LETTING EXTERNAL NORMS IN: HOW DO COURTS BEHAVE WHEN REVIEWING ENVIRONMENTAL NORMS?

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How do courts treat norms that are external to their foundational document? In this paper, we seek to understand the way international courts develop external norms – subject matters that are not explicitly mentioned in, or otherwise not the main objectives of, their constitutive treaties. Applying a tripartite typology, we assess whether they tend to proactively develop the norm and encourage judicial cross-fertilization (i.e. acting as *entrepreneurs*), or apply established reasoning introduced in previous rulings (i.e. acting as *arbitrators*), or issue evasive rulings and employ judicial economy (i.e. acting as *delineators*). In so doing, we analyze whether they act entrepreneurial or deferential and we distinguish deference to legal authorities from deference to states. We analyze the patterns of judicial behavior looking at the case of environmental norms across three fields of international law, namely trade, human rights, and law of the sea. In particular, we evaluate the case law of the Appellate Body of the World Trade Organization (the AB), the Inter-American Court of Human Rights (IACtHR), and the International Tribunal of the Law of the Sea (ITLOS). We employ a mixed method approach: relying on content analysis to categorize judicial behavior, using a social network analysis to visualize the relationship of judicial decisions across three regimes, and supporting our findings with a traditional doctrinal analysis. Looking at these courts' judicial behavior and citation patterns, we find a correlation between the two. Our findings also indicate that each regime portrays a dominant judicial character and an idiosyncratic approach to environmental norms. While the AB is predominantly deferential to the authority of the previous decisions, the IACtHR is an eternal entrepreneur for environmental norms, and for their cross-fertilization across different fields of International Law. The ITLOS, on the other hand, employs judicial economy when it can and shows deference to states. This exploratory research sheds light not only on the link between judicial behavior and citation patterns, but also on diverging and converging judicial strategies when addressing environmental norms.

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INTRODUCTION

International courts and tribunals, as legitimate interpreters and enforcers of various regional and international treaties, are fundamental pillars of International Law.[2] As such they exercise their prerogative to interpret rules enshrined under their foundational documents.[3] The question then is how do they treat norms that are not central to their constitutive documents? This question is particularly pertinent in the context of newly emerging norms which were not originally expressed in the treaties concluded several decades ago. While existing literature on judicial politics provide insightful accounts on judicial behavior and strategies in general,[4] it does not pay attention to whether the locality of a norm – namely its centrality or externality to the treaty – influences the type of judicial review the courts and tribunals carry out. Would courts show more deference to states when evaluating external norms because states did not explicitly agree to be bound by these norms in the first place? If the source of judicial authority to engage with and develop these norms does not come from states, what kind of authority do courts and tribunals resort to? In this paper, we tackle these questions and we show that studying judicial attitudes towards external norms presents a fertile ground to understand judicial behavior and strategies for norm development.

We build our analysis around the case of environmental norms looking at their treatment across three fields of international law, namely trade, human rights, and law of the sea. Today, most international courts and tribunals, irrespective of their jurisdiction *ratione materiae*, deal with environmental issues directly or indirectly. This is despite the fact that environmental norms may not figure much in their constitutive documents. Previous studies have looked into the way international courts and tribunals develop environmental norms.[5]

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[2] Karen Alter, "The Multiple Roles of International Courts and Tribunal: Enforcement, Dispute Settlement, Constitutional and Administrative Review," in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (New York: Cambridge University Press, 2013); Andreas Follesdal, "Survey Article: The Legitimacy of International Courts," *Journal of Political Philosophy* 0, no. n/a (2020), https://doi.org/10.1111/jopp.12213; Andreas Føllesdal, Johan Karlsson Schaffer, and Geir Ulfstein, *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (Cambridge University Press, 2013).

[3] Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford, New York: Oxford University Press, 2012).

[4] See for example, Jeffrey L. Dunoff and Mark A. Pollack, "The Judicial Trilemma," *American Journal of International Law* 111, no. 2 (April 2017): 225–76; Laurence Helfer and Karen Alter, "Legitimacy and Lawmaking: A Tale of Three International Courts," *Theoretical Inquiries in Law* 14 (January 1, 2013): 479–503.

[5] See generally, Christina Voigt, *International Judicial Practice on the Environment: Questions of Legitimacy* (Cambridge University Press, 2019); Alan Boyle, "The Environmental Jurisprudence of the International Tribunal for the Law of the Sea," *The International Journal of Marine and Coastal Law* 22, no. 3 (January 1, 2007): 369–81; Philippe Sands, "Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of

However, the courts' treatment of external norms has not been viewed as a special case in the rich literature on judicial behaviour,[6] and strategies.[7] How do courts behave when they receive claims containing environmental norms? Are they prone to integrate environmental concerns in their reasoning, or do they prefer to circumvent the environmental claims? We believe answers to these questions reveal insights into the aspects of judicial behavior that have not been fully investigated before. By examining the treatment of environmental claims, we shed lights on how courts and tribunals reproduce authority to develop or make law in the absence of one given by states.[8]

In order to compare degrees of judicial engagement and strategies for norm development, we evaluate the case law of the Appellate Body of the World Trade Organization (the AB), the Inter-American Court of Human Rights (IACtHR), and the International Tribunal of the Law of the Sea (ITLOS). While environmental norms are external to the foundational documents of the first two bodies, they are mentioned – albeit in broad terms – in the ITLOS's foundational text: the 1982 UN Convention on the Law of the Sea (UNCLOS). Hence our study shows an interesting degree of variation.

When we talk about environmental disputes, we refer to those cases where one or more claims relate to the protection of the environment.[9] We limit our analysis only to those cases that involve an explicit claim touching on states' environmental obligations. We map out these courts' treatment of environmental norms by employing mixed methods. We combine content analysis to classify their behavior and social network analysis to capture their relationship to one another based on their citation patterns. We then use doctrinal analysis to contextualize our findings and shed light on the link between their judicial behavior and citation patterns.

International Environmental Law," *Law of the Sea, Environmental Law and Settlement of Disputes*, January 1, 2007, 313–25.

[6] Erik Voeten, "Borrowing and Nonborrowing among International Courts," *The Journal of Legal Studies* 39, no. 2 (June 1, 2010): 547–76; Niccolo Ridi, "The Shape and Structure of the 'Usable Past': An Empirical Analysis of the Use of Precedent in International Adjudication," *Journal of International Dispute Settlement* 10 (2019): 200–247; Zarbiyev, "Judicial Activism in International Law—A Conceptual Framework for Analysis."

[7] Diana Kapiszewski, "Tactical Balancing: High Court Decision Making on Politically Crucial Cases," *Law & Society Review* 45, no. 2 (2011): 471–506; Dunoff and Pollack, "The Judicial Trilemma"; Mikael Rask Madsen, "Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence," in *The European Court of Human Rights between Law and Politics*, ed. Jonas Christoffersen and Mikael Rask Madsen (New York: Oxford University Press, 2011), 43–61.

[8] For the decline of state consent, see Nico Krisch, "The Decay of Consent: International Law in an Age Of Global Public Goods," *The American Journal of International Law* 108, no. 1 (2014): 1–40; Joost Pauwelyn, Ramses A. Wessel, and Jan Wouters, "When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking," *European Journal of International Law* 25, no. 3 (August 1, 2014): 733–63.

[9] This comprises when the rule is embodied in the foundational instrument of the court or tribunal (e.g. Part XII of UNCLOS; Article 11 of the Protocol of San Salvador); or when the rule is external but it is indispensable to understand the scope of an internal rule (e.g. the Indus Waters Treaty).

We combine our findings concerning these courts' judicial behavior and citation patterns in order to distill their judicial strategies towards developing environmental norms. We find no convergence of strategies. While the AB is predominantly deferential to the authority of the previous decisions, the IACtHR acts as a consistent entrepreneur for environmental norms, and for their cross-fertilization across different fields of International Law. When it comes to the ITLOS, it employs judicial economy when it can and shows deference to the states, despite the fact that environmental norms figure in the UNCLOS.

This article is composed of two parts. In Part I, we will introduce our conceptual framework and methodological approach. In particular, we will explain the concepts upon which we built our argument, how we gathered our data and present a preliminary analysis. In Part II, we will introduce three case studies on the WTO, the IACtHR and the ITLOS. We then discuss the cross-cutting themes in light of these studies and conclude.

PART I: CONCEPTUAL FRAMEWORK & METHODS

A Typology for Judicial Behavior & Strategies

The quest to understand judicial behavior has found a sizable amount of scholarly attention from International Law scholars as well as interdisciplinary International Law and International Relations researchers.[10] Among different models and concepts they have proposed to understand the courts' power and limits thereof, the judicial activism and restraint framing stands apart. Judicial activism is generally associated with courts' willingness to issue rulings with wide-spread implications beyond the case at hand, which often means departing from the treaty text, or the precedent.[11] Judicial restraint, on the other hand, implies unwillingness to expand the meaning or the application of the law out of deference to the executive authority that makes the law and draft treaties.[12] Several scholars have applied or adapted these concepts,

[10] See for example, Archibald Cox, "The Role of the Supreme Court: Judicial Activism or Self-Restraint?," *Maryland Law Review* 47, no. 1 (January 1, 1987): 118–38; John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, Revised ed. edition (Cambridge, Mass.: Harvard University Press, 1980); Paul O. Carrese, *The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism*, 1 edition (Chicago: University of Chicago Press, 2003); Stephen Breyer, "Judicial Activism: Power without Responsibility?," in *Judicial Activism: Power without Responsibility?*, ed. Benjamin Kiely (Melbourne: The University of Melbourne, 2006), 71–86; Richard A. Posner, "The Rise and Fall of Judicial Self-Restraint," *California Law Review* 100, no. 3 (2012): 519–56; Stefanie A Lindquist and Frank B. Cross, *Measuring Judicial Activism* (Oxford University Press, 2009).

