

Addressing Fragmentation and Inconsistency in International Environmental Law

Analysis of the Role of Specialised or Treaty Judicial Bodies

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Abstract

This paper analyses the contribution of treaty or specialised judicial bodies to striking problems such as fragmentation and inconsistency within International Environmental Law (IEL) as they fill the gaps in IEL, taking advantage of the absence of an overarching International Environmental Court (IEC) and the indolence of the International Court of Justice (ICJ). It argues that by helping improve the ICJ, they will help resolve IEL's jurisprudential inconsistency and fragmentation. The paper therefore first explains the sense in which jurisprudential fragmentation and inconsistency underline IEL's compliance mechanisms, and shows the limits of the state-centripetal approach of the ICJ as a solution to such a problem. Finally, it proposes a state-centrifugal paradigm that stresses how international specialised judicial bodies may help strengthen the ICJ's fragmentation and inconsistency management functions. To propose this novel approach, this paper employs legal critical methods to expose current gaps in the state-centripetal approach.

Keywords: Specialised or Treaty Judicial Bodies, fragmentation, inconsistency, International Court of Justice, Environmental law, state-centripetal approach, state-centrifugal approach

1. Introduction

Constructing the integrity of International Environmental Law (IEL) is a significant challenge to be tackled by academics and policymakers. In relation to the review of the issue of the proliferation of treaties and related bodies, it poses some legal challenges that can worsen the differences within IEL. The multiplicity of treaty or specialised judicial bodies' involvement in IEL typically leads to fragmentation and inconsistency. Therefore, the multiplicity of treaty or specialised judicial bodies that intervene in IEL is closely related to its fragmentation and inconsistency. Their implication includes, among others, the fragmentation of jurisprudence and legislation that undermines the coherence of IEL. Specialisation is one of the techniques used to retain the integrity of subfields in international law, while encouraging their diversity. Some existing scholarship recommends many approaches from structural and normative viewpoints to maintain balance. Some researchers argue that the specialisation of the international treaty or specialised judicial bodies does not inherently threaten IEL's cohesion since they work without competition in a parallel manner (Forteau, 2016: p. 192). Therefore, to further encourage its specialisation, resolving the rivalry between the specialised or treaty judicial bodies intervening in IEL could be a solution to its unity.

A central judicial body likely to harmonise its activities is needed to tackle competition between the treaty or specialised judicial bodies. The International Court of Justice (ICJ) can address this short fall which is caused by the absence of the International Environmental Court (IEC). Therefore, as a solution to the fragmentation and uncertainty of international law, some scholars suggest an ICJ-centred approach.

Recent research emphasises that the ICJ is expanding its authority over environmental issues and developing certain principles, including environmental impact assessment. As a result, the treaty or specialised judicial bodies, arising from the specialisation of international law, contend with its leadership in the field. However, some scholars note that while theoretically, specialised judicial bodies and the ICJ can coexist harmoniously without severe competition; technically, conflicting cases remain among them because the treaties they draw from frequently

overlap their jurisdictions (Forteau, 2016: p.192). A report by the United Nations (UN) concluded, illustratively, that the widening of IEL's scope results in tensions and inconsistencies between its rules and compliance mechanisms (UNGA, 2018). The overview of the multiplication of the treaty or specialised judicial bodies and the latest report on the Multilateral Environmental Agreements (MEAs), respectively show that fragmentation and inconsistency are judicial problems that impede IEL implementation. In the meantime, in resolving fragmentation and inconsistency, scholars are divided over the function of specialised or treaty judicial bodies. Some suspect them of being the issue's determinants. As a result, some scholars argue that they challenge the unity of disciplines in international law, namely IEL. Meanwhile, others consider that, in this mission, they should complement the ICJ. For instance, it is suggested that the best way to ensure the uniform development of jurisprudence may be to improve the position of the ICJ because the ICJ is relevant to general international law and its sub-fields, such as IEL (Koskenniemi & Leino, 2002: pp. 574-5; Trinidad, 2010: p. 135). Charney emphasises the idea of associating the ICJ with other actors in the international law scheme, a remedy that can be applied to IEL because it is fundamentally part of general international law. Alternative mechanisms complement the ICJ's work and reinforce the international law system as long as all of them are bound by the joint purpose to discover the perfect guideline to represent humanity as a whole (Charney, 1999). IEL is exposed to potentially troubling dynamics that lead to institutional fragmentation and conflicting jurisprudence in the absence of an overarching environmental agreement. The study of jurisprudential problems is also at stake, as enhancing the nature of the human environment relies on the efficacy of various environmental treaties (Bodansky, 2010). Two decades ago, Sands alerted that the issue to be addressed among IEL scholars and practitioners would be judicial inconsistency (Sands, 1998). He said that case law will require coherence between different forums in which international environmental concerns are litigated to be upheld (Sands, 1999: p. 1641). This observation is not far-fetched, as domestic and international politics seem to have struggled to find permanent solutions to global environmental problems. The Living Planet Index continues to decline, for instance, particularly in tropical regions, despite the enormous increase in the number of MEAs (WWF, 2016: p.12; Bodansky, 2019: p.265). Therefore, it is claimed that these judicial bodies and MEAs produce more issues than they address. For instance, Judge Schwebel argues that the power of specialised international judicial bodies generate evisceration of the ICJ docket (Koskenniemi & Leino, 2002: pp. 553-4).

