The international legal personhood of Nature and other ecosystems: A legal approach based on ecocentric ethics

Ph.D. Dissertation

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For my beloved Bárbara and Rebeca.

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Abstract

This dissertation aims at appraising the proposition of conferring international legal personhood on Nature,[1] as an alternative instrument to cope with the present ecological crisis. It focuses on the transition from the object to the subject of law, namely from the traditional Western worldview of understanding natural resources as goods, even as commodities, chiefly represented by the contemporary notion of the human right to a healthy environment, towards the recognition of Nature as an entity endowed with rights. Correspondingly, it deals with encouraging the participation of Nature as a new actor in the international arena, emphasising its intervention, particularly in green judgements before the international courts of justice. The jurisprudence coming from the Court of Justice of the European Union (CJEU) constitutes the referential case study.

In fairness, although the idea is not new at the national level and seems to resurface every now and then,[2] the scheme of Nature as a holder of rights merits further research and development. Indeed, the state of affairs has been significantly modified in the ordinary course of events, mainly because what was "*unthinkable*" in the past, before the U.S. courts,[3] has become presently feasible before tribunals of New Zealand, Colombia, and India, which have conferred legal personality on rivers and other ecosystems.[4]

Although one of the first and most celebrated propositions about the recognition of rights of Nature is on the records of *Sierra Club v. Morton*, nay in the dissent opinion by Justice Douglas, the case also represented a relative judicial setback. It is due to the fact that the Court of Appeals rejected the lawsuit, brought before it to prevent the construction of a ski resort and its facilities on Mineral King Valley, holding that the claimant lacked legal standing to claim on behalf of the ecosystem.[5]

Nevertheless, twenty years later, the community of *Whanganui Iwi* and the Crown of New Zealand signed an agreement to discharge a long-running legal dispute, begun in 1990, which mainly focused on the creation of legal personality for the *Whanganui River.*[6] On their part, Colombian Courts have been acutely active in recognising diverse ecosystems as subjects of law and granting rights. In that regard, the Colombian Constitutional Court

[1] The term "Nature" with the first capital letter will be used as a synonym of Mother Earth, environment, planet, or ecosystem to avoid misunderstandings of meaning.
[2] A contemporary reference at domestic level in Gordon (2018) 50.
[3] Stone (1972) 450-7.
[4] An accurate compilation of contemporary experiences in Harmony with Nature (2020) § 1-23.
[5] See Case 70-34, *Sierra Club v. Morton* (1972) § III, 741.
[6] Agreement between *Whanganui Iwi* and the Crown (2012) para. 2.7. Hereinafter *Tūtohu Whakatupua*.

recognised the *Atrato River*, including its watershed and tributaries as a subject of law in 2016, in order to be protected, conserved, maintained and restored, by the State along with ethnic communities. In addition, the Administrative Tribunal of Boyacá declared Pisba Highlands (*páramo*) as a subject of rights, just like the Supreme Court did it to Colombian Amazon.[7] India followed suit, when the High Court of Uttarakhand at Nainital bestowed legal personality on the rivers *Ganga* and *Yamuna*, in addition to the ecosystems comprised of the glaciers *Gangotri* and *Yamunotri* in 2017.[8]

Moreover, the recognition of Nature's rights has gone beyond, by reaching out to be part of domestic law in the United States, Bolivia, and New Zealand, and even of constitutional law in Ecuador. Indeed, the first formal acknowledgement of an ecosystem as a person–endowed of rights–occurred in 2006, in Tamaqua Borough, Pennsylvania, by means of an ordinance relative to the ban on corporations from engaging in the land application of sewage sludge.[9] Thenceforth, a total of twenty-six towns in the United States counts on similar bylaws, i.e., in addition to Pennsylvania, the states of Virginia, New Hampshire, New Jersey, New York, Maryland, Ohio, New Mexico, Idaho, Wisconsin, and California.[10]

On its part, Nature or "*Mother Earth*" is legally a "*collective subject of public interest*", who has rights to life, diversity of life, water, clean air, balance, restoration, and a life free of pollution in Bolivia.[11] Meanwhile, in New Zealand, the 2012 agreement between *Maori* people and the Crown of New Zealand was enacted into law in 2017, declaring the so-called *Te Awa Tupua*–the ecosystem linked to the *Whanganui River*–as a legal person.[12] Finally, as the corollary of the constitution-making process in Ecuador, Nature has the constitutional right to "*integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes*" since 2008.[13]

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[7] Case T-622, *Centro de Estudios para la Justicia Social "Tierra Digna" y otros v. Colombia* (2016) Decision No. 4; Case 15238 3333 002 2018 00016 01, *Juan Carlos Alvarado Rodríguez y otros v. Ministerio de Medio Ambiente y otros* (2018) Decision No.3; Case STC4360-2018, *Andrea Lozano Barragán y otros v. Presidencia de la República de Colombia y otros* (2018) number 14.

[8] Writ Petition (PIL) No.126 of 2014, *Mohammed Salim v. State of Uttarakhand & others* (2017) Direction No. 19; Writ Petition (PIL) No.140 of 2015, *Lalit Miglani v. State of Uttarakhand & others* (2017) Direction No. 2.

[9] Ordinance Tamaqua Borough No. 612 (2006) § 7.6.

[10] Harmony with Nature (2020) § 23.

[11] Ley de Derechos de la Madre Tierra (2010) Article 7; Ley Marco de la Madre Tierra y Desarrollo Integral para Vivir Bien (2012) Article 1 (a) and 9 (1).

[12] Te Awa Tupua (Whanganui River Claims Settlement) Act (2017) § 14. Hereinafter *Te Awa Tupua Act*; *Tūtohu Whakatupua* (2012) paras. 2.6 to 2.9.

[13] Constitution of the Republic of Ecuador (2008) Article 71, translated by Georgetown University & Center for Latin American Studies Program (2011). Hereinafter Constitution of Ecuador.

All of these national experiences have led this question towards a new judicial, legal, and even ethical moment, in which will turn out crucial, at least, to contextualise the real scope of Nature, as a global entity, and reinforce the mechanisms allowing the implementation of its legal representation systematically. In order to attain these ends, it will be necessary to pose the dilemma of the bearer of rights since the perspective of international law. This single scenario is capable of encompassing the authentic physical extension of Nature beyond the mere national boundaries.

On the other hand, the common thread running within this work will be property rights, given the remarkable role they played in the different dimensions of the debate about how to understand and address the current environmental emergency. Indeed, ownership of natural resources quite probably represents the major criticism of anthropocentrism, being deemed by its detractors as one of the chief sources of ecological depletion[14] and social conflict.[15] David R. Boyd himself, the current U.N. Special Rapporteur on Human Rights and the Environment, has assured that "[a]*nthropocentrism and property 'rights' provide the foundations of contemporary industrial society,* [where economic] *growth is the principal objective for governments and businesses, and it consistently trumps concerns about the environment*".[16]

Nevertheless, there are also utterly contradictory criteria thereon, such as Cole's or Flipo's. So, Cole asserts that those views about property rights at the centre of environmental concerns are too much reductionist since they do not take into account many other circumstances involved, like institutional distortions, technological deficiencies, extremely high transaction costs, and so on. On his part, Flipo pleads the rights of Nature should articulate with human rights, given that both categories are not excluding. He believes Nature's rights, just like human rights, can get instrumentalised against those promoting selfishness surreptitiously and enforced against polluters and exploiters. "*Nature rights might be enforced against the poor but not the rich,* [he asserts] *in a Malthusian approach, just as human rights can serve as a mask for ownership*". Interestingly, Boyd himself quotes a couple of judicial cases, albeit at the Constitutional level, recounting how certain courts, in Slovenia and Belgium, have not decided in favour of property rights and to the detriment of Nature, based predominantly on reasons of public interest.[17]

[14] Sands (1994) 294; Borràs (2016) 113-4; Ramlogan (2002) 15-6.
[15] Taylor (1998a) 383.
[16] Boyd (2017) xxiii.
[17] Cole (2002) 1-19; Flipo (2012) 136-7; Boyd (2018) 34-5.

To that extent, the acknowledgement of Nature as a holder of rights, instead of merely a set of possessions, comprises a radical measure going beyond the continuous necessity of rethinking and restructuring the concept concerning the property of natural resources, as suggested by Taylor. In other words, it does not deal with that empirical definition of Nature, wherein environmental protection and its economic functions are correctly balanced, as argued by Sax, Hunter, and Rieser, even though in the end without brushing aside its legal category of commodity.[18]

The notion of rights rather involves bringing Nature further the limits of the paradigm of legality, and even of morality, overriding any loophole of ownership, in order to extend its ambit of lawful protection like any another existing subject of law, similarly–perhaps–to what has once occurred with slaves, women, workers or blacks, and so on.[19] Around this reasoning, it arouses various enquiries that exceed the purely legal analysis and settle in the field of other related disciplines, particularly ethics. It is well known that legal practices improve if they get integrated with ethical considerations.[20]

[18] Taylor (1998a) 394-5; 384-5; Sax (1993); Hunter (1988); Rieser (1991). There is a more recent and exhaustive compilation of articles relative to the incorporation of environmental variables into the concept of property rights, including critical stances, in Grinlinton and Taylor (2011). Likewise, one can find additional references about parallel approaches, for instance, in Maguire and Phillips (2011); Meyer (2009); Rodgers (2009); Freyfogle (2003) 203-27; Searle (1990); Cribbet (1986).
[19] Nash (1989) 7.
[20] Deák (2019) 284.

Chapter One
Introduction

1.1 General methodological aspects

1.1.1 Why an international insight?

Unquestionably, all current experiences about the recognition of rights of Nature and its legal personality come from local legislation and national courts, as one can see in the United Nations' compilation. Nevertheless, Nature is comprehensive in practice, indivisible, as it were. Territorial boundaries cannot separate the cycles of life, the structure, or the functioning of Nature. Its natural processes do not bring about isolated effects that one could differentiate by countries or regions. Evidently, those effects are global.[21]

Thus, albeit one should acknowledge the local experiences have been crucial to promoting this new paradigm, they will be merely isolated endeavours if one does not take into account the wholeness of Nature. For example, the attempts to protect a transnational river or any other similar ecosystem will not be fruitful while all countries involved do not take the appropriate eco-friendly measures. The individual actions will be useless in the end.

In conclusion, lawmakers should design normative to respond to the totality, not to the particularities, and the best fashion, quite probably the only one, to address those integral visions of Nature is through international law.

1.1.2 Novelty of the research

The hypothesis is novel in the field of study. Indeed, despite the fact that there are a lot of developments in matters of recognition of rights of Nature at the national level, even concerning comparative law, this is one of the first efforts to present an assessment from the global legal perspective and scrutinise the international judicial decisions thereon.

1.1.3 Qualitative methods

[21] Harmony with Nature (2020) § 1-23.

The scope of the legal, judicial, and ethical perspectives determined the methodology employed in the present dissertation. In that regard, the traditional doctrinal method guided the analysis of the legal and judicial components of the research, which corresponds to the classic technique of analysing "*black-letter law*", in the words of Paul Chynoweth. In general terms, following Jacobstein, Mersky, and Dunn, black-letter law deals with a colloquial expression relating to "[…] *the basic principles of law generally accepted by the courts and/or embodied in the statutes of a particular jurisdiction*".[22] Its application is going to allow counting on a systematic formulation of legal data about the international instruments currently in force, just like the academic works about the topic.