[11] See for example, Ernest Young, "Judicial Activism and Conservative Politics," *University of Colorado Law Review* 73 (January 1, 2002): 1139–1216; Keenan Kmiec, "The Origin and Current Meanings of Judicial Activism," *California Law Review* 92, no. 5 (October 31, 2004): 1441.

[12] See for example, Aileen Kavanagh, "Judicial Restraint in the Pursuit of Justice," *The University of Toronto Law Journal* 60, no. 1 (2010): 23–40; Posner, "The Rise and Fall of Judicial Self-Restraint."

originally developed in the context of domestic courts, to analyze international courts.[13] For example, inspired by this framing, Fuad Zarbiyev categorizes courts as either "dispute settlers," (a function limited to reviewing cases without working for "a grand design"), or social actors "giving meaning to the public values" for the communities they serve.[14] He then argues that although not every international court could easily be classified under these two clear-cut categories, looking at their caselaw one can distill a "center of narrative gravity."[15]

This is precisely what we plan to show in this research. To do so, we adopt the typology of judicial characters, which also comes from judicial behavior literature as an adaption of judicial activism and restraint framing.[16] Developed in the context of the European Court of Human Rights, this typology allows us not only to study these three courts and tribunals, but also to test its applicability. Our study promises to take this framework further and explain the citation behavior of each character type. We follow the definitions used in the typology of judicial characters:[17]

We define *entrepreneur* rulings as those that employ "widely applicable reasoning" and arrive at "expansive conclusions." In our case, this means acknowledging the existence of environmental norms as applicable or as autonomous rights and obligations. The tribunal should show a genuine interest in bringing environmental norms to light, fleshing them out and enforcing them. We call judgments and decisions *arbitrator* rulings, when they rely on "repeated or tailored reasoning" or when they reach "narrow conclusions." The reasoning is repeated when the court is simply basing it on a precedent; and the reasoning is tailored when it is extremely narrow and given based on the special circumstances of the claim. We identify rulings *delineator*, when they involve "evasive or restraining reasoning" and when they find "retractive conclusions." When a delineator, generally, the tribunal refuses to engage with the claim fully or partially for a variety of reasons (i.e. on jurisdictional or evidentiary grounds, or the fact that they do not find it necessary to address the claim). In addition, we will classify the decisions where a tribunal decides against applying the environmental norms or expanding their application (retractive conclusions). In these instances, the courts assume a deferential

[13] Gareth Davies, "Activism Relocated. The Self-Restraint of the European Court of Justice in Its National Context," *Journal of European Public Policy* 19, no. 1 (January 1, 2012): 76–91; Dragoljub Popovic, "Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights," *Creighton Law Review* 42 (2009); Jorge Contesse, "Contestation and Deference in the Inter-American Human Rights System," *Law and Contemporary Problems* 79, no. 2 (June 20, 2016): 123–45.
[14] Zarbiyev, "Judicial Activism in International Law—A Conceptual Framework for Analysis," 254–58.
[15] Zarbiyev, 258.
[16] Ezgi Yildiz, "A Court with Many Faces: Judicial Characters and Modes of Norm Development in the European Court of Human Rights," *European Journal of International Law* 31, no. 1 (August 7, 2020): 73–99.
[17] Yildiz, 84–87.

position or refrain from expressing legal opinion related to matters on which the states did not give explicit consent.

We prefer this adapted typology over the judicial activism and restraint framing for a variety of reasons. First, this typology provides us better lenses to categorize judicial behavior and the way they develop environmental norms. Since judicial activism and restraint concepts are inherently linked to certain ideologies or world-views (liberal and conservative, respectively), they are rather static and inelastic concepts. Therefore, they are better suited to define an entire institution or era of an institution. This typology, on the other hand, offers a certain degree of flexibility as it works on the assumption that a court or tribunal may easily switch between these judicial character types or hold them at the same time. That is, they can engage in more than one behavior pattern even within the same case. For example, they may actively develop one environmental norm while side-lining another one in the same case or they can adopt different approaches for different procedures, as we will see in the case of ITLOS. Another instance is in the case of the WTO. The AB usually relies on precedents, thus adopting an arbitrator behavior and, at the same time, expands the rules based on these prior reports to further lay out finer legal points *vis-à-vis* Article XX of GATT 1994.

Second, instead of analyzing case law through dichotomous lenses, this typology introduces an intermediate category – arbitrator to cover judgments and decisions that are solely built upon previous decisions. While judicial activism and restraint literature treats narrow judgments and evasive judgments together in the same category, this typology distinguishes them. As we will see in this study, the international courts and tribunals engage in different citation behavior for narrow and evasive rulings. While arbitrator decisions are mostly built upon internal jurisprudence, entrepreneur decisions are built upon internal and external jurisprudence and soft law documents. Finally, delineator decisions oftentimes refrain from citing any internal or external jurisprudence – except the instances where they differentiate the case at hand from previous decisions or where they arrive at retractive conclusions based on rulings that support norms that are in conflict with environmental norms (e.g. freedom of navigation).

Third, this framework helps us capture two types of deference. While arbitrator rulings show deference to the authority of previous decisions, delineator rulings indicate the courts' deferential attitude towards states. Arbitrator character captures precisely what the precedent or citation analyses refer to as deferential behavior (i.e. deference to the authority of previous decisions). Delineator character, on the other hand, provides insights into courts' deference to states. We believe courts' unwillingness to seize an opportunity to elaborate on environmental

norms or enforce them is a sign of their deference to states, especially when they did not explicitly express to be bound by this norm. By not acknowledging new state obligations or extending the scope of existing ones, delineator decisions tend to limit the grounds for state liability. This typology, therefore, helps us distinguish different deferential behavior that courts and tribunals may show.

Another concept closely interconnected is judicial cross-fertilization, whereby a judicial organ transfers or translates ideas developed in one regime to another through citations. It is well known that the statutes of courts and tribunals do not provide for a rule of precedent that oblige them to follow previous judicial reasoning as it is the case in common law systems.[18] Yet, some scholars consider that every judicial decision entails an authoritative pronouncement on the law which should be replicated in other disputes where the same or a similar legal issue arise.[19] International courts and tribunals tend to engage in judicial cross-fertilization in two situations: First, when they refer to the established rules of general international law (e.g. State responsibility, treaty interpretation or diplomatic law); second, when they review legal issues that are connected with the developing and constantly changing concepts or fields of law (e.g. environment or health issues).[20] We argue that judicial cross-fertilization is a condition and a product of entrepreneur decisions. As Erik Voeten shows in a study, courts tend to cite external jurisprudence more when they are issuing expansive decisions.[21] Fully subscribing to this point, we also show that decisions that cite external jurisprudence themselves become points of reference and thereby tend to get cited more.

Our analysis takes this typology further by showing the links between judicial behavior and citation patterns and providing insights into the specific sets of behavior one can associate with each character type. We propose that arbitrator decisions are deferential to the authority of previous rulings, and therefore tend to be built upon internal jurisprudence. Entrepreneur rulings, on the other hand, rely on external and internal jurisprudence. As for delineator decisions, they are deferential to states and tend not to cite previous decisions except when differentiating the case at hand or introducing a rival norm to develop retractive conclusions.

[18] See: A. Boyle and C. Chinkin, *The Making of International Law*, (Oxford University Press, 2007), p. 293-301.
[19] See: R. Higgins, Problems and Processes in International Law, (Oxford University Press, 2005), p. 202; G. Guillaume, "The Use of Precedent by International Judges and Arbitrators", *Journal of International Dispute Settlement*, 2(1), (2011), p. 19; S. Rosenne, The Law and Practice of the International Court 1920-1996, vol III, (Brill/Nijhoff, 1997), p. 1610; H. Cohen, "Theorizing Precedent in International Law", at A. Bianchi, D. Peat and M. Windsor, *Interpretation in International Law*, (Oxford University Press, 2015), pp. 268-289.
[20] G. Guillaume, "The Use of Precedent by International Judges and Arbitrators", *Journal of International Dispute Settlement*, 2(1), (2011), p. 19.
[21] Voeten, "Borrowing and Nonborrowing among International Courts."

Methods and Preliminary Observations

In order to uncover judicial behavior and citation patterns dominant within these three regimes, we employ a mixed method approach: relying on content analysis to categorize their judicial behavior and using social network analysis (SNA) to visualize the relationship of judicial decisions across the three regimes. We support our findings with a traditional doctrinal analysis to understand the legal contexts in which these institutions carry out judicial review and tackle claims pertaining to environmental norms. That is to say, each method is built upon the findings gathered from the previous one. This multilayered assessment provides us with a holistic picture and allows us to grasp not only these regimes' behavior patterns but also the subtle ways they advocate or shy away from developing environmental norms.

First, we use content analysis to categorize judicial behavior and to collect data to be used for SNA.[22] Following the code book instruction that is based on the typology explained above, we identified the dominant judicial characters we observe in a given decision. We restrict our data collection to those cases where the environment is central to a dispute. Due to different legal instruments used for the three regimes, we define the scope of an environmental issue differently.[23] A unit of analysis is an individual claim. Accordingly, a case may have more than one claim related to the environment, each of which is analyzed separately. Subsequently, for each unit of analysis, we classify a corresponding judicial behavior in adjudicating an environmental issue. For each unit, the court may exhibit mixed behaviors, depending on the context of each dispute. We also note whether the legal reasoning or conclusions are built upon existing jurisprudence or any other legal instrument. In this regard, we make a clear distinction between "internal precedent," "external precedent," and "external document" cited by each decision. An internal precedent is defined as a prior decision within the same regime that also addressed an environmental issue. An external precedent may be either a prior decision within the same regime that did not address any environment issue directly, or a prior decision outside of the regime (e.g. ICJ and GATT). An external document is a legal instrument that does not belong within the regime but is referred to by a tribunal.