Against this background, this paper analyses the contribution of treaty or specialised judicial bodies to striking problems such as fragmentation and inconsistency within IEL as they fill the gaps in IEL, taking advantage of the absence of an overarching IEC and the indolence of the ICJ. The article argues that by helping to improve the ICJ, they may lead to resolving jurisprudential fragmentation and inconsistency throughout IEL.

The paper therefore first explains the sense in which jurisprudential fragmentation and inconsistency underline IEL's compliance mechanisms, and shows the limits of the state-centripetal approach of the ICJ as a solution to such a problem. Finally, it proposes a state-centrifugal paradigm that stresses how international specialised judicial bodies will help strengthen the ICJ's fragmentation and inconsistency management functions. To propose this novel approach, this paper employs legal critical methods to expose current gaps in the state-centripetal approach. After the introduction, the context of the emergence of jurisprudential fragmentation and inconsistency is defined in Part 2. To tackle jurisprudential fragmentation and inconsistency in IEL, Part 3 describes how specialised or treaty judicial bodies can work on improving the ICJ.

2. Setting the Scene within the Judicial System: Fragmentation and Inconsistency of IEL

This section describes fragmentation and inconsistency and some induced problems.

2.1 The Concepts of Fragmentation and Inconsistency

Depending on the perspective from which it is presented, the notion of fragmentation has many definitions. One may consider valuable or detrimental fragmentation according to the essence of its effects. It can be described with regard to its subject matter. Thus, it is substantive fragmentation or primary rules-related fragmentation as it applies to primary rules or substantive norms (Kotze, 2014: pp. 554-6). Similarly, procedural or secondary rules-related fragmentation relies on secondary or procedural rules. Normative fragmentation constitutes these two groups. It focuses on organisations, organs, and actors in systemic fragmentation, which embodies institutional fragmentation. In addition to these categorisations, they are also approached from the viewpoint of the categories of norms and the character of the bodies from which they emanate. Therefore, there are legislative fragmentations, defined as those resulting from the content of treaties and associated procedures. They originate from law-makers' negotiation practices. This group of norms is named 'rule of negotiators' (Bodansky, 2017). Conversely, the jurisprudential fragmentation results from the actions of judicial bodies, which is the product of the great number of courts and tribunals internationally (Popa, 2017, p. 15); it belongs to the structural or institutional fragmentation group. This

group of norms is known as the 'rule of judges' or the 'rule of law' (Bodansky, 2017). This research focuses on jurisprudential fragmentation. In the jurisprudence of IEL, Kotze notes a lack of homogeneity, centralisation, uniformity, unity, continuity, holism, coherence and/or integration (Kotze, 2014: p. 554). As such, the idea of inconsistency, as a side effect, embodies his conception of fragmentation. Inconsistency is divided into two major groups, taking into account the degree of regimes involved: horizontal and vertical inconsistency. Contradictions between two or more self-contained regimes of the same degree include horizontal inconsistency. For instance, the Appellate Body of the World Trade Organisation (WTO) and the International Tribunal for the Law of Sea (ITLOS) opposed each other over the interpretation of the statute of the precautionary principle in IEL (Appellate Body, 1998; Boyle, 2007: p. 374; Dunoff & Pollack, 2015). When self-contained judicial bodies of different levels, international and regional as an example, have conflicting positions on the interpretation of the same concept or principle, the inconsistency becomes vertical. By extension, as shown by the Court of Justice of the European Community (CJEC), which specifically claims that the European Community law is independent of international law, a regional court can disregard the rules of international law (Dupuy, 1999: pp. 796-7).