Additionally, the processes of collecting information, processing of data, ascertaining of facts, and analysis of results have followed the general steps explained in the literature thereon. Thus, as Van Hoecke describes, the relevance of each case determined the contents and the manner of collecting the empirical data which comprised mainly of the normative sources and case-law.[23] Likewise, the quotation and report of various repealed European directives, for instance, corresponded to their level of importance concerning specific jurisprudence.

In a similar vein, the guidelines for the interpretation of wording have been crucial to obtaining results, focusing primarily on the texts of the adjudications. The position of the CJEU is not always homogeneous so that it is necessary to determine the diverging readings about the same norm, in order to interpret a potential opinion of the Court or its meaning concerning this and that specific matter.

Furthermore, one cannot lose sight of the uncertainty principle in legal research, particularly in this kind of environmental studies, in which the replies are often interpretative and not definitively the simplest ones so that the results are far to be conclusive.[24] In any event, the comments, opinions, and arguments come from the highest possible number of sources and evaluations in order to correct, to the extent feasible, the errors or misunderstandings derived from the uncertainty of data. By the way, Hoffman and Rumsey have an accurate compilation of legal sources in several disciplines of law but mostly related to international environmental law.[25]

[22] Chynoweth (2008) 29; Jacobstein, Mersky and Dunn (1998) xx.
[23] Hoecke (2011) 11-4.
[24] Elias, Levinkind and Stim (2007) 16.
[25] Hoffman and Rumsey (2012).

Moreover, one should be conscious about the existing tensions between the attributed rigid and inflexible features of doctrinal analysis, in contradistinction to the wider challenges of the interdisciplinary tools, just as have been described by Douglas Vick. Then, the employment of concepts taken from different scientific disciplines has been inevitable, above all, when they have been useful to avoid misinterpretations.[26]

On the other hand, the search for bibliographic information about the methods "*of*" ethics does not look like a difficult task at first glance. However, once one has undertaken the quest, the lack of specific references is quite noticeable. The bulk of study materials refers mainly to the role of ethics in the research of both sciences and humanities, evidently including law, emphasising the addressing of ethical challenges and dilemmas during the process of conducting research.[27]

Thus, when one reviews several works about applied ethics, including academic dissertations, they give the impression that authors take it for granted the analysis of moral principles should fit the traditional Western practices, namely they adopt those methods influenced mainly by Kant and his categorical imperative towards deontological enquiries. In the course of the examination, however, it is common to be tempted to occasionally opt for empirical analysis, assigning a greater weight to the behavioural observations and practices than the categories of thought. In contradistinction to what Kantianism states, it often occurs–for example–with generally accepted tenets like the precautionary principle, which differ from the aprioristic focus of the categorical imperative.[28] It turns out trying to contrast the persuasive scientific evidence through, so to speak, mere intuitions.

In the same line of reasoning, at the risk of being superfluous as suggested by Sidgwick, it has also been crucial to preventing certain casuistry that outweighs fundamental principles of ethics. The reason lies in the avoidance of obtaining misplaced results to the main objective of this research, such as the responsibility of animals, promoted by utilitarianism, for example. Incidentally, Peter Singer, one of the most prominent thinkers of contemporary utilitarianism, joint with his colleague Katarzyna de Lazari-Radek, affirmed that Sidgwick's book was the best on ethics ever written. Therefore, conforming to Katz, one has attempted to balance the metaphysical approach, as the "*proper*" ethical method, with the tools of

[26] Vick (2004) 163-4.
[27] Wiles (2013) 9.
[28] Hill (2000) 228-9.

casuistry, being beforehand conscious of the theoretical incompatibilities between both, but assuming the risks about the final results.[29]

1.1.4 Quantitative tools

The method to compare the data regarding the adjudications issued by the Court of Justice of the European Union (CJEU) was the "*Pearson product-moment correlation coefficient*", perhaps the most known and used correlation coefficient for two variables. The variables subject to comparison were environmental protection, representation of ecological interests, property rights, trade, and a healthy environment. Given the nature of information and its compilation, there is a detailed explanation in the following subheading.

1.2 Methodological notes concerning the statistical analysis

1.2.1 Why the European Court of Justice?

In the framework of this analysis, the Court of Justice of the European Union (CJEU) got selected, heeding two key methodological reasons. Firstly, this choice allows the examination of property rights on a broader scope, given the applicable normative, i.e., the Treaty of the European Union guarantees the right to bring legal actions not only to Member States but also natural and legal persons. On the contrary, other tribunals instead restrict the right to participate as a party in a trial. For example, the International Court of Justice's statute limits the right to claim and counterclaim solely to the ambit of States, as already mentioned, which would circumscribe the range of the study merely to the field of the assumptions.[30]

Secondly, the employment of jurisprudence coming from the CJEU reduces, at least in part, the biased criteria towards the human rights-based approach of the environmental matters, particularly the right to a healthy environment. It does not mean that judicial decisions issued by the international courts of human rights from Africa, America, or Europe, cannot be the object of study. Indeed, one could suggest future research addressing the adjudications from those tribunals. Nevertheless, in this particular case, their exclusion

[29] Sidgwick (1893) 99; Katz (1988) 20-1; Singer and Lazari-Radek (2017) 12.
[30] Consolidated Version of the Treaty on European Union (2016) Article 19 (3a). Hereinafter Treaty on European Union; Statute of the International Court of Justice (1945) Article 34 (1).

has to do somewhat with the fact that a legal analysis about the rights of Nature, from the anthropocentric perspective of human rights, would be hardly exempt from partiality, and even prejudice.

1.2.2 Avoiding research arbitrariness

The design and application of a specific scheme for the choice of study cases aim mainly at avoiding the arbitrariness to the extent feasible and guarantee the independence of the observer likewise. At the risk of appearing too much technocratic, the process of selection avoids the employment of mere bibliographic references, emphasising the utilisation of correlations as a guideline. This mechanism helps the researcher to maintain a tolerable distance with respect to the data, preventing leaving the choice to the exclusive will of the observer and the convenience of his/her desired results. It did not mean, however, the avoidance of checking several outstanding compilations of jurisprudence, such as the works by Bándi and others, Krämer, Hedemann-Robinson, and the European Commission itself, among others, which were thoroughly useful to the ends of this research.[31]

To this extent, the process of selection did not base exclusively on the already systematised assemblage of case-law because, despite its enormous importance, a common perceivable flaw is the generalised lack of an explanation relating to the methodology applied in the selection of documents;[32] with punctual exceptions. For example, Rass-Masson and others use the European directives and types of infringement to choose their research cases about the enforcement of legislation. Likewise, there is not an explicit explanation about the methodology utilised in the European Commission's compilation about Environmental Impact Assessment rulings of 2010. Nevertheless, one can notice the analysis generally follows the screening criteria provided by the 1985-Council Directive No. 85/337/EEC and its subsequent amendments (no longer in force). In other reports, also prepared for the European Commission about specific areas, such as Nature, biodiversity, or habitats, the choice of cases depends on a precise directive or article, meaning not necessarily

[31] Bándi and others (2008) 269-79; Bándi (2009) 9-29; Krämer (2002) xi-xviii; Krämer (2008); Hedemann-Robinson (2015) xvii-xxxi; European Commission (2016) 4-80. Other compilations about the jurisprudence of the European Court of Justice in Sands (2003) xxvii – xxxii; Zengerling (2013) 60-77; Chalmers, Davies, and Monti (2011) 894-8; Sadeleer (2014) xii-xxv; Jans and Vedder (2008) 478-89; Edwards (Edwards, 1999) 193; Jacobs (2006) 185.

[32] Heta-Elena Heiskanen, who was writing a parallel research about the European Court of Human Rights, made me notice this issue. Heiskanen (2018) 36.

the application of any methodology in particular, but at least of a standard pattern.[33] Still, there is a possibility to place the sample in jeopardy, either excluding valid cases or including unusable ones, it is worthier it to count on a standardised method in aid of the avoidance of research bias.

The use of the environmental category available in the online search engine of the CJEU–as a sole source–neither constituted the perfect option, because the bulk of adjudications are not concerned to "property rights". By doing it, one would have carried out a nonsensical alteration of the sample. A precise selection of cases was necessary to fulfil the requirements of the study. Moreover, considering there is not an academic antecedent in the literature of international environmental law, in which one can observe a criteria screening based on or revolved around "property rights", the formulation of a method implies an academic contribution.

1.2.3 Pearson correlation coefficient

The statistical analysis of the database shown in this section corresponds to the application of *Pearson product-moment correlation coefficient* [also known as *Pearson's correlation* or *bivariate correlation*], which is perhaps the most spread measure of the strength and direction of linear relationships between two variables. Its choice was principally due to its frequent utilisation in the cluster analysis of data with linguistic contents (e.g., regulations, contracts, and corporate bylaws, among other legal documents); i.e., it accurately was fitting to the examination of court decisions.[34]

In technical terms, the universe and the variables comprise the information derived from the Court's adjudications concerning both environmental protection and property rights. Its mainstream symbol will be the letter "r". And the ranges of results will be as follows: the closer the coefficient is to 1, the stronger the association between the two variables, while the closer the score is to 0, the weaker the association.[35]

1.2.4 The universe of cases

[33] Rass-Masson and others (2016) 29-43; European Commission (2010) 29-45; Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (1985) [repealed] Articles 5 to 10; European Commission (2006) 47-118; Sundseth and Roth (2014) 70-80.
[34] Moisl (2015) 11.
[35] Lær statistics (2018) paras. 1st and 2nd.

As a starting point, the universe and every sample of analysis come from a handy online search engine the CJEU maintains. The entire database divides into 65 categories, clustering more than 100 thousand documents in total. The selection restricted only to environmental judgements and closed cases (either published or unpublished in the European Court Reports–ECR), owing to they are the sole legal instruments in respect of which one could attempt to corroborate the hypotheses. The rest of the documents are merely procedural ones, so they have been excluded, given that they do not allow achieving the foreseen research aim. Consequently, the total universe number of selected judgements is 965, comprised between 1 January 1979 and 31 December 2019. The adjudications pertain to the Court of Justice (898) and the General Court (67).[36]

1.3 The selection of the sample of CJEU's adjudications

Given the interactions between property rights and environmental issues are the driving force behind the present research, it would not only turn out useful to count on a statistical reference concerning their correlation but also to construct the indicators in the function of both variables. Indeed, in the framework of the CJEU's adjudications, one can find some decisions oriented to impractical or disjointed matters, in terms of both ownership and Nature's protection. Therefore, it is indispensable to carry out a depuration of data that adequately transpires from the Court's information.

1.3.1 Choice of judgements in the function of property rights

The initial step to determine how influential "property rights" could be within the legal parlance of the Court consists of examining their frequency of repetitions in the judicial adjudications. This incidence of mentions aims at a twofold objective. Firstly, it is a general indicator of the importance and recurrence of the concept of property rights within the ambit of the Court's activities. Effectively, if the judges do not even allude to the idea of property rights within the judicial reasoning, for example, how could one evaluate their degree of influence upon the CJEU's decisions? Secondly, it reduces the number of rulings towards a lesser sample, which will permit focusing solely on the specific cases and handling much more adequately the statistical data.

[36] Case-law of the Court of Justice (2019) Search form.