Second, SNA is an empirical technique to represent and analyze the relationship between actors of interests. The method is popular among social scientists but sees a graduate

[22] Klaus Krippendorff, *Content Analysis: An Introduction to Its Methodology* (SAGE Publications, 2018).
[23] On the definition of an environment-related dispute, see the discussions of each regime below.

propagation into the empirical legal studies, both domestic law and international law.[24] Because SNA's main interest is in the relationship between actors, the objects of analysis are actors, visually represented as nodes, and their relations, visually represented as ties between the nodes. In this study, nodes represent judicial decisions that address environmental issues and ties represent direct citations from one case to another. The citation networks are constructed based on decisions of the three regimes, albeit with some nodes from other international courts that these decisions referred to, such as the ICJ and the GATT. A citation network is, by nature, a directed network. The network contains a tie from one node to another node with an arrow. An arrow pointed toward a particular node indicates that the node is being cited.

[24] See e.g. James H. Fowler et al., "Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court," *Political Analysis* 15, no. 3 (2007): 324–46; Niccolo Ridi, "The Shape and Structure of the 'Usable Past': An Empirical Analysis of the Use of Precedent in International Adjudication," *Journal of International Dispute Settlement* 10 (2019): 200–247; Joost Pauwelyn, "Forget about the WTO: The Network of Relations between PTAs and Double PTAs," n.d.

Figure 1: Citation Network of the AB (on the right), IACtHR and ITLOS (on the left)

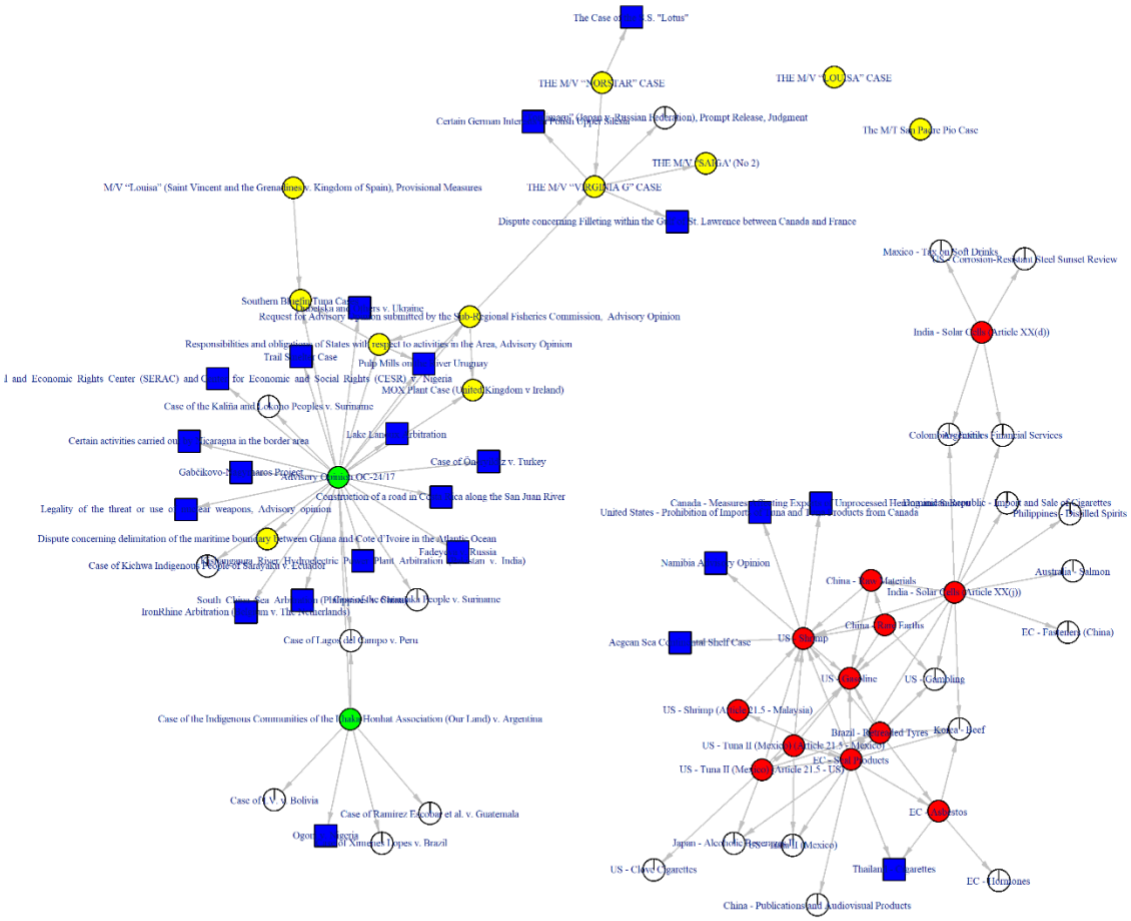


Figure 1, for instance, shows the current citation network of environment-related disputes from the WTO (in red), the ITLOS (in yellow), the IACtHR (in green). Moreover, decisions belonging to the three regimes of interest that are cited but do not address any environmental issue themselves are in white and external decisions from the ICJ, the PCA, the PCIJ, the ECtHR, the GATT, and the ACHPR are all in blue. Here, it is also important to distinguish between 1) a decision that belongs to the regimes of interest (a circle shape) and 2) a decision that belongs to external regimes (a square shape).

Based on the visualizations provided by SNA, we then identify several key disputes within each regime and complement such general observations with a doctrinal analysis and

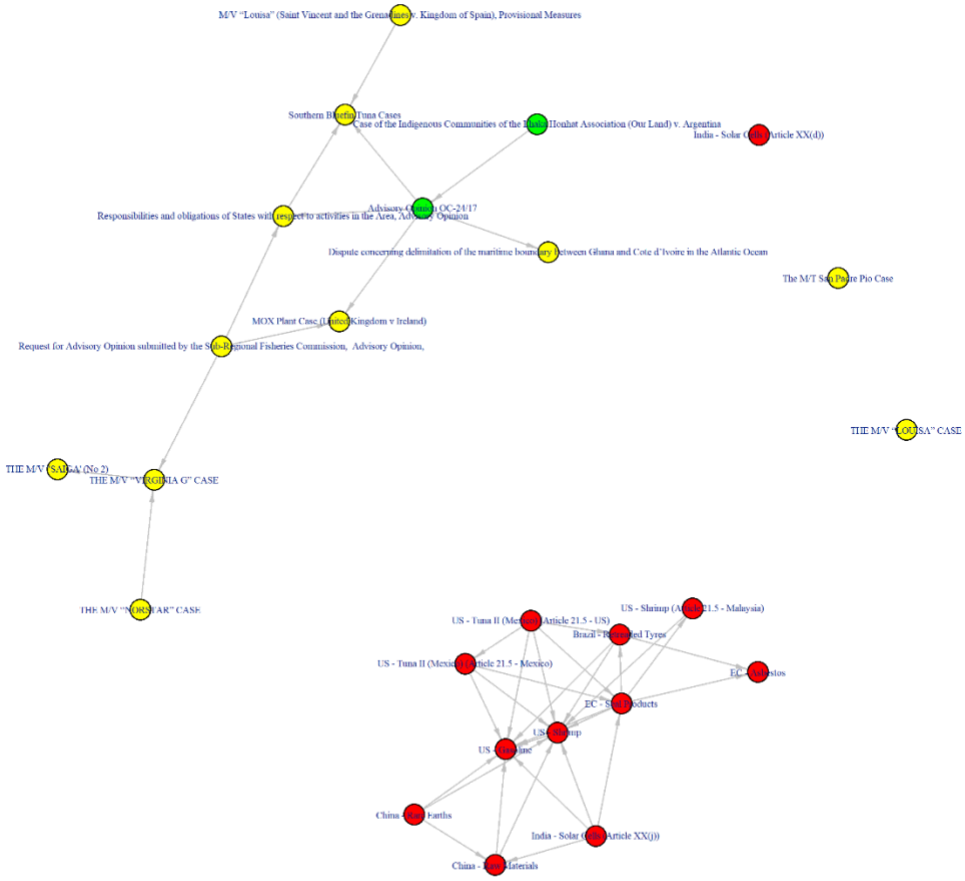
an analysis of judicial behaviors. Moreover, we are able to identify the correlation between citation patterns and judicial behavior in each regime, as shall be discussed later on. Indeed, the idea of the mixed method between SNA and the traditional doctrinal analysis is to complement the strength of quantitative and qualitative approaches.[25] SNA offers a systematic abstraction of complicated relationships, i.e. citations across different tribunals in this case. Yet, precisely because of its abstraction, many details are left out of the analysis. It is for this reason, we turn to doctrinal analysis, as our third method, to cover the remaining blind spots and report on the nuances and details that are generally not included in quantitative abstraction.

Preliminary Analysis

We identified in total 24 cases from the three regimes of interest that addressed environmental issues: 11 disputes in the WTO AB, 11 disputes in the ITLOS, and 2 in the IACtHR. The complete network is shown in Figure 1 above. Additionally, Figure 2 below shows the network of 24 cases without the external jurisprudence. The simplified version of this citation network shows that among the three regimes, there is cross-fertilization between the ITLOS and the IACtHR disputes, and the WTO is by far the most isolated regime. The cross-fertilization is, however, still a one-way relationship. The IACtHR established the link to the ITLOS jurisprudence via its advisory opinion (see *Advisory Opinion OC-24/17*). In the case of the WTO AB, we observe a close-knit network with strong ties across all cases. Particularly, *US – Gasoline* and *US – Shrimp* are two of the most cited and central to the WTO jurisprudence relating to environmental issues in trade disputes.

[25] See e.g. Nick Crossley, "The Social World of the Network. Combining Qualitative and Quantitative Elements in Social Network Analysis," *Sociologica* 4, no. 1 (2010): 1–34.