Jurisprudential inconsistency is divided into two categories in relation to their scope: intrinsic and extrinsic inconsistency. The former includes internal inconsistency within a single judicial body's jurisprudence or by extension, within a single self-contained regime. This form of inconsistency remains manageable because it can easily be resolved by the judicial body itself or by others in the regime. Extrinsic inconsistency, however, is more difficult to manage because it involves multiple self-contained regimes that are often incompatible. Therefore, it becomes quite difficult for judicial bodies whose jurisprudence is opposed, to address the discrepancy. These concerns are not often discussed in the conventions creating international judicial bodies to intervene in international environmental matters. There will be no clear development in this respect as treaty or specialised judicial bodies are designated as issue-specific bodies that intervene within the realm of IEL. These judicial bodies, including human rights and trade laws judicial bodies, gradually address environmental concerns (Stephens, 2007). They fill gaps created by the absence of an overarching IEC and the indolence of the ICJ, the court of general jurisdiction in the matter. Consequently, such tribunals or courts had or may still have authority over environmental issues.

2.2 The causes of Fragmentation and Inconsistency in Jurisprudence in IEL

This section demonstrates that the lack of IEC, the indolence of the ICJ and actions of specialised or treaty judicial bodies generate or exacerbate jurisprudential fragmentation and inconsistency in IEL.

2.2.1 Fragmentation and Inconsistency in IEL's Jurisprudence and the Absence of IEC

This section points out how IEC's weaknesses hinders IEL's 'rule of judge' cohesion. IEL's judicial system is void, as there is no real IEC to occupy the sector with all related implications. But the idea of establishing IEC does not seem to fascinate states. For example, in most MEAs and environmental instruments, consultation prevails over environmental dispute resolution processes (Bodansky, 1993: p. 549). Overall, IEL compliance mechanisms are often non-adversarial, as they help failing countries to adjust their obligations rather than penalise them (Bodansky, 1993: pp. 547-8). In general, IEL compliance structures are merely semi-adjudicative bodies (Bodansky, 1993). In view of this, states should not be setting up an IEC very soon. Consequently, IEL fails to apply its instruments and domestic mechanisms help implement environmental provisions internationally. For example, the U.S. threatened to strike Japan and Norway to prevent them from exercising their power to withhold the International Whaling Commission's decision (Bodansky, 2011).

2.2.2 The indolence of the ICJ and Fragmentation and Inconsistency in Jurisprudence in IEL

The above developments do not augur well with general international law and specialised regimes under IEL, human rights and trade laws. Stephens recommends that environmental cases be resolved in courts such as the ICJ, whose jurisdiction encompasses general matters in the new international legal order (Stephens, 2007: p. 228). Except that this court has, as illustrated below, indolently tackled environmental cases. ICJ's lassitude has many interpretations to it. In fact, states do not refer to the Court for environmental issues; illustratively, decision-makers suspended the Chamber of Environmental Affairs in 2006, ten years after it was formed pursuant to Article 26 (1) of the Statute, as States had never seized it. (ICJ, 2006). Nevertheless, the ICJ ruled incidentally on environmental protection (ICJ, 1949: p. 4; ICJ, 1997: p. 7 & ICJ, 1996: p. 226).

The court had to interpret or enforce the treaty in several of these cases. Although an environmental principle had to be investigated, it hardly goes beyond the terms of the treaty. This has led some academics to criticise ICJ methods. For example, in his separate opinion, Judge Trindade strongly criticised the court for being too cautious regarding the precautionary principle (ICJ, 2010: p. 161). Furthermore, contrary to Judge Weeramantry's separate opinion, which recognises the importance of assessing the risks of environmental development, A-Khavari and

Rothwell highlight the failure of the ICJ to value the environmental impact assessment and the precautionary principle as such in the case of the Danube Dam; rather it relied on the 1977 treaty between the parties, as it did in the case of Argentina against Uruguay (A-Khavari & Rothwell, 1998: pp. 530-2). Consequently, in this case, the ICJ expressly rejected the reversal of the presumption of proof and concluded that operations can continue even without the understanding of the precise implications of such conduct. Similarly, in its Whaling decision the court avoided describing science while implicitly assessing Japan's arguments against largely unexplained scientific standards (Gogarty & Lawrence, 2014: p. 135). The ICJ was described as being too cautious in the same logic as it ignored fundamental issues underlying the conflict.