Chart # 1 Total Cases v. Property Rights (preliminary data)

Source: CJEU (2019)

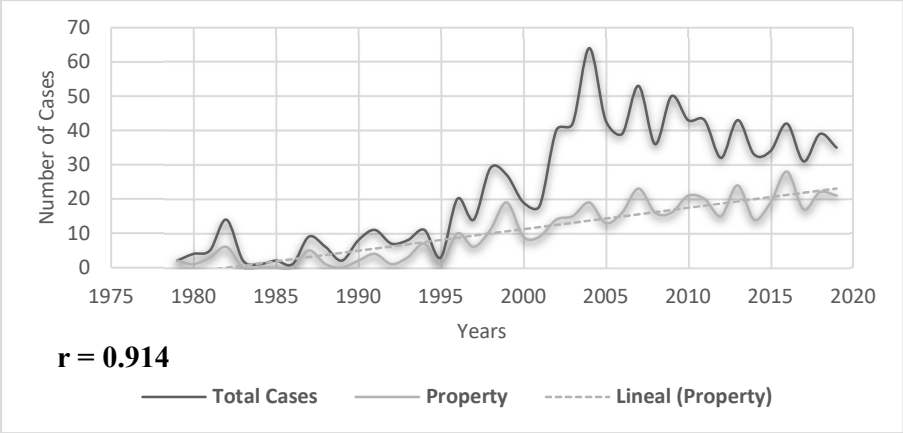
In this regard, chart # 1 shows the chronological tendency of the number of environmental adjudications that mention–at least one time–the words "*property*" and "*right*" (including plurals), joint with their different combinations, such as "*right to property*". The parameter of comparison is the total of environmental adjudications, issued by the CJEU. Furthermore, one can read the data displayed by the graph both in figures and percentages. Curiously, there was not a combination of those words in the judicial sentences before 1999.

Thus, in the analysis period, i.e., between 1999 and 2019, the green decisions represented an average rate of 7.8% in relation to the total selected ones. The highest percentage was recorded in 2015 (20.6%), while there was not any case in 2001 and 2002. As a general remark, one can see the frequency of mentions is not significant in the function of the universe, not even when it reaches the peak level. Complementarily, the score of the correlation coefficient (r) is 0.419, meaning a weak interplay between both sets of data, given its level of closeness to 0. Consequently, these results are not determinant to establish an interconnectedness, let aside any interdependence between "*property rights*" and environmental judgements. The total items of the sample were 63, while the universe counted on 806 records.

At first glance, the low incidence of "property cases" in terms of percentages, along with a medium strength of association, derived from a correlation coefficient closeness to a cero level, could lead to believe in the absence of tensions between Nature and property rights or a relative lack of interdependence between the two analysed variables. Nonetheless, to avoid

a hasty conclusion and obtain an alternative result to compare, the range of cases was expanded to the frequency of the appearance of other terminologies, also relating to "property rights", as one will see in the next chart # 2.

Chart # 2 Universe v. Property (associated words included)



Source: CJEU (2019)

Effectively, the second curve contains a set of data constructed from the inclusion of adjudications that alluded to other words, such as "property", "owner", "proprietor", "private", and their linked terms (e.g., plurals, suffix and prefix in nouns, and so on). Moreover, the selection was validated through the contrast with other terminologies, such as "belong", "possess", "tenant", and their linked expressions. Nevertheless, after the first review in detail of documents, one can also notice the locution "economic interest(s)" frequently refers to cases in which there is a tension between property rights and Nature so that it was necessary to include those cases in the sample as well.

The upshot of this new stage of analysis was a corrected sample of 433 records. As one can notice, the correlation between the number of cases containing references to property rights and the universe is severely much more persuasive than the last results, i.e., much closer to 1 ($r = 0.914$) and a considerably highest rate of 44.9% concerning environmental judgements in the function of the totality. One can also corroborate the level of association between variables by observing the parallelism experience by the two curves. Although both lines flow through different ranges, they seem to follow similar dynamics together, deviating upwards and downwards at the same time.

This methodological procedure, however, brings about two practical issues to warn carefully. Initially, the linguistic diversity of the Court's decisions is a real hindrance to determining properly the sample, which reflects even in their English translations.

Inconvenient handles of language also occur as a result of the ambiguity, imprecision, context-dependence, and other forms of the so-called "*linguistic vagueness and uncertainty*", coming from the original national adjudications or the conflict between norms, derived from the "*value pluralism*".[37]

In this line of reasoning, the word "*possess*" does not always denote property, particularly in the legal parlance. Nevertheless, the judgements in which it appears should not be discarded in the first instance, owing to the fact that court members employ them under the connotation of property. In *Brady v. Environmental Protection Agency (2013)*, for one, judges are thoroughly aware that "*ownership*" and "*possession*" are different concepts. In contrast, in the preliminary ruling about the criminal case of *Nilsson*, possession is utilised as a synonym of "*property*". Curiously, none of the texts includes the term "*property*".[38] Indeed, one should not reject the words associated with the concept of property because it would imply to run the risk of losing valid information.

Secondly, the effect of this aggregation of data makes for another obstacle regarding the insertion of useless or disjointed cases. Nonetheless, it is the lesser of two evils, given it occurs even with the term "*property*" without others at stake. In *Commission v. Alquitranes and others (2017)*, for instance, the term "properties" is used in a scientific sense, like "physiochemical properties". Likewise, the word "possess" is also employed within the same context. Consequently, after a review of terminology, this adjudication had to be formally discarded.[39]

Additionally, a clarification is thoroughly necessary at this point. The allusions concerning property rights within the adjudications' texts do not mean that either applicants or defendants are holders of ownership. In the very first stage, it barely implies the existence of some issue related to property rights. Thus, for example, in the request for a preliminary ruling No. C-411/17, the reference about property rights has to do with Electrabel, the owner of two nuclear power stations, which is not a litigant of the leading dispute but an intervener. The case regards the restarting of one nuclear power station of electricity's production, previously closed, and the deferral of the date initially set for deactivating the other. The parties of the original proceedings are two environmental associations (claimants) and the

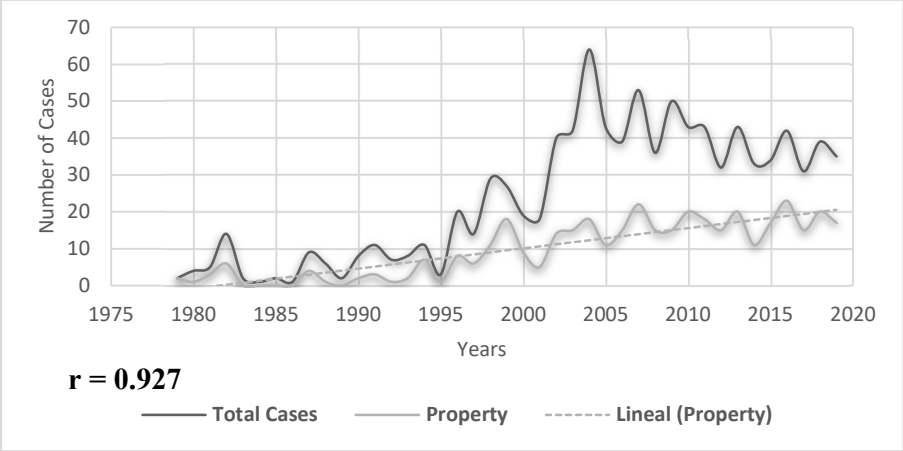
[37] A study in deep in Beck (2012) 52-90.
[38] Case C-113/12, *Donal Brady v Environmental Protection Agency* (2013) para. 27th; Case C-154/02, *Criminal proceedings against Jan Nilsson* (2003) para. 35th.
[39] Case C-691/15 P*, Bilbaína de Alquitranes, SA and Others v. European Commission* (2017) paras. 4th, 24th, 53rd, and 55th.

Belgian Council of Ministers (defendant).[40] Consequently, in a second stage, an exhaustive review of cases allowed determining to whom corresponded the rights of property, either applicant or defendant or any other intervener within the judicial procedure.

Thus, the semantic analysis of the Court's decisions was methodologically crucial to verify the pertinence of information and overcome the inconveniences. The scrutiny focused mainly on those rulings with terminology more prone to meaning confusion, i.e., "possess", "belong", "economic interest(s)", and their associated expressions. All database's records underwent the same procedure to avoid any kind of arbitrariness in the choice. In other words, the documentary review case by case aimed at searching all terminologies and restrictions of topics, for confirming or rejecting adjudications.

Once eliminated the useless judgements, the new sample comprises a total of 391 records, which represent 40.5% of the total cases. The correlation with the universe gets illustrated in chart # 3.

Chart # 3 Universe v. Property (depurated data)



Source: CJEU (2019)

Curiously, even though the new depurated sample includes fewer records than the previous one regarding associated words to property, the coefficient of correlation is lightly closer to one (r = 0.927). Moreover, the visual parallelism between both curves remains. It could be due to various reasons; however, there are perhaps a couple of remarkable implications to emphasise. Firstly, the discard of unserviceable cases delivers uniformity to the cluster, diminishing the linguistic vagueness and uncertainty, alluded to earlier by Gunnar Beck, namely the set of decisions possesses more conceptual consistency in context.

[40] Case C-411/17, *Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v. Conseil des Ministres* (2019) para 2nd.

Secondly, as a subsequent result, the increase of the coefficient demonstrates the procedure satisfactorily unfolded.

In either event, the methodological procedure is not yet complete, considering the orientation of the research aims at correlating property rights with Nature. Therefore, the next step will consist of searching for their interconnectedness.

1.3.2 Choice of judgements in the function of environmental parameters

As a starting point, one should notice that the sample of 391 records–i.e., as it stands–could be readily deemed as the definitive cluster, above all taking into account the universe of judgements come directly from the category called "*environment*" in the CJEU's online search engine. Moreover, this selection provides a quite clear and confident overview of the presence of property rights in the ambit of the Court's action. Nevertheless, when one carefully examines the adjudications' texts, one figures out in the environmental parlance similar semantic obstacles to those identified in the preceding selection.

Unsurprisingly, several Court's decisions focus on a too extensive diversity of topics, including impractical and discardable material, so to speak, such as specific regulations of chemicals,[41] payment of charges due to access to environmental information,[42] conditions of import of agricultural products,[43] and so on. These themes do not fit, of necessity, into the research orientation, which prioritises recurrent subject matters concerning, for example, ownership and state sovereignty over natural resources, representation of Nature, biased rulings to the ecological detriment, among others. Therefore, it will be necessary to refine once again the sample around the concept of natural resources and remove the futile judgements.

Methodologically, the process of refinement of data should aim attention at the concept of "*natural resources*" and other analogous expressions, such as "*ecosystems*", because the notions of representation, sovereignty, property rights, and so forth, revolve around them. Furthermore, even the idea of recognising the rights of Nature, coming from agreements and judicial decisions in New Zealand, Colombia, and India, involves precisely, rivers, glaciers, and other ecosystems. There is a parallel scope in the legislative experience of the United

[41] Case C-651/15 P, *Verein zur Wahrung von Einsatz und Nutzung von Chromtrioxid und anderen Chrom-VI-verbindungen in der Oberflächentechnik eV (VECCO) and Others v. European Commission* (2017) para. 1st.
[42] Case C-71/14, *East Sussex County Council v. Information Commissioner and Others* (2015) para. 2nd.
[43] Case C-62/88, *Hellenic Republic v. Council of the European Communities* (1990) para 1st.