Figure 2: Citation Network without the external jurisprudence



A simple observation of the citation network yields different citation behaviors across the three regimes. The WTO AB with a strong citation pattern tends to keep the jurisdiction within its own system, with the exception of *US – Shrimp* which reached out to the ICJ cases and the GATT reports (see Figure 1 above). Conversely, the ITLOS is less studious in following precedents and establishes diverse citation behaviors. For example, there are some isolated nodes such as the M/V *"Louisa"* and the M/T *"San Padre Pio"*. There are also more active cases that cited both internal and external jurisprudence, e.g. the Sub-Regional Fisheries Commission Advisory Opinion. As we shall see in a separate analysis, the ITLOS citation behavior is indeed diverse depending on the types of dispute, i.e. whether it is an advisory opinion, a provisional measure, or a merit case. Overall, the ITLOS tends to rely on the treaty

text – the specific UNCLOS provisions on environmental protection – more than previous decisions when developing its reasoning. Lastly, for the IACtHR, there are only two judicial decisions relating to environmental issues, one of which is an advisory opinion. In both cases, however, judicial citations are prominent within the regime and outside. The advisory opinion, in particular, has reached out to many external jurisprudences – including the ICJ, the PCA, the ECtHR, and the ITLOS – causing significant cross-fertilization across different international regimes. Next, we provide a separate analysis of each regime, emphasizing the relationship between judicial behavior and citation patterns, as well as doctrinal analysis of important disputes.

PART II: CASE STUDIES

A) Environment-Related Disputes in the WTO

As stated, this study focuses on the judicial behavior in the three regimes in dealing with external issues, particularly in the context of environmental disputes. In the case of the WTO, we define environment-related disputes as those that have invoked a general exception under Article XX of the GATT 1994, particularly paragraphs (b) and (g).[26]

The relationship between trade and environment was recognized as early as the birth of the international trade regime in the 1940s. For example, general exceptions listed in Article 45 of the Havana Charter for an International Trade Organization (ITO) specify that states may enforce a measure that is "necessary to protect human, animal or plant life or health," "relating to the conservation of exhaustible natural resources…," or "…relates solely to the conservation of fisheries resources, migratory birds or wild animals…"[27] Indeed, as reflected in Article XX, paragraphs (b) and (g) of GATT 1994, the exceptions continue to feature in environment-related trade disputes.

The first real confrontation between trade and environment is the Tuna/Dolphin Cases during the GATT era – *US – Tuna I* and *US – Tuna (EEC)*[28]. *US – Tuna I* was brought by Mexico and other states against the United States for its embargo under the Marine Mammal

[26] See also Daniel Bodansky and Jessica C Lawrence, "Trade and Environment," in *The Oxford Handbook of International Trade Law*, ed. Daniel Bethlehem et al., Oxford Hanbooks in Law (Oxford University Press, 2009), 530. ("One way to address trade-and-environment disputes would be for the WTO dispute settlement process to interpret the Article XX GATT 1994 exceptions to allow more environmental rules to meet the tests of XX(b), XX(g), and the chapeau…")

[27] ITO was the predecessor of the WTO, envisioned to be an international governance of trade and investment.

[28] Bodansky and Lawrence, "Trade and Environment," 515. See also GATT Panel Report, *US – Tuna I* and GATT Panel Report, *US – Tuna (EEC)*.

Protection Act ("MMPA") banning imports on tuna from countries with no conservation program to protect dolphins in the process.[29] Both the panels in *US – Tuna I* and *US – Tuna (EEC)* struck down the US measures as violating the rights of other GATT members. The reports were never adopted, nor do they ever be referred to in subsequent WTO disputes. They did, however, raise an important concern over a potential conflict between trade and the environment, as well as paint "a distinct pro-trade bias" toward the GATT system.[30]

During the 1994 Uruguay Round, the WTO Agreement establishing the WTO itself includes several provisions on the environment. Remarkably, the Preamble of the WTO Agreement states that this agreement would allow "for the optimal use of the world's resources in accordance with the objective of *sustainable development,* seeking both to *protect and preserve the environment*… (emphasis added)." Indeed, in the very first two disputes dealing with an environmental issue under Article XX of GATT 1994, the newly established Appellate Body (AB) referred to the Preamble as "specific acknowledgement to be found about the importance of coordinating policies on trade and the environment."[31] And, as shown in the citation network in Figure 1 above, *US – Gasoline* and *US – Shrimp* have been at the forefront as the main interpretative authority on the recognition of environmental concerns in the WTO regime.

In *US – Gasoline,* the AB first established a two-tiered test under Article XX of GATT 1994: any GATT-inconsistent measure falling under Article XX general exception must 1) meet the requirement set out in one of the paragraphs under Article XX; and 2) meet the requirement of the chapeau or the introductory clause of Article XX.[32] The AB in *US – Shrimp* further set out the step: first, the AB examines whether a disputed measure is justified under a specific provision, i.e. paragraphs (a)-(j) of Article XX; and then the AB considers whether the *application* of the measure satisfy the requirement under the chapeau of Article XX.

As stated, this study defines an environmental issue in trade dispute as those invoking Article XX(b) and (g) Article XX(b) is an exception for a measure that is "necessary to protect human, animal or plant life or health." In considering the necessity of a disputed measure, the AB in *Brazil – Retreaded Tyres* stated that "a panel must consider the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution to

[29] See *US – Tuna I*, para. 2
[30] The Levin Institute - The State University of New York, "The Tuna-Dolphin Case," *Globalization 101* (blog), n.d., http://www.globalization101.org/the-tuna-dolphin-case/.
[31] See *US – Gasoline*, p 30 and *US – Shrimp*, para. 129. See also Bodansky and Lawrence, 516 ("Since the advent of the WTO, perhaps the most significant effort to reconcile the trade and environmental regimes has come from the newly created Appellate Body.")
[32] *US – Gasoline*, p 22.

the achievement of the measure's objective, and its trade restrictiveness."[33] If the balancing of factors suggests that the measure is necessary, then the measure should be compared to less restrictive trade alternatives which can possibly provide an equivalent contribution to the objective. Article XX(g) relates to the conservation of exhaustible natural resources, made effective in conjunction with a domestic measure. The AB in *US – Shrimp* has adopted an evolutionary approach to the interpretation: "measures to conserve exhaustible natural resources, whether *living* or *non-living*, may fall within Article XX(g)."[34] Moreover, there must be a "close and real" relationship between the measure and the policy objective. Lastly, the measure must be "made effective in conjunction with" a domestic measure. In *US – Gasoline*, the AB stated that this particular clause "is a requirement of *even-handedness* in the imposition of restriction" (with respect to domestic production or consumption).[35]

Thereafter, the application of a disputed measure must comply with the chapeau of Article XX, which indicates that the application of the measure should not be "arbitrary or unjustifiable discrimination." The object and purpose of the chapeau is to guarantee a reasonable application of the general exceptions, a balance between rights and obligations of a Member.[36] It embodies, in other words, a principle of good faith. To decide whether an application is arbitrary or unjustifiable discrimination, the AB in *US – Shrimp* laid out three elements: 1) the application of the measure must result in discrimination; 2) such discrimination must be arbitrary or unjustifiable; and 3) the discrimination occurs between countries where same conditions prevail.[37]

Citation analysis. From the brief doctrinal review above, one can expect certain cases such as *US – Gasoline, US – Shrimp,* and *Brazil – Retreaded Tyres*, to be more prominent in the citation network. Based on its citation patterns, the WTO AB has developed an isolated judicial system within international law in dealing with environmental issues. Unlike the other two regimes studied here, the trade regime does not heavily rely on international disputes outside of the WTO itself, except for two ICJ cases and four GATT panel reports in total.[38] Most notably, only the first three disputes dealing with environmental issues refer to external disputes, namely *US – Gasoline, US – Shrimp,* and *EC – Asbestos*. Likewise, the AB did not rely much on external soft law documents in subsequent disputes. Again, only *US – Shrimp*

[33] *Brazil –Retreaded Tyres, para. 307.*
[34] *US – Shrimp,* paras. 129-130 ("They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.")
[35] *US – Gasoline,* p 20-21
[36] *US – Gasoline,* p 22; and *US – Shrimp,* para. 156.
[37] *US - Shrimp,* para.150. Textbook,pp?
[38] Most external citations were contained in *US – Shrimp,* as we shall discuss further later on.

and, to a lesser extent, *India – Solar Cell* have referred to external soft law documents, e.g. the Rio Declaration on Environment and Development (and Agenda 21), the 1982 United Nations Convention on the Law of the Sea, the Convention on Biological Diversity, and the Resolution on Assistance to Developing Countries in conjunction with the Convention on the Conservation of Migratory Species of Wild Animals.

In contrast to its relatively secluded arbitrating system, the WTO disputes heavily rely on their own precedents, forming a comprehensive web of citations on the issue of the environment and trade under Article XX of GATT 1994, paragraphs (b) and (g). Figure 1 above shows a strong connection across disputes. In particular, two disputes are to be further discussed here, namely *US – Shrimp* and *Brazil – Retreaded Tyres*. Based on the citation network, *US – Shrimp* is the earlier case that the AB established a linkage between trade and the environment. In doing so, it is the only report in the WTO regime that heavily relied on judicial decisions outside of the WTO, namely the ICJ cases and the former GATT panel reports, to develop its jurisprudence. More specifically, the ICJ cases, i.e. *Namibia (Legal Consequences) Advisory Opinion* and *Aegean Sea Continental Shelf Case*, were cited in support of an evolutionary reading of the term "natural resources" as "embracing both living and non-living resources."[39] The AB in *US – Shrimp* additionally cited two adopted GATT reports, i.e. *United States – Prohibition of Imports of Tuna and Tuna Products from Canada* and *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, to further support its interpretation based on the principle of effectiveness, on the meaning of "exhaustible natural resources" under Article XX(g) as stated above.