2.2.3 The Specialised or Treaty Judicial Bodies and Fragmentation and Inconsistency in Jurisprudence in IEL

The treaty or specialised judicial bodies' attempt to resolve environmental concerns in line with their mandates has critical adverse effects on IEL. Stephens strongly claims that fragmentation arises from the fact that environmental disputes are gradually settled, not in courts with environmental specialisation or in courts with general jurisdiction, but in judicial bodies specific to other issues (Stephens, 2007: p. 228). Specialised or treaty judicial bodies may segment the overall normative framework into increasingly distinct and isolated legal orders. As a result, the uniform applicability of general IEL requirements may be undermined. These deviations can arise from a court or tribunal leadership dispute, each determined to impose its own particular perspective (Koskenniemi M., 2003; Koskenniemi & Leino, 2002: p. 561; Stephens, 2007: p. 232-3). In other words, specialised or treaty judicial bodies will play against IEL to impose environmental considerations on specialised matters. Most specialised or treaty judicial bodies do not care about environmental protection; besides, a court's interest in environmental protection can decrease over time. Consequently, there is no assurance that specialised or treaty judicial bodies properly guarantee environmental protection (Bodansky, 2019: p. 266). Their approach to environmental issues may also question the original purpose and goals of IEL rules and principles (Stephens, 2007: p. 234). Consequently, conflicts and disputes between courts and tribunals usually lead to collision over IEL concepts. For example, there is conflicting jurisprudence between the ITLOS and the ICJ on the status of environmental impact assessment as either a requirement under general international law or a general obligation under customary international law (ITLOS, 2011: p. 145; Vasaitytė, 2011). The doctrine warns of the detrimental impact of the IEL's multiplicity of specialised or treaty judicial bodies within the international law landscape and by extension, the judiciary. For example, Judge Guillaume argues that forum-shopping in these international tribunals can create needless uncertainty that distorts the functioning of justice and increases the likelihood of conflicting judgments or jurisprudence associated with the loss of overall control (Koskenniemi & Leino, 2002). He added that specialised or treaty jurisdictions not only deviate from, but also assert their prevalence over, general international law. Stephens points out that IEL is mainly exposed to such issues, as there is no counterweight to powerful structures that force normative change in non-environmental sectors (Stephens, 2007: p. 233). In IEL, typical 'rule of judges' strands suffer from weaknesses such as jurisprudential collision. Specialised or treaty judicial bodies that intervene in this field are responsible for a number of these issues such that some scholars and practitioners have described them as a barrier to coherence with IEL.

Other factors exacerbate this representation of negative aspects of specialised or treaty courts. As an aspect of aggravating the problems posed by the proliferation of these judicial bodies, the extension of IEL operating in an extremely fragmented manner is established (Popa, 2017) (Vasaitytė, 2011). For example, lack of coordination, as there is no structured *Grundnorm*, is likely to lead to issues such as inconsistency, discrepancy or incoherence in IEL. MEAs disregard the world's interconnectedness and interdependence and its issues (Asselt, 2012: p. 1213; Kim & Bosselmann, 2013: p. 286-7, 299). In addition, Dupuy argues that the absence of an overarching framework can involve insecurity in the judiciary (Dupuy, 1999: p. 797-8). These two hypotheses demonstrate positive and negative fragmentations as the first results from the multiplication of environmental agreements, and thus the second from the absence of a fundamental norm. However, the UN Secretary's report suggests that fragmentation leads to coherence deficits. This is also of great concern, as it further indicates that IEL's effective implementation depends, inter alia, on the comprehensive unification of international instruments (UN, 2018: p. 2). Meanwhile, the separate bodies resulting from IEL's enlargement ignore the earth's ecosystem's unity, interconnectedness and interdependence (Kim & Bosselmann, 2013: pp. 286-7, 299). Although diversification can help achieve the protection of the environment, standing against this legal order's traditional self-appreciation (Dupuy, 1999: p. 796), it can also intensify it as it also installs the illusion of completely autonomous sub-systems equipped with their judicial or control system. As seen in this example of the radical autonomy of the Court of Justice's (CJEC) jurisprudence, these sub-systems often behave as if they were independent of the general legal order and its basic principles (Dupuy, 1999: p. 796-7).

2.3 Jurisprudential Interference within IEL

This section describes cases of conflicting analyses between environmental jurisprudence. It focuses specifically on the treatment of the precautionary principle or approach and the concept of environmental impact assessment (Serna, 2015: p. 25). The review presents the case law of the ICJ and the ITLOS. Finally, this section illustrates some of the inconsistencies of ITLOS.