States, where several ordinances contain provisions about the acknowledgement of rights in favour of specific natural resources, such as wetlands, streams, rivers, and aquifers. Notwithstanding, they also include a more holistic category, the "*natural communities*". Except for the ordinances of Mahanoy and Tamaqua (both in Pennsylvania), which only refers to "*natural communities*", all bylaws issued in the United States between 2006 and the present therein comprises similar regulations.[44] As mentioned, in Bolivia and Ecuador, their legal systems are even more holistic bestowing rights on Nature as a whole.

One should bear in mind that the method to systematise information does not meet the same requirements as the procedure used to construct the sample about property rights, concerning the aggregation of data particularly. The environmental character of the juridical texts implies that the bulk of associated references is virtually bonded and has too much general connotation. In other words, if one thinks about the expression "*environment*", for example, as a semantic option to "*ecosystem*" or "*natural resources*" (the key terms), it is quite probable that one winds up including all or almost all records of the database in the "green" sample, as it were. Therefore, it has been avoided making that methodological mistake because it would misrepresent the main objective of refining data.

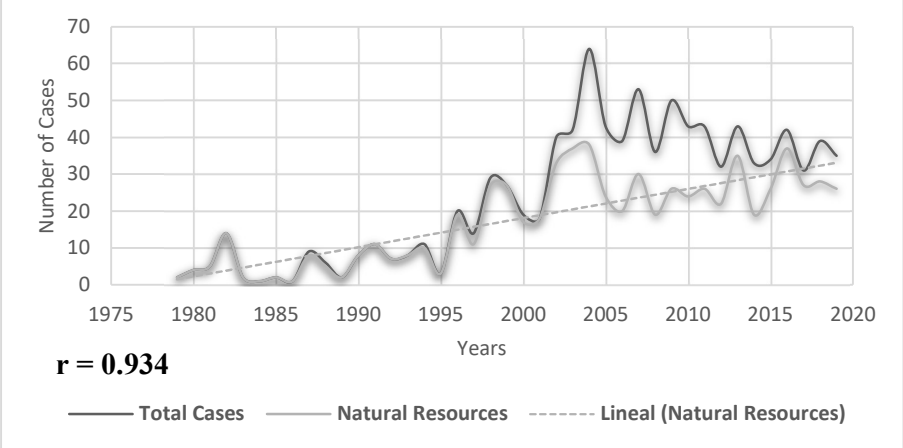
Under this assumption, the estimation of potential useless or disjointed information would be out of a reasonable range. Comparable effects are observable when using other linked expressions, such as "*nature*", "*natural*", "*natural habitats*", "*wild*", and "*ecology*", concomitantly with their connected terms. Once again, the diversity of languages and their translations presumably impose restrictions on the choice, albeit this time it happens in the opposite direction. So many words are translated, for instance, as "*nature*", "*environment*", "*land*", or "*water*" and their linked expressions. The extension of the sample dramatically grows if terminologies about specific natural resources are also listed, for example, "*soil*" and "*forest*" in addition to "*land*" and "*water*", among others. It got carried out a preliminary test directly from the universe to confirm this statistical effect, reaching a sample of 709 records in total, entirely pointless for any analysis. Chart # 4 shows the results only for referential purposes.

Given that both universe and sample share the same conceptual orientation toward environmental issues, it is not weird the comparison of data indicates high rates on the coefficient of correlation ($r = 0.934$) and the percentage of the cluster with respect to the

[44] Ordinance Mahanoy Township No. 2008-2 (2008) § 7.14; Ordinance Tamaqua Borough No. 612 (2006) § 7.6.

total (73.5%). Indeed, several sections of the curves overlap each other, as a result of similar patterns and values. They experience practically analogous trends.

Chart # 4 Universe v. Natural Resources (associated words incl.)



Source: CJEU (2019)

On the contrary, however, when other expressions (e.g., earth, mountains, farmlands, and so on) are part of the procedure, they give rise to a tiny group of rulings in comparison with the complete database. Therefore, it gets recreated an equivalent hindrance of systematisation to what occurred with the initial subject matter of "property rights", i.e., they represent a too-small sample of the universe. The solution would be again the inclusion of other terms, which could imply a boomerang effect.

To recapitulate, one should be cautious enough to select the terminologies adequately for the systematisation, carefully avoiding falling in the uncomfortable disjunctive between choosing just one key term or all of them. While it is true that using only a single category of selection could lead to the omission of meaningful cases, the vagueness of the process of aggregation distorts the sample sharply to the point of its futility instead.

Consequently, the intermediate solution consisted of utilising two key expressions, "*ecosystem(s)*" and "*natural resource(s)*", for the selection and starting from the final sample of property rights (i.e., the matrix with 391 records). The combination of both factors, concepts, and cluster, brings about the duality between ownership and Nature that this research aims. Moreover, the procedure somehow conveys a message concerning natural resources as goods or commodities to possess, represent, or even protect. This option also rejects the excessive strictness that could lead to getting rid of suitable documents and, at the same time, eludes any kind of arbitrariness in the selection, being a standardised method,

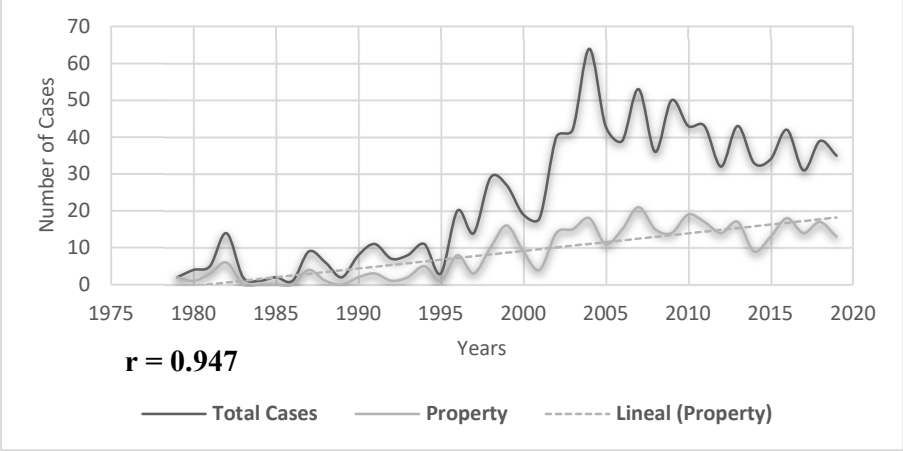
applicable to the whole database. Therefore, this methodological technique guarantees the independence of the observer regarding the sample.

To conclude, the review of the adjudications' texts, case-by-case, turned out inevitable, mainly owing to that the mechanical selection of records did not allow the identification of worthless decisions for the present dissertation, namely there was a series of judgements that did not bring about any concrete contribution to the analysis in practice, not even at a discursive level. Thus, for example, the chief questions in *Valev Visnapuu v Kihlakunnansyyttäjä (Helsinki) and Suomen valtio–Tullihallitus* referred to the imposition and exception of taxes on specific beverage packaging, and the obligations to count on retail sale licenses. In context, the subject matter of the judgement did not fit the research objective, so its discard–joint with other invalid records'– transpired kind of obligatory.

1.3.3 Final sample of cases

The final sample, shown in chart # 5, contains 355 records in total, which corresponds to both the General Court and the Court of Justice (Annexe No. 1 includes a complete list of cases). The curves chronologically illustrate the number of cases where the conceptions of "*property*" and "*natural resources*", joint with their associated terminologies appear somehow alluded to in the adjudications, at least one time. As mentioned, information is referential in semantic terms so that it does not, of necessity, depict or gather the contents of the CJEU's decisions explicitly.

Chart # 5 Total Cases v. Property Rights (final)



Source: CJEU (2019)

Once again, the sample and universe correspond to the environmental adjudications, issued by the CJEU, between 1979 and 2019. The most evident fluctuation comprises the manner how the correlation coefficient goes up towards 1 (r = 0.947), despite the cluster counts on fewer records. The increase describes a significant strengthen of association between both variables. Indeed, the coefficient reveals the highest value so far. The drawings of the tendencies even follow a similar pattern, without coming to be thoroughly parallel, although the curves deviate upwards and downwards virtually under the same rhythm.

Nevertheless, the percentage does diminish. Thus, the ratio between the sample and the universe goes down from 40.5% to 36.8%. One could not affirm, however, that it deals with a significant decrease.

Although the set of data displayed on the chart are not definitive indicators of how the property rights influence the Court decisions in environmental issues, they do allow arriving at relevant conclusions, at least a couple of them. On the one hand, it turns out conspicuous that property rights constitute a present subject matter within the CJEU's reasoning about environmental issues. One could hardly affirm that it deals with the most noteworthy aspect, but its presence is undeniable inside a significant quantity of adjudications with respect to the total. They are certainly not the majority, but they do reach a high proportion (above 35%). On the other hand, the tendency line of property (line of dashes) is rising, meaning that the Court members are addressing more frequently those merits of each case concerning property rights within the framework of environmental issues.

1.4 Research questions

The General research question has been somehow tacitly mentioned above. Therefore, it reads as follows: ***How feasible is it to confer international legal personality on Nature, as an alternative instrument to cope with the environmental crisis?***

The complexity of the topic, involving not only legal and judicial elements but also ethical ones, makes necessary the employment of a succession of arguments, whose implications should be evaluated previously to the approach of the central research question. Thus, there is a series of subsidiary questions to facilitate the general analysis and guide the whole structure of the dissertation. These ancillary questions are:

1.4.1 From the ethical perspective

a) *Are the traditional human-centred principles sufficient to provide the ethical foundations for the recognition of international legal personality to Nature?*

b) *What is the moral status of Nature according to the principles guided by environmental ethics?*

c) *How feasible would be to enlarge the moral limits towards including Nature within them?*

d) *What would be the key ethical foundations with which the holistic perspective would contribute to enhancing the interplay between humans and Nature?*

1.4.2 From the legal viewpoint

e) *Are the existing legal mechanisms, based on anthropocentric tenets, enough to guarantee the protection and respect of Nature?*

f) *How necessary would it be the representation of Nature as a bearer of rights and a subject of international law in the current state of legal affairs?*

g) *Is it true that Nature is considered as a mere set of goods, subject to property, in the international legal framework currently in effect?*

h) *Are property rights really deemed more important than Nature, according to the international legal framework, currently in force?*

i) *What aspects of the national laws in current force, by which Nature has been recognised as a holder of rights, would be useful for its international acknowledgement?*

j) *To what extent would the bestowal of international legal personality on Nature modify the legal conditions of the property rights?*

k) *What would be the key rights and duties of Nature as an international subject of law?*

l) Who would represent Nature as a subject of law in the international ambit?

1.4.3 From the judicial standpoint

m) Do international courts of justice rule in favour of property rights and individual interests to the detriment of Nature?

n) Is it necessary to be the owner of natural resources or exercise any kind of associated rights for obtaining eco-friendly rulings before international courts?

o) Is there anybody who can represent Nature's interests before international courts within the international legal framework currently in force?

p) Are there enough warranties to protect natural resources in the current international system of justice?

