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International Adjudication and the Commons

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I. INTRODUCTION

The historic idea of the commons has animated a broad range of scholars within and across many disciplines, while providing a powerful suggestion of a shared enterprise and a productive past in international law.[1] Popularized by biologist Garrett Hardin's metaphor of an open pasture doomed to overgrazing by free-riding cattle herders, the commons was depicted as holding a remorseless logic towards the over-exploitation of any space or place that was not privatized or centrally planned.[2] This "tragedy" was refuted by empirical examples of small-scale fisheries, forests, and irrigation offered by Elinor Ostrom.[3] She showed the institutional frameworks that

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[1] *See* Case Concerning the Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, 1997 I.C.J. Rep. 7, 88, 110 (Sept. 25) (Separate Opinion of Vice-President Weeramantry) (noting that '[n]atural resources are not individually, but collectively, owned, and a principle of their use is that they should be used for the maximum service of people; *see also* United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (entrenching the 'common heritage of mankind' concept).

[2] *See generally* Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

[3] *See generally* ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF

existed to support endurable common pool resources, which included rule enforcement and the appropriators' access to sanctions.[4] Ostrom's empirical engagements were with natural resources used collectively by certain groupings, never across state boundaries, [5] thus, although she emphasized governance through rules and enforcement, the translation of her work to international law is not a ready one.

The central question of this Article—what, if anything, does international adjudication have to do with the commons?—brings the concept of sharing and use of ownerless or commonly-held places or things to the context of dispute settlement between countries. As will already be clear, posing this question requires more than a few intellectual leaps. First, it draws attention to the scope and definition of the commons, which in pre-industrialization times comprised a manageable circle of users of a shared pasture or lake, but which then extended to air and flowing streams so as to include an unknowable circle of those affected.[6] Recent times have confirmed that action in one place can not only trigger harm in another place, but it can also be difficult to predict and have global, long-lasting consequences. Whether the concept of the commons can withstand not only a massive extension of scale, but more fundamentally a change of identity of the user (from human to nation-state), is an important question for international lawyers,[7] especially given the commons-crushing enterprise at the origins of international law.[8]

A second leap required to arrive at this Article's central question relates to the character and function of relevant dispute settlement bodies. This moves the focus of analysis from the decentralized and bounded community-based institutions that provide for rule enforcement within a commons, including through the imposition of graduated sanctions that Elinor Ostrom identified as necessary to secure endurability,[9] into a set of international courts and tribunals that are variously limited in both jurisdiction and remedies. How the international judicial function can mediate the immediate need for dispute settlement between states with the broader interests of a global community

INSTITUTIONS FOR COLLECTIVE ACTION (Cambridge Univ. Press 1990).

[4] *Id.* at 100-101.

[5] *See id.* 26.

[6] JOACHIM RADKAU, NATURE AND POWER: A GLOBAL HISTORY OF THE ENVIRONMENT, 205 (Thomas Dunlap trans., 2008).

[7] *See* PHILIP ALLOTT, EUNOMIA: NEW ORDER FOR A NEW WORLD 309 (2d ed. 2001) (explaining the detriment to the notion of international community caused by the legal powers of states).

[8] Olivier De Schutter, *From Eroding to Enabling the Commons: The Dual Movement in International Law*, *in* THE COMMONS AND A NEW GLOBAL GOVERNANCE 231 (Samuel Cogolati & Jan Wouters eds., 2018); *see also* ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 13–31 (2004).

[9] OSTROM, *supra* note 3, at 90.

remains an ongoing quest within the discipline.[10] Indeed, treaty regimes are generally regarded as the primary venues for "collective concern" law making in international law, where norms are agreed under negotiation rather than identified through adjudication.[11] A third leap – or perhaps sidestep – relates to the property arrangements underpinning resources within a commons. The central question of this Article may seem to downplay the preoccupation of many about such arrangements—because the adjudication of disputes between states may be wholly separate or at least agnostic about the public or private models of ownership that operate within the borders of the litigating parties—but makes much more central the issue of production and consumption within globalized trade. Analogizing the organic, decentralized practices of small-scale endeavors to the artificial, state-led institutions that comprise public international law serves as a demanding intellectual exercise but also as a reminder not only of the limitations of metaphors, but also of disciplinary foundations.

This Article does not aspire to provide a new definition of the commons that suits the fraught fundamentals of sovereignty and consent in international law. Rather, it endorses the view that warns against confusing "commons" and "global commons," with the former used to emphasize self-government by small groups that actively manage collective resources, and the latter describing areas of open access that are often unmanaged.[12] Indeed, on whether an issue arises "in the commons," Oran Young observed that "the appropriate framing of problems involving human-environment interactions can and often will be at least as much a function of prevailing sociopolitical conditions as it is a matter of the characteristics of the biophysical systems involved."[13] Thus, while some spaces and places may be suggestive of open access areas, and the high seas, atmosphere, and polar regions are generally

[10] James Crawford, *Responsibility, Fraternity, and Sustainability in International Law*, 52 CAN. YEARB. INT. LAW 1–34 (2015); G.I. Hernandez, *A Reluctant Guardian: The International Court of Justice and the Concept of "International Community"*, 83 BRIT. Y.B. INT'L L. 13–60 (2013); James Crawford, *Responsibility to the International Community as a Whole*, 8 IND. J. GLOBAL LEGAL STUD. 303 (2001).

[11] Jutta Brunnée, *Common Areas, Common Heritage, and Common Concern*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 550, 572 (Daniel Bodansky et al. eds. 2008).

[12] Samuel Cogolati & Jan Wouters, *Introduction: Democratic, Institutional and Legal Implications of the Commons for Global Governance*, *in* THE COMMONS AND A NEW GLOBAL GOVERNANCE 1, 7 (Samuel Cogolati & Jan Wouters eds., 2018); *see* Vito De Lucia, *The Concept of Commons and Marine Genetic Resources in Areas Beyond National Jurisdiction*, 5 MAR. SAFETY & SECURITY L.J. 1, 7–8 (2018).

[13] Oran Young, *Land Use, Environmental Change, and Sustainable Development: The Role of Institutional Diagnostics*, 5 INT'L J. COMMONS 66, 76 (2011).

accepted "global commons"[14] one must be aware of the contexts of these labels as well as their effects. This is particularly so with the blurring of local, transboundary or global issues through trade measures that respond to problems faced by the natural environment in territories outside the importing state.[15]

Instead of grasping for a concept of the commons to suit public international law, this Article makes clearer the intellectual leaps that are required through an engagement with international disputes. It determines whether commons-type scenarios can be discerned in existing case-law of international courts and tribunals, and examines how the commons was advanced or negated. To do this, the Article chooses cases from three different international tribunals—the International Court of Justice ("ICJ"), the International Tribunal for the Law of the Sea ("ITLOS"), and the World Trade Organization Appellate Body ("WTO")—in order to seek a cross-cutting overview of contemporary international judicial bodies. It takes a contentious or advisory proceeding from each of these three bodies that, by virtue of its subject matter, can be framed according to the accepted characteristics endorsed in literature on the commons. Although ideas from economic theory such as common pool resources and global public goods are dominant in these framings, this Article also draws from associated literature on the commons, from political science, anthropology, law, and behavioral science. In its analysis of international disputes, this Article acknowledges that although different disciplinary offerings are disparate in aims and methods,[16] their interest in issues of endurability and sustainability often converges.

In selecting the cases for study, this Article does not depend on the framing offered by the litigants or the courts themselves, as the language of "the commons" is almost invisible in the case-law.[17] Instead, it selects

[14] *E.g.*, XUE HANQIN, TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW 6 (2003).

[15] Margaret A. Young, *Trade Measures to Address Environmental Concerns in Faraway Places: Jurisdictional Issues*, 23 REV. EUR. COMP. & INT'L ENVTL. L. 302, 310 (2014).

[16] *See generally* Surabhi Ranganathan, *Global Commons*, 27 EUR. J. INT'L L. 693 (2016) (discussing the need to be upfront about the disciplinary biases with which one approaches commons scenarios).

[17] For a rare exception, see Case Concerning the Gabčíkovo-Nagymoros Project (Hung./Slovk.), Separate Opinion of Vice-President Weeramantry, 1997 I.C.J. Rep. 88, 110 (Sept. 25). In a Separate Opinion, Judge Weeramantry calls for international law to:

> [T]ake account of the perspectives and principles of traditional systems . . . with reference to specific principles, concepts, and aspirational standards.
>
> . . .
>
> Land is to be respected as having a vitality of its own and being integrally linked to the welfare of the community. When it is used by humans, every opportunity should be afforded to it to replenish itself.

characteristics of common pool resources, such as whether they are prone to rival or excludable uses and the related concept of global public goods, to demonstrate how international courts have adjudicated on the goods or places that may be said to belong to the commons. By bringing attention to these cases, this Article points to the capacity of international courts to engage in the ideals and ideas of the commons, which may develop in ways that refute the prescriptions for tragedy that have been apparent in the literature.

Part II of this Article thus outlines five different cases from international courts and tribunals, beginning with a tabular summary of these international cases as categorized according to economic theories relating to the commons. It explains how international adjudicators have made orders relating to the exploitation by states of southern bluefin tuna and deep seabed minerals, and argues that the subject of these disputes may be characterized as common pool resources.[18] It also shows how whales, sea turtles, and freedom from the threat of nuclear weapons have led to inter-state judicial settlement of what may be described as global public goods.[19] While these five cases constitute a very limited set of fact scenarios, the way in which they may be framed offers a series of provocations for notions of community interest in international law. Procedural aspects of the disputes are then analyzed in Part III. Institutional features such as rules on jurisdiction and standing differ across the selected tribunals and can either constrain or facilitate the ability of them to adjudicate. Part IV considers some of the substantive principles

> . . .
>
> Natural resources are not individually, but collectively, owned, and a principle of their use is that they should be used for the maximum service of people.