2.3.1 The Precautionary Perspective of Case Law Applicable to the ICJ and ITLO

The Precautionary principle requires countries to exercise with circumspection and watchfulness to avoid endangering the environment (ITLOS, 1999: p. 280). This provision exists irrespective of the purpose of the projects undertaken, as demonstrated by the ITLOS decision, which claims that even research projects performed with a view to preserving the environment must comply with the precautionary requirements (ITLOS, 1999: p. 280). This is due to the fact that the disproportionate use of precautionary measures could result in new risks to the environment (Thome da Silva & Mata Diz, 2018, p. 55). However, the treatment of this concept in IEL cases varies from court to court. The discourse of the ICJ, for example, is different from the terms used by the ITLOS. This section therefore sets out the nuances between the ICJ and the ITLOS discourses on the precautionary principle or approach.

Judge Laing points out that treaties and formal instruments use different terms to refer to the precautionary obligation (as a principle, an approach, a concept, an action and measures) (ITLOS, 1999: p. 311). In comparison to UNCLOS, which refers to the 'precautionary measures' (UNCLOS, Article 23 & 115), ITLOS uses the term 'principle' in the Southern Bluefin Tuna (SBT) case (ITLOS, 1999: p. 280) and the word 'approach' years later (ITLOS, 2011, p. 10). Judge Laing argues that ITLOS favours the use of a 'precautionary approach' which it finds more flexible to avoid precipitate assumptions on normative frameworks (LAING, 1999: p. 313). In reality, the logic of progressive evaluation can be seen behind the concept of 'approach'. That is, contrary to the 'principle', the logic of approach is step-by-step. At each point, throughout implementation of the entire project (UN, 1992: p. Principle 15), the obligation of precaution – which stems from the obligation of due diligence – shall be applied (ITLOS, 2011, p. 10; Glazweski & Plit 2015: p. 200). The circumstances can therefore change as a result of the implementation of the project, requiring the modification of the precautionary measures. The ICJ upheld this logic by affirming that operators shall continually evaluate the risks (Hey, 2020: p. 244). The practice of the ITLOS shows that the UNCLOS laid down both precautionary approach and principle, with the former including provisional measures.¹

Judge Cançado Trindade concludes that the ICJ disregarded the precautionary principle in the *Pulp mills* case, although both parties had made claims (Glazweski & Plit 2015: pp. 200-1). Abhijeet Singh and Shachi Singh argue that the ICJ is silent on the precautionary principle (Singh & Singh, 2018: p. 8). Part of the scholarship believes that the Court has abstained from accepting this principle (Huang, 2020: p. 86). In addition, the Court held that a State can be exempted from the obligation to take precautionary measures if it shows that it is confronted with an 'ecological necessity' (Singh & Singh, 2018: p. 8). The ICJ's reasoning goes against the ITLOS, which ruled that even scientific measures to preserve the environment are subject to precautionary measures. The official pronouncement of this court also contrasts with the argument of some of its judges (Vinueza, 2006; Trouwborst, 2009: pp. 108-9).

However, while the attitude of the ICJ may lead some scholars to declare precautionary principle value only at doctrinal level, one should not neglect its evolution in the Stockholm and Rio Declarations, the United Nations Convention on Climate Change and the Convention on Biological Diversity (Singh & Singh, 2018: p. 8; UN, 1992). In the hormones case, the Appellate Body criticised the ICJ for failing to accept that the precautionary principle prevails over the Gabcikovo-Nagymaros case, what Ellen Hey vehemently rejected (Hey, 2020: p. 245). Surprisingly, the Appellate Body followed the steps of the ICJ by acknowledging that the 'precautionary principle' cannot circumvent the terms of the Treaty (Stein, 2000: pp. 9-10). The ICJ even ignored this principle in the same case whereas it erected impact assessment as a concern of international customary law.

2.3.2 Environmental Impact Assessment in Environmental Jurisprudence Related to ICJ and ITLOS

The ITLOS and the ICJ have nuanced their discourses on the obligation to evaluate environmental risks. The

¹ Judge Laing believes that the concept 'precautionary approach' applied by the ITLOS emerges from the interpretation of Articles 119 and 290 of the UNCLOS and Paragraph 17.21 of Agenda 21. See Separate opinion of Judge LAING to Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), ITLOS Reports 311, (1999); Judge Treves separate opinion to Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), ITLOS Reports, 318, (1999); Separate opinion of the Judge ad hoc Shearer to Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), ITLOS Reports, 327, (1999).

tribunal believes that it is an unequivocal conventional and customary obligation while the court states it is a necessity within general international law (ITLOS, 2011, p. 10). In these remarks, two words are striking: 'obligation' and 'requirement'. The term 'obligation' enunciated by the ITLOS seems to be limited than the 'requirement.'