Chapter Two

Nature in the international legal framework in force

The present chapter sets out with the premise that Nature, within the realm of current international law, is seen as either a human right or a collection of things aimed at guaranteeing human welfare. It is indisputably evident that Nature is not a legal person. The legal personality, indeed, has been historically reserved for States, although it has been progressively getting extending to certain international organisations, and even individuals under very special circumstances.[45]

In that sense, one should argue that environmental protection is governed under a thoroughly anthropocentric character at a global level, which is not really concerned with safeguarding and respecting Nature in itself, but rather benefiting the best conditions for human life. In this line of thought, as Knox and Pejan state, "[…] *healthy environment is necessary for the full enjoyment of human rights and, conversely, the exercise of rights (including rights to information, participation, and remedy) is critical to environmental protection*".[46]

Consequently, the central argument is aligned with the recurrent assertion that environmental protection laws have essentially failed because they are *anthropocentric*, i.e., "[…] *their goal is* [as Laitos and Wolongevicz state] *to protect and benefit humans, not the environment in which humans live* [and] *assume human superiority and exceptionalism to nature and natural processes*", among other analogous reasons.[47]

The common thread running with this section will consist principally of determining what the implications are resulting from the anthropocentric management of Nature regarding its legal status. It embeds a deterministic approach to some extent, predicated on the belief that the anthropocentric character of international law is ubiquitous, and subsequently, its exercise could bring about potential environmental impacts everywhere.

Hence, the study pretends to reply to a couple of research questions. On the one hand, it will focus on establishing ***if the existing legal mechanisms are enough to protect and respect Nature in itself, and not necessarily for human sake.*** And, on the other hand, it will

[45] Abass (2012) 113.
[46] Knox and Pejan (2018) 1.
[47] Laitos and Wolongevicz (2014) 1. In a quite same sense, from a theoretical perspective, see Boyd (2017) 93; Gudynas (2016) 96; Leib (2011) 39 and Taylor (2010) 198. Moreover, one can find a judicial argument, in turn, in Writ Petition (C) No. 202, *T.N. Godavarman Thirumulpad v. Union of India & others* (2012) para. 9th.

examine ***how necessary the representation of Nature as a bearer of rights and a subject of international law would be in the current state of legal affairs.***

2.1 Legal status and representation of Nature

When one thinks about anthropocentrism, it is difficult to omit the question of hierarchies, i.e., human beings predominating upon any other creatures, things, or even concepts. Therefore, the Rio Declaration on Environment and Development probably represents the cornerstone of anthropocentrism at the international level and the archetype of people's interests above environmental ones. These aspects get signified immediately from the first line in the initial precept: "*Human beings are* ***at the centre*** *of concerns for sustainable development*".[48]

Likewise, the fight against desertification constitutes another clear-cut acknowledgement of anthropocentrism and human dominance over Nature, as the first recital lays down explicitly: "[…] *that human beings in affected or threatened areas are* ***at the centre*** *of concerns to combat desertification and mitigate the effects of drought*".[49]

On its part, the Aarhus Convention constitutes another straightforward illustration of legal human-centred discourse in the branch of international law. From the outset, the preamble allows perceiving this tilt by recognising "[…] *that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights* […]".[50]

In the branch of international law, however, there are very few concepts so visibly anthropocentric such as the notion of human rights. And one of the most curiously convincing manners of approaching environmental protection is precisely through human rights. This interconnection between both elements comprises the widely known "*human right to a healthy environment*", which is, although it has not yet acknowledged in any international instrument at that level, quite probably one of the most spread concepts regarding environmental issues worldwide.

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[48] Rio Declaration on Environment and Development (1992) Principle 1 (emphasis added). Hereinafter Rio Declaration.

[49] Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (1994) Recital 1st emphasis added. Hereinafter Convention to Combat Desertification.

[50] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998) Recital 6th. Hereinafter, Aarhus Convention.

2.1.1 States and other legal persons of international law

States have been deemed as the sole subjects of international law for a long time, not only from the perspective of the orthodox positivist doctrine[51] but also from the diversity of more modern developments.[52] Furthermore, States usually accomplish the four traditional requirements of international legal personality, established in the Montevideo Convention on Rights and Duties of States of 1933, whose Article 1 provides that they should possess: (a) a permanent population, (b) a defined territory, (c) a government, and (d) capacity to enter into relations with the other states.[53] Although this instrument is solely applicable to the ambit of the American States, which are the signatory members, it is useful as a legal reference, having been even considered–as Shaw asserts–the most widely accepted notion of "*statehood*" worldwide.[54]

In parenthesis, within this legal framework, one could argue that human beings and Nature curiously occupy an equal hierarchical level before international law, given that both are constitutive elements of the State, i.e., population and territory. However, while humans have reached nowadays certain doctrinal and even legal recognition as subjects of international law, Nature continues to be a set of things, susceptible to property. Their discursive and practical development before the law has been, therefore, unbalanced.

Effectively, ancient dogmas have been experiencing shifts towards increasingly inclusive conceptions, which have given rise to the participation of greater numbers of actors in the international sphere, although with the exception of Nature. The way how jurists of the "*Law of Nations*", an early way to call international law, used to address the expansion of legal personality from "*real subjects*" (i.e., states) towards the so-called "*apparent ones*" (i.e., confederations or insurgents)[55] can be deemed somehow parallel to the current endeavours to incorporate in its scope to religious, political, and even commercial institutions.[56] It certainly deals with a manner to overcome that kind of "*dogmatisms*". A contemporary example is the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations (INGOs),[57] currently in

[51] Lauterpacht (1975) 489.
[52] Abass (2012) 112.
[53] Convention on Rights and Duties of States (1933) Article 1. Hereinafter Montevideo Convention.
[54] Shaw (2003) 178.
[55] Oppenheim (1905) 99.
[56] Shaw (2003) 176-7.
[57] European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations (1986) Article 1.

effect. By the way, it is curious the parallelism with the aforementioned idea of "*ethical extensionism*", studied in the chapter five.

Something similar has occurred in judicial practice, where States are not anymore the only legal persons capable to bring a suit or be claimed. One of these cases is, for example, the Consolidated Version of the Treaty on European Union, whose article 3 (a) provides that the Court of Justice of the European Union can "[…] *rule on actions brought by a Member State, an institution or a natural or legal person*".[58]

Nevertheless, one should also be aware of the existence of provisions in which the limitation regarding the exclusive orbit of States keeps still in force. Effectively, this part of the dichotomy could be exemplified through the Statute of the International Court of Justice (ICJ), whose article 34 (1) reads that "*Only **states** may be parties in cases before the Court*",[59] an aspect that could be even seen as a lawful hindrance to look for judicial protection in favour of Nature.

As it is alluded to, both in the ancient and contemporary scholar literature, there is a generalised acceptance that States do have international legal personality.[60] Indeed, the theoretical roots could be identified around the eighteenth century. Portmann explains that early doctrinal developments concerning the interconnections among States could be traced originally in the 1758 work by Emer de Vattel, *Le Droit des Gens*. In turn, Vattel's influences have been associated with the multiplicity of contractual conceptions, sometimes even contradictory, coming mainly from Hobbes, Pufendorf, and Wolff, although the common ground could be located in Hugo Grotius.[61] Other authors, such as Oppenheim and Lauterpacht, who have written around the eighteenth and nineteenth centuries, generally agree.[62]

But then ever since, however, a theoretical debate questioning the idea that States are the sole subjects of international law has emerged as well. Some authors have been discussing the incorporation of new actors inside the international sphere, including from non-governmental organisations to human beings, for instance. Table # 1, based on an

[58] Treaty on European Union (2016) Article 19 (3a).
[59] Statute of the International Court of Justice (1945) Article 34 (1).
[60] See, for example, Abass (2012) 113; Akehurst and Malanczuk (1997) 75; Aufricht (1943) 217; Chen (2015) 25-6; Korowicz (2010) 541-3; Oppenheim (1905) 99ff; Portmann (2010) 42ff; Shaw (2003) 177; Tiunov (2010) 65ff; among others. Particularly about the environmental sphere, see Birnie, Boyle, and Redgwell (2009) 211ff; Kiss and Shelton (2007) 47-8; and Sands (2003) 71-2.
[61] Portmann (2010) 31-2, 36.
[62] Oppenheim (1905) 4-5, 82-5; Lauterpacht (1975) 335, 428.

outstanding work by Portmann, shows a summary of the most important conceptions concerned. There is not a deeper analysis, given it is not a key objective of this dissertation.

Table # 1 Theories of the International Legal Personality

Doctrine	Key Authors	Main Statements	Associated theoretical terms:	Recognised actors:
States-only	Heinrich Triepel, Dionisio Anzilotti, Lassa Oppenheim	• State is a historical fact enabling true freedom of individuals. • Law is created by state will.	Law of Nations, Orthodox positivist doctrine	Only states
Recognition	Karl Strupp, Georg Schwarzenberger, Arrigo Cavaglieri	• Same as states-only, but supplemented with a sociological perspective.	Traditional Doctrine of International Law, Positivist doctrine	States and other entities acknowledged by States as international legal persons.
Individualistic	Hersch Lauterpacht (Léon Duguit, Georges Scelle)	• State is a functional entity representing relations between individuals. • International law includes constitutional principles.	Procedural capacity of individuals	Human beings and States as corporate bodies having rights and duties
Formal	Hans Kelsen	• State is a juridical construction. • Law is a formally complete system of positive norms.	Kelsenian theory	Anyone being the addressee of an international norm (right, duty, or capacity) is an international person.
Actor	Myers S.McDougal, Harold D. Lasswell (W. Michael Reisman, Rosalyn Higgins)	• Law is a decision-making process, not a set of rules. • The actual and the normative coincide in international law.	Functional view	All entities exercising "effective power" in the international "decision-making process" are international persons

Based on Portmann (2010) 246-7

This sort of "*extension*" of the international legal personality, described by authors as a transition from only States towards new members of the international community, is also visible through the comparison between the traditional definition of the Law of Nations, proposed by Vattel, and the modern tendencies of international law.

Effectively, in Vattel's work, one can interestingly see how the very concept of international law has been constructed around the legal personhood of States and their correlative rights and duties, when he argues that the "*Law of Nations*" is "[…] *the science which teaches the rights subsisting between nations or states, and the obligations correspondent to those rights*", somehow brushing aside the international affairs coming from any other entity.[63]

[63] Vattel (1853) xlix.

Meanwhile, the modern ideas regarding international law are connected with the perspective that "[…] *an 'international legal person' is 'someone' who is capable of being a subject and object of international law; that is to say, someone who can apply international law, and against whom international law can be applied*",[64] which ratifies the existence of those correlative rights and duties as in past, although not necessarily focussing exclusively on States.

In essence, the doctrinal attempts to extend the circle of the international legal standing have beaten, nay still beat, a track towards the progressive inclusion of new "*participants*",[65] "*actors*"[66], "*stakeholders*"[67] or "*subjects*",[68] interestingly without reaching a general accord concerning its denomination. Indeed, there is a yet persistent debate about the international recognition of the legal personhood of certain institutions, especially non-governmental organisations (NGOs),[69] despite the regional efforts to determine their legal characteristics in practice. An example is the already mentioned European Convention on the Recognition of the Legal Personality of International NGOs. The argument is not recent, however, and does not specifically refer to environmental entities, but rather international organisations in general, such as the cases of the Holy See and the Order of Malta, for instance.[70]

Other international actors of importance are the Multinational Corporations (MNCs), whose role in environmental politics is particularly decisive within the logic of capitalism, according to Michele Betsill.[71] In 2003, the U.N. Commission on Human Rights legally recognised them, under the label of "*transnational corporations*", in the "*Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*". Although it is an instrument aimed at the promotion, security, and respect for human rights, the mentioned definition is crucial due to its legal connotation. It reads:

> *The term "transnational corporation" refers to an economic entity operating in more than one country or a cluster of economic entities operating in two or more*

[64] Abass (2012) 113-4.
[65] Chen (2015) 23.
[66] Hunter, Salzman, and Zaelke (2007)219ff.
[67] Kiss and Shelton (2007) 47ff.
[68] Shaw (2003) 175-7.
[69] Barrat (2014) 192-215.
[70] Aufricht (1943) 220-1.
[71] Betsill (2014) 186.