[39] *US – Shrimp*, para. 130. In the same paragraph, the AB also relied on an external soft law document, i.e. the 1982 United Nations Convention on the Law of the Sea, the Convention on Biological Diversity, Agenda 21, and the Resolution on Assistance to Developing Countries in conjunction with the Convention on the Conservation of Migratory Species of Wild Animals.

Figure 3: Citation Network, the WTO in 2006

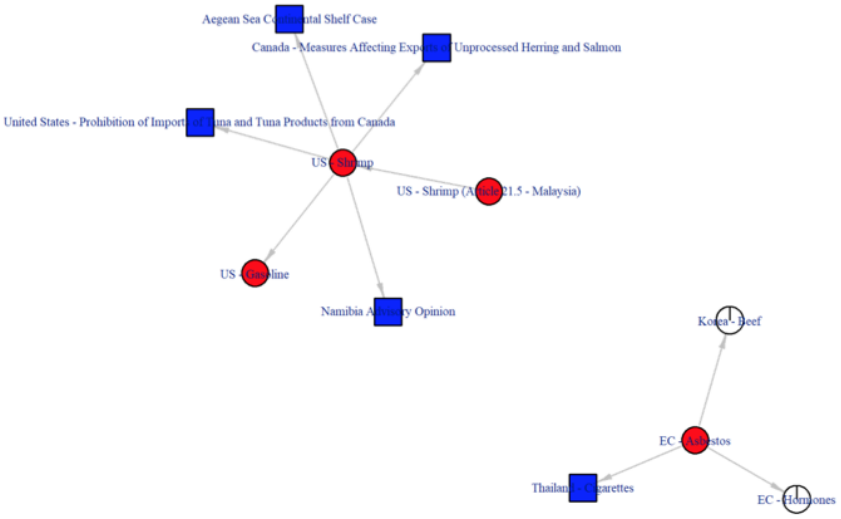
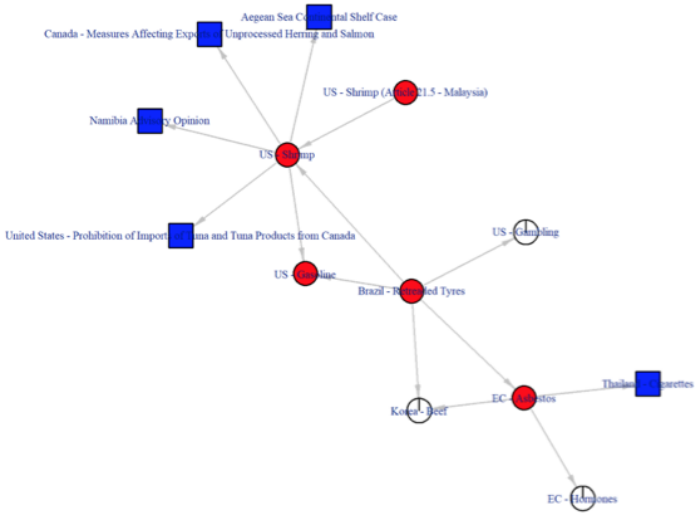


Figure 4: Second Citation Network, the WTO in 2007



Brazil – Retreaded Tyres also plays a key role in the WTO jurisprudence on environmental issues. The citation network in Figures 3 and 4, displaying the WTO AB citation networks in 2006 and 2007 respectively, highlights the role of *Brazil – Retreaded Tyres* as the linkage

between different disputes on environmental issues, namely *US – Gasoline*, *US – Shrimp*, and *EC – Asbestos*. Indeed, the legal analysis of the report yields that the AB first reiterated the now established practice in analyzing the necessity test under Article XX of GATT 1994.[40] Crucially, the report is the first case to apply the current necessity test, first developed in the context of Article XX(d) under *Korea – Various Measures on Beef.*[41] It has established what subsequent disputes have referred to as the holistic balancing approach to ascertain the necessity of disputed measures, which arguably allows the AB the space to maneuver much of its decisions across different contexts.[42]

Judicial Behavior. Noticeably, as shown in Table I below, the AB judicial behavior post-*Brazil – Retreaded Tyres* are much less entrepreneurial, displaying a more deferential tone, i.e. arbitrator, following former landmark disputes. Considering the AB's judicial behavior coupled with its citation pattern discussed above, it seems that initially, the AB was highly innovative and entrepreneurial. As reflected in *US – Gasoline* and *US – Shrimp*, the AB reached out to external documents and tribunal decisions, and adopted an evolutionary interpretation to incorporate environmental concerns into the trade regime. The AB's tone was accordingly more entrepreneurial in order to build a precedent on this relatively new issue in international trade.

[40] The AB in *Brazil – Retreaded Tyres* cited both *US – Gasoline* and *US – Shrimp* as the main authoritative cases. See *Brazil – Retreaded Tyres*, paras. 139-140.
[41] Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 4th ed. (Cambridge: Cambridge University Press, 2017), 562.
[42] See also Bodansky and Lawrence, 516-517; and Sébastien Thomas, "Trade and Environment under WTO Rules after the Appellate Body Report in Brazil - Retreaded Tyres," *Journal of International Commercial Law and Technology* 4, no. 1 (2009): 43.

Table I: Judicial Behavior Patterns at the AB (WTO)

Year	Report Name	GATT Article	Judicial Behavior
1996	*US - Gasoline*	XX(g)	Entrepreneur
1998	*US - Shrimp*	XX(g)	Entrepreneur & Arbitrator
2001	*US - Shrimp (Article 21.5 - Malaysia)*	XX(g)	Arbitrator
2001	*EC - Asbestos*	XX(b)	Entrepreneur
2007	*Brazil - Retreaded Tyres*	XX(b)	Entrepreneur & Arbitrator
2012	*China - Raw Materials*	XX(g)	Entrepreneur & Arbitrator
2014	*EC - Seal Products*	XX(a)	Arbitrator
2014	*China - Rare Earths*	XX(g)	Entrepreneur & Arbitrator
2015	*US - Tuna II (Mexico) (Article 21.5 - Mexico)*	XX (the Chapeau)	Arbitrator
2018	*US - Tuna II (Mexico) (Article 21.5 - US)*	XX (the Chapeau)	Arbitrator
2016	*India - Solar Cells*	XX(j)	Arbitrator
2016	*India - Solar Cells*	XX(d)	Entrepreneur & Arbitrator

Empirically, *Brazil – Retreaded Tyres* also played a crucial role in linking up two different environment-related exceptions under Article XX of GATT 1994, i.e. Article XX(b) and (g). Likewise, doctrinally, *Brazil – Retreaded Tyres* revised and clearly established a modern practice, building on *EC – Asbestos*. Hence, it is predictable to see the AB was more or less entrepreneurial. The report, however, also followed previous precedents; accordingly, one can see much of the previously established rules laid out by precedents being referred to and followed. As a result, *Brazil – Retreaded Tyres* displayed a mixed behavior between arbitrator and entrepreneurial. Thereafter, most AB reports on the environmental issue displayed arbitrator characteristics.

To conclude, in the beginning of its existence, the WTO AB embraced an issue on the environment as a part of its jurisdiction. In order to do so, in *US – Gasoline* and *US – Shrimp*, it has reached out to various documents such as the WTO negotiating history, external documents on international cooperation to address environmental issues, as well as decisions of tribunals outside of the WTO system, particularly those from the GATT era, its predecessor. Thereafter, it carefully crafted its own jurisprudence on the issue, under Article XX(b) and (g) of GATT 1994. Hence, we see a very isolated judicial system that hardly reaches outside of its own jurisdiction, and *vice versa*. Moreover, we also see that post-*Brazil – Retreaded Tyres*, the jurisprudence is relatively well-established and has been religiously followed by latter cases.

B) Inter-American Court of Human Rights

The Inter-American Court of Human Rights (IACtHR) has gathered significant judicial experience concerning environmental claims since its foundation in 1979.[43] Nevertheless, the manner in which the Court has dealt with these claims changed over time and can be perceived in two stages. First, the IACtHR treated environmental rights as adjacent to other human rights, including right to health or to property. Second, more recently, the Court dealt with the right to a healthy environment as an autonomous right.

First stage: Environmental rights as adjacent to other human rights

In this stage, the IACtHR's jurisprudence, including provisional measures,[44] and merits stage,[45] encompassed cases involving environmental claims adjacent to other human rights such as the human right to property and human right to health. In those cases, the Court already recognized the undeniable link between the protection of the environment and the right to collective property.[46] For example, in *Kaliña and Lokono Peoples v. Suriname,* the Court held Suriname responsible for omitting an environmental impact assessment prior to the start-up of an extractive project. Thereby, the Court ruled that an environmental impact assessment constitutes a safeguard to ensure that the restrictions imposed on indigenous or tribal peoples should not mean a denial of their survival as a people.[47] Thus, while assessing a violation to the right to property, the IACtHR introduced several key environmental principles such as the obligation to conduct an environmental impact assessment or the obligation to grant access rights well before establishing a right to a healthy environment as an autonomous right. Thus, the Court signalled that environmental principles are interlinked to some human rights. The

[43] See: T. Buergenthal, "New Upload - Remembering the Early Years of the Inter-American Court of Human Rights," *New York University Journal of International Law and Politics*, 37(2)(2005), pp. 259-280; R. Mackenzie, C. Romano, Y. Shany and P. Sands, *The Manual on International Courts and Tribunals*, (Oxford University Press, 2010), pp.367-374.

[44] *Matter of Pueblo indígena de Sarayaku regarding Ecuador*. Provisional Measures. Order of the Court of June 17, 2005, Considerations, para. 9.

[45] *Case of the Mayagna Community (Sumo) Awas Tingni*. Judgment of August 31, 2001. Series C No. 79, paras. 144, 149; *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, paras. 131, 137, and 141; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs, supra note 190, paras. 118, 121 and 131; *Case of the Saramaka People. v. Suriname*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007. Series C No. 172, paras. 121, 122, 123, 126, 128 and 146.

[46]See: IACtHR, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua,* Merits, Reparations and Costs, Judgment of August 31, 2001. Series C No. 79, para. 149; IACtHR, *Case of the Kaliña and Lokono Peoples v. Suriname,* Merits, Reparations and Costs. Judgment of November 25, 2015. Series C No. 309, para. 130.

[47] *Case of the Kaliña and Lokono Peoples v. Suriname,* Merits, Reparations and Costs. Judgment of November 25, 2015. Series C No. 309, paras. 214 and 215.

table below shows a list of cases where environmental concerns featured in the Court's reasoning:

Table II: Judicial Behavior of the IACtHR dealing with environment as adjacent other rights

Proceeding	Year	Case Name	Human right adjudicated	Judicial Character
Provisional Measures	2005	*Matter of Pueblo indígena de Sarayaku regarding Ecuador*	Right to property	Entrepreneur
Merits	2001	*Case of the Mayagna Community (Sumo) Awas Tingni*	Right to property	Entrepreneur
	2006	Case of the Yakye Axa Indigenous Community v. Paraguay	Right to property	Arbitrator
	2008	*Case of the Saramaka People. v. Suriname*	Right to property	Arbitrator
	2012	Case of Kichwa Indigenous People of Sarayaku v. Ecuador	Right to property	Arbitrator
	2015	Case of the Kaliña and Lokono Peoples v. Suriname	Right to property	Arbitrator

Second stage: Right to a healthy environment as an autonomous right

Within the Inter-American system, the possibility to adjudicate a human right to a healthy environment remained unclear, however. Indeed, this right is encompassed under Article 11 of the Additional Protocol to the American Convention on Human Rights on the Area of Economic, Social and Cultural Rights (San Salvador Protocol). Nevertheless, it was unclear whether the IACtHR will have jurisdiction over disputes dealing with the interpretation or application of this protocol since its competence was thought to cover only the American Convention on Human Rights (ACHR). In 2017, in *Lagos del Campo v. Peru*,[48] the Court adopted a controversial interpretation allowing itself to review the violations of rights enshrined in Article 26 of the ACHR in connection with the San Salvador Protocol. This innovative interpretation created the possibility to directly address the human right to a healthy environment, as an autonomous right.

[48] IACtHR, *Case of Lagos del Campo v. Peru*, Preliminary objections, merits, reparations and costs. Judgment of August 31, 2017. Series C No. 340. See also: IACtHR, *Case of the Dismissed Employees of Petroperu et al. v. Peru*. Preliminary objections, merits, reparations and costs. Judgment of November 23, 2017. Series C No.344

Table III: Judicial Behavior of the IACtHR & a healthy environment as an autonomous right

Proceeding	Year	Case Name	Judicial Character
Advisory Opinions	2017	Human rights and the environment	Entrepreneur
Merits	2020	Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina	Entrepreneur

Almost around the same time, in 2016, Colombia requested an advisory opinion and called on the IACtHR to clarify the scope of states' obligations concerning the environment while guaranteeing the right to life and to personal integrity. In 2017, the Court delivered its advisory opinion where it acted as an entrepreneur and elaborated on the link between human rights and the environment. Not stopping there, it also defined the right to a healthy environment as an individual and collective right. The Court also recognized that the human right to a healthy environment can be adjudicated relying on Article 26 of the ACHR and Article 11 of the San Salvador Protocol.[49] Moreover, the Court emphasized that to guarantee the right to a healthy environment, states should comply with their obligations to protect the environment under International Law. The Court specifically referred to the no harm principle, the prevention principle, the precautionary approach, the obligation to conduct an environmental impact assessment, the obligation to cooperate and the access rights on environmental decision-making. While doing so, it relied on the judicial reasoning employed by the ICJ,[50] the ITLOS,[51] and Arbitral Tribunals.[52] For example, the Court cited the *South China Sea Arbitration* – concluded one year before this opinion – to elucidate the content of the prevention principle and the due diligence obligations.[53] Figure 1 reflects the extent to which this single advisory opinion cross-fertilized the fields of international environmental law and human rights. Furthermore, the Court built its reasoning on external soft law instruments

[49] IACtHR, *Human rights and the environment*, Advisory Opinion OC-23/17, Series A, No. 23, para. 57; IACtHR, *Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*, Reparations and Costs. Judgment of February 6, 2020. Series C No. 400, para. 202.

[50] ICJ, *Case of Pulp Mills on the River Uruguay* (Argentina v. Uruguay). Judgment of April 20, 2010; ICJ, *Construction of a road in Costa Rica along the San Juan River* (Nicaragua v. Costa Rica). Judgment of December 16, 2015

[51] ITLOS, *Request for an advisory opinion submitted by the Subregional Fisheries Commission (SRFC).* Advisory Opinion of April 2015; *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*. Advisory Opinion of February 1, 2011; ITLOS, *Dispute concerning delimitation of the maritime boundary between Ghana and Cote d'Ivoire in the Atlantic Ocean* (Ghana v. Cote d'Ivoire). Case No. 23, Order for provisional measures of April 25, 2015

[52] *Trail Smelter Case* (United States v. Canada). Decision of April 16, 1938, and March 11, 1941, p. 1965; *Iron Rhine Arbitration* (Belgium v. The Netherlands). Award of May 24, 2005, para. 222; *Kishanganga River Hydroelectric Power Plant Arbitration* (Pakistan v. India). Partial award of February 18, 2013.

[53] See footnotes140, 257 and 454 of the advisory opinion. IACtHR, *Human rights and the environment*, Advisory Opinion OC-23/17, Series A, No. 23.

such as the Stockholm Declaration on the Human Environment or the Rio Declaration on Environment and Development — both were also used by the ICJ, the ITLOS, the WTO and Arbitral Tribunals. That is, in the absence of a specific ACHR provision, the IACtHR channeled the authority derived from a variety of legal instruments to create a new autonomous human right to a healthy environment.

This advisory opinion is certainly crucial for the Inter-American system as well as the international human rights regime. Yet its importance goes beyond this because this single opinion has connected human rights with the obligations derived from international environmental law.[54] In so doing, it serves as a reference point not only for the human rights community but also for the community of international environmental law. The outcome of this decision was welcomed by international and regional organizations,[55] academia and NGOs.[56]

The implications of the changes generated by the advisory opinion are evident in *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina.* This was the first contentious case in which the Court examined the human right to a healthy environment and delivered an entrepreneurial judgement. It was also the first time in which the Court assessed whether a state complied with its obligations under international environmental law while guaranteeing a right to a healthy environment. The Court's reasoning signalled that the influence of the 2017 advisory opinion would continue permeating the Inter-American system,[57] and would serve as guideline for other human rights systems. It therefore certified the IACtHR's entrepreneurial character when it comes to establishing environmental rights. Indeed, this judicial body, different from the ITLOS and the WTO, has consistently worked for establishing and clarifying environmental norms and for their cross-fertilization.

[54] IACtHR, *Human rights and the environment*, Advisory Opinion OC-23/17, Series A, No. 23, para. 59.See: C. Campbell-Duruflé, "The Inter-American Court`s Environment and Human Rights Advisory Opinion: Implications for International Climate Law", *Climate Law*, 8(3,4) (2018), p. 321-337.

[55] For example, the Organization of American States endorsed its content. See: OAS, *The Office of the Special Rapporteur on Economic, Social, Cultural and Environmental Rights (SRESCER) presents a report on its results in 2018 and, together with the IACHR, calls for a commitment to its strengthening*, Press Release, 27 February 2019, http://www.oas.org/en/iachr/media_center/PReleases/2019/048.asp.

[56] IUCN endorsed the opinion and its subsequent effect in the case-law of the IACtHR. See: IUCN, *Inter-American Court recognizes the right to a healthy environment of indigenous peoples in first contentious case*, Press Release, 4 May 2020, https://www.iucn.org/news/world-commission-environmental-law/202005/inter-american-court-recognizes-right-a-healthy-environment-indigenous-peoples-first-contentious-case

[57] See: IACHR, *Inhabitants of the surrounding areas to the Santiago River with respect to Mexico*, MC-708-19, Resolution 7/2020 of 5 February 2020, available at: https://www.oas.org/es/cidh/prensa/comunicados/2020/MC70819.pdf

C) International Tribunal for the Law of the Sea

The ITLOS is considered as the main guardian and interpreter of the 1982 UNCLOS.[58] Environmental norms do figure in the UNCLOS, particularly Part XII pronounces a series of obligations to protect marine environment and encourages states to enforce their laws and regulations to that effect. For example, Article 192 establishes "the obligation to protect and preserve the marine environment." Article 194 obliges states to "to prevent, reduce and control pollution of the marine environment from any source." Despite the prominence of environmental norms inbuilt in the UNCLOS, we cannot say that the ITLOS shows an unwavering interest to serve as an entrepreneur and strengthen the environmental protection norms across the board. While the ITLOS tends to be an entrepreneur when issuing its advisory opinions and ordering provisional measures; it leans more toward being a delineator on merits stage. The table below distinguishes the ITLOS's behavior across its advisory opinions, provisional measures and judgments separately:

Table IV: Distribution of ITLOS Judicial Characters Across Different Procedures

	Year	Case Name	Judicial Character
Advisory Opinions	2011	Responsibilities and obligations of States with respect to activities in the Area	Entrepreneur
	2015	Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission,	Arbitrator & Entrepreneur
Provisional Measures	1999	Southern Bluefin Tuna Cases	Entrepreneur
	2001	MOX Plant Case	Entrepreneur
	2010	M/V "Louisa"	Delineator
	2015	Dispute concerning delimitation of the maritime boundary between Ghana and Cote d'Ivoire in the Atlantic Ocean	Entrepreneur
	2019	The M/T San Padre Pio Case	Delineator
Merits	1999	The M/V "Saiga' (No 2)	Delineator
	2013	The M/V "Louisa" Case	Delineator
	2014	The M/V "Virginia G" Case	Entrepreneur & Delineator
	2019	The M/V "Norstar" Case	Delineator

[58] Alan E. Boyle, "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction," *International and Comparative Law Quarterly* 46, no. 1 (1997): 37–54; Philippe Sands, "Of Courts and Competition: Dispute Settlement under Part XV of Unclos," *Contemporary Developments in International Law*, January 1, 2016, 789–98; Xu Zengcang and Lu Jianxiang, "Review of the UNCLOS Dispute Settlement System during the Past Decade: Achievements, Disadvantages, and Developments - From the Perspective of Comparative Empirical Analysis among ITLOS, PCA and ICJ," *China Oceans Law Review* 2007, no. 1 (2007): 424–40.