Id. at 110. A separate point, which is outside the scope of this Article, relates to the languages used to evoke the language of the commons. *See* Vijaya Nagarajan, *On the Multiple Languages of the Commons*, 21 WORLDVIEWS GLOBAL RELIGIONS, CULTURE & ECOLOGY (2017).

[18] *See generally* Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Request for Advisory Opinion Submitted to the Seabed Disputes Chamber), Case No. 17, Advisory Opinion of Feb. 1, 2011, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/17_adv_op_010211_en.pdf [hereinafter *Deep Seabed Mining* Advisory Opinion]; Southern Bluefin Tuna Cases (N.Z. v. Japan; Austl. v. Japan), Case Nos. 3 and 4, Order of Aug. 27, 1999, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/published/C34-O-27_aug_99.pdf.

[19] *See generally* Whaling in the Antarctic (Austl. v. Japan: N.Z. intervening), Judgment, 2014 I.C.J. Rep. 226 (Mar. 31), https://www.icj-cij.org/files/case-related/148/148-20140331-JUD-01-00-EN.pdf; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226 (July 8); Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. Rep. 66 (July 8); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Import Prohibition of Certain Shrimp*].

evoked in the cases, including the precautionary principle, duties of due diligence, and principles of inter-generational equity. Though limited in scope, this discussion helps situate the constitutive role played by the courts. In the context of the selected cases, the Article thus brings to the fore the social, cultural, and economic conditions that have been at play in international litigation over commons-type scenarios, and reflects upon whether the tribunals were well-equipped to deal with them.

II. Framing Of "The Commons" in Selected Cases

International adjudication has resolved conflicts or provided opinions on the sharing and utilization of resources by states at least since the United States and the United Kingdom agreed to an arbitration over fur seals in the Bering Sea in 1893.[20] This Article focusses, however, on three courts and tribunals established in the post-war era: the ICJ,[21] ITLOS and the WTO.[22] The disputes selected for analysis in this Article involve southern bluefin tuna, sea turtle bycatch, deep seabed mining, whales, and the public good of living without the threat of nuclear weapons.[23] While arbitration continues to provide a forum for similar disputes (including under UNCLOS), these more ad hoc arrangements are outside the Article's scope..

Whether the selected cases involve the concept of the commons is admittedly open to debate. Instead of arguing this point by establishing and relying upon a universalized concept of the commons, this Article endorses the view that the concept in international law contains "terminological

[20] Award between the United States and the United Kingdom Relating to the Rights of Jurisdiction of United States in the Bering's Sea and the Preservation of Fur Seals (U.S. v. U.K), XXVIII R.I.A.A. 263 (Perm. Ct. Arb. 1893). Russia, which has transferred fisheries rights after the handover of Alaska, was not a party.

[21] The ICJ, also known as the World Court, was founded after World War II to replace the Permanent Court of International Justice. *History*, International Court of Justice, https://www.icj-cij.org/en/history (last visited May 21, 2019).

[22] *The Tribunal*, International Tribunal for the Law of the Sea, https://www.itlos.org/en/the-tribunal/ (last visited May 21, 2019); *Appellate Body*, World Trade Organization, https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm (last visited May 21, 2019).

[23] *See supra* notes 19–20. The aim is to concentrate on these cases, rather than canvas the wide range of international disputes involving natural resources. *See, e.g.*, Case Concerning the Gabčikovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 7 (Sept. 25); Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14 (Apr. 20); Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Judgment, 2018 I.C.J. Rep. 665 (Dec. 16); Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica), Judgment, 2015 I.C.J. Rep. 665 (Dec. 16); South China Sea Arbitration Award (Phil. v. China), 2013–19 (Perm. Ct. Arb. 2016). Some of the norms and principles that emerge from such jurisprudence are noted throughout the Article.

ambiguities and semantic slippages[.]"[24] The idea of the commons arguably depends upon a small scale and specific historic context and is open to interpretation based on its subject and objects. If Hardin's focus had shifted from the common pasture to the herders' arrangements for private property in their cattle, a wholly different prescription may have emerged.[25] In addition, the accompanying arrangements for private property should be recognized as themselves contingent upon and subject to the law; it is not inevitable, for example, that private property will be adjudicated as solely serving private ownership.[26]

As mentioned above, rather than seeking to defend a universalized conception of the commons, this Article considers scenarios that have characteristics that are ascribed to the commons in the relevant literature. Central to this is the concept of "common pool resources." Although Elinor Ostrom called her book *Governing the Commons,* it was really common pool resources that were her focus, which has been influential in the legal discourse.[27] An associated characterization, "global public goods," is another economic concept that is increasingly taken up in international law.[28] These concepts are described in this Part by reference to characteristics of the selected international disputes. Although at a more abstract level, international adjudication itself might constitute a global public good, or a mechanism which produces such goods,[29] this Article provides a framing for a limited number of cases, as summarized in Table 1.

[24] *See* De Lucia, *supra* note 12, at 3.

[25] *See* David Harvey, *The Future of the Commons*, 109 Radical Hist. Rev. 101, 104 (2011).

[26] For a recent account, see generally Ben France-Hudson, *Surprisingly Social: Private Property and Environmental Management*, 29 J. Envtl. L. 101 (2017).

[27] *See* Carol M. Rose, *Ostrom and the Lawyers: The Impact of Governing the Commons on the American Legal Academy*, 5 Int'l J. Commons 28, 29 (2011); Nicholas A. Robinson, *The Charter of the Forest: Evolving Human Rights in Nature*, Pace L. Fac. Publications 1, 4–5 (2017), https://digitalcommons.pace.edu/lawfaculty/1075/.

[28] J. Samuel Barkin & Yuliya Rashchupkina, *Public Goods, Common Pool Resources, and International Law*, 111 Am. J. Int'l L. 376, 376 (2017). *See generally* Fabrizio Cafaggi & David D. Caron, *Global Public Goods Amidst a Plurality of Legal Orders: A Symposium*, 23 Eur. J. Int'l L. 643 (2012); Daniel Bodansky, *What's in a Concept? Global Public Goods, International Law, and Legitimacy*, 23 Eur. J. Int'l L. 651 (2012).

[29] Joshua Paine, *International Adjudication as a Global Public Good?*, 29 Eur. J. Int'l L. 1223–49 (2018).

	ICJ		ITLOS		WTO	
	Contentious case	Advisory Opinion	Contentious case	Advisory Opinion	Contentious case (Appellate Body)	(no advisory jurisdiction)
Short title	*Whaling* (2014)[30]	*Nuclear Weapons (UNGA Request)* (1996)	*Southern Bluefin Tuna (Prov measures)* (1999)[31]	*The Area* (2011)[32]	*U.S.-Shrimp* (1998)[33]	-
Characterization according to economic theory	Global public good / common pool resource (whale)	Global public good (freedom from threat of nuclear weapons)	Common pool resource (southern bluefin tuna)	Common pool resource (deep seabed minerals)	Global public good (sea turtles threatened as bycatch by shrimp harvesting)	

Table 1: Selected international cases and the characteristics of the goods according to economic theory

A. Common Pool Resources

Economic analysis develops from the questions of whether the use of a good diminishes its availability for others, and whether such use can be excluded. Common pool resources are assessed as rival in consumption (i.e., use of the good will reduce the ability of another party to use it) and non-excludable (i.e., others cannot be excluded from the use of the good).[34] A common pool resource differs from a "public good" because though both are non-excludable, the public good is non-rival in consumption (i.e., its consumption by one individual does not reduce its availability for other individuals).[35] Bodansky points to high seas fisheries as an example of a

[30] *See generally* Whaling in the Antarctic (Austl. v. Japan: N.Z. intervening), Judgment, 2014 I.C.J. Rep. 226 (Mar. 31).

[31] Southern Bluefin Tuna Cases (N.Z. v. Japan; Austl. v. Japan), Case Nos. 3 and 4, Order of Aug. 27, 1999, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/published/C34-O-27_aug_99.pdf.

[32] *Deep Seabed Mining* Advisory Opinion, *supra* note 18.

[33] *Import Prohibition of Certain Shrimp*, *supra* note 19.

[34] *See generally* Inge Kaul, Donald Blondin & Neva Nahtigal, *Review Article: Understanding Global Public Goods: Where We Are and Where to Next, in* GLOBAL PUBLIC GOODS (Inge Kaul ed., 2016).

[35] *Id.*

common pool resource, and national defense as a public good.[36] Inversely, the "club good" is non-rivalrous but may be excludable (Bodansky invokes cable television signals as an example),[37] while a private good is both rivalrous and excludable.

The southern bluefin tuna, which has been the subject of much litigation between states, conforms to the accepted definition of a common pool resource. Located in an open access environment of the high seas and therefore non-excludable, the southern bluefin tuna was at risk of over-exploitation by rival fishers from Japan, Australia and New Zealand in 1999.[38] ITLOS was called upon to grant provisional measures in a dispute between these countries, which required interpretation of provisions in the United Nations Convention on the Law of the Sea ("UNCLOS") relating to the high seas and highly migratory species.[39] After the granting of provisional measures, an ad hoc tribunal subsequently found it did not have jurisdiction to hear the dispute on account of a highly controversial interpretation of UNCLOS.[40]

Australia and New Zealand's case rested on Japan's alleged over-fishing of southern bluefin tuna, where quotas established by the three states according to the relevant fisheries agreement[41] were being exceeded.[42] This scenario signals an important differentiating feature in literature on the commons, namely, what is done with the shared resource. Some would assert that the historic notion of the commons depended on the production of goods for use, rather than production for exchange.[43] By contrast, the common pool resource of the southern bluefin tuna has long been commodified and traded by states.[44] The high seas fisheries organizations overseeing fishing from

[36] Bodansky, *supra* note 28, 652–53.

[37] *Id.* at 653.