*countries - **whatever their legal form**, whether in their home country or country of activity, and whether taken individually or collectively*.[72]

In a similar vein, as Worster observes, there are some situations in which States, or even the United Nations, should recognise to non-state armed groups a status of limited and functional [*de facto*] personality. It occurs especially in order to undertake negotiations to protect human rights. Although Mc Hugh and Bessler make clear that bargaining does not confer legitimacy or recognition to armed groups, including terrorists or paramilitary organisations, they acknowledge that those negotiations "[…] *a legitimate and appropriate approach to securing humanitarian outcomes*". In matters of international law, Mc Hugh and Bessler allude to a provision thereon in the second additional Protocol of the Geneva Conventions, which refers to "*dissident armed forces*".[73]

The recognition in matters of humanitarian law virtually corresponds to stateless people or a diaspora of people whose personal status is governed by the country of their domicile or their residence, as appropriate, according to the 1954 Convention relating to the Status of Stateless Persons.[74]

The totality of examples is a potential subject of the extension of legal standing, or the limits of legality have already extended to them in practice, which demonstrates the enormous dynamics of legal status. Following Portmann's didactic categorisation, or even Chen's, one could affirm the legal considerability has expanded towards an increasing range of governmental, non-governmental organisations, business corporations, and individuals as well. Furthermore, with their specific restrictions, one can argue they are "*legitimised*" members of the international community.[75]

One could even come to believe in the parallelism of this process with the extension of human rights. Still, it is necessary to be cautious enough to understand that both experiences are quite different in substance. The recognition of human rights corresponds to an array of fierce discussions about ethical values and even to a violent social confrontation, such as the case of slaves, women, workers, and so on, while the appearance of forthcoming fellows of international law did not.

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[72] Norms on the responsibilities of transnational corporations and other business enterprises with regard to human right (2003) para. 20th (emphasis added). Hereinafter Norms on transnational corporations.
[73] Worster (2016) 232-3; Mc Hugh and Bessler (2006) 28, 65, 68, 71-3; II Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (1977) Article 1 (1).
[74] Convention relating to the Status of Stateless Persons (1954) Article 12 (1).
[75] Portmann (2010) 246ff; Chen (2015) 23ff.

Without a doubt, albeit the acknowledgement of new actors in the international sphere has not taken place overnight and has been the outcome of the abundant doctrinal debate and arduous political negotiation, it has arisen out of "*expediency*" and "*practicality*", as determinant motivations to meet the expectancies about international and transboundary relationships. It has occurred, at least, with the ambit of institutions, at the private and public level[76]. Thus, their creation fundamentally aims at satisfying human needs.

On its part, the recognition of human beings as subjects of international law followed a quite different pattern. It was going to occur sooner or later, not only as an effect of the application of that ideological factor coming from the "*Western, liberal-democratic theory*"[77] but also because human beings are the real bearers of rights, materialised particularly since the *Universal Declaration of Human Rights* of 1948.

Therefore, even though the role played by international entities in the global environmental field can have relevant repercussions, chiefly in the bargaining and adoption of more eco-friendly agendas and policies,[78] and even more regarding their intervention in litigation as parties or amicus curiae,[79] the core defence of the human right to a healthy environment, sustainable development, and the rights of future generations should spring precisely from individuals.

Here is probably the main reason why internationalists have popularised the idea of an interplay between human rights and the environment, affirming that the adverse impact on human living standards, derived from ecological degradation, has implied a serious threat to the "[…] *full enjoyment of human rights,* […] *including the right to life, health, habitation, culture, equality before the law, and the right to property* [,] *as well as the achievement of sustainable levels of development* […]".[80]

In any case, as one can see, no matter how elaborated the theoretical developments are, Nature is completely outside the discursive considerations. *Ergo,* ***Nature has never been and is not a legal person of international law.*** Therefore, one should conclude that doctrines and legal framework concerning the international legal personality are biased towards the human benefit, i.e., they are anthropocentric.

[76] Cassese (2002) 69.
[77] ibid 70.
[78] Keohane, Haas, and Levy (2001) 8.
[79] Beyerlin (2001) 357; Sands (1999) 1619.
[80] Hunter, Salzman, and Zaelke (2007) 1365-6.

2.1.2 Nature as a set of things

Traditionally, the law has been divided into three branches: persons (*personas*), things (*res*), and actions (*actiones*). Gaius himself, one of the most influential Roman jurists, wrote so in his celebrated "*Institutes*", "*The whole of the law by which we are governed relates either to persons, or to things, or to actions*".[81] Consequently, discarding the last category, if Nature is not a legal person–as it has been argued in the previous section–it will be necessarily considered a thing or an array of things.

In the *Institutes*, the conception of things is strongly anchored in the notion of ownership. Both expressions look like synonyms in several sections of Gaius' work or, at least, one can affirm that *property* is part of the definition of the *thing*. So, for example, in the § 1 of the Book II, one can read that "[…] *the law of things* [is] *either subject to private dominion or not subject to private dominion*". Indeed, this interconnection is addressed throughout the whole document under diverse categories of things (public and private, corporeal and incorporeal, mancipable and non-mancipable, etc.).[82] A summary of the classification of things, proposed by Gaius, is going to be shown in table # 2.

Nevertheless, it is not the only [ancient] case, in which this link between things and property appears. Effectively, in the *Institutes* of Justinian, released during the Sixth Century, the essence of this connection remained intact, having experienced just a little change of form regarding the names. In a certain way, it is an obvious upshot considering his categorisation of things (*res*) based on Gaius' one. According to Justinian, things were capable of private ownership (*in nostro patrimonio*) or non-capable of private ownership (*extra nostrum patrimonio*). Additionally, under Roman law, some things belonged to all men (*communes*), to State (*publicæ*), to no men (*nullius*), and to corporate bodies (*universitatis*).[83]

Long after, in the year of 1265, in the "*Siete Partidas*" (Seven-part Code), for example, one can find analogue regulations regarding the conceptual interconnection between things and property, above all when Alfonso X of Castile has asserted that there are differences among the "[…] *things of this world;* […] *and others belonging only to men; and others appertaining commonly to a city or village or castle, or any other place where men inhabit;*

[81] "*Omne autem ius quo utimur uel ad **personas** pertinet uel ad **res** uel ad **actiones***" (emphasis added) in Inst. 1, 2, 12: Gaius in Dig. 1, 5, 1. Gaius (1904) 13
[82] ibid 122ff.
[83] Justinian (1941) 90.

and others subjected to the individual property of every man; […] *and others that correspond to nobody*".[84] Once again, the property becomes somehow the axis of the definition of things.

In a certain way, the concept of things historically denotes property as a constitutive element. It seems like the definition of "*thing*" is not complete if one sets aside the question of ownership. There are not simply "*things*". Indeed, as one could see, even the Roman notion of "*res nullius*" is often translated as a "[…] *thing that can belong to no one; an ownerless chattel*".[85] This issue is even clearer when one refers to "*goods*" or "*commodities*".

This idea has remained until these days. According to a contemporary definition, taken from a dictionary form, a thing is the "[…] *subject matter of a right, whether it is a material object or not; any subject matter of* ***ownership*** *within the sphere of* ***proprietary or valuable rights***",[86] from which one can infer the idea of property as the historical link between subjects and objects within the lawful sphere.

Nonetheless, it does not only occur within the academic field. It also happens inside some national legal frameworks worldwide. For instance, if one takes a glance at the Second Book of the French Civil Code, currently in force, one can notice it is organised based on this relationship. The very title states "*Of the goods and the different modifications of ownership*".[87] In the same sense, one can find equivalent provisions regarding the liaison between things and property in several U.S. state laws, currently also in effect.[88]

Another example, although a little peculiar, is the German Civil Code, which describes a "*thing*" under the following terms: "[o]*nly corporeal objects are things as defined by law*". Despite the notion of ownership is thoroughly excluded from the concept of "*thing*", its association appears some articles later, given its essential parts cannot be the subject of separate rights. This is the case, for example, of the rights connected with the ownership of land. Those rights are part of the land.[89]

As far as the "*law of nations*" is concerned, well-known in the Roman world as "*ius gentium*", it seems that Gaius did not make any difference regarding the relationship between things and property, despite the fact that he did emphasise the existence of certain dissimilarities between Roman and foreign laws. Gaius argued that "[t]*he rules established*

[84] Alfonso X (2007) 82.
[85] Garner (2004) 4089.
[86] ibid 4619 (emphasis added).
[87] French Civil Code (2019) Book II, Articles 515-14ff.
[88] For example, see Louisiana's Civil Code (2018) Book II Article 448ff; California's Civil Code (2018) Section 654ff; Georgia Code (2018) § 44-1-1, among others.
[89] German Civil Code (2002) § 90, 93, and 96.

by a given state for its own members are peculiar to itself, and are called jus civile [while] *the rules constituted by natural reason for all are observed by all nations alike, and are called jus gentium*".[90] In other words, the aforesaid relationship with property works out similarly inside the nation and regarding other nations, an interpretation also supported and shared by Brian Tierney.[91]

At the sight of the principal instruments of international law, currently in effect, one can corroborate that this association lingers hitherto. The provisions about property rights, coming from the regional conventions on human rights are barely a few examples.

To recapitulate, when one scrutinises the legal history of the property and things, it is very possible to find ancient references, especially taken from Roman law, about the legal status of Nature and its components. There is not too much to debate thereon, however, because Nature has been a set of things throughout time.

From the outset, Gaius himself had categorised animals and plants as things, getting limited merely to describe specific rules for those contested cases involving the decision about whom the property corresponded to. Thus, Gaius differentiated tame animals (e.g., dogs, geese, oxen, horses, mules, and asses) from wild (e.g., bears, lions, pigeons, bees, and deer) and semi-wild ones (e.g., elephants, camels, and peacocks), in terms of their capability of being transferred to the property of others. Domesticated animals were mancipable (*res mancipi*) while the rest were not so (*res nec mancipi*).[92] See table # 2 below.

The *mancipation* (from the Latin expression *mancipation,* meaning *hand-grasp*) was a formal procedure of "*imaginary*" or "*simulated*" sale of specific things, exclusive for Roman citizens who had reached puberty. It consisted of a public pronunciation of a solemn statement before, at least, five witnesses, aimed at formalising the purchase by passing the legal title to the new owner, i.e., the transference of property.[93] So, people used to follow this legal procedure for the purchase and sale of tame animals.

On the other hand, Roman citizens did not follow this procedure in the case of wild or semi-wild animals due to the fact that it was useless. According to Gaius, "[c]*omplete ownership in things not mancipable* [used to be] *transferred by merely informal delivery of possession (tradition), if they* [were] *corporeal and capable of delivery*".[94]

[90] Gaius (1904) 13.
[91] Tierney (2001) 136.
[92] Gaius (1904) 75, 132-3, 160, 165.
[93] Garner (2004) 3047-8.
[94] Gaius (1904) 133.