Advisory opinions

The ITLOS have issued two advisory opinions. The first advisory opinion was requested in 2010 by the International Seabed Authority. The request concerned the sponsoring states' obligations to protect the marine environment and their liability for potential harm arising from deep seabed mining. The ITLOS acted as an entrepreneur when assessing this request. It built its opinion upon previous judicial decisions such as *Pulp Mills,*[59] and *Southern Bluefin Tuna Cases.*[60] It also referred to external documents such as the Rio Declaration on Environment and Development, ILC Articles on State Responsibility and ILC Articles on Prevention of Transboundary Harm from Hazardous Activities. Moreover, it used this opportunity to fleshed out what "the responsibility to ensure" entails and the content of states' due diligence obligations.[61] More specifically, the Tribunal listed a series of direct obligations incumbent on sponsoring states, including "the obligation to apply a precautionary approach;" "the obligation to apply best environmental practices;" "the obligation to ensure the availability of recourse for compensation in respect of damage caused by pollution;" and "the obligation to conduct environmental impact assessments."[62] Having a strong entrepreneurial character, this advisory opinion became a reference point to determine the content and scope of states' environmental obligations and liability.[63]

The second advisory opinion was issued in response to a request from the Sub-Regional Fisheries Commission (a regional fisheries management organization) in 2015. The request invited the ITLOS to elaborate on the obligations of flag states to tackle illegal, unregistered and unreported fishing (IUU). The ITLOS first established that "the primary responsibility for taking the necessary measures to prevent, deter and eliminate IUU fishing rests with the coastal State."[64] To do so, it particularly relied on the UNCLOS provisions and its own 2014 judgment *M/V "Virginia G" Case*.[65] The ITLOS then moved to assessing the flag states' responsibilities in IUU fishing. Highlighting that the UNCLOS does not address this issue, it went on

[59] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* Judgment on the merits 20 April 2010, ICGJ 425 (ICJ 2010)
[60] *Southern Bluefin Tuna Cases (New Zealand v Japan),* Order Provisional Measures of 27 August 1999.
[61] *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, §107-120.
[62] *Responsibilities and obligations of States with respect to activities in the Area*, §122.
[63] It has also been regarded, *inter alia*, as a model for the discussions on business and human rights. See: N. Bernaz and I. Pietropaoli, "Developing a Business Human Rights Treaty: Lessons from the Deep Seabed Mining Regime under the United Nations Convention on the Law of the Sea", *Business and Human Rights Journal* 5(2020), p. 200-220.
[64] Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015.
[65] M/V "Virginia G" (Panama/Guinea-Bissau), Judgment of 14 April 2014.

establishing flag states' due diligence obligations. To do so, it particularly referred to "the responsibility to ensure" principle developed its 2011 advisory opinion. Hence, it employed an already established principle and assumed its arbitrator character. However, it did not stop there and engaged its entrepreneur character too. The Tribunal applied this principle to a new field and it assumed its entrepreneur character to establish flag states' obligation to prevent IUU fishing by vessels flying its flag. Similar to the first advisory opinion, the second advisory opinion was also built upon previous internal and external jurisprudence, such as *Southern Bluefin Tuna*, *MOX Plant,* and *Pulp Mills*.[66]

Provisional measures

As Table IV shows, the ITLOS tends to be slightly more entrepreneurial when ordering provisional measures. For this study, we analysed 5 provisional measures orders. 3 out of these 5 orders were entrepreneurial while the remaining 2 appear to be delineator decisions. We expect this tendency is due to the nature of the ITLOS's provisional measures mandate. According to Article 290 of the UNCLOS, provisional measures are granted to preserve the rights of the parties to a dispute or to prevent *serious* harm to the marine environment. For example, in the *Delimitation of the Maritime Boundary in the Atlantic Ocean*, Côte d'Ivoire requested an order to suspend all exploration or exploitation activities conducted by or on behalf of Ghana in the disputed area. Nevertheless, the Tribunal ordered Ghana to carry out strict and continuous monitoring of all activities with a purpose to prevent a serious harm to the marine environment.[67] In particular, the Tribunal prioritized environmental concerns and highlighted that leaving oil rigs unattended may itself constitute a violation because of its potential environmental impact.[68] We can find similar approaches in *Southern Bluefin Tuna* and *MOX Plant*.[69] Yet, in 2 other provisional measures orders, the ITLOS chose not to engage with environmental claims. For example, in *M/T "San Padre Pio" Case,* the ITLOS declined to review Nigeria's claims concerning the Swiss vessels' bunkering activities from an environmental angle, acting as a delineator.[70]

[66] *MOX Plant (Ireland v. United Kingdom)*, Order of December 2001.
[67] *Delimitation of the Maritime Boundary in the Atlantic Ocean* (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015, p. 146, paras. 100-101.
[68] *Delimitation of the Maritime Boundary in the Atlantic Ocean*, §99.
[69] *Southern Bluefin Tuna* (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 280, at p. 296, para. 77; *MOX Plant (Ireland v. United Kingdom)*, Order of December 2001.
[70] *M/T "San Padre Pio" Case; Switzerland v. Nigeria*, Provisional Measures, ITLOS, Order of 6 July 2019. The other order with a similar character is *M/V"Louisa"* (Saint Vincent and the Grenadines v. Kingdom of Spain), Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010, p. 58, at p. 70, para. 77.

Merits

The ITLOS have dealt with very few cases in the merits stage. Most of these cases involved claims concerning maritime delimitation and detention of vessels.[71] Therefore, these cases did not necessarily centre around environmental issues. However, some of the claims touched upon environmental norms. What is striking is that the ITLOS did not take the initiative to flesh out environmental norms through these cases and certify its entrepreneurial role for the protection of marine environment. On the contrary, the ITLOS often chose not to directly engage with environmental claims, especially when they were expressed indirectly and without urgency. For this study, we examined 4 judgments and only in 1 of them – in *M/V Virginia* – the ITLOS partially acted as an entrepreneur. In *M/V Virginia*, the ITLOS task was to determine whether sovereign rights to protect and preserve the marine environment included the regulation of fishing vessels' bunkering in the EEZ of a coastal State. Relying on its previous jurisprudence, namely the *M/V "SAIGA"* and *Tomimaru" (Japan v. Russian Federation),*[72] and external jurisprudence,[73] the ITLOS pronounced that coastal states may regulate bunkering of foreign vessels fishing in their EEZ.[74] However, it later balanced its entrepreneurial instinct and assumed its delineator character when it declined to entertain a broader question about whether they can regulate bunkering to protect marine environment. It effectively resorted to judicial economy and said as little as possible about this matter. Other three decisions, namely the *M/V "Saiga" (No.2), the M/V "Louisa" Case*, and *the M/V "Norstar Case"* carry the same delineator characteristics.

Reflection on the ITLOS's Judicial Behavior and Citation Patterns

Looking at the ITLOS's entire jurisprudence through the lenses of network analysis and the judicial characters typology, we arrive at two conclusions: *Judicial behavior analysis.* The ITLOS's judicial behavior record appears to be bipolar, showing a degree of ambivalence.[75]

[71] For example, in the M/V Virginia, the ITLOS task was to determine whether sovereign rights to protect and preserve the marine environment included the regulation of bunkering to fishing vessels in the EEZ of a coastal State. See: *M/V "Virginia G"* (Panama/Guinea-Bissau), Judgment of 14 April 2014, paras. 212 and 213.
[72] M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p. 10; ("Tomimaru" (Japan v. Russian Federation), Prompt Release, Judgment, ITLOS Reports 2005–2007, p. 74.
[73] Dispute concerning Filleting within the Gulf of St. Lawrence between Canada and France, Decision of 17 July 1986, ILR 82(1990), p. 591, at p. 630, para. 52; Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J. Series A, No. 7, p. 19
[74] *"Virginia G"* (Panama/Guinea-Bissau), §220-224
[75] We believe one of the reasons behind this ambivalence is competition. The ITLOS is able to portray itself as a truly independent tribunal with no agenda. Jacob Katz Cogan, "Competition and Control in International Adjudication Essay," *Virginia Journal of International Law* 48, no. 2 (2008 2007): 411–50.

When *directly* confronted with environmental questions through requests for advisory opinions, the ITLOS tends to act as an entrepreneur. Similarly, environmental concerns figure more prominently in its provisional measures orders. The ITLOS leans towards being more of an entrepreneur when ordering provisional measures in the face of imminent environmental risks.[76] However, we observe less of an engagement at the merits stage, especially when environmental claims are not at the center of complaints. That is, when environmental issues are raised *indirectly*. These are the instances, the ITLOS safely assumes its delineator role and sidelines environmental concerns. It does so despite the fact environmental protection norms are not external to the UNCLOS since the treaty text includes a series of provisions on environmental protection. This does not entrust the ITLOS with judicial courage to certify its role as an unequivocal entrepreneur as we see in the case of the IACtHR, however.

Therefore, we characterize the ITLOS's attitude towards environmental norms as ambivalent. Ambivalence could be a strategic choice.[77] On the one hand, the ITLOS shows that it prioritizes environmental norms when directly asked.[78] On the other hand, its unwillingness to act on indirect environmental claims helps not branding itself as an active entrepreneur of environmental concerns. This diverse representation communicates a friendly message to all relevant stakeholders to safely bring their cases no matter what their claims are. This strategy might be necessary for the ITLOS to attract more applications and to keep the inflow of cases in the face of a tough competition with the ICJ and Arbitral Tribunals.[79]

Arbitral Tribunals due to their *ad hoc* nature tend not to have this concern and, as a result, they often have the judicial courage to be more entrepreneurial.[80] For example, the *Trail Smelter* A*rbitration* constructed the famous no harm principle.[81] Later on, the *Iron Rhine Arbitration* elaborated on the importance of using external environmental soft law documents to interpret and determine the scope of environmental obligations.[82] This trend continued with *Indus Kishenganga Arbitration*, which established the link between sustainable development

[76] Boyle, "The Environmental Jurisprudence of the International Tribunal for the Law of the Sea."
[77] Harlan Grant Cohen et al., *Legitimacy and International Courts* (Cambridge University Press, 2018).
[78] Alexander Proelss, "The Contribution of the ITLOS to Strengthening the Regime for the Protection of the Marine Environment," in *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals*, ed. Angela Del Vecchio and Roberto Virzo (Cham: Springer International Publishing, 2019), 93–106.
[79] Cogan, "Competition and Control in International Adjudication Essay."
[80] See Table V in the Annex.
[81] *Trail Smelter Arbitration*, 16 April 1938 and 11 March 1941, 13 R.I.A.A. 1905, at 1965
[82] For example: *Iron Rhine Arbitration (Belgium/Netherlands)*, PCA 2003-02, Award of 24 May 2005, para. 59; *Indus Waters Kishenganga Arbitration* (Pakistan v. India), Partial Award, 18 February 2013, PCA Award Series (2014), para. 449.

and the prevention principle.[83] The *South China Sea Arbitration* clarified the scope of the due diligence obligations under Part XII of UNCLOS.[84] Specifically, building on the ITLOS's jurisprudence, such as *Louisa* and *Ghana and Côte D'Ivoire,* the Tribunal established that Article 192 includes a positive obligation to take measures and a negative obligation to refrain from degrading the marine environment.[85] As seen, Arbitral Tribunals not only play a crucial role in developing and cross-fertilizing important environmental norms but also they tend to take rulings of the ICJ or the ITLOS further and arrive at more progressive conclusions.

Citation patterns. The ITLOS tends to rely on the UNCLOS more and cite the precedents and external documents less than the two other courts we study. This is because the UNCLOS includes several environmental protection norms. However, we can still observe a correlation between judicial characters and citation behaviour. We observe that the ITLOS often cites its previous rulings and external jurisprudence or documents when acting as an entrepreneur. It channels the authority of the previous jurisprudence when developing environmental norms, as we see in M/V *"Virginia G" Case*, where it relied on two external ruling, *the Gulf of St. Lawrence (Canada and France),*[86] and *Certain German Interests in Polish Upper Silesia.*[87] Moreover, it also referred to the 2009 Agreement on Port State Measures and several regional fisheries management conventions (e.g. the Convention for the Conservation of Southern Bluefin Tuna and the Southern Indian Ocean Fisheries Agreement). Entrepreneur decisions are also the ones that are most cited in the network. For example, looking at Figure 1 we observe that two other important cases in the network are the 1999 *Southern Bluefin Tuna Case* and the 2001 *MOX Plant Case,* as well as the two advisory opinions, all of which are entrepreneurial. These decisions are widely cited within the ITLOS regime and referred to in the IACtHR's advisory opinion.

As expected, the ITLOS's single (partly) arbitrator decision, the 2015 advisory opinion relied on internal jurisprudence, the 2011 advisory opinion. Finally, the delineator decisions such as the *M/V "Louisa" Case*, and the *M/T "San Padre Pio" Case* do not refer to the existing jurisprudence at all. Therefore, they are the ones disconnected from the network. In a few delineator cases, where previous jurisprudence is cited, it is done to distinguish the case at hand

[83] *Indus Waters Kishenganga Arbitration* (Pakistan v. India), Partial Award, 18 February 2013, PCA Award Series (2014), para. 450.
[84] See: *The South China Sea Arbitration* (The Republic of Philippines v. The People's Republic of China), PCA 2013-19, Award, 12 July 2016**,** para. 941, 959, 964, 966.
[85] *The South China Sea Arbitration,* para 941.
[86] Dispute concerning Filleting within the Gulf of St. Lawrence between Canada and France, Decision of 17 July 1986, ILR 82(1990), p. 591, at p. 630, para. 52
[87] Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J. Series A, No. 7, p. 19.

or to fortify the claims to discard environmental norms. For example, in *M/V "Louisa"* provisional measures order, the ITLOS referred to *Southern Bluefin Tuna* to explain that the situation at issue was not as urgent. Similarly, in the *M/V "Norstar" Case*, another delineator ruling, the ITLOS cited *Lotus*, to build its reasoning that bunkering on the high seas is part of the freedom of navigation and cannot be interfered due to environmental concerns and arrived at a retractive conclusion.

D) Concluding Discussions

In this article we show these three regimes' idiosyncratic approach to environmental norms. While the WTO tends to be deferential to the authority of its previous decisions, the IACtHR acts as an entrepreneur and works for the cross-fertilization of environmental norms. As for the ITLOS, it shows deference to states when it can and displays less reliance on precedents compared to the other two – since the norms at issue are often covered under the UNCLOS. In addition, this article offers a series of insights and findings that advance the literature on judicial behavior.

First, we show the link between judicial behavior and citation patterns of the three regimes. This link is indeed a significant finding to our research question because it answers how tribunals behave differently with different objectives in mind. Across all regimes, we observe that an entrepreneurial tribunal – attempting to address an environmental issue by embracing such external norms into its judicial system – tends to cite extensively, particularly outside of its regime. Cases in point are, for instance, *US – Shrimp* in the WTO, the *M/V "Virginia G"* of the ITLOS, and the Advisory Opinion OC-14/17 of the IACtHR. This suggests that naturally, when an international arbitrating body incorporates an external norm into its jurisprudence, it does see the need to substantiate its claim by reaching out toward external jurisprudence and documents, especially those on international environment cooperation. Interestingly, in the case of the ITLOS and the IACtHR, tribunals usually do so in advisory opinions, which become reference points for latter disputes.

When a tribunal acts like an arbitrator, it tends to provide a black letter law approach to a dispute at hand. Such case is, however, only possible when there is already an established rule on how to deal with environmental issues as an external norm. Here, a norm of precedent-following becomes crucial in establishing arbitrator as a dominant behavior in the regime. The WTO AB, for example, has a strong precedent following culture. In all of its subsequent disputes on environment, the AB acts as an arbitrator and forms a close-knit network of

citations. In contrast, the ITLOS has been less explicit in its precedent following, and shows more reliance on the treaty text. Alternatively, when a tribunal acts as a delineator, it tends to avoid the issue in its entirety oftentimes with almost no citation.

International courts and tribunals have a way of engaging with other jurisprudence and legal instruments outside of their direct mandates if circumstances permit. Such cross-fertilization is inevitable to be able to address issues related to external norms not originally envisioned in its mandates. There are several techniques which the courts and tribunals employ to deal with external norms. The IACtHR's rulings epitomize the spirit of judicial cross-fertilization. Especially its advisory opinion single-handedly connects human rights and law of the sea regime by extensively citing internal and external jurisprudence, soft law documents and other legal instruments. The WTO AB, on the other hand, consistently puts its own precedents as the main and often the only source of authority. In its earlier cases, however, it did engage with external sources, such as the ICJ and the GATT reports, as well as external documents on international cooperation on conservation of the environment. The ITLOS's main source of authority is the UNCLOS. However, when it needs to address issues outside the scope of the treaty, the ITLOS also relies on judicial cross-fertilization especially in its advisory opinions and some of its provisional measures orders. When cross-fertilization occurs, we also observe that in most cases courts often act as an entrepreneur, instead of an arbitrator or a delineator. As mentioned earlier, entrepreneur decisions also tend to cite outside sources more than arbitrator or delineator ones.

This research also shows the importance of soft law documents and advisory opinions in the development of environmental judicial reasoning. Soft law instruments, such as the 1972 Stockholm Declaration on Human Environment and the 1992 Rio Declaration on Environment and Development, are relied upon as authoritative texts in key rulings issued by the courts and tribunals we study. These documents confer these judicial bodies with authority to elucidate whether and to what extent substantive and procedural obligations are part of a broad obligation to protect the environment or human rights. In a similar vein, advisory opinions serve as catalysts. The tribunals tend to be more open to discuss environmental issues in the context of advisory proceedings. This could be due to the lack of contending parties or an active dispute. Instead, it is an open dialogue between states and other relevant stakeholders, which allows them to exchange considerations but it leaves to the legal authority to say the final word. Furthermore, advisory opinions may be likely to provoke less contestation and more endorsement from states. As Judge Buergenthal once said, it is easier for states to implement advisory opinions since they "do not stigmatize them as violators […] which in turn diminishes

the domestic political cost of compliance."[88] Future studies can test this claim, and show the link between judicial behavior and implementation records – be they for advisory opinions or outcomes of contentious procedures.

[88] See: T. Buergenthal, "The Inter-American Court of Human Rights", *The American Journal of International Law*, 76(2), (1982), p. 245; See also: *Interpretation of Peace Treaties*, Advisory Opinion: I.C. J. Reports (1950), p. 65, para. 71.

E) Annex

Table V: Judicial Behavior Patterns of Arbitral Tribunals

Proceeding	Year	Case Name	Judicial Character
Merits	1949	Trial Smelter Arbitration	Entrepreneur
	1957	Lake Lanoux Arbitration	Entrepreneur
	2005	Arbitration Regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands	Entrepreneur
	2013	Kishenganga River Hydroelectric Power Plant Arbitration	Entrepreneur
	2016	The South China Sea Arbitration	Entrepreneur