[38] Leah Sturtz, *Southern Bluefin Tuna Case: Australia and New Zealand v. Japan*, 28 ECOLOGY L.Q. 455, 458–59, 468–70 (2001) (discussing the facts and surrounding context for the dispute).

[39] *Id.* at 459; *see* Southern Bluefin Tuna Cases (N.Z. v. Japan; Austl. v. Japan), Case Nos. 3 and 4, Order of Aug. 27, 1999, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/published/C34-O-27_aug_99.pdf.

[40] Southern Bluefin Tuna (Austl. & N.Z. v. Japan), Award on Jurisdiction and Admissibility, 23 R.I.A.A. 1, ¶ 65 (Arb. Trib. 2000).

[41] Convention for the Conservation of Southern Bluefin Tuna, Austl.-Japan-N.Z., May 10, 1993, 1819 U.N.T.S. 360 [hereinafter CCSBT].

[42] *Souther Bluefin Tuna*, 23 R.I.A.A. at ¶¶ 21–34.

[43] Ugo Mattei, *The Ecology of International Law: Towards an International Legal System in Tune with Nature and Community?*, *in* THE COMMONS AND A NEW GLOBAL GOVERNANCE 212 (2018).

[44] For separate examples, see STEFANO B. LONGO, REBECCA CLAUSEN & BRETT CLARK, THE TRAGEDY OF THE COMMODITY: OCEANS, FISHERIES, AND AQUACULTURE 63–105 (2015) (discussing the commodification and over-fishing of bluefin tuna in the Mediterranean).

multiple states, such as the Commission for the Conservation of Southern Bluefin Tuna established by Australia, New Zealand, and Japan, are at times criticized as forums for extracting profit under a metric of "maximum sustainable yield," especially at the expense of outsiders.[45] Whether such rationalist appropriation for exchange leads to endurability in environmental terms is open to question, due to both the susceptibility of collapse of the fish population (which in itself prompted the litigation) and the interests of other fishers and other states (but also of other species and of the ecosystem itself). To digress from the case for a moment, it can be noted that high seas fisheries organizations are undergoing an evolution in their approaches, with newer governing principles emphasizing the ecosystem rather than management of specific species,[46] and with rights of participation of newer entrants proving to be hotly sought.[47] Moreover, human rights principles are beginning to emerge as central to the management of fisheries resources. The use of quotas, for example, gave way to models of collective rights within some fisheries communities.[48] The United Nations Special Rapporteur for the Right to Food reported to the General Assembly in 2012 that "[o]nly by linking fisheries management to the broader improvement of the economic and social rights of fishers, in a multisectoral approach that acknowledges how fishing fits into the broader social and economic fabric, can progress be made towards robust and sustainable solutions."[49] While further comments on the ITLOS case are provided below, these observations point to a tension between the concept of common pool resources and the need for the southern bluefin tuna to continue to exist within an ecosystem.

Another example of international litigation over purported common-pool resources can be found in the area of the deep seabed (the "Area")[50] that is

[45] For a brief introduction to Regional Fisheries Management Organizations (RFMOs), see MARGARET A. YOUNG, TRADING FISH, SAVING FISH: THE INTERACTION BETWEEN REGIMES IN INTERNATIONAL LAW 34–46 (Cambridge University Press, 2011).

[46] *See* Adriana Fabra & Virginia Gascón, *The Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) and the Ecosystem Approach*, 23 INT'L J. MARINE AND COASTAL L. 567, 571 (2008) (discussing that the ecosystem approach to high seas fishery management "incorporates ecosystem considerations into the regulation of fishing activities, in recognition that traditional single-species management approaches have failed in meeting ecological, social and economic objectives.").

[47] *See* Erik J. Molenaar, *Participation in Regional Fisheries Management Organizations*, *in* STRENGTHENING INTERNATIONAL FISHERIES LAW IN AN ERA OF CHANGING OCEANS 103 (Richard Caddell & Erik J. Molenaar eds., 2019).

[48] De Schutter, *supra* note 8, at 251–52.

[49] Olivier De Schutter (Special Rapporteur on the Right to Food), *The Right to Food*, ¶ 59, U.N. Doc. A/67/268 (Aug. 8, 2012).

[50] UNCLOS coined the term the "Area" to describe "the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction[.]" U.N. Convention on the Law of the Sea, art. 1, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter *UNCLOS*].

located beyond the limits of national jurisdiction.[51] The Area is non-excludable but the minerals that it contains could be depleted by largescale mining. The Area could be characterized as a "common pool resource" but has been conceived legally with the somewhat different notion of "common heritage of mankind."[52] The emphasis on underlying distributional and cultural concepts as well as "use" resonates with conceptions of the commons outside the economics literature. For example, drawing on the history of the enclosures in medieval England, Peter Linebaugh emphasizes that the notion of the "commons" combines both resources *and* people.[53] The commons is thus not a thing, but a relationship, and the resultant activities can be expressed through the verb commoning.[54] Given the aspirations of developing countries that were part of UNCLOS's negotiations,[55] a verb of "global commoning" could have started to enter the lexicon, though in the deep seabed context, it undoubtably would have depended on access to technology and resources. Instead, as has been explored in detail, the subsequent implementing agreement transformed the issue into a far more instrumentalist one.[56] Perhaps unsurprisingly, no notion of "global commoning" can be deduced from the International Tribunal for the Law of the Sea in its advisory opinion.[57] Before discussing that case in further detail, it is useful to consider how common pool resources have been reconceived in ways more akin to "global public goods."

B. Global Public Goods

Whales might be seen to be a common pool resource if one still viewed them as items for consumption. The 1946 Convention agreed to "make possible the orderly development of the whaling industry."[58] But at least by

[51] *See generally Deep Seabed Mining* Advisory Opinion, *supra* note 18.

[52] *See UNCLOS*, *supra* note 50, art. 136 ("The Area and its resources are the common heritage of mankind.").

[53] *See* PETER LINEBAUGH, THE MAGNA CARTA MANIFESTO: LIBERTIES AND COMMONS FOR ALL 103 (2008).

[54] *See id.* ("The allure of commoning arises from the mutualism of shared resources. Everything is used, nothing is wasted. Reciprocity, sense of self, willingness to argue, long memory, collective celebration, and mutual aid are traits of the commoner.").

[55] For a history of such negotiations, see Ranganathan, *supra* note 18, at 711–14. *See also* SURABHI RANGANATHAN, STRATEGICALLY CREATED TREATY CONFLICTS AND THE POLITICS OF INTERNATIONAL LAW (Cambridge University Press 2014).

[56] *See generally* Martti Koskenniemi & Marja Lehto, *The Privilege of Universality: International Law, Economic Ideology and Seabed Resources*, 65 NORDIC J. INT'L L. 533 (1996).

[57] *See Deep Seabed Mining* Advisory Opinion, *supra* note 18; *but see infra*, note 172.

[58] International Convention for the Regulation of Whaling, pmbl., Dec. 2, 1946, 161

1982, when the moratorium on commercial whaling was agreed by states, the intrinsic value of whales as an iconic species may be said to have gained ascendancy. The value of whales held by societies continues to be expressed by states under the auspices of the International Whaling Commission through resolutions, for example, restricting the use of lethal methods for purposes of scientific research.[59] This value is not diminished by the abstract enjoyment of increasing numbers of people, nor can it be excluded; therefore whales may be placed in the category of global public goods.[60] Such a conception is facilitated by other developments in public international law, including the establishment of the "international community as a whole" as a recipient of legal obligations.[61] Whether whales could be defined according to these notions was a question that came before the International Court of Justice in 2014.[62] As is described further in the next Part, the Court was asked to consider possible violations of the International Convention for the Regulation of Whaling (hereinafter the "Whaling Convention") by Japan in its killing of whales ostensibly for scientific purposes.[63]

Sea turtles might once have been a common pool resource for some, but again, the species can now be considered as a global public good given the recognition of its value for biodiversity (and the fact that it is exploitable to extinction) evidenced by instruments such as the Convention on the International Trade in Endangered Species ("CITES").[64] Science plays a key role in this conception, especially in determining the characteristic of rival consumption, because we largely understand the diminishing of a resource through observation and experiment with the physical and natural world. The

U.N.T.S. 74.

[59] *See* Whaling in the Antarctic (Austl. v. Japan: N.Z. intervening), Judgment, 2014 I.C.J. Rep. 226, ¶ 35 (Mar. 31), https://www.icj-cij.org/files/case-related/148/148-20140331-JUD-01-00-EN.pdf (discussing the resolutions).

[60] *See, e.g.*, André Nollkaemper, *International Adjudication of Global Public Goods: The Intersection of Substance and Procedure*, 23 EUR. J. INT'L L. 769 (2012).

[61] Int'l Law Comm'n, Rep. to the General Assembly, Articles on Responsibility of States for Internationally Wrongful Acts U.N. Doc. A/56/10, at 126 (2001) [hereinafter *ILC Articles on State Responsibility*].

[62] *See* Whaling in the Antarctic (Austl. v. Japan: N.Z. intervening), Judgment, 2014 I.C.J. Rep. 226 (Mar. 31), https://www.icj-cij.org/files/case-related/148/148-20140331-JUD-01-00-EN.pdf.

[63] *See id.* at 246, ¶ 42.

[64] *See generally* Convention on International Trade in Endangered Species of Wild Fauna and Flora, *opened for signature* Mar. 3, 1973, 993 U.N.T.S. 243. Note that van Aaken considers CITES to transform common pool resources into club goods, due to the way in which trade is restricted to those who have the required customs documentation. Anne van Aaken, *Behavioral Aspects of the International Law of Global Public Goods and Common Pool Resources*, 112 AM. J. INT'L L. 67, 77 (2018). Instead, I am focusing on the complete prohibition in trade of Annex I species, which includes sea turtles.