Table # 2 Roman Division of Things (res) by Gaius

Things

Law of things:

Subject to private dominion [*in nostro patrimonio / alicujus in bonis / in commercio*]	Not subject to private dominion [*extra nostrum patrimonioum / nullius in bonis / extra commercium*]

Leading division of things:

Subjects to Divine [*res diuini iuris*]		Subjects of Human Right [*res humani iuris* / *aliae humani*]	
Sacred [*res sacrae*] devoted to gods above	*Religious* [*res religiosae*] devoted to gods below	*Public* [*res publicae*] Social or corporative dominion	*Private* [*res priuatae*] Individual dominion, such as *land, cattle, houses, etc.*
They are exempt from private dominion.		x	

Public things: [*res publicae*]	
Res in patrimonio populi – e.g., public treasure, domain, and slaves, etc.	*Res non in patrimonio populi* – e.g., Public roads, rivers, and buildings, etc.

Another divisions of things:

Corporeal [*res coporales*] Tangible, such as *lands*, slaves, clothing, *gold, silver,* etc.	*Incorporeal* [*res incorporales*] (Intangible, such as inheritance, usufruct, obligation, etc.)

Mancipable [*res mancipi*] Transferable property by a special procedure, such as lands, houses, tame animals [e.g., oxen, horses, mules, and asses], rustic servitudes, stipendiary and tributary estates, etc.)	*Not mancipable* [*res nec mancipi*] (Transferable property by mere tradition, such as urban servitudes, not tamed animals or beasts [e.g., bears, lions, etc.] and semi-wild beasts [e.g., elephants, camels, etc.)

Based on Gaius (1904) 122-8

From the perspective of Gaius, Roman law also ruled another kind of rights connected to property of animals, such as usufruct. In parenthesis, a specific provision regarding the formality of usufruct leads to thinking curiously that the author believed that slaves were [some kind of] domesticated animals. Indeed, the § 32 of the Book II reads: "*In **slaves and other animals** usufruct can be created even on provincial soil by surrender before a*

magistrate".[95] However, as Abel Greenidge–one of the interpreters of Gaius–suggests, one cannot judge the Roman system exclusively based on the theory of Roman slavery. Most of the time, although slaves were considered goods, not persons, they had often a superior intelligence and culture than their masters. So, they were frequently "*active men of business*es" in practice.[96]

Likewise, the Institutes referred to different ways of defining the property of plants, which was often associated with the ownership of lands. In some sections, for instance, one can find regulations regarding the way to determine the property upon those trees and corn planted or sown on their own land or even on other people's soils.[97]

There were also rules concerning the ownership on derivatives of natural resources, either vegetal (such as oil, wine, and chairs coming from olives, grapes, and wood), or animal (e.g., wool coming from lambs, sheep, and some goats, as well as mead prepared from honey), or even mineral (for instance, *electrum* manufactured with silver and gold, and used for jewellery).[98]

In general, other natural resources, like light, air, and running water (included oceans) were considered things belonging to all men (*res communes*), therefore incapable of *appropriation.* In contrast, there were some references regarding the property of lands, which could be susceptible to both private and public *dominium*. However, they were even subject to the dominion of the emperor.[99]

To conclude, beyond the fact that the historical tracks allow supporting, without doubt, the idea that Nature has been legally a set of goods, subject to property, they also confirm the historical existence of a legal system, based on anthropocentrism. So, keeping in mind that anthropocentrism has been mentioned as one of the direct causes of the current environmental crisis, this is the great paradigm that supporters of the rights of animals and Nature are bringing into question through their theories, and whose shift has also been promoted. Here lies the legal transmutation of Nature from object to subject of law. This change would mean a quantum leap from an exclusively human-centred perspective towards another different, founded on either living beings [biocentrism] or the ecosystem [ecocentrism], as appropriate.

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[95] ibid 141 (emphasis added). Original provision in Latin states: "*Sed cum ususfructus et hominum et ceterorum animalium constitui possit, intellegere debemus horum usumfructum etiam in prouinciis per iniure cessionem constitui posse*".
[96] Greenidge (1904) xxxvii.
[97] Gaius (1904) 161.
[98] ibid 162-6.
[99] ibid 75, 127, 134, 152.

A priori, there are three basic options that scholars and lawmakers could choose to face the aforesaid environmental crisis. Firstly, they could search for an obvious way out, keeping things ongoing, i.e., without changing anything. This alternative has been called "*public trust doctrine*" and has been employed mainly in the U.S.A. as a mechanism against the depletion of natural resources. The core idea is that Nature continues to be a set of things, although ecologically protected by a steward, curator, or representative, who usually is the State. Secondly, from biocentric tendencies, it has aroused the possibility of granting legal personality to non-human individuals, i.e., essentially animals. Both sentientism and animalism are just a couple of doctrinal positions supporting this possibility. And, finally, there is a holistic position of recognising the rights of Nature as a whole, and not individually. These theories are known as ecocentric ones. Nevertheless, given the magnitude and importance of these three doctrinal stances, a more in-depth analysis will be presented in a separate chapter.

2.1.3 Nature from the rights-based approach

The rights-based approach essentially regards the incorporation of environmental issues into the international system of human rights. It deals with a legal mechanism to cope with the ecological crisis worldwide.

In legal parlance, the human right to a healthy environment is undoubtedly the most spread label, although some authors consider it as one of the narrower interpretations[100]. Effectively, as Leib explains, the adjective "*healthy*" as a qualifier represents the most common formula employed to categorise the desired quality of the environment, instead of a significant number of identifiers, such as "*decent*", "*clean*", "*ecologically balanced*", "*safe*", and "*sound*", among others.[101] As far as one continues to review more information, it is possible to find additional adjectives, such as "*sustainable*",[102] "*harmonious*",[103] "*healthful*", or for example, including even a comparison of terminology.[104] Virtually all these expressions are part of the theoretical discourse, but also come from some international instruments, as one will see later in this section.

[100] Leib (2011) 3.
[101] ibid 91.
[102] Taylor (1998a) 338.
[103] Daly and May (2018) 51.
[104] Popović (1996) 346-7.

On the contrary, the question of the concept itself is quite distinct. There is not yet a consensual definition of the relationship between human rights and the environment. Indeed, reaching an accord concerning its academic content constitutes one of the most demanding challenges. As suggested by Bruce Ledewitz, the reason would mainly lie in its vagueness and unrestrictive use, either in speculative or authoritative writings.[105] In that regard, this relationship usually appears as the right to a healthy environment, environmental right, or the right to environment.[106] Nevertheless, when scholars refer to the connotation of "*right*"– it is worth clarifying–they often use it in the overall semantic sense of "[a] *legally enforceable claim that another will do or will not do a given act* [or] *a recognized and protected interest the violation of which is a wrong*".[107]

A frequent divergence about the contents of the right to a healthy environment consists of a duality between anthropocentric and non-anthropocentric inferences. Consequently, the former corresponds to a clearly human-centred vision, usually encompassed by the United Nations and various scholars.[108] It deals with the idea "[…] *that a healthy environment is integral to the full enjoyment of basic human rights, including the rights to life, health, food, water and sanitation, and quality of life*".[109] It plainly means that a sound environment necessarily constitutes a prerequisite to the exercise, or even the satisfaction, of the other human rights. Consequently, the protection of Nature is not transcendent in itself. Its usefulness aims at guaranteeing the quality of natural resources for humanity's benefit. On the other hand, the latter contains a non-anthropocentric bias, which could be better explained through Ledewitz's argument, as follows:

> *What people have a right to now, and what future generations have a right to, is more than just a certain quality of clean air and pure water, though it is surely a part of having a healthy environment.* ***The right to a healthy environment is more than a functioning biosphere not degraded in its systems by people.*** *The right that we have is to a planet that has not been unalterably changed by man, and that right is grossly threatened today*.[110]

[105] Ledewitz (1998) 583.
[106] Leib (2011) 109-10, 115.
[107] Garner (2004) 4120.
[108] See, for example, Knox and Pejan (2018) 16; Leib (2011) 3; Birnie, Boyle, and Redgwell (2009) 278-9.
[109] UNEP (2016) 14.
[110] Ledewitz (1998) 583 (emphasis added). Quoted also by Leib (2011) 91.

Ledewitz's definition is significant since it avoids a thoroughly anthropocentric partiality. When the author claims for a "*planet that has not been unalterably changed by man*",[111] he demands the integrity of the world and humankind altogether. In this manner, the right to a healthy environment does not focus on an exclusive search for human benefit. It does not only deal with the availability of natural resources (e.g., clear air or pure water), but it also refers to the ecological wellbeing. Thus, it turns out evident his argument shifts away from the traditional idea of human rights, i.e., from the visible prone to look for solely people's welfare.

One of the scholars who have someway supported this stance is Louis Kotzé. From the perspective of *ius cogens,* he confirms the environmental wellbeing *sometimes* also goes for non-humans, albeit admitting the existence of disagreements in this respect.[112] In point of fact, this favouritism, understood within the logic of the human rights doctrine, possesses passionate defenders and severe detractors. In the realm of both the theorists and the practitioners, for example, it has repeatedly generated a heated debate concerning the anthropocentric dimensions.[113]

Nevertheless, one should also say that Ledewitz keeps an instrumental point of view in favour of humans in a certain sense, above all, when he reaffirms that current and future generations are entitled to have that healthy environment. In discursive terms, it is still a human right more than Nature's one. Moreover, when Ledewitz mentions the way how Bill McKibben raised this entitlement in a modern context, he seems to suggest the right to a healthy environment determines human domination over the earth.[114]

Beyond the discourse, either anthropocentric or non-anthropocentric, it seems to underlie a sort of contradiction amid the approaches of environmental protection and human rights. In effect, if the principal aim of ecological rights is people's benefit, welfare will be only possible through the use and enjoyment of natural resources. In other words, environmental protection will be necessary to provide clean air, drinking water, safe nourishment, and other standard living conditions. In this way, Nature becomes the supplier of goods and services that allows meeting the human needs. So, without natural resources, there is no welfare for people. It is precisely around this kind of reasoning that the need for environmental protection arises, but also the ambiguities and paradoxes.

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[111] ibid.
[112] Kotzé (2018) 136.
[113] For example, one could find an inspiring selection of articles in Knox and Pejan (2018).
[114] Ledewitz (1998) 584. In the original context, McKibben refers to his previous work, *The End of Nature* as "[…] *an early attempt to show that human beings now dominate the earth*". See McKibben (1998) 65.

Nevertheless, despite the increasing criticism regarding its efficacy in practice, especially within the legal realm and public policy, its successful spread all over the world turns out undeniable due to a couple of potential reasons. Firstly, the pre-existence of the human rights system, widely accepted by the international community, does not imply any further elaboration of new postulates, either theoretical or empirical. It would often be necessary only a re-definition of existing human rights, aimed at including the environmental variables into their scope. Secondly, conceptualising ecological protection as a human right entails somehow maintaining the *status quo* of legal personality, namely States and other actors of the international sphere will continue to be the subjects of law, while Nature will remain as a set of goods. Of course, there is a greening of the discourse and legislation, inclined towards the protection and respect of natural resources. Although in the end, however, the utmost aim seems to be the guarantee of human benefit. Indeed, remarkable and globally broadcast definitions, such as sustainable development and rights of the future generations, are somehow derived from this rights-based approach.

To sum up, various authors consider environmental welfare as a right, even as a human right, whose implementation would be a useful mechanism to protect Nature. According to Prudence Taylor, the rights-based approach focuses on analysing environmental protection from a threefold perspective of rights: substantive, procedural, and adequately human ones.[115] Some other authors share this categorisation under more or less the same terms.[116] The next pages contain a description of all these categories.