The 'obligation' concept includes the idea of duty or accountability and contract, or agreement. Therefore, this duty may be viewed as a commitment of each concerned actor. In general, the contract generates obligations between the parties, and the agreement can be terminated by the will of the parties. Consequently, treating such a duty as an 'obligation' limits its compliance with the will of the parties fundamentally. For example, if a sponsoring country or organisation and the contractor agree, a project can be initiated without assessing the environmental effects. It is enough to remember, in developing countries in particular, what certain policymakers and investors think of environmental standards. Therefore, projects' stakeholders can bypass the environmental impact assessment stage as long as there are no immediate adverse effects. When the obligated actor does not intend to conduct an environmental impact assessment, it can deal with another partner who does not care about environmental standards. Only the wrongdoer may be prosecuted by a third party, such as a non-governmental entity or the neighbouring state (Dugard, 2015: pp. 3-4).

Conversely, the notion of 'requirement' embraced by the ICJ applies to a 'requisition' an 'injunction' or a 'command/order'. In other words, environmental impact assessment may also be viewed as a qualification that projects must meet to be executed in compliance with environmental standards. Framed in this way, environmental impact assessment is an open access obligation: not only are the parties to the project-related contract concerned with this. Whereas the concept 'obligation' is similar to the contract, the term 'requirement' embodies the essence of legislation. From the requirement perspective, carrying out an environmental impact assessment should prevail over any contractual term between the parties to a project or between the States. That is, the obligation to carry out an environmental impact assessment shall not be compromised by any agreement, unless the object is to carry out such an assessment (ITLOS, 2011: p. 43). Even if funding and funded states, the contractor and any interested state sign an agreement, it should not weaken the requirement to carry out an environmental impact assessment. Self-sponsored projects also reveal that the logic of 'obligation' approach is limited. That is, a supported state, which relies on the evaluation of the funded project to comply with its obligation of due diligence, cannot control the process. In the 'requirement' approach, such issues will not prosper.

Such a distinction is important as the ICJ showed in the joint cases of *Certain Activities* and *Road Building* (ICJ, 2015: pp. 719-721). In this case, the court avoided responding to the question as to whether the state of emergency overrides the obligation of assessment, in contrast to the reasoning underpinned by the 'requirement' approach (ICJ, 2015: pp. 719-721). It nevertheless claimed in its argument that Costa Rica, the complainant, was not able to prove an emergency that could exempt it from its duty to carry out an evaluation assessment, insinuating that states can expect such an exemption if they meet the requirements. The attitude of the ICJ in this case and the fact that the ITLOS indistinguishably use these terms shows that both judicial bodies do not care about the interpretation which they can derive from.

2.3.3 Self-contradictory Jurisprudence of the ITLOS

The ITLOS shows its contradictions in the SBT and the Mox Plant cases. In fact, it established contradictory claims by deciding on the risks of projects to environmental or natural assets. It ruled that scientific doubt constitutes a breach of the obligation of diligence. In an extremely subtitled manner, this judicial body orders the defender to show that its actions do not affect the ecosystem or help to consolidate its protection. In the meantime, the tribunal concluded differently in the MOX Plant case in which it ruled that the plaintiff must give proof that the project threatens its rights or the environment (Zanella & Cabral, 2017: p. 246). In this case, the plaintiff had to prove that the defender's actions could jeopardise the environment. In other words, the ITLOS prevented the defender from being charged with the obligation to prove that its operations would not result in environmental damage (VanderZwaag, 2002: pp. 176-177). The ICJ drew a similar conclusion that Argentina did not persuade it of the inability of Uruguay to comply with the precautionary principle (Thome da Silva & Mata Diz, 2018: p. 52). Judge Treves and Judge Ad Hoc Székely rejected this opinion (VanderZwaag, 2002: p.177). Nevertheless, in both cases, the tribunal advised parties to cooperate because it recognises cooperation as an integral concept in avoiding environmental degradation.

As principles are considered to be flexible commands that can point in many directions while interpreting the law, this misunderstanding merits to be explained (Pedersen, 2014: p. 334). The ICJ upheld this reasoning as it ruled that the substance of the precautionary principle should be decided in terms of their respective capabilities by each state's domestic legislation (Pedersen, 2014: p. 338).

3. Solution – From the State-centripetal Approach to the State-centrifugal Paradigm

The aim of this section is to establish that, by helping strengthen the ICJ, specialised or treaty judicial bodies contribute to building the integrity of IEL. To this end, it first asserts that the state-centripetal approach promoted by the ICJ is deficient; then, the virtues of specialised or treaty judicial bodies are established. In fact, the state-centripetal approach tends to place the states in the core of international concerns, which the ICJ is likely to uphold. In contrast, the state-centrifugal approach aims to depart from the state-centrism by allowing the protection of non-states' interests internationally as promoted in IEL, human rights law and criminal law, as well as their judicial bodies.

A justice system, which is unable to deal with the problems arising from the actions of its components, is not working properly. To preserve this field of international law from disintegration, international specialised judicial bodies intervening in the IEL would also address jurisprudential contradictions. This raises the question of the ability of specialised or treaty judicial body to deal with the inconsistency in their jurisprudence.

3.1 *The State-centripetal Approach of the ICJ and Jurisprudential Fragmentation and Inconsistency – An Unrealistic Response*

This section demonstrates that the ICJ method cannot overcome fragmentation and inconsistency within IEL. To this end, the analysis stressed that the characteristics of IEL are not compatible with those of the ICJ. It also demonstrates that solutions advanced to address fragmentation in general public international law are not sufficient in the case of jurisprudential fragmentation in IEL.

Firstly, the features of environmental concerns make it impossible for the ICJ to deal effectively with such problems. Certain important characteristics of the world court scarcely cope with the configuration of modern fields of international law, including IEL. States are the primary subjects of international law. In traditional international law, lawmakers, practitioners and academics usually focus on the interests of states: a state-centripetal approach; that is, any effort seeks to promote national interests such as diplomatic immunity, sovereign equality of states and territorial integrity, while new areas of international law challenge them (D van der Vyver, 2009: p. 88). That is a state-centrifugal approach as these disciplines tend to differ from state-centrism. The ICJ was formulated in the state-centripetal logic and has not yet been fundamentally reformed. Thus, IEL's state-centrifugal approach is less consistent with ICJ's state-centripetal approach. For example, the court generally confirms the rule of customary international law on the inviolability and immunity from criminal proceedings of incumbent foreign officials (ICJ, 2000). In this case, the ICJ confirmed that the privileges given to State officials during the course of their duties is intended to ensure the successful execution of their functions on behalf of their respective States (ICJ, 2000). The goals of new fields of international law are often different. For example, international criminal law seeks to protect persons from grave breaches of international humanitarian law. For its part, ecocentric and anthropocentric approaches characterise IEL (Plicanic, 2000: p. 155; Ottuh, 2020: p. 9). In addition, IEL's human rights-based approach emphasises the defence of the rights of individuals and groups to a healthy environment. Individuals, associations, and new actors, including non-governmental organisations (NGOs), business and scientific communities, have therefore invested in the field of environmental law (Richardson, 2006, p. 168). Illustratively, all initiatives relating to the establishment of an IEC emphasise the possibility for individuals, NGOs and other non-state actors to seize this court (Desai & Sidhu, 2012, p. 113). In the meantime, none of these new actors cannot seize the ICJ and states are hesitant to take environmental concerns to the ICJ because their political interests may be at risk (Rest, 2004: p. 12). This indicates that the ICJ is not familiar with environmental litigation. In the meantime the Environmental Chamber has been suspended since no State has seized it. How can the ICJ adequately resolve the fragmentation and inconsistency of IEL when it cannot participate in environmental litigation?

Solutions advanced to resolve fragmentation and inconsistency in general public international law seem unable to solve this issue, as the ICJ frames them in an ICJ-centred approach that is state-centripetal while the IEL is state-centrifugal. A scholarship survey reveals no indication that could constrain this irrelevant approach to IEL. Rather, scholars focus on how to empower the court. However, this approach is difficult to achieve. For example, the reformation of the court is a political matter which encompasses the interests of states. For this reason, given that IEL is a state-centrifugal domain, States will not allow new actors to challenge them before the ICJ, to preserve their prestige in a changing world order (Rest, 2004: p. 28). Thus, either the advisory opinions, the contribution of its *orbiter dicta*, or the *provisional measures*, will not be successful as long as the ICJ remains state-centripetal. While, as Cymie R. Payne points out, advisory opinions shape the nature of the rule, their power lies in the capacities of a number of actors to apply for it (Dupuy, 1999: p. 799). To date, only States and intergovernmental organisations can apply to the ICJ for an advisory opinion when the matter concerns their field of competence. For

its part, the efficacy of *obiter dicta* depends on the willingness of the court to deal with some kind of environmental litigation as previously established in this paper. For the time being, environmental lawsuits by people, associations or NGOs cannot succeed before the ICJ. Finally, while the world court can enrich IEL's content with the provisional measures prescribed *proprio motu* (on its own initiative) (ICJ, 1978) or *ultra petita* (beyond the request of the parties), its state-centripetal approach once again hinders this process. The indolence of the ICJ, particularly when it comes to environmental issues, explains the inefficiency of these mechanisms. In the Pulp Mills case for example, it had the ability to act *ultra petita* on the precautionary principle from the point of view of international customary law, but rather opted for a strict interpretation of the treaty.

3.2 The State-centrifugal Approach of Specialised or Treaty Judicial Bodies and Resolution of Jurisprudential Fragmentation and Inconsistency – The Path Forward

As the ICJ is indolent when it comes to dealing with environmental issues, the increase in the participation of specialised or treaty judicial bodies in this field will push the ICJ to more effort since its pride as a world court is at stake, which can result in tensions with other competing judicial bodies. Nevertheless, the ICJ should harmonise the jurisprudence on environmental cases. For this reason, it can use the methods mentioned above, including the prescription of provisional measures *proprio motu* or *ultra petita* and the establishment of principles in the *ratio decidendi*. This is possible if the ICJ copes with the state-centrifugal approach. Specialised or treaty judicial bodies can thus help build this state-centrifugal approach; contrary to the ideas put forward by some scholars, the presence of the specialised judicial bodies in IEL embodies some virtues.

Given that some environmental agreements allow individuals to initiate proceedings before international judicial bodies, this practice of specialised or treaty judicial bodies can help to dilute the hyper-centripetal approach of the ICJ by inspiring the international community. In fact, if by dealing with its centripetal component, these courts achieve results in IEL, despite state-driven obstacles, the ICJ may also establish a doctrine that enables non-state actors to seize it. This is possible through the *ratio decidendi*, the prescription of provisional measures *proprio motu* or *ultra petita*. As a consequence, the court can extend its operation in the field. This is important to harmonise the case law of environmental litigation. To serve this function, the ICJ would play a central role in the environmental regime within the international judicial system. This can only be achieved if all relevant environmental cases can be submitted to it. As a consequence, the ICJ will override the commands of policymakers with hyper state-centripetal character. To do so, its judges shall depart from the classical view of the court. Additionally, the achievements of a centrifugal approach of specialised or treaty judicial bodies can also inspire policymakers as a perfect paradigm to broaden.

If the ICJ opts for a state-centrifugal approach because it enables all possible actors to capture it, a strong backup may be required. This backup will barely come from policymakers who serve the interests of the states. It is likely that only specialised courts and tribunals which intervene in IEL could provide this support to the ICJ because they are judicial bodies and their strength relies on the capacity of the ICJ to stand firmly against other power throughout the international order. As a result, a bottom-up approach will help the ICJ gain credibility from the specialised or treaty judicial bodies, and by extension, of many other international actors. This may make it stronger enough to ensure the coherence of international law as a whole. In addition, its judgments can therefore be readily adopted and promoted by other judicial bodies. The acknowledgment of their functions is crucial for the coherence of the jurisprudence of IEL. Indeed, if the ICJ shows respect for, and willing to collaborate with specialised courts, they can even develop a doctrine that encourages all specialised courts to concede part of their functions, likely to threaten the stability of the judicial system, to the ICJ for it to tackle, prevent or resolve possible conflict in the jurisprudence. If these specialised tribunals and courts weaken the ICJ with unnecessary conflicts, they will destabilise themselves.

4. Conclusion

This paper sought to demonstrate that specialised or treaty judicial bodies can help strengthen the ICJ in addressing the jurisprudential fragmentation and inconsistency in IEL. By applying a critical approach to law, this research concluded that the state-centrifugal approach upheld by specialised or treaty judicial bodies can contribute to addressing fragmentation and inconsistency within IEL. The paper first found that the ICJ-centred strategy cannot overcome IEL's fragmentation and inconsistency as its state-centripetal approach, which mainly promotes states' interests, does not cope with IEL. In addition, provisional measures, *obiter dicta*, the prescription of provisional measures *proprio motu* or *ultra petita* and the establishment of principles in the *ratio decidendi* are not sufficient to overturn IEL's fragmentation and inconsistency, as long as the ICJ remains attached to the state-centripetal approach. The paper then suggested that specialised or treaty judicial bodies can help the ICJ build a state-centrifugal approach by inspiring the world court to and the international community to allow non-state actors to

initiate proceedings. They also help the ICJ build its legitimacy and constitute its backup.

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