Appellate Body of the World Trade Organization drew on the treaty listing of sea turtles when it accepted that avoiding turtle bycatch in faraway places was an appropriate goal for a unilateral trade measure.[65] Although the United States failed to convince the Appellate Body that its import ban had been implemented in a non-discriminatory way, and thus lost the case, economists support this outcome as usefully requiring that the wealthy actor—the United States—sit down with four developing countries to determine the appropriate compensation to help finance global turtle protection.[66] The Appellate Body thus denied the individualist approach of the United States, which had required importing states to use a particular turtle excluder device in fishing methods.[67] Whether and how local discrimination can support global public goods continues to be an important conversation,[68] as is the place of third party adjudication in overseeing such approaches.

C. Club Goods or Private Goods

The notion of global public goods moves to "club goods" in the economics literature when a non-excludable good becomes excludable.[69] International security, which every country can be said to seek and enjoy without reducing available security to all (non-rival), may become the preserve of a club (excludable); indeed, the Security Council has been conceived in these terms, given it will have the final say on what constitutes a threat to international security.[70] But when asked about the legality of nuclear weapons for its 1996 Advisory Opinion, the ICJ did not address the issues in these terms, preferring instead to extend the club to global, even limitless, proportions, and using notions of inter-generational equity and humanity, as is discussed below.[71] While the inclusion of the *Nuclear Weapons* advisory opinion may seem out of place alongside the other cases involving the oceans (and Ostrom herself left out of her study situations in which participants could produce major external harm for others),[72] this Article points to analogies with the

[65] *See generally* YOUNG, *supra* note 45, at 189–240.

[66] JAGDISH BHAGWATI, THE WIND OF THE HUNDRED DAYS: HOW WASHINGTON MISMANAGED GLOBALIZATION 100 (2002).

[67] YOUNG, *supra* note 45, 192–193.

[68] *See* Timothy Meyer, *How Local Discrimination Can Promote Global Public Goods*, 95 B.U. L. REV. 1937 (2015).

[69] *See supra* note 34 and accompanying text.

[70] *See* Barkin & Rashchupkina, *supra* note 28, at 392 ("In the case of international security, those states able and willing to spend most on military capabilities will have the greatest say over what constitutes a threat to international security.").

[71] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226 (July 8).

[72] OSTROM, *supra* note 3, at 26.

other cases, such as the related question of whether the conduct of nuclear weapons tests "might be contrary to international law on the ground that it causes radioactive contamination of the environment of a third State or of the *global commons*."[73]

"Private goods" are both excludable and non-rival, and usually secured through property rights. Ostrom rejected Hardin's prescription that property rights would best safeguard the commons.[74] Ostrom's examples were small scale, where "various members of communities enjoy complicated and overlapping entitlements – entitlements that are well understood and respected in local norms, but that are often far too sensitive and complex to alienate to strangers, except at great peril to the entire community management structure []."[75] Carol Rose has commented on the attractiveness of these arrangements in terms of "commitment, sustainability and stability."[76] Yet Rose points to the attractiveness of the opposing forms (especially of property ownership and alienability) that underlie modern property law: "the quick movement of resources into valuable uses, the refreshing openness to all comers, the encouragement to change and innovation."[77] The parallels with modern sovereignty are beguiling and deserving of engaged study, to which this Article seeks to make a modest contribution.

In some of the literature, the Law of the Sea Convention is said to have made much of the oceans into private goods, given the extension of the concept of exclusive economic zone ("EEZ") and the reduction of the open access area of the high seas.[78] While this might be true from the perspective of coastal states, it shows the malleability of the relevant concepts. An area within an EEZ may well be thought of as a club good when access rights are awarded to a foreign state for a fee, as is often done by coastal developing countries.[79] Declarations of "marine protected areas" within EEZs, which often prohibit fishing activity in efforts to protect biodiversity and the ecosystem, establish private goods that are in theory policed by the coastal state, but from the internal domestic perspective, these are commons that are

[73] For Australia's oral submission to the ICJ in *Legality of Nuclear Weapons*, see *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. Oral Statements (Oct. 30, 1995), https://www.icj-cij.org/files/case-related/95/095-19951030-ORA-01-00-BI.pdf (the public sitting was held at 10 a.m. at the Peace Palace).

[74] OSTROM, *supra* note 3, 12–18.

[75] Rose, *supra* note 27, at 34–35.

[76] *Id.* at 35.

[77] *Id.*

[78] Barkin & Rashchupkina, *supra* note 28, at 387.

[79] *See* Margaret A. Young, *A Quiet Revolution: The Exclusivity of Exclusive Economic Zones, in* TRAVERSING DIVIDES: HONOURING DEBORAH CASS'S CONTRIBUTION TO PUBLIC AND INTERNATIONAL LAW (K. Rubenstein ed., ANU Press, forthcoming 2019) (on file with author).

owned by no one individual. This reinforces the point made by Samuel Cogolati and Jan Wouters, who call attention to the distinction between "open access, one the one hand, and self-government by a limited number of users actively involved in the management of the commons, on the other."[80] Given the variances in compulsory and consensual jurisdiction at the international level, these differences in conceptions can affect whether state users of a resource can bring challenges against another state.[81] Such jurisdictional vagaries are explored further in Part III, but regardless of the economic conception of the EEZ, the law assesses coastal states as holding obligations as well as sovereign rights.[82]

D. Other Conceptions of the Commons

The preceding discussion in this Part sought to apply established economic notions to goods that have been litigated internationally. Of itself, this establishes that international courts have and do adjudicate disputes over the commons, as understood at least by applications of economic theory. Yet, this is not to say that tribunals have depended upon economic concepts or methods in characterizing the disputes, nor that such methods would have been appropriate. Moreover, other conceptions of the commons advanced outside of economic theory are relevant to the selected cases.

At the risk of caricature, it might be said that the "commons" literature divides according to two premises. On the one hand, a hard-nosed, self-interested rationality when dealing with others leads to "tragedy" of open access resources unless privatized or centrally planned (Hardin) or self-governed with evolving institutions (Ostrom).[83] On the other hand, a communal orientation emphasizing practices of sharing, ritual, and empathy underpinning diverse sets of relationships is explored in historical and anthropological literature.[84] The latter set of ideas can be gleaned not just

[80] Cogolati & Wouters, *supra* note 12, at 7.

[81] For example, see Chagos Marine Protected Area (Mauritius v. U.K) 31 R.I.A.A 359, 416–18 (Perm. Ct. Arb. 2015) when Mauritius sought to challenge the proclamation of a marine protected area in the neighboring British Indian Ocean Territory, it emphasized the United Kingdom's expansive aims of biodiversity and coral reef preservation. These aims, which went well beyond fisheries management, rendered the dispute susceptible to compulsory jurisdiction under the terms of the Law of the Sea Convention. *See id.* at 441–522 (discussing the Tribunal's jurisdiction).

[82] *See* Young, *supra* note 79; see also Tullio Scovazzi, *'Due Regard' Obligations, with Particular Emphasis on Fisheries in the Exclusive Economic Zone*, 34 INT'L J. MARINE & COAST. L. 56 (2019).

[83] *See* Hardin, *supra* note 2; OSTROM, *supra* note 3.

[84] *See* LINEBAUGH, *supra* note 53; *see also* Marc Brightman & Jerome Lewis, *Introduction: The Anthropology of Sustainability, in* THE ANTHROPOLOGY OF SUSTAINABILITY:

from the commons in medieval Europe but from accounts of the earth-centered beliefs and practices of indigenous peoples, and the recognition that paths to sustainability depend on human and non-human species.[85] International law may begin to recognize such rationalities through developments such as the Declaration on the Rights of Indigenous Peoples,[86] the Paris Agreement's reference to "Mother Earth,"[87] and concepts of animal rights.[88] In another example, the Food and Agriculture Organization has published voluntary guidelines relating to food security, which recognize that "there are publicly-owned land, fisheries, and forests that are collectively used and managed (in some national contexts referred to as commons)[.]"[89]

In the cases considered in this Article, none of these conceptions of the commons were advanced by the parties or featured in the reasoning of the majority. In the *Whaling* case, for example, neither the parties nor the Court invoked the concept of the commons, either in common pool resource, public good terms, or in the more spatial idea of global commons associated with whales' migration routes through multiple jurisdictions and the high seas.[90] Yet, there was a collective foundation to how the case was brought: Australia invoked Japan's responsibility *erga omnes partes* under the Convention, seeking to uphold compliance, "an interest it shares with all other parties."[91]

BEYOND DEVELOPMENT AND PROGRESS 1–34 (Marc Brightman & Jerome Lewis eds., 2017).

[85] *See, e.g.*, Anna Tsing, *A Threat to Holocene Resurgence Is a Threat to Livability, in* THE ANTHROPOLOGY OF SUSTAINABILITY: BEYOND DEVELOPMENT AND PROGRESS 51–65 (Marc Brightman & Jerome Lewis eds., 2017); Mattei, *supra* note 44, at 223 (elaborating on the commons and other-than-humans).

[86] *See* G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

[87] *See* Paris Agreement, pmbl., Dec. 12, 2015, A.T.S. 24, 27 U.N.T.S. 7d. ("*Noting* the importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity, recognized by some cultures as Mother Earth, and noting the importance for some of the concept of 'climate justice', when taking action to address climate change").

[88] *See* Alexander Gillespie, *Animals Ethics and International Law, in* ANIMAL LAW IN AUSTRALASIA 333 (Peter Sankoff & Steven White eds., 2009) (discussing international law and animal rights).

[89] Comm. on World Food Sec., *Voluntary Guidelines on the Responsible Governance of Tenure Land, Fisheries, and Forests in the Context of National Food Security*, at 12 (2012).

[90] *See* Whaling in the Antarctic (Austl. v. Japan; N.Z. intervening), Judgment, 2014 I.C.J. Rep. 226 (Mar. 31), https://www.icj-cij.org/files/case-related/148/148-20140331-JUD-01-00-EN.pdf. Others have described whales as the global commons. *See, e.g.*, Nico Schrijver, *Managing the Global Commons: Common Good or Common Sink?*, 37 THIRD WORLD Q. 1252, 1253 (2016).

[91] *See* Christian J. Tams, *Roads Not Taken, Opportunities Missed: Procedural and Jurisdictional Questions Sidestepped in the Whaling Judgment, in* WHALING IN THE ANTARCTIC: SIGNIFICANCE AND IMPLICATIONS OF THE ICJ JUDGMENT 193, 206 (Malgosia Fitzmaurice & Dai Tamada eds., 2016); *see also* James Crawford, *Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts, in* FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA 224, 236 (Ulrich Fastenrath et al. eds., 2011).

I discuss this aspect of standing later, but some other aspects of the framing of the case are pertinent to note. The graphic photos of dead or dying whales in Australia's submission, though not given specific commentary, seem intended to generate a sense of common empathy with these marine mammals.[92] One could tie this to Christopher Stone's early call for standing for non-human species.[93] Acknowledging that whaling could be considered as causing harm to aggrieved and sympathetic humans, he instead famously called for a procedure to allow a court-appointed guardian who could be asked "how the whales view whaling."[94] By submitting a photograph of a Japanese whaler holding a rifle at a defenseless and bleeding whale, the Court was implicitly invited to reflect upon this very question.[95]

In ruling that the lethal whaling was a violation of the Whaling Convention (because it did not fall within the exception from the prohibition on whaling for scientific purposes), the Court found that Japan had a duty to give due regard to the work of the International Whaling Commission even if it did not vote in favor of its resolutions.[96] While by no means an endorsement of notions of common concern,[97] this ruling may be said to be an implicit rejection of a rationalist account of exploitation of the commons and instead supports an assessment of a reciprocal and ongoing set of social and legal practices surrounding whale protection.[98]

The possibility of alternative conceptions is of course apparent from my earlier observation that the courts do not seek to frame the disputes in terms of the commons. This possibility also enables me to reject the argument that has appeared in recent literature that global commons issues are best

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[92] *Whaling in the Antartic*, 2014 I.C.J Memorial of Australia (May 9, 2011), https://www.icj-cij.org/files/case-related/148/17382.pdf, at 96-103 [hereinafter Memorial of Australia].

[93] *See generally* Christopher D. Stone, Should Trees Have Standing?: Law, Morality, and the Environment (3d ed. 2010).

[94] CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING?: LAW, MORALITY, AND THE ENVIRONMENT 176 (3d ed. 2010); *see also* Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 SOUTHERN CAL. L. REV. 450 (1972).

[95] Memorial of Australia, *supra* note 102, at 98. Japan also included photographs in their submissions, which were pictures of scientific laboratories testing specimens of whale earplugs and muscles. *See Whaling in the Antarctic*, 2014 I.C.J. Counter-Memorial of Japan, at 171, 177 (Mar. 9, 2012), https://www.icj-cij.org/files/case-related/148/17384.pdf.

[96] *Whaling in the Antarctic*, 2014 I.C.J Rep. 226, at ¶¶ 83, 137.

[97] Such endorsement appeared in a Separate opinion by Judge Cançado Trindade. *See id.* at 348 (separate opinion of Judge Cançado Trindade).

[98] Japan's recent indication of its withdrawal from the IWC does of course remind one of the mutability of the 'international community as a whole' in various settings, a point I return to later.

characterized as common pool resources.[99] On the contrary, the cases generate a richer understanding than mere resource allocation and use. In addition to Whaling, the due diligence obligations that were invoked for southern bluefin tuna fishing and deep seabed mining are worthy of attention, as is discussed below. The World Trade Organization accepted that avoiding turtle bycatch in faraway places was an appropriate goal for a unilateral trade measure, and the International Court of Justice evoked humanity's shared history and obligations to the future unborn in the *Nuclear Weapons* Advisory Opinion.[100] By giving expression to the idea of an "international community as a whole[,]" which now features in the International Law Commission's ("ILC") articles on state responsibility, the tribunals allowed for an interpretation of state behavior that depended on mutual and ongoing rights and obligations. This leads to the discussion of procedure and substance in the following Parts.

III. Legal Process Before International Courts

Having established the multiple framings evident in my selected cases, I wish now to consider some of the procedural features that affected how the cases came to be before the relevant international courts and tribunals. Most prominent are questions of standing and jurisdiction. The courts analyzed in this Article are forums in which the parties are states, acting on their own or together under the auspices of an international organization requesting an advisory opinion. Non-state actors are rarely permitted to participate. Moreover, the ability of affected states to seek to enforce rules of international law is most often curtailed by the need to obtain consent of the respondent state. Procedures differ across the ICJ, ITLOS, and WTO, as this Part explains.

A. Jurisdiction

In her small-scale, decentralized examples, Ostrom showed that mechanisms were available to stakeholders to resolve conflicts among appropriators of common pool resources and to ensure endurability.[101] In inter-state dispute settlement, constituting a forum is more difficult. Even if states consent to the jurisdiction of the ICJ through the optional clause procedure, they may make reservations or withdraw their acceptance of the

[99] *See* Barkin & Rashchupkina, *supra* note 27, at 383.

[100] *Import Prohibition of Certain Shrimp*, *supra* note 19, at 51. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226 (July 8).

[101] Ostrom, *supra* note 3, at 100–01.

Court's jurisdiction.[102] After losing the *Whaling* case, Japan altered its optional clause declaration to ensure that it will never again be a respondent in a whaling dispute.

Even for tribunals with compulsory jurisdiction (the WTO[103] and, to a lesser extent, ITLOS), there are legal constraints on whether and how the courts can engage with commons-type issues. For the global public good of protecting an endangered species like sea turtles, for example, the acceptability of a country imposing unilateral trade measures may depend upon the ability of that country to establish a public rather than self-serving national interest. In *U.S.-Shrimp*, it was argued that the United States could not impose trade measures for the protection of sea turtles, because it lacked the jurisdictional nexus to regulate a good that was located outside of its territory.[104] The Appellate Body did not accept this argument and noted instead that there was a sufficient nexus between the sea turtles and the importing country given that waters subject to American jurisdiction were traversed by the migratory animals.[105] As previously argued, states' justifications to impose trade measures of this kind are advanced not just by the need to conserve exhaustible natural resources (as considered in *U.S.-Shrimp*), but also by their ability to take measures "necessary to protect public morals" and by the acceptance that public morality encompasses concern about faraway places.[106] This is the point at which "global commons" as an idea becomes mixed with "common concern." A wide range of environmental problems, which are exacerbated by global supply and trade, require a philosophical extension from the original commons idea of a small, closed circle of users; trade panels, the Appellate Body, and other international courts must grapple with this, not only with respect to their own jurisdiction, but also with respect to the limitations on extraterritorial action that is foundational to international law.

[102] *See* Statute of the International Court of Justice, art. 36, https://www.icj-cij.org/en/statute (providing that states may, but are not required to, submit to the compulsory jurisdiction of the ICJ) [hereinafter Statute of the I.C.J.]; *ILC Articles on State Responsibility*, *supra* note 61, at 178.

[103] Although the jurisdiction of the Appellate Body to hear appeals is soon to be thwarted by the U.S. veto on appointments. *See generally* Ernst-Ulrich Petersmann, *How Should WTO Members React to Their WTO Crisis?*, World Trade Rev., 1–23 (2019).

[104] *Import Prohibition of Certain Shrimp*, *supra* note 19. This built on earlier successful claims. *E.g.*, Panel Report, *United States – Restrictions on Imports of Tuna*, WTO Doc. WT/DS29/R (adopted June 16, 1994); *see generally* Young, *supra* note 15.

[105] *Import Prohibition of Certain Shrimp*, *supra* note 19, at 51.

[106] Young, *supra* note 15, at 310–12. Noting especially, Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS401/AB/R (May 22, 2014).

The jurisdictional hurdles confronting states over the southern bluefin tuna also show that enforcing rules between states over common pool resources is constrained and heavily dependent on whether states have consented to compulsory third-party settlement. ITLOS awarded provisional measures in the case brought by Australia and New Zealand against Japan, but when the case came to the merits, the subsequent ad hoc tribunal found that it did not have jurisdiction to hear the claim.[107] The second tribunal interpreted UNCLOS as requiring parties to prioritize dispute settlement through their own regional arrangements (which were consensual under the terms of the relevant regional treaty),[108] rather than relying on compulsory dispute settlement under the general treaty.[109] This decision was met with criticism, as it left the substantive questions about conservation and management unresolved.[110]

The situation is different for advisory opinions of international courts, which as mentioned in Part II may be used to resolve legal questions relating to common pool resources (like the deep seabed) or global public goods (like freedom from the threat of nuclear weapons), but which are not binding on states. Advisory opinions do not depend on the consent of litigant states, although the jurisdictional requirements are not trivial and it may well be possible for states to establish that an opinion is outside the competence of the court.[111] This occurred when the World Health Organization ("WHO") requested an opinion on the legality of the use by a state of nuclear weapons in armed conflict; the ICJ refused to deliver an opinion because it found that the request was not properly within the powers of the WHO.[112] In the alternative, the General Assembly launched a request for an opinion on the legality of the threat or use of nuclear weapons, which was considered to fall within the scope of *its* activities and thus validly made.[113] The high stakes of

[107] *See generally* Southern Bluefin Tuna (Austl. & N.Z. v. Japan), Award on Jurisdiction and Admissibility, 23 R.I.A.A. 1 (Arb. Trib. 2000).

[108] CCSBT, *supra* note 41.

[109] Southern Bluefin Tuna Cases (N.Z. v. Japan; Austl. v. Japan), Case Nos. 3 and 4, Order of Aug. 27, 1999, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/published/C34-O-27_aug_99.pdf; *see also* Bernard H. Oxman, *Complementary Agreements and Compulsory Jurisdiction*, 95 AM. J. INT'L L. 277–312 (2001).

[110] Natalie Klein, *Litigation over Marine Resources: Lessons for Law of the Sea, International Dispute Settlement and International Environmental Law*, 28 AUSTL. YEAR BOOK INT'L L. 131 (2009). *But see* Tim Stephens, *The Limits of International Adjudication in International Environmental Law: Another Perspective on the Southern Bluefin Tuna Case*, 19 INT'L J. MARINE COASTAL L. 177 (2004).

[111] Statute of the I.C.J, *supra* note 103, at art. 65.

[112] Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. Rep. 66 (July 8).

[113] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226 (July 8); *see also* General Assembly Resolution, *infra* note 130.

advisory opinions is also reflected in the difficulties faced by countries in generating sufficient support for requests to be made, as is evident from the abandoned effort by the small island state of Palau to seek support at the General Assembly for a request for an advisory opinion on climate change responsibility.[114]

In the Advisory Opinion on Deep Seabed Mining, Nauru and Tonga successfully prompted the International Seabed Authority Council to ascertain the rights and duties of states, particularly developing countries, when they sponsor exploration of the minerals on the deep seabed.[115] The Seabed Disputes Chamber of ITLOS accepted its competence to engage with these legal questions which related expressly to the Area declared by UNCLOS to be part of the common heritage of mankind.[116] A later advisory opinion by ITLOS was delivered in spite of many objections to its jurisdiction, when it interpreted its own Statute as well as other relevant constitutive instruments to find that it had competence to make rulings on illegal, unreported and unregulated fishing.[117]

These jurisdictional aspects show that generalizations about international adjudication are difficult to make: much depends on the constitutive instruments of the relevant international tribunals as well as the substantive law. In particular, the advances in compulsory jurisdiction established by UNCLOS give more open conditions for the pursuit of common interests and ideals.[118] Before turning to related questions of standing for the international community, it is prudent to point to a strategic issue in the context of current legal developments: the ongoing negotiations on marine biodiversity beyond national jurisdiction, now before the United Nations, should seek to incorporate into the new rules the compulsory jurisdiction of UNCLOS.[119]

[114] *See generally* Stuart Beck & Elizabeth Burleson, *Inside the System, Outside the Box: Palau's Pursuit of Climate Justice and Security at the United Nations*, 3 TRANSNATIONAL ENVTL. L. 17 (2014). I note, however, that the prospect of an advisory opinion request on climate obligations to the ICJ or ITLOS is increasingly anticipated. *See* Phillipe Sands, *Climate Change and the Rule of Law: Adjudicating the Future in International Law,* 28 J. OF ENVTL. L 19 (2016).

[115] *Deep Seabed Mining* Advisory Opinion, *supra* note 18, at 35.

[116] *Id.* at 15–18.

[117] Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Case No. 21, Advisory Opinion of Apr. 2, 2015, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion_published/2015_21-advop-E.pdf.

[118] Philip Allott, *Mare Nostrum: A New International Law of the Sea*, 86 AM. J. INT'L L. 764 (1992).

[119] *See UNCLOS*, *supra* note 50, Part XV; *see also* Margaret A. Young & Andrew Friedman, *Biodiversity Beyond National Jurisdiction: Regimes and Their Interaction*, 112 AJIL UNBOUND 123 (2018).

B. Standing

Closely related to the question of jurisdiction of international courts and tribunals is the question of which bodies have standing to pursue their claims. For contentious cases like the litigation over southern bluefin tuna and whales, only states have standing to pursue claims.[120] The nature of their legal interest is also important. The traditional understanding is that dispute settlement can be invoked only by a state that has suffered identifiable injury as a result of a breach of an international legal obligation which is owed to that state.[121] Whether a right of *actio popularis* exists before international courts and tribunals is subject to some controversy.[122] However, this issue has evolved significantly with the ILC Articles on State Responsibility, which recognized in Article 48 the "international community as a whole" as a recipient of legal obligations.[123]

As mentioned above, the *Whaling* case was launched by Australia purely on the basis of its collective interest in Japan's treaty compliance, rather than on any harm that it specifically suffered.[124] This conception of public interest standing is in line with Article 48, though no express finding was made by the Court in this regard.[125] Article 48 was however endorsed by the Seabed Disputes Chamber of ITLOS in its Advisory Opinion on deep seabed mining in *The Area,* when it observed that party states may be entitled to claim compensation for breaches of UNCLOS "in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area."[126]

When voting upon its request for an advisory opinion on nuclear weapons, the UN General Assembly pointed to the "serious risks to humanity" posed

[120] Statute of the I.C.J, *supra* note 102, at art. 35; Statute of the International Tribunal for the Law of the Sea, https://www.itlos.org/fileadmin/itlos/documents/basic_texts/statute_en.pdf [hereinafter Statute of ITLOS].

[121] This is itself subject to varying application. *E.g.*, Appellate Body Report, *European Communities – Regimes for the Importation, Sale and Distribution of Bananas (EC – Bananas III)*, WTO Doc. WT/DS27/AB/R (adopted September 9, 1997). The AB ruled that a Member is "largely self-regulating" when deciding whether the action it pursues is in its interests. *Id.* at ¶ 135.

[122] *See* Nuclear Tests Case (NZ v. Fr.), Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Aréchga and Sir Humpherey Waldock, 1974 I.C.J. Rep. 494, 521 (Dec. 20); *see also* FARID AHMADOV, THE RIGHT OF *ACTIO POPULARIS* BEFORE INTERNATIONAL COURTS AND TRIBUNALS (2018).

[123] *ILC Articles on State Responsibility*, *supra* note 61, at 126.

[124] *See* Whaling in the Antarctic (Austl.v. Japan; N.Z. intervening), Judgment, 2014 I.C.J. Rep. 226 (Mar.31).

[125] Tams, *supra* note 90, at 193.

[126] *Deep Seabed Mining* Advisory Opinion, *supra* note 18, at ¶ 180.

by the continuing existence of nuclear weapons.[127] Though there was no opportunity for non-governmental organizations to formally participate in the proceedings, given the lack of *amicus* provisions in the ICJ Statute or rules, a strong social movement known as the "World Court Project" had exerted pressure on states to make the request, first under the auspices of the WTO, and then through a vote at the General Assembly.[128] Country submissions referred to interests beyond the national interest in invoking the Court's role as "guardian of the legal interests of succeeding generations."[129]

Both the *Whaling* case and *U.S.-Shrimp* were proceeded by domestic litigation brought by civil society actors, who were acting on behalf of the whales and sea turtles themselves.[130] This observation may fit with commons literature that emphasizes and endorses polycentricity, but it also suggests that international law lags behind domestic legal avenues for justice. The attitudes of international tribunals to non-governmental organizations is far from inclusive, and even the tribunals that have formally allowed for *amicus* briefs (the WTO and ITLOS) are slow to grant them rights to participate[131] or refer to them in decisions.[132] To properly evaluate whether collective or communal interests in a commons can be advanced by states requires deep engagement with the relevant dispute; for example, an assessment about Australia's motivation in pursuing the cases on southern bluefin tuna and whaling requires a close analysis of inter-state relations and attitudes.[133] At the very least, the motives of states in bringing cases on behalf of the environment seem to contradict rationalist accounts of statecraft that depict litigating parties as self-serving, warranting closer empirical work that would

[127] G.A. Res. 49/75, U.N. Doc. A/RES/49/75, Part K (Dec. 15, 1994).

[128] Kate Dewes & Commander Robert Green, *The World Court Project: How a Citizen Network Can Influence the United Nations*, 7 PACIFICA REV.: PEACE, SEC. & GLOBAL CHANGE 2, 17–37 (1995); NICHOLAS GRIEF, THE WORLD COURT PROJECT ON NUCLEAR WEAPONS AND INTERNATIONAL LAW 53–58 (Aletheia, 2nd ed., 1993).

[129] *See e.g.*, *Legality of the Threat or Use of Nuclear Weapons,* 1996 I.C.J. Oral Statements, at ¶32 (Oct. 30, 1995), https://www.icj-cij.org/files/case-related/95/095-19951030-ORA-01-00-BI.pdf.

[130] *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3; Earth Island Institute v. Christopher, 913 F. Supp. 559 (Ct. Intl. Trade 1995).

[131] The *Deep Seabed* Advisory Opinion did not grant a request from Stichting Greenpeace Council (Greenpeace International) and the World Wide Fund for Nature to participate as *amici curiae. Deep Seabed Mining* Advisory Opinion, *supra* note 18, at ¶ 14.

[132] On the WTO, see YOUNG, supra note 45, at 220-224. On ITLOS, see generally *Deep Seabed Mining* Advisory Opinion, *supra* note 18.

[133] *See generally* Natalie Klein, *Whales and Tuna: The Past and Future of Litigation between Australia and Japan*, 21 GEO. INT'L ENVTL. L. REV. 143 (2008); Shirley V. Scott, *Litigation Versus Dispute Resolution Through Political Processes*, *in* LITIGATING INTERNATIONAL LAW DISPUTES: WEIGHING THE OPTIONS 24 (Natalie Klein ed., 2014).

be invaluable for behavioral accounts of the commons as well as for international law.[134]

IV. Ruling Upon the Substance

As far as the international disputes considered in this Article have included commons-type scenarios, legal norms have been applied to issues of endurability. The five cases considered in this Article demonstrate important developments relating to rights *erga omnes,* the emerging customary norm of precaution,[135] duties of due diligence, and principles of inter-generational equity, although not all tribunals accept such rights uniformly. As there is not the space to review the role of international courts in developing these principles,[136] I will limit myself to a few observations about the substance of the relevant underlying obligations.

It is clear that tools exist for courts to apply collective or communitarian interests, but they face many constraints. In its 1996 Advisory Opinion, the Court agreed that nuclear weapons had the potential to "destroy all civilization and the entire ecosystem of the planet[,]" and used evocative language to demonstrate the grave risks for both humans and non-humans.[137] President Bedjaoui noted the "collective juridical conscience" that reflected the move towards an international community and away from international law's positivist, voluntarist foundations.[138] He continued, "[a]dded to the evolution of international society itself is progress in the technological sphere, which now makes possible the total and virtually instantaneous eradication of the human race."[139] Yet while the Court ruled that the threat or use of nuclear weapons "would generally be contrary to the rules of international law applicable in armed conflict," it refused to conclude definitively on the law in the context of an extreme circumstance of self-

[134] *See generally* Margaret A. Young, Emma Nyhan & Hilary Charlesworth, *Studying Country-Specific Engagements with the International Court of Justice*, J. Int'l Disp. Settlement (2019) (forthcoming) (on file with author).

[135] "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." *See e.g.*, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26, Principle 15 (Aug. 12, 1992).

[136] *See generally* Tim Stephens, International Courts and Environmental Protection (2009).

[137] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 35 (July 8).

[138] *Id.* at 271 (Declaration of President Bedjaoui).

[139] *Id.*

defense, "in which the very survival of a State would be at stake[.]"[140] In this instance, and by a narrow margin, the freedom of the nuclear weapon holding states prevailed over the freedom of non-nuclear weapon holding states. In contrast, writing in dissent, Judge Weeramantry drew on authorities that noted the *jus cogens* status of "rules which ensure to all members of the international community the enjoyment of certain common resources (high seas, outer space, etc.)." [141]

Since the ICJ's advisory opinion was delivered, the ILC has finalized its work on state responsibility, which includes Article 48 of the ILC Articles on State Responsibility recognizing the "international community as a whole" as a holder of interests.[142] Yet the cases show that the courts are deeply reserved about the use of this concept, leading some to ask whether the concept of *erga omnes* can bear all that it is asked of it.[143] The extension of rights to the international community might even be critiqued according to Koskenniemi's well-known depiction of the two poles of international legal argumentation, where any utopian concept is exposed as disconnected from state will (and where rebounding to realism is equally open to critique, as eschewing all normativity).[144] This dilemma confronted the Court in the most recent claim on nuclear weapons. In 2016, the Marshall Islands filed a case at the ICJ—this time, under its contentious, rather than advisory, jurisdiction—over alleged failures of the UK, India and Pakistan to comply with obligations of nuclear disarmament.[145] The case could be framed in commons terms: the elimination of national arsenals of nuclear weapons

[140] *Id.* at 266 (Order 2.E; 7 votes to 7, by the President's casting vote).

[141] *Id.* at 496 (Weeramantry, J. dissenting) (citation omitted) (emphasis added).

[142] *ILC Articles on State Responsibility*, *supra* note 61, at 126.

[143] This question has been posed even by the Judge who would have ruled substantively on the legality of nuclear weapons. In the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 216 (July 9), Judge Higgins in her Separate Opinion stated that the dictum "is frequently invoked for more than it can bear."

[144] *See generally* Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (2006). Separately, Koskenniemi supported the Court's *non liquet* in the Advisory Opinion. *See* Martti Koskenniemi, *The Silence of Law/The Voice of Justice, in* International Law, the International Court of Justice and Nuclear Weapons 488 (Laurence Boisson De Chazournes & Philippe Sands eds., 1999).

[145] *See* Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161. The Marshall Islands also filed applications against the other nuclear-weapons holding states (China, the Democratic People's Republic of Korea, France, India, Israel, Pakistan, the Russian Federation and the United States of America), but those states had not recognized the compulsory jurisdiction of the Court pursuant to the optional clause declaration and did not accept the jurisdiction in this case. *See* Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v U.K), Preliminary Objections, Judgment, 2016 I.C.J Rep. 833, ¶ 22 (Oct. 5).

safeguards against immediate and largescale destruction of shared areas. Indeed, *erga omnes* rights were discussed by some members of the bench. While the Marshall Islands was clearly concerned about nuclear weapons given its location for many years as a testing site, Judge Crawford also emphasized that "States can be parties to disputes about obligations in the performance of which they have no specific material interests."[146] A bare majority of the Court, however, rejected the case on jurisdictional grounds.[147]

This Article's inclusion of cases from three different tribunals makes clear that the relevant substantive law is not developing uniformly. For example, ITLOS found southern bluefin tuna to warrant precautionary measures and a precautionary approach,[148] and subsequent management procedures adopted by the Commission have combined these with considerations of the ecosystem as a whole.[149] With respect to deep seabed mining, the Tribunal also recognized that determining responsibilities and obligations for mining activities in the Area was not a narrow question of determining allocation and use under the principle of "common heritage of mankind."[150] The Tribunal endorsed the precautionary approach and a combined obligation of due diligence by states.[151] The precautionary approach was accepted by some ICJ judges, including, in the cases considered here, the *Whaling* case[152] and

[146] *Id.* at 1093, 1102 ¶ 22 (Crawford, J. Dissenting).

[147] *Id.* at 856, ¶ 59 (voting 8:8, with President's casting vote, finding there was no justiciable dispute between the parties); *see also* Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India), Judgment, 2016 I.C.J Rep. 256, 277 ¶ 56 (Oct. 5). For separate proceedings see also Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. Pak.), 2016 I.C.J. Rep. 552, 573 ¶ 56 (Oct. 5).

[148] Southern Bluefin Tuna Cases (N.Z. v. Japan; Austl. v. Japan), Case Nos. 3 and 4, Order of Aug. 27, 1999, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/published/C34-O-27_aug_99.pdf.

[149] "The Rules of Procedure shall also be amended to task the Scientific Committee to incorporate advice consistent with a precautionary approach:

Rule 8 B is (SCIENTIFIC ADVICE)

1. The Scientific Committee shall incorporate advice consistent with the precautionary approach in its advice to the Commission[.]

COMM'N FOR THE CONSERVATION OF SOUTHERN BLUEFIN TUNA, REPORT OF THE SEVENTEENTH ANNUAL MEETING OF THE COMMISSION 1, 7 (2010). "The meeting further agreed that the ESC in future shall be asked to consider how an ecosystem approach might be incorporated into its advice to the Commission." *Id.*

[150] *Deep Seabed Mining* Advisory Opinion, *supra* note 18, at ¶ 230 (the sponsoring state "must act in good faith, especially when its action is likely to affect prejudicially the interests of mankind as a whole.").

[151] *Id.* at ¶ 242..

[152] Whaling in the Antarctic (Austl. v. Japan: N.Z. intervening), Judgment, 2014 I.C.J. Rep. 226 (Mar. 31); *see id.* at 453 (Charlesworth, J. separate opinion); *id.* at 348 (Cançado Trindade, J. separate opinion).

in the *Nuclear Weapons* advisory opinion.[153] Yet precautionary principles are applied differently in WTO litigation due to different rules set out in the covered agreements; while this was not at issue in *U.S.-Shrimp,* cases relating to sanitary and phytosanitary measures have proved highly restrictive in their application of the concept.[154]

It is also important to point out the emerging norms that might have shaped the five cases, but did not. For example, the recognition of a new geological epoch of the Anthropocene, which emphasizes the irreversible and geologically-detectable human destruction of planetary systems, has led to calls for new legal protections within an "environmental" rule of law.[155] Posthumanist conceptions of environmental law incorporate the needs of nonhumans as well as humans with radical consequences for methodologies and subjects.[156] Rights for nature have been established in domestic legal systems, including in domestic constitutions,[157] and are debated in international forums.

I noted above that the *Whaling* case included implicit submissions to the Court to consider lethal techniques from the perspective of the whale.[158] This did not, however, lead to an "earth-centered point of view" in the Court's decision. To do so would have required a very different set of underlying rights than the Convention at issue. Indeed, in the reimagining of the case as part of the "Wild Law Judgment Project"[159] (a creative rewriting of

[153] *See, e.g.*, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, 502 (July 8) (Weeramantry, J. dissenting). The approach is also endorsed in other cases before the ICJ. *See* Nagymaros Project (Hung./Slovk.), 1997 I.C.J. Rep. 7 (Sept. 25) (although not using this term); Pulp Mills on the River Uruguay (Arg. V. Uru.), 2010 I.C.J. Rep. 14 (Apr. 20).

[154] *See* Joanne Scott & Ellen Vos, *The Juridification of Uncertainty: Observations on the Ambivalence of the Precautionary Principle within the EU and the WTO, in* GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET 253, 273 (Christian Joerges & Renaud Dehousse eds., 2002). On invocation by respondents rather than complainants, see Margaret A. Young, *Fragmentation, in* OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW (Lavanya Rajamani & Jacqueline Peels eds., 2nd ed. forthcoming) (on file with author).

[155] *See e.g.*, Louis J Kotzé, *Global Environmental Constitutionalism in the Anthropocene, in* ENVIRONMENTAL LAW AND GOVERNANCE FOR THE ANTHROPOCENE 189 (Louis J. Kotzé ed., 2017).

[156] Andreas Philippopoulos-Mihalopoulos, *Critical Environmental Law as Method in the Anthropocene, in* RESEARCH METHODS IN ENVIRONMENTAL LAW: A HANDBOOK 131 (Andreas Philippopoulos-Mihalopoulos & Victoria Brooks eds., 2017).

[157] DAVID R. BOYD, THE RIGHTS OF NATURE: A LEGAL REVOLUTION THAT COULD SAVE THE WORLD (2017); Louis J. Kotzé & Paola Villavicencio Calzadilla, *Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador*, TRANSNATIONAL ENVTL. L. 401 (2017); Erin O'Donnell, *At the Intersection of the Sacred and the Legal: Rights for Nature in Uttarakhand, India,* J. OF ENVTL. L. 135 (2018).