2.1.4 Substantive rights and the greening of existing human rights

Taylor points out that the *substantive rights* refer to a process of "*reinterpretation*" of pre-existing human rights intended to incorporate the criteria of environmental quality into these rights mentioned above.[117] Generally, the author alludes to those [fundamental] rights included in the Universal Declaration, such as life, health, and an adequate standard of living.[118] Likewise, she mentions other "relevant" rights coming from the international covenants of human rights, such as self-determination, freely disposition of natural wealth and resources, safe and healthy working conditions, protection of children against social

[115] Taylor (1998a) 338.
[116] Atapattu (2002) 72-3; Birnie, Boyle, and Redgwell (2009) 271-88; Chapman (1993) 224-6; Leib (2011) 71-108; Pallemaerts (2002) 11-46; Shelton (2006) 130-63.
[117] Taylor (1998a) 339.
[118] Universal Declaration of Human Rights (1948) Articles 3, 25. Hereinafter Universal Declaration.

exploitation, and economic and social development.[119] Being an interpretation of existing rights, it is not weird that Taylor herself not be completely convinced about the legal efficacy of this procedure in practice. She mainly adduces a lack of clarity regarding the relationship between human rights and environmental protection.[120]

Although Birnie, Boyle, and Redgwell do not employ exactly the same structure of Taylor's analysis, they do share her stance on this point. They speak about the *greening of existing human rights,* despite the fact that there is not any independent "*right to a decent environment*" within international law. Thus, they recommend a derivation from other existing rights, emphasising the rights to life, private life, property, and access to justice. To them, the virtue of looking at environmental protection through other human rights interestingly lies in that this interpretation "[…] *focuses attention on what matters most: the detriment to important, internationally protected values from uncontrolled environmental harm*".[121]

On her part, Linda Leib describes this process as the "*theory of expansion*", namely the eco-friendly interpretation of a group of well-established human rights aims to expand its range until encompassing an environmental scope, beyond the mere human interests. She argues that these [fundamental] rights are "*derivative*" and thus they can be invoked within the environmental context. That is why she argues that this kind of *green interpretation* of substantive human rights will correspond to future recognition of the "*right to environment*".[122]

Other scholars, such as Philippe Cullet and Audrey Chapman, also pose the environmental reinterpretation of international instruments, concerning human rights, as a mechanism to face the environmental crisis. But their main contribution refers to the inclusion of environmental conservation into it.[123]

By way of a conclusion, according to ecocentrists and other defenders of the rights of Nature, this doctrinal position would not be useful to guarantee the protection and respect of the environment, which is the first research question formulated in this section. The main reason would lie in the fact that they theoretically adduce that one of the key problems of the environmental crisis is due to the anthropocentric character of the law. And, there is not

[119] International Covenant on Civil and Political Rights (1966) Article 1. Hereinafter Political Covenant; and International Covenant on Economic, Social and Cultural Rights (1966) Articles 1, 7 (b), and 10 (3). Hereinafter Economic Covenant.
[120] Taylor (1998a) 339-40.
[121] Birnie, Boyle, and Redgwell (2009) 282.
[122] Leib (2011) 71-2.
[123] Cullet (1995) 25; Chapman (1993) 222-4.

probably anything more anthropocentric than a reinterpretation of *human* rights, even if this reinterpretation possesses an environmental bias.

2.1.5 Procedural rights and the environmental democracy theory

Taylor explains that *procedural or participatory rights* imply the creation of guarantees to protect Nature, through the implementation of rules associated with social participation and information. In other words, procedural rights aim at endowing people with prior knowledge regarding environmental impacts, participation in decision-making, and employment of recourses within administrative instances and before the international system of justice.[124]

In a certain way, given that procedural rights denote the application of normative which was not originally thought for environmental issues (probably except for the so-called Aarhus Convention[125]), Taylor conceives their application as an expansion of political and civil rights. In consequence, the rights to freedom of expression, information, and political participation–encompassed by the international instruments of human rights[126]–turn out crucial to guarantee the protection of the environment.[127]

Birnie, Boyle, and Redgwell share this idea about the expansion of civil and political rights, under the umbrella of "*environmental rights*".[128] To them, environmental rights endow people with access to information, judicial remedies, and political processes, namely almost the same scope attributed by Taylor, although highlighting the questions of participation.[129] The authors believe that environmental rights play a crucial role in the *empowerment* of people, resulting from both participation in decision-making and exigency to governments to accomplish basic standards about the protection of life and property against environmental impacts. States cannot be the only responsible entities in charge of environmental protection and sustainable development. Consequently, social participation in public affairs favours the exercise of existing civil and political rights.[130]

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[124] Taylor (1998a) 343.
[125] Aarhus Convention (1998).
[126] Universal Declaration (1948) Article 19; Political Covenant (1966) Articles 19 (2) and 25.
[127] Taylor (1998a) 343-5.
[128] In parenthesis, Sumudu Atapattu uses this name to describe procedural rights as well, but in contrast to the connotation of substantive rights. See Atapattu (2002) 72.
[129] Besides the references used by Taylor, the authors Birnie, Boyle, and Redgwell underline the Universal Declaration (1948) Article 21; American Convention on Human Rights (1969) Article 23; Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (1952) Article 3. Hereinafter Additional Protocol to the European Convention on Human Rights.
[130] Birnie, Boyle, and Redgwell (2009) 271-2, 288.

On her part, Linda Leib agrees with virtually all the arguments set out by Birnie, Boyle, and Redgwell. Indeed, one can also find inside her work the emphasis on the role of procedural rights on *empowering* individuals, communities, and the civil society itself, to combat environmental impacts and influence public decisions and policies regarding environmental matters. Indeed, the author considers empowerment as one of the most significant benefits derived from the implementation of environmental procedural rights. Similarly, she believes that "[...] *environmental issues should not be left to the discretion of governments*", remarking the increasing level of independence of other actors to exercise the rights of information, participation, the search of redress, and the like.[131]

Nevertheless, her major contribution undoubtedly consists of linking "*democratic governance*" with "*ecological sustainability*". For this reason, Leib speaks about the "*Environmental Democracy Theory*" from the outset[132]. In this regard, both Principle 10th of the Rio Declaration and the Aarhus Convention are crucial to the recognition of procedural rights. Effectively, civic participation, access to information, intervention in decision-making, and access to judicial and administrative proceedings, established within the Rio Declaration,[133] constitute a decisive political framework (while not binding) to develop the theoretical grounds of democratic participation and governance in environmental matters. The idea is the exercise of these rights would support a more equal interplay among people, States, and other institutional actors of the international arena, in practice. Likewise, being part of the Aarhus Convention, the rights to access to and collection of environmental information, public participation, access to justice, and so forth,[134] constitute the explicit recognition of the enforcement that procedural rights have within the international legal framework and, therefore, one of the unique instruments on global environmental democracy.

One last important aspect that should be stressed from Leib's arguments refers to avoid the perception that substantive and procedural rights could be seen as substitutes in practice. They are conceptually different, and they often are addressed separately, as Leib and other authors usually do.[135] Other researchers, however, see both rights as complementary ones. Cullet, for example, puts forward the use of proceeding rules of human rights, but along with

[131] Leib (2011) 81-6.
[132] ibid 81.
[133] Rio Declaration (1992) Principle 10.
[134] Aarhus Convention (1998) Articles 4-9.
[135] Leib (2011) 87-8.

environmental ones, aimed at forming "[…] *a body of very effective technical rights*".[136] Paul Gormley anticipated this and other similar standpoints thereon through a telling essay in 1990.[137]

To conclude, Birnie, Boyle, and Redgwell have written a decisive phrase regarding the implementation of these procedural rights, which is quite descriptive about their real scope and effective impact concerning the topic in question. The authors assert that this "[…] *approach is essentially* ***anthropocentric*** *insofar as it focuses on the harmful impact on individual humans, rather than on the environment itself: it amounts to a 'greening' of human-rights law, rather than a law of environmental rights*".[138]

2.1.6 A new environmental human right and the genesis theory

By and large, the idea regarding the right to a healthy environment consists of endowing people with express recognition of an "*environmental human right*", emerging independently from what it currently exists in this field. Consequently, it deals with a thoroughly new category of human rights, which does not refer to the "*greening*" of pre-existing substantive or procedural rights.

Linda Leib, for example, follows this line of reasoning described above, to the point of cataloguing the right to a healthy environment within the so-called "*genesis theory*". It turns out suggestive to speak about *genesis* as if it were the origin or beginning of this new right. The hypothesis consists of upholding that this right fits a different category of human rights within the realm of international law. To her, the existence of the *right to environment* is essential to guarantee the exercise of other fundamental human rights. Nevertheless, her argument constitutes an adaptation of Rich's "*indispensability theory*", in which this author had posed virtually the same postulate regarding the right to development, namely the presence of the entitlement to development determines the enjoyment of other human rights.[139] By way of commentary, one could argue the wellbeing of Nature, in this case, plays the role of a mean to search human benefit, instead of an end in itself. Consequently, the approach is thoroughly anthropocentric.

[136] Cullet (1995) 25.
[137] Gormley (1990) 85.
[138] Birnie, Boyle, and Redgwell (2009) 272.
[139] Leib (2011) 71, 88; Rich (1983) 320-2.

On her part, Prudence Taylor expresses somehow a similar idea in distinct words. She argues that there are no existing human rights to the environment, except those derived from international treaties or those coming from customary international law.[140] The former got already mentioned under the label of substantive and procedural rights, while the latter would be effectively new *dedicated environmental human rights.*[141] To her, despite the rights to life, health, an adequate standard of living, and the like, are quite close to ecological issues, they are not sufficient to support the conformation of new human rights. She admits that "[…] *there is no logical rationale for this argument*". However, environmental protection does constitute a prerequisite to assuring integrally human rights, Taylor states, namely the realisation of human rights depends directly on the welfare of Nature, which is more or less the same argument upheld by Leib. In any case, the level of importance the ecological variable possesses is not enough, the author affirms, to protect Nature satisfactorily,[142] a criterion which Atapattu shares[143].

In this regard, according to Taylor, the human right to a "[…] *decent, healthy, or sustainable environment*" already exists within the ambit of international customary law. In her view, it even represents one of the most progressive arguments in the context of the interplay between human rights and environmental protection[144]. Taylor is plainly conscious about the lack of regulations on environment, from the perspective of human rights, at a global level. Indeed, she explicitly mentions this peculiarity in her work "*An Ecological Approach to International Law*", especially regarding the United Nations' instruments[145]. Thus, the probable reason why she prefers attributing the notion of an environmental human right to customary law would lie in the fact that it does not exist in legal practice.

In effect, despite the right to a healthy environment has not been yet explicitly recognised within any international instrument at a global level, it perhaps represents the most successful case of "*lawful universalisation*" through national legislation. Both Knox and Boyd point out that around 100 countries have currently included this right in their constitutional frameworks, and more than 150 nations have recognised it inside their legal systems, having increased this tendency mainly during the last years of the twentieth century.

[140] Taylor (1998b) 197.
[141] Taylor (2010) 96ff.
[142] Taylor (1998b) 199.
[143] Atapattu (2002) 103.
[144] Taylor (1998a) 345-6.
[145] Taylor (1998b) 197.

In context, Taylor also remarks this aspect through a historical review of its emergence and implications, both in national legislation and international customary law.[146]

The recognition of the right to a healthy environment, as Boyd argues, does not make up the only existing regulation at the constitutional level. