle was part of customary international law,⁹³ again disposing of the issue by finding that even if the precautionary principle was customary international law the European Union had not shown enough probability of risk.⁹⁴ Before doing so, however, the panel noted that there were numerous conventions and declarations and domestic laws incorporating the precautionary principle. Although this would normally indicate the precautionary principle's status as customary international law, the panel found that these "for the most part . . . [were] environmental conventions and declarations."⁹⁵ Even as the WTO rejected the use of the precautionary principle in this case, in dictum it almost explicitly accepted the precautionary principle as customary international environmental law.⁹⁶

83. See Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, at 2, WT/DS245/AB/R (Nov. 26, 2003) (adopted July 20, 2005).

84. See *id.*

85. See *id.* at 3.

86. See *id.* at 14.

87. See *id.* at 19.

88. *Id.* at 62 (some internal citations omitted).

89. See Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, at 33, WT/DS26/AB/R & WT/DS48/AB/R (Jan. 16, 1998) (adopted Feb. 13, 1998).

90. Panel Report, *EC Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS291/R, & WT/DS293/R (Sept. 29, 2006) (adopted Nov. 21, 2006).

91. See *id.* ¶¶ 2.1–2.2

92. See *id.* ¶ 4.525.

93. See *id.* ¶ 7.89.

94. See, e.g., *id.* ¶¶ 7.3062, 7.3212, 7.3260.

95. *Id.* ¶ 7.88.

96. The European Union did not appeal the panel decision. See *Trade Disputes*, 6 THE WORLD TRADE REV. 16–31 (2006), available at <http://www.worldtraderereview.com/news.asp?pType=N&iType=A&iID=146&siD=23&nID=30805>. In 2009, the United States sued the European Union for banning poultry treated with any substance other than water. The panel for this case has been established but not

III. PRECAUTIONARY PRINCIPLE IN THE INTERNATIONAL COURT OF JUSTICE

While the WTO and ITLOS have increasingly accepted the precautionary principle in matters of international environmental law, the ICJ has always been more reticent. Before *Pulp Mills*, the precautionary principle was exclusively mentioned in dissents and concurrences in ICJ cases but never in a majority opinion.

A. *Decisions Prior to Pulp Mills*

Questions of precaution might have arisen in the 1995 ICJ case *Nuclear Tests (New Zealand v. France)*,⁹⁷ but the principle received only a brief mention in a dissent. The conflict in this case emerged in 1973, when New Zealand asked the ICJ to ban France from testing nuclear weapons in the atmosphere.⁹⁸ Before the ICJ could decide the case, France declared that it did not plan to test its nuclear weapons.⁹⁹ Consequently, the ICJ dismissed the case without ruling on the merits.¹⁰⁰ Oddly,¹⁰¹ the court added, “[I]f the basis of this Judgment were to be affected, the Applicant could request an examination of the situation.”¹⁰² This provision was central to a continuation of the dispute more than twenty years later.

In 1995, France decided to conduct underground nuclear testing.¹⁰³ By that time France had withdrawn its consent to the jurisdiction of the ICJ,¹⁰⁴ so New Zealand attempted to use the ICJ’s 1973 promise to reopen the case under the old jurisdiction.¹⁰⁵ The majority considered New Zealand’s claims to be new, because France’s tests were not atmospheric tests, and therefore found that the ICJ did not have jurisdiction.¹⁰⁶

While New Zealand also invoked the precautionary principle in making its case,¹⁰⁷ only a dissent issued by Judge Weeramantry responded to this aspect of

composed. See *European Communities—Certain Measures Affecting Poultry Meat and Poultry Meat Products from the United States*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds389_e.htm (last visited Mar. 2, 2011). It is likely that Europe will again invoke the precautionary principle, and it remains to be seen how the panel will respond.

97. 1995 I.C.J. 288 (Sept. 22).

98. See *Nuclear Tests (N.Z. v. Fr.)*, 1974 I.C.J. 457, 458 (Dec. 20).

99. See *id.* at 465–66.

100. See *id.* at 478.

101. See *Nuclear Tests (N.Z. v. Fr.)*, 1995 I.C.J. 288, 320 (Sept. 22) (Weeramantry, J., dissenting) (noting that this is odd).

102. *Nuclear Tests (N.Z. v. Fr.)*, 1974 I.C.J. at 477.

103. See *Nuclear Tests (N.Z. v. Fr.)*, 1995 I.C.J. at 290.

104. See *id.* at 420 (Palmer, J. ad hoc, dissenting); Stephen M. Tokarz, *A Golden Opportunity Dismissed: The New Zealand v. France Nuclear Tests Case*, 26 DENV. J. INT’L L. & POL’Y 745, 748–49 (1998).

105. See *Nuclear Tests (N.Z. v. Fr.)*, 1995 I.C.J. at 289.

106. See *id.* at 307.

107. See Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the *Nuclear Tests Case (N.Z. v. Fr.)*, Application Instituting

New Zealand's case. He contended not only that the ICJ had jurisdiction,¹⁰⁸ but also that the precautionary principle mandated an injunction to prevent potential harm to the environment.¹⁰⁹ He also argued that as France threatened serious environmental harm, it had the burden of showing the activity was safe.¹¹⁰ While many discussions of the precautionary principle understand it to include burden shifting, to Judge Weeramantry these were two distinguishable principles.