[158] *See supra* note 108 and accompanying text.

[159] WAKEFIELD PRESS, EXPLORING WILD LAW: THE PHILOSOPHY OF EARTH JURISPRUDENCE

judgments following an earlier approach within feminist legal studies), the authors set up a reframed Whaling Convention which not only included provisions for the court-appointed representation of whales, but also revoked all lethal whaling, including for scientific purposes.[160]

Instead, in the stated case before the ICJ, the Court dealt with the rights contained in the existing Convention and associated sources. The Court chose not to pronounce upon the parties' intentions *vis-à-vis* the original basis of the Convention, resting its decision instead on whether the design and implementation of Japan's scientific whaling activities were reasonable in relation to achieving its stated objectives.[161] In reviewing Japan's conduct, the Court drew upon Japan's duty to give due regard to resolutions of the International Whaling Commission relating to non-lethal scientific methods, notwithstanding that the resolutions were not binding *per se*.[162] The Court's findings with respect to Japan's duties to cooperate with its peers is highly suggestive of a commons-scenario where trust and reciprocal arrangements will develop over time through institutional structures and practices. Moreover, some of the differences of views of the bench are salutary for the invocation of economic notions of common pool resources. For example, in dissent, Judge Bennouna read in the Convention a spirit of "strengthening co-operation between States parties for the purposes of managing a shared resource"[163]—an instrumentalist attitude reminiscent of common pool resources. In contrast, judges in the majority focused on obligations to cooperate without imposing a purposive construction on their legal and institutional relationships.[164]

The majority in the *Whaling* decision did not rule upon whether whales were part of nature or part of natural resources.[165] Future advocacy could go much further in demonstrating to the Court 'how the whales view whaling', and these would not be isolated to species of iconic marine mammals.

(Peter Burdon ed., 2011); Nicole Rogers and Michelle Maloney, *Law as if Earth Really Mattered: The Wild Law Judgment Project* (2017).

[160] Hope Johnson, Bridget Lewis & Rowena Maguire, *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)*, *in* LAW AS IF EARTH REALLY MATTERED: THE WILD LAW JUDGMENT PROJECT 257–281 (Nicole Rogers & Michelle Maloney eds., 2017).

[161] Whaling in the Antarctic (Austl. v. Japan: N.Z. intervening), Judgment, 2014 I.C.J. Rep. 226, ¶ 227 (Mar. 31) (concluding "that the special permits granted by Japan for the killing, taking and treating of whales in . . . are not 'for purposes of scientific research' pursuant to Article VIII, paragraph 1, of the Convention.").

[162] *Id.* at ¶ 137. *See also* Margaret A. Young & Sebastián Rioseco Sullivan, *Evolution through the Duty to Cooperate: Implications of the Whaling Case at the International Court of Justice*, 16 MELBOURNE J. INT'L L. 1 (2015).

[163] *Whaling in the Antarctic*, 2014 I.C.J. at 347.

[164] *See generally id.*

[165] *See id.*

Emerging science is proving collaborative tendencies and practices in complex fish behavior and social cognition.[166] Indeed, if collaborative behavior can be observed in fisheries, it may be asked whether the southern bluefin tuna are participating in a (disrupted) commons of their own. Whether this knowledge could have been incorporated by ITLOS in *Southern Bluefin Tuna* lends itself to perhaps comical speculation. In a similar vein, if a reimagining of the *U.S.-Shrimp* case was to be penned, the customs and indeed cosmologies associated with sea turtles could find valid legal expression. Broader reflection on the biological tendencies for "mutual aid" among species, as observed over a century ago by Kropotkin, is outside the scope of this Article but opens promising lines of further legal and political inquiry.[167]

The capacity for mutual aid to be supported by law gives rise to further questions in the context of the disputes presented in this Article. One is whether the commons includes moral or ethical commitments to care for and help others.[168] Another relates to conditions for support and distribution, and the place of law to secure these. If the rights of turtles were determinative of the case of *US-Shrimp*, for example, where would this leave the fishers in developing countries that were unable to afford the patented turtle excluder device required for access to the market of the United States? Under conditions of globalization, where privileged and economically disadvantaged communities expect markets to provide the appropriate and quantifiable price for goods (whilst also serving to protect global public goods), there is a need not only for guaranteed judicial oversight, but to develop the background social and legal arrangements for endurability and fairness of the commons.

V. CONCLUSION

International adjudication of inter-state interests in southern bluefin tuna, whales, deep seabed mining, sea turtles, and nuclear weapons provide insights into both the metaphor of the commons and the foundations of public international law. The contentious cases and advisory opinions from three

[166] *See e.g.*, Alexander L. Vail et al., *Fish Choose Appropriately When and With Whom to Collaborate*, 24 CURRENT BIOLOGY 791 (2014).

[167] PETER KROPOTKIN, MUTUAL AID: A FACTOR OF EVOLUTION (1902). The exploration of anarchist tendencies within a theory of international law is provocative and worthy of further inquiry. So too is the contextualization of Kropotkin's theory among contemporaneous events of the period. *See* Ruth Kinna, *Kropotkin's Theory of Mutual Aid in Historical Context*, 40 INT'L REV. SOC. HIST. 2, 259–83 (1995).

[168] *See* BORIS FRANKEL, FICTIONS OF SUSTAINABILITY: THE POLITICS OF GROWTH AND POST-CAPITALIST FUTURES 387 (2018).

different forums—the ICJ, ITLOS, and the WTO Appellate Body—show that scenarios akin to the commons are being placed before a range of different international courts and tribunals. Though categorizations such as common pool resources and global public goods are not invoked by the adjudicators, this Article has shown that the facts of selected cases are open to such a framing. Give that circumstances akin to the commons do confront international adjudicators, it has been important to investigate how their reasoning differs from a scholarly community that has invoked an inexorable logic to the "tragedy of the commons,"[169] or instead traced the management of common pool resources to decentralized institutions.[170]

The Article demonstrates how the common resources and interests that led to the selected litigation could be framed not only according to definitions adopted in the economics literatures, but also according to wider conceptions from anthropology, historical studies, and behavioral science. Indeed, some of the cases were less amenable to the rationalist assumptions of the economics literature and more understandable through the lens of reciprocity and repeated cooperative endeavors that were initially assumed away and that remain to be investigated empirically in the context of international law.[171] Decisions like *Whaling* demonstrate how international courts can elaborate and augment states' duty to cooperate; such a duty is essential for the international system to adapt to global ecological realities. Yet the cases discussed in this Article also complicate expectations for international adjudication, at least in terms of theories about the commons. In *Whaling,* Australia's motivation to bring the case does not fit within a 'free-riding' frame, though self-serving rationalities may account for Japan's subsequent behavior in withdrawing from the International Whaling Commission and amending its optional clause declaration. *Southern Bluefin Tuna* was considered to have a beneficial influence on the parties' resolution of their dispute even without a substantive decision on the merits.[172] In *Nuclear Weapons,* the interests of the planet were successfully placed before the ICJ, although it proved difficult for the Court to provide the ethical imprimatur against nuclear weapons, regardless of its invocation of humanity's shared history and obligations to the future unborn.

Procedurally, the Article showed how the primary need for consent to international adjudication shaped the work of different tribunals, which were variously constituted with compulsory or consensual jurisdiction, but which all required states to be the instigators of the claims. Standing for non-state actors is not available, though the filing of *amicus* briefs was sometimes

169 Hardin, *supra* note 2.
170 OSTROM, *supra* note 3.
171 *See generally* van Aaken, *supra* note 64.
172 *See generally* Stephens, *supra* note 136.

permitted. In general terms, where at the domestic level there is talk of the "commons," at the inter-state relations level there is talk of the "international community." Although such a community is not an observable entity, it resides in legal doctrine including *erga omnes,*[173] and the Article points to ways community interests are advanced.

The Article also points to emerging norms that are yet to find expression, such as ecological, cultural, and philosophical narratives that move away from "resources" or "goods" and towards a complex set of legal protections and understandings. Whether such revised conceptions are necessary to ensure the endurability of the commons is likely, and this Article rejects the idea that commons-scenarios in international law should be universally categorized as common pool resources. Instead, framing of the cases in commons-terms exposed interesting questions: does the emphasis on "use" and "shared use" of the commons de-emphasize other frames, such as earth-centered governance or the rights of non-human species? When nation-states advance their own interests, is the possibility of communal bonds negated? Or is the notion of "common concern" a utopian global ideal hiding valid minority needs such as the food security of a country with small land-based protein sources (Japan in *Southern Bluefin Tuna* or *Whaling*) or the development aspirations of shrimp harvesters seeking to exchange their goods for value (Malaysia et al. in *U.S.-Shrimp*)? Rather than depicting a progression from individualist appropriation to negotiated shared use and then onwards towards accepted wholesale nature protection, the cases discussed here have exposed the contingencies of these attitudes.

The cases considered in this Article demonstrate a set of arrangements that are instigated and shaped by nation-states but that nonetheless can promote or hinder shared understandings of a broader community. That courts play an educative role, and do not simply serve the objective of compliance, means that they might help to develop an ethic of belonging that moves beyond national-interest and parochialism. The implications for the notions of sovereignty are profound. This prospect must be checked, of course, by the highly contested nature of the cases, the rationalist suspicion that "global" interests are a boon for free-riders and the low expectations that global problems can be adequately dealt with, at least in time to avert environmental catastrophe. Ideals of an "international community as a whole" require a mature, reliable, just, equitable, and ongoing set of social practices, which cultivate shared objectives and a sense of fairness in common history. While it remains an open question whether such a society can develop globally, international tribunals play an undeniable role.

173 *ILC Articles on State Responsibility, supra* note 61, at 126.