Judge Weeramantry revisited these issues the next year, when the United Nations asked the ICJ whether a state was permitted to use nuclear weapons.¹¹¹ The ICJ ruled that while international law certainly forbade the use of nuclear weapons if there was no threat to the state's existence, it was unclear whether use of such weapons was permitted when there was such a threat.¹¹² Judge Weeramantry argued in dissent that use of nuclear weapons should always be forbidden because their use would violate the precautionary principle and, separately, "the principle that the burden of proving safety lies upon the author of the act complained of."¹¹³ Again, Judge Weeramantry separated the question of burden of proof from the precautionary principle. In this opinion he did not expound explicitly on the precautionary principle, but his conclusion on the proper remedy for the principle's violation was consistent with his previous opinion: courts should grant an injunction when there is threat of environmental harm.

Another opportunity to invoke the precautionary principle arose in the 1995 *Gabčíkovo-Nagymaros* case. In 1977, Czechoslovakia and Hungary agreed to build a dam on the Danube.¹¹⁴ After Czechoslovakia split into the Czech Republic and Slovakia, Slovakia insisted Hungary fulfill its

Proceedings, ¶¶ 105–08 (1995), available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=cd&case=97&code=nzfr&p3=0>.

108. See *Nuclear Tests (N.Z. v. Fr.)*, 1995 I.C.J. at 361 (Weeramantry, J., dissenting) (basing jurisdiction on the 1973 statement of the I.C.J.).

109. See *id.* at 343 ("New Zealand has placed materials before the Court to the best of its ability, but France is in possession of the actual information. The [precautionary] principle then springs into operation to give the Court the basic rationale for considering New Zealand's request and not postponing the application of such means as are available to the Court to prevent, on a provisional basis, the threatened environmental degradation, until such time as the full scientific evidence becomes available in refutation of the New Zealand contention.").

110. See *id.* at 348.

111. See *Legality of the Threat or Use of Nuclear Weapons (United Nations)*, 1996 I.C.J. 226, 227–29 (July 8).

112. See *id.* at 266.

113. *Nuclear Tests (N.Z. v. Fr.)*, 1974 I.C.J. 457, 502–03 (Dec. 20) (Weeramantry, J., dissenting). It is not entirely clear how the burden of proof can affect an advisory opinion since there is no party present that can possibly meet the burden. Judge Weeramantry probably meant that since it cannot be shown that international law allows for the use of nuclear weapons, it is therefore impossible for any state to meet the burden that would be required of it prior to launching a nuclear attack—namely the burden of proving that such an attack was legal.

114. See *Gabčíkovo-Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. 7, 17–18 (Dec. 17).

obligations.¹¹⁵ Hungary was worried about the environmental effects of the project¹¹⁶ and in 1989 resolved to suspend work.¹¹⁷ It claimed the obligations of the treaty were suspended due to a “state of ecological necessity.”¹¹⁸ Slovakia denied that an “ecological necessity” existed and argued that even if one did exist, the necessity would not permit Hungary to nullify the treaty.¹¹⁹ The ICJ ultimately found that while “ecological necessity” would be a sufficient reason to nullify a treaty,¹²⁰ there was no “ecological necessity” because the harm was uncertain.¹²¹ The court thus seemed to implicitly reject the precautionary principle’s notion that uncertain harm was sufficient to prevent an action.¹²² Additionally, the court viewed Hungary as shouldering the burden of proof, despite the fact that Slovakia was the party that would potentially damage the environment.¹²³

It is possible, however, that *Gabčíkovo-Nagymaros* was not a repudiation of the precautionary principle. At the time that Hungary and Czechoslovakia agreed to build the dam, Hungary was already aware that there was a risk of environmental damage.¹²⁴ Perhaps the court decided in favor of Slovakia not because it rejected the precautionary principle, but because it viewed Hungary as estopped from raising these claims.¹²⁵ At the very least this explains why Judge Weeramantry voted with the majority despite being a proponent of the precautionary principle and burden shifting in environmental cases.

B. *The Pulp Mills Case*

1. *History of the Case*

Pulp Mills was the first time the majority opinion of the ICJ explicitly addressed the precautionary principle. Argentina had championed a broad reading of the principle in bringing its case against Uruguay. Not only did the court reject Argentina’s claim, but it also undermined many previous readings of precaution, interpreting the principle far more narrowly.

115. *See id.* at 16–17.

116. And perhaps the economic feasibility, as well. *See id.* at 31.

117. *See id.*

118. *Id.* at 35.

119. *See id.* at 37.

120. *See id.* at 41.

121. *See id.* at 42–44. “The Court notes that the dangers ascribed to the upstream reservoir . . . remained uncertain.” *Id.* at 42.

122. *See id.* at 42 (“[S]erious though these uncertainties might have been they could not, alone, establish the objective existence of a ‘peril’ in the sense of a component element of a state of necessity.”).

123. *See id.* at 41–43.

124. *See id.* at 45.

125. *See id.* at 115–16 (separate opinion of Judge Weeramantry); *id.* at 233–34 (Skubiszewski, J., dissenting).

In 2006, Argentina claimed Uruguay's authorization for the construction of a pulp mill on the Uruguay River violated the 1975 Statute of the River Uruguay, a treaty between Argentina and Uruguay. The two countries had adopted the statute to create a mechanism to rationally use the River Uruguay.¹²⁶ The statute established the Administrative Commission of the River Uruguay ("CARU")¹²⁷ and stated that if a party planned any significant construction or modification of an existing structure, that party must notify CARU. If CARU determined there was likely to be significant damage to the environment or if CARU could not decide whether there was likely to be significant damage, the party had to notify the other party about the possible damage. If there was disagreement between the parties about the construction, either party could submit the case to the ICJ.¹²⁸

One important limitation was that CARU was represented equally by Argentina and Uruguay. Since CARU did not contain any provision on how to resolve deadlocks between the two countries, it could only function efficiently if both Argentina and Uruguay were already in agreement about a course of action, or at least willing to come to an agreement.¹²⁹ Still, for the first couple of decades CARU functioned quite well.¹³⁰ It set out rules for the use of the Uruguay River, established regulations for the Salto Grande Power Plant,¹³¹ and determined which parts of the Uruguay River were to be policed by which country.¹³²

In the early 2000s, however, Argentina and Uruguay's relations became tense, eventually leading to a failure of the parties to negotiate effectively through CARU. The major source of tension was a banking crisis in Argentina, causing Argentina to close all the country's banks.¹³³ As a result, Argentines with Uruguayan bank accounts began a run on Uruguayan banks, leading to a Uruguayan economic crisis.¹³⁴ Tensions mounted when President Batlle of Uruguay said, "All Argentines are thieves from the first to the last,"¹³⁵ and

126. Statute of the River Uruguay, Uru.-Arg., Feb. 26, 1975, 1295 U.N.T.S. 340.

127. From the Spanish acronym for "Comisión Administradora del Río Uruguay."

128. *See id.* at 341.

129. *See Pulp Mills on the River Uruguay (Arg. v. Uru.)*, ¶ 7 (Apr. 20, 2010) (separate opinion of Judge Greenwood), available at <http://www.icj-cij.org/docket/files/135/15889.pdf>.

130. *See id.*, Judgment, ¶ 281.

131. The Salto Grande Power Plant is a hydroelectric power plant shared by Argentina and Uruguay. *Hydroelectric Plants in Argentina*, POWER PLANTS AROUND THE WORLD (Mar. 2, 2011), <http://www.industcards.com/hydro-argentina.htm>.

132. *See THE RIVER URUGUAY EXECUTIVE COMMISSION 6*, available at <http://www.caru.org.uy/publicaciones/The-River-Uruguay-executive-commission-Uruguay-Paysandu.pdf> (last visited Mar. 2, 2011).

133. *See Argentina Closes all Banks*, BBC ONLINE (Apr. 20, 2002), <http://news.bbc.co.uk/2/hi/business/1940533.stm>.

134. *See Banking Crisis Grips Uruguay*, BBC ONLINE (July 31, 2002), <http://news.bbc.co.uk/2/hi/business/2162956.stm>.

135. *Apoyo a la Reacción del Gobierno Argentino*, LA NACION ONLINE (Dec. 20, 2003), http://www.lanacion.com.ar/nota.asp?nota_id=557207 (author's translation of "todos los argentinos son

escalated further when Argentina tried to pressure Uruguay to admit to military atrocities in its past.¹³⁶

The dispute regarding the pulp mills exacerbated the already tense situation.¹³⁷ In 2003, Uruguay declared that the construction of a pulp mill on the Uruguay River, near Fray Bentos, would not cause significant environmental harm and therefore issued a construction permit to the Empresa Nacional de Celulosa España [National Spanish Pulp Company] (ENCE).¹³⁸ On the same day, Presidents Nestor Kirchner of Argentina and Jorge Batlle of Uruguay met. According to Argentina, the presidents agreed the project would not proceed until the environmental impacts were further studied.¹³⁹ According to Uruguay, the parties agreed to circumvent the CARU decision-making process.¹⁴⁰ Uruguay later gave Argentina ENCE's assessment of the environmental impacts of the construction of a pulp mill. Interpretations of the assessment conflicted; Uruguay believed the assessment showed that it could continue, while Argentina thought it was too cursory.¹⁴¹ Argentina officially complained to the ICJ that Uruguay had ignored CARU.¹⁴² Moreover, Argentines began protesting the construction of the mill by blocking several bridges and roads connecting Argentina and Uruguay to prevent tourists from traveling into Uruguay during the holiday season.¹⁴³ In 2006, due to the political pressure from Argentina,¹⁴⁴ ENCE abandoned the project.¹⁴⁵

In 2005, Uruguay issued a permit to Botnia, another pulp producer, to construct a mill on the Uruguay River.¹⁴⁶ CARU was not satisfied with Botnia's proof that there would be no significant environmental harm and requested further documentation, but Uruguay ignored CARU's request.¹⁴⁷ Argentina then went to the ICJ, requesting that the ICJ permanently shut down the Botnia mill and declare that Uruguay violated its procedural responsibilities by ignoring

una manga de chorros, del primero al ultimo"). It seems Batlle thought his microphone was off. <http://lamula.pe/2010/04/07/microfono-abierto-el-gran-enemigo-de-los-politicos/41>.

136. See *Un Nuevo Capítulo en la Pelea con Uruguay*, LA NACION ONLINE (Jan. 18, 2004), http://www.lanacion.com.ar/nota.asp?nota_id=565043.

137. See Florencia Carbone, *Amenaza de Otro Conflicto con Uruguay*, LA NACION ONLINE (Feb. 23, 2004), http://www.lanacion.com.ar/nota.asp?nota_id=575463.

138. See *Pulp Mills on the River Uruguay* (Arg. v. Uru.), Judgment, ¶¶ 29–31.

139. See *id.* ¶ 31 ("Argentina maintains that the President of Uruguay, Jorge Batlle [sic], then promised his Argentine counterpart, Néstor Kirchner, that no authorization would be issued before Argentina's environmental concerns had been addressed.").

140. See *id.*

141. See *id.* ¶ 33.

142. See *id.* ¶ 22.

143. See *Pulp Mills on the River Uruguay* (Arg. v. Uru.), Request for the Indication of Provisional Measures, 2007 I.C.J. 3 (Jan. 23).

144. See Chris Lang, *ENCE Cancels Pulp Mill in Uruguay*, PULP INC. (Oct. 2, 2006), <http://pulpinc.wordpress.com/2006/10/02/ence-cancels-pulp-mill-in-uruguay>.

145. *Pulp Mills on the River Uruguay* (Arg. v. Uru.), Judgment, ¶ 36 (Apr. 20, 2010), available at <http://www.icj-cij.org/docket/files/135/15877.pdf>.

146. See *id.* ¶ 39.

147. See *id.* ¶ 38.

CARU the first time and by not submitting sufficient documentation the second time.¹⁴⁸ In the meantime, Argentina requested a provisional closing of the mills until the ICJ decided the case.¹⁴⁹ A near-unanimous court¹⁵⁰ ultimately denied this request for provisional measures in 2006, on the grounds that the mills were sufficiently safe and that whatever harm Uruguay might cause was neither imminent nor irreparable.¹⁵¹ Uruguay was thus able to continue the permitting process, and the Botnia mill opened in 2007.¹⁵²

In 2010, the ICJ ruled that Uruguay had violated its procedural obligations to Argentina.¹⁵³ First, while Uruguay had notified CARU of its plan, it had not responded to CARU's requests for further documentation to show that there would be no significant environmental harms.¹⁵⁴ Second, Uruguay had violated its obligation to notify Argentina in a timely manner of its plans to grant the pulp mills a permit.¹⁵⁵ Third, the ICJ questioned whether Batlle and Kirchner had ever come to a personal agreement, and ruled that even if they had, Uruguay had not followed through with the terms of the supposed agreement. Finally, the ICJ held that the supposed agreement never included the Botnia Mill.¹⁵⁶

Despite these procedural violations, the ICJ ruled that Uruguay had not violated its substantive obligations and could therefore continue running the mill.¹⁵⁷ Argentina had claimed that Uruguay should bear the burden of proof that the mills did not cause environmental harm because of the precautionary principle.¹⁵⁸ The ICJ rejected this claim, concluding, "[W]hile a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute, it does not follow that it operates as a reversal of the burden of

148. *See id.* ¶ 268.

149. *See* Pulp Mills on the River Uruguay (Arg. v. Uru.), Request for the Indication of Provisional Measures, 2006 I.C.J. 113 (July 13).

150. *See id.* at 134–35. The only dissenting judge was Judge ad hoc Vinuesa, *see id.* at 135, who was nominated by Argentina. *See id.* at 119.

151. *See id.* at 132 (opinion for the court).

152. Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, ¶ 37 (Apr. 20, 2010), *available at* <http://www.icj-cij.org/docket/files/135/15877.pdf>.

153. *See id.* ¶ 282.

154. *See id.* ¶ 111.

155. *See id.* ¶ 124.

156. *See id.* ¶¶ 129–32.

157. *See id.* ¶ 282.

158. *See id.* ¶ 160; Memorial of Argentina ¶ 5.15 (Jan. 15, 2007), *available at* <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=88&case=135&code=au&p3=1> (citing “an author of great authority,” (author’s translation), PATRICIA BIRNIE & ALAN BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 118 (2d ed. 2002), for the proposition that the burden of proof should be reversed). The humor lies in the fact that Alan Boyle represented Uruguay in *Pulp Mills*. Boyle and Birnie clarified (or revised) their statements in the next edition of INTERNATIONAL LAW AND THE ENVIRONMENT, explicitly noting that situations where the precautionary principle reverses the burden of proof are “exceptional.” *See* PATRICIA BIRNIE, ALAN BOYLE & CATHERINE REDGWELL, INTERNATIONAL LAW AND THE ENVIRONMENT 159 (3d ed. 2009).

proof.”¹⁵⁹ The ICJ then found that Argentina had failed to meet its burden of proof for all the environmental harms it claimed were likely to result.¹⁶⁰ The ICJ thus ruled that while Uruguay had violated its procedural obligations, the permit for the pulp mill did not violate any substantive obligations.¹⁶¹

2. *The New Precautionary Principle*

Pulp Mills has important implications for the precautionary principle. First, the decision explicitly ruled that precaution did not reverse the burden of proof.¹⁶² In addition, the court offered many more subtle statements on how precaution should be used. When discussing the standard of proof, for example, the ICJ never mentioned the precautionary principle at all,¹⁶³ and held Argentina to the standard of “convincing,”¹⁶⁴ “clear,”¹⁶⁵ and “conclusive”¹⁶⁶ evidence.¹⁶⁷

In particular, the ICJ demanded a high level of proof when it came to Argentina’s claim that the mills were discharging an unacceptable amount of chlorinated organic material.¹⁶⁸ Under the Statute of the River Uruguay, the maximum allowable effluent was a yearly average of 6 milligrams per liter of adsorbable organic halogens, but at one point concentrations reached 13 milligrams per liter.¹⁶⁹ While Uruguay found this high concentration in only one measurement, Argentina questioned Uruguay’s monitoring of the halogens generally and found this incident indicative of a broader chlorine pollution problem.¹⁷⁰ The ICJ ruled for Uruguay because “in the absence of convincing evidence that this is not an isolated episode but rather a more enduring problem, the Court is not in a position to conclude that Uruguay has breached

159. *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, ¶ 164 (Apr. 20, 2010), available at <http://www.icj-cij.org/docket/files/135/15877.pdf>.

160. *See id.* ¶¶ 180, 228, 250, 254, 257, 259, 262, 265.

161. *See id.* ¶ 282.

162. *Id.* ¶ 164.

163. *See id.* ¶¶ 180, 228, 250, 254, 257, 259, 262, 265.

164. *Id.* ¶¶ 189, 228.

165. *Id.* ¶¶ 225, 257, 259, 262, 264.

166. *Id.* ¶ 265.

167. *Cf. id.* (Al-Khasawneh and Simma, JJ., dissenting) (finding the science so complicated and the possible harmful effects so serious, they felt it was unfair to simply rely on traditional burdens and standards of proof, instead feeling the court should have appointed scientific experts); *id.* (separate opinion of Judge Yusuf) (voting with the majority, but agreeing that the issues were sufficiently complicated that the court should have appointed scientific experts).

168. *See id.*, Judgment, ¶ 228.

169. *See id.*

170. Measurement of adsorbable organic halogens is complicated, and the two sides vigorously disputed the efficacy of the measurements. Argentina pointed to the one high measurement as proof of a more prevailing problem. *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Public sitting held on Thursday 17 September 2009, XV ¶¶ 31, 38, available at <http://www.icj-cij.org/docket/files/135/15433.pdf>.

the provisions of the 1975 Statute.”¹⁷¹ The ICJ thus held that Argentina needed to show “convincing evidence” that Uruguay was regularly violating the statute; simply showing there was reason for concern about Uruguay’s actions was insufficient.

Argentina also claimed the pulp mill emitted nonylphenols, endangering the river environment.¹⁷² The level of nonylphenols in the Uruguay River near the mills had gone up since the mill opened, harming local wildlife.¹⁷³ Since other parts of the river had lower levels of nonylphenols, and nonylphenols are commonly used in pulp mills, Argentina argued that the source must have been the mills.¹⁷⁴ Uruguay argued the mill did not use any nonylphenol precursors and could therefore not be the source of the nonylphenol.¹⁷⁵ The ICJ again ruled in favor of Uruguay because Argentina had not “adduced clear evidence which establishes a link between the nonylphenols found in the waters of the river and the Orion (Botnia) mill.”¹⁷⁶ Again, the risk of environmental harm did not lower the standard of proof; Argentina had to show “clear evidence” in order to prevail.

In these questions of standard of proof and burden shifting, the ICJ seemed to reject conclusively the interpretation of the precautionary principle accepted by ITLOS and the WTO. However, it did not ignore precaution entirely, noting, “[A] precautionary approach may be relevant in the interpretation and application of the provisions of the Statute.”¹⁷⁷ Indeed, in a post-*Pulp Mills* decision, ITLOS saw this acknowledgment as an affirmation of the precautionary principle.¹⁷⁸ While the court did not find precaution necessary in this case, perhaps its understanding of precaution more broadly was similar to Judge Weeramantry’s *Nuclear Tests (New Zealand v. France)* dissent,¹⁷⁹ which read precaution to mean that the court can issue injunctions in cases where a threshold of harm is met. Given the paucity of the ICJ’s discussion of the precautionary principle, it is difficult to be sure.

171. *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, ¶ 228 (Apr. 20, 2010), available at <http://www.icj-cij.org/docket/files/135/15877.pdf>.

172. *See id.* ¶ 255.

173. *See id.*

174. *See id.*

175. *See id.* ¶ 256.

176. *Id.* ¶ 257.

177. *Id.*

178. *See Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area: Advisory Opinion*, ¶ 135, INT’L TRIB. L. OF THE SEA, <http://www.itlos.org> (last visited Mar. 9, 2011) (follow “Proceedings & Cases” hyperlink, then follow “list of cases” hyperlink, then “Case No. 17” hyperlink) (Advisory Opinion of 1 February 2011). However, the language of “may be relevant,” *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, ¶ 164 (Apr. 20, 2010), available at <http://www.icj-cij.org/docket/files/135/15877.pdf>, makes it doubtful that the ICJ was claiming that the precautionary principle was definitively customary international law.

179. *See discussion infra* Part II.a.

3. *Environmental Impact Assessments versus the Precautionary Principle*

While the court understood the precautionary principle narrowly, it did mandate the use of environmental impact assessments, “a national procedure for evaluating the likely impact of a proposed activity on the environment.”¹⁸⁰ As ITLOS has since noted,¹⁸¹ *Pulp Mills* mandated environmental impact assessments as an obligation of general international law.¹⁸²

Scholars and judges have noted that environmental impact assessments are clearly precautionary in nature, in that states consider likely impacts before commencing a potentially harmful activity.¹⁸³ It thus seems paradoxical that the same decision that rejected burden shifting and lowered standards of proof in international litigation¹⁸⁴ also mandated that individual countries take a precautionary approach via environmental impact assessments when there is a serious environmental risk.

The ICJ’s institutional interests as well as practical considerations explain this discrepancy. One institutional concern in applying the precautionary principle to lower the standard or shift the burden of proof is that it would force courts to take a more active role in international disputes by making it easier to bring cases against states acting in a way that might harm the environment.

180. Convention on Environmental Impact Assessment in a Transboundary Context (“Espoo Convention”), art. 1(vi), Feb. 25, 1991, 30 I.L.M. 802, available at http://www.unece.org/env/eia/about/eia_text.htm.

181. See Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area: Advisory Opinion, ¶¶ 146-48, INT’L TRIB. L. OF THE SEA, <http://www.itlos.org> (last visited Mar. 9, 2011) (follow “Proceedings & Cases” hyperlink, then follow “list of cases” hyperlink, then “Case No. 17” hyperlink) (Advisory Opinion of 1 February 2011). *Accord* Cymie R. Payne, *Pulp Mills on the River Uruguay: The ICJ Recognizes Environmental Impact Assessment as a Duty Under International Environmental Law*, 14:9 AM. SOC. INT’L L. INSIGHTS (2010); Cymie R. Payne, *Environmental Impact Assessment as a Duty under International Law: The ICJ Judgment on Pulp Mills on the River Uruguay*, 3 EUR. J. RISK REG. 317 (2010).

182. See *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, ¶ 204 (“It may now be considered a requirement under general international law to undertake an environmental impact assessment 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.”). In its recent opinion, ITLOS too acknowledged that environmental impact assessments are part of customary international law. Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area: Advisory Opinion, ¶ 150, INT’L TRIB. L. OF THE SEA, <http://www.itlos.org> (last visited Mar. 9, 2011) (follow “Proceedings & Cases” hyperlink, then follow “list of cases” hyperlink, then “Case No. 17” hyperlink) (Advisory Opinion of 1 February 2011).

183. See *Report of the International Law Commission*, ¶ 716, U.N. Doc. GAOR A/55/10(SUPP) (May 1–June 9 & July 10–Aug. 18, 2000) (“[T]he Special Rapporteur [of the International Law Commission] pointed out that, in his view, the precautionary principle was already included in the . . . environmental impact assessment, and could not be divorced therefrom.”); *Gabčíkovo-Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. 88, 113 (Dec. 17) (separate opinion of Judge Weeramantry) (arguing environmental impact assessments are “a specific application of the larger general principle of caution”). The word “caution” in this sentence is almost certainly a synonym for precaution. Indeed, the French translation uses precaution. *Projet Gabčíkovo-Nagymaros (Hung. v. Slov.)*, 1997 C.I.J. 88, 113 (separate opinion of Judge Weeramantry).

184. See *supra* Part III.b.ii.

However, given that the ICJ cannot enforce its own judgments and enforcement is at the discretion of the United Nations,¹⁸⁵ the ICJ could find itself weakened if its decisions are too aggressive to be enforced.¹⁸⁶ In most cases, parties voluntarily opt in to the ICJ's jurisdiction.¹⁸⁷ If the ICJ does not act with restraint, it would discourage countries from submitting to its jurisdiction, making the ICJ irrelevant.¹⁸⁸ Some have even suggested that unpopular ICJ decisions are the reason the United Nations has reduced the ICJ budget.¹⁸⁹

Additionally, it is not always clear what erring on the side of the environment means. For instance, Argentina wanted Uruguay to decrease pollution by installing another round of treatment to the effluent.¹⁹⁰ Uruguay argued that the energy consumption and carbon emissions required to run such a treatment would outweigh the benefits.¹⁹¹ Even if the ICJ only wanted the best possible outcome for the environment, it is not clear what it should dictate when both the problem and solution have negative environmental consequences.¹⁹²

Finally, the ICJ was hesitant to invoke the precautionary principle because uniformly erring on the side of the environment when the science was uncertain would be bad policy. In *Pulp Mills*, for example, the mills represented 2 percent

185. See U.N. Charter art. 94, para. 2. In fact, it seems the United Nations has never enforced an ICJ decision. See Adele Ramos, *ICJ STATS—Enforcement of ICJ Rulings*, AMANDALA (Jan. 30, 2009), <http://www.amandala.com.bz/index.php?id=8092>. This is in contrast to the ICJ's predecessor, the Permanent Court of International Justice, whose decisions were enforced by the United Nations' predecessor, the League of Nations. See Covenant of the League of Nations art. 13.

186. See, e.g., *Armed Activities on the Territory of the Congo (Congo v. Uganda)*, Provisional Measures, 2000 I.C.J. 131, 132 (July 1) (declaration of Judge Oda) (“[T]he repeated disregard of the judgments or orders of the Court by the parties will inevitably impair the dignity of the Court and raise doubt as to the judicial role to be played by the Court in the international community.”). *Accord* *Giles v. Harris*, 189 U.S. 475, 488 (1903) (opinion for the court by Holmes, J.) (deciding that the Supreme Court of the United States will not find the Alabama voting system unconstitutional for several reasons, including that the Court does not have the practical capabilities to enforce such a decision).

187. Article 36 of the Statute of the I.C.J. says, “The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.” *Statute of the Int’l Ct. of Justice: Article 36*, INT’L CT. OF JUSTICE, <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> (last visited Mar. 2, 2011). Other than “matters specially provided for in the Charter of the United Nations,” all those cases require a state to accept ICJ jurisdiction. Moreover, the Charter of the United Nations does not include any situations that grant jurisdiction to the ICJ, making irrelevant the one provision that would grant the ICJ jurisdiction without acceptance by states.

188. See Shigeru Oda, *The Compulsory Jurisdiction of the ICJ: A Myth?*, 49 INT’L & COMP. L.Q. 251, 263–64 (2000) (an article by a justice of the ICJ showing that when the ICJ finds jurisdiction when the losing party does not think the ICJ should, the losing party often does not comply with the court's order and subsequently the losing party sometimes withdraws its grant of jurisdiction to the ICJ).

189. See Tom Ginsburg, *International Judicial Lawmaking*, in INTERNATIONAL CONFLICT RESOLUTION 155, 176–79 (Stefan Voight, Max Albert & Dieter Schmidchen eds., 2006).

190. See *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, ¶ 221 (Apr. 20, 2010), available at <http://www.icj-cij.org/docket/files/135/15877.pdf>.

191. See *id.* ¶ 222.

192. See Cass R. Sunstein, *The Paralyzing Principle*, 25 REGULATION 32, 34 (2003).

of Uruguay's gross domestic product.¹⁹³ In cases where such significant economic benefit is at stake, the ICJ would not want to be compelled to err on the side of the environment when harms were so uncertain. Favoring environmental impact assessments, meanwhile, would not bind the ICJ, and by extension the states, in any way, but would likely diminish environmental harm when harm was more certain.¹⁹⁴ The ICJ, however, will not overrule a state's impact assessment unless another party proves that assessment "clearly," "convincingly," or "conclusively" wrong.¹⁹⁵

In 2008, President Wolfrum of ITLOS highlighted these differences between his tribunal and the ICJ: "The jurisprudence of the [ICJ] has hitherto not accepted the precautionary approach as a binding principle of international law. [ITLOS], when asked to prescribe provisional measures for the protection and conservation of southern bluefin tuna fish stocks, nevertheless relied upon such principle."¹⁹⁶ While *Pulp Mills* may indicate that the ICJ sees some vaguely defined role for the precautionary principle, the two tribunals certainly applied the precautionary principle in vastly different manners. ITLOS, and the WTO in dicta, interpreted the precautionary principle as granting definite legal rights: it either lowered the standard of proof or reversed the burden of proof, making it simpler to obtain an injunction. The ICJ, meanwhile, understands the precautionary principle as granting fewer (or no) substantive rights. Rather, it favors the use of environmental impact assessments, leaving the ICJ more options in ruling on environmental cases.

The question then arises why ITLOS, which is even less capable of enforcing its own decisions than the ICJ,¹⁹⁷ took a far more progressive approach to the precautionary principle. One possibility is that the five countries with permanent members on the Security Council have always had a judge on the ICJ.¹⁹⁸ Of these countries, China, Russia, the United States and the

193. See *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Request for the Indication of Provisional Measures, 2006 I.C.J. 113, 126 (July 13).

194. *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, ¶ 205. ("[G]eneral international law [does not] specify the scope and content of an environmental impact assessment.")

195. Cf. National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4347 (2006). This Act "does not mandate particular results. Instead, NEPA imposes only procedural requirements to ensure that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Winter v. Natural Res. Def. Council, Inc.*, 129 S.Ct. 365, 376 (2008) (internal citations removed).

196. ITLOS STATEMENT BY H.R. JUDGE RÜDIGER WOLFRUM, PRESIDENT OF ITLOS TO THE ILC 5–6 (2008), available at http://www.itlos.org/start2_en.html (follow "news/Statement of the President" hyperlink, then "Statements of President Wolfrum" hyperlink, and then "Statement delivered to the International Law Commission, Geneva, 31 July 2008").

197. Indeed, ITLOS has no mechanism to enforce its decisions. See ROBERT E. SCOTT & PAUL B. STEPHAN, *THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW* 115 (2006).

198. See <http://www.icj-cij.org/court/index.php?p1=1&p2=2> ("[T]he [ICJ] has always included judges of the nationality of the permanent members of the Security Council.")

United Kingdom have been ambivalent towards the precautionary principle.¹⁹⁹ Thus, the bias that international judges tend to show towards their own countries²⁰⁰ would make the ICJ limit applications of the precautionary principle. On ITLOS, meanwhile, no countries have permanent representatives,²⁰¹ so the weight of judges from those powerful countries is less likely to be determinant.

CONCLUSION

In a broad sense, the cards were stacked against Argentina in *Pulp Mills*. It is highly unlikely the ICJ would obligate Uruguay to shut down mills that represented 2 percent of its gross domestic product,²⁰² or even to significantly modify the way Uruguay operated the mills.²⁰³ As discussed above, the ICJ must be careful not to issue remedies that a party ignores.²⁰⁴ In fact, Argentina's satisfaction with the final decision—focusing on the ICJ's finding that Uruguay had violated its procedural obligations²⁰⁵—may reflect recognition that winning the substantive issues was never a possibility.

However, even if it was a foregone conclusion that Uruguay would win, the ICJ's narrowing of the precautionary principle in reaching this conclusion is important. This is especially true given that a broader reading of the precautionary principle was not necessarily in conflict with Uruguay's position. For example, Judge Trindade vigorously protested the short shrift given to the

199. See LIU HONG, COMPARING THE PRECAUTIONARY PRINCIPLE IN THE UNITED STATES AND RUSSIA, available at [http://www.cal-china.org/documents/Trainees%20%20Paper/Wang%20Liu/David's%20Precautionary%20principlein%20US%20and%20China4\(final_12.22.03\).doc](http://www.cal-china.org/documents/Trainees%20%20Paper/Wang%20Liu/David's%20Precautionary%20principlein%20US%20and%20China4(final_12.22.03).doc) (China); Andrew Jordan & Timothy O'Riordan, Geir Hønnelan, *Towards a Precautionary Fisheries Management in Russia*, 48 OCEAN & COASTAL L.J. 619, 621–22 (2005) (Russia); discussion *supra* Part II.b. (discussing WTO disputes where the United States challenged the status of the precautionary principle as customary international law); ANDREW JORDAN & TIMOTHY O'RIORDAN, THE PRECAUTIONARY PRINCIPLE IN U.K. ENVIRONMENTAL LAW AND POLICY (1994), available at http://www.uea.ac.uk/env/cserge/pub/wp/gec/gec_1994_11.pdf (United Kingdom).

200. See Eric A. Posner, *The International Court of Justice: Voting and Usage Statistics*, 101 ASIL PROC. 130 (2005).

201. Indeed, there have been no judges from the United States in ITLOS. See *General Information—Judges*, ITLOS, <http://www.itlos.org> (last visited Mar. 9, 2011) (follow “General Information” hyperlink, then follow “Judges” hyperlink, then “Judges” hyperlink). Additionally, the fact that a country will not always be represented may mean that even the countries that are represented are less able to enforce their jurisprudence on the tribunal.

202. See *Pulp Mills on the River Uruguay* (Arg. v. Uru.), Request for the Indication of Provisional Measures, 2006 I.C.J. 113, 126 (July 13).

203. Although Argentina actually requested that the mills be decommissioned. See *Pulp Mills on the River Uruguay* (Arg. v. Uru.), Judgment, ¶ 23 (Apr. 20, 2010), available at <http://www.icj-cij.org/docket/files/135/15877.pdf>.

204. See *supra* Part III.b.iii.

205. See *Uruguay's and Argentina Celebrate Court's Ruling on Pulp Mill Dispute*, MERCOPRESS (Apr. 20, 2010), <http://en.mercopress.com/2010/04/20/uruguay-s-and-argentina-celebrate-court-s-ruling-on-pulp-mill-dispute>. Of course it is possible that Argentina was just saving face.

precautionary principle in the majority's opinion in *Pulp Mills*²⁰⁶ yet still voted with the majority.²⁰⁷ Additionally, Uruguayan law explicitly recognizes the precautionary principle,²⁰⁸ and yet Uruguay permitted the pulp mills. The precautionary principle was thus not necessarily fatal to Uruguay's case, and did not require the narrow reading the ICJ ultimately gave it in *Pulp Mills*.

There are several ways the ICJ could have offered a broader reading of the precautionary principle and still sided with Uruguay. For example, it could have found that Argentina had not shown enough likelihood of harm or that the threatened harm it did show was not severe enough. Alternatively, the court could have ruled that the precautionary principle does not apply to situations in which the economic benefit clearly outweighs the potential environmental harm. While most formulations of the precautionary principle omit such a limitation,²⁰⁹ the Rio Declaration included a provision that called for "cost-effective measures" in applying the precautionary principle,²¹⁰ thus suggesting that the benefits of precaution must be weighed against its economic costs.²¹¹ Nonetheless, the court did not go this route and instead, by requiring certainty of harm, rejected most common understandings of precaution. Ultimately, the ICJ's decision in *Pulp Mills* left only a vaguely defined and weak precautionary principle.²¹² On the other hand, ITLOS still stands by its decision in the *Bluefin*

206. See *Pulp Mills on the River Uruguay* (Arg. v. Uru.), separate opinion of Judge Trindade, ¶¶ 62-00, 103-13 (Apr. 20, 2010), available at <http://www.icj-cij.org/docket/files/135/15885.pdf>.

207. *Pulp Mills on the River Uruguay* (Arg. v. Uru.), Judgment, ¶ 282.

208. See *id.* ¶ 97; Uruguay Law 17,283(6)(b) (2000), <http://faolex.fao.org/docs/html/uru23655.htm>, ("[W]hen there are threats of serious or irreversible damage, lack of full technical or scientific certainty shall not be used as a reason for not taking preventative action." (author's translation)).

209. *Id.*

210. See United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, vol. I, annex I, princ.15, U.N. Doc. A/CONF.151/26/ (Aug. 12, 1992). See generally TROUWBORST, *supra* note 4, at 259-66 (2006).

211. See APPELATE, *supra* note 41, at 29-30.

212. Just before this Note went to press, the International Court of Justice ruled on a request for provisional measures in a case where there was uncertain environmental harm. See *Certain Activities carried out by Nicaragua in the Border Area* (Costa Rica v. Nicar.), Request for the Indication of Provisional Measures, Order of 8 March 2011, ¶ 81 available at <http://www.icj-cij.org/docket/files/150/16324.pdf> ("Costa Rica asserts that the programme creates an imminent risk of irreparable prejudice to its environment . . ."). The ICJ ruled against Costa Rica on many of the issues, and did not even mention the precautionary principle. See also *id.* ¶¶ 17-34 (separate opinion of Judge Sepúlveda-Amor), available at <http://www.icj-cij.org/docket/files/150/16328.pdf> (arguing that the court should have more thoroughly considered the risk of irreparable harm, and should therefore have ruled more favorably for Costa Rica.); *id.* ¶¶ 13-15, (declaration of Judge Greenwood), available at <http://www.icj-cij.org/docket/files/150/16332.pdf> (arguing for the same). The ICJ's rejection of precaution has thus continued post-*Pulp Mills*.

Tuna Cases,²¹³ and sees the precautionary principle as a method of dealing with potentially dangerous environmental activities.²¹⁴

213. See Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area: Advisory Opinion, ¶ 132, INT'L TRIB. FOR THE L. OF THE SEA, <http://www.itlos.org> (last visited Mar. 9, 2011) (follow "Proceedings & Cases" hyperlink, then follow "list of cases" hyperlink, then "Case No. 17" hyperlink) (Advisory Opinion of 1 February 2011).

214. See *id.* ¶¶ 125–35. The phenomenon of fragmentation of international law because of multiple tribunals is not new. See Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553 (2002). See also Tulio Treves, *Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice*, 31 N.Y.U. J. INT'L L. & POL. 809, 810 (1999).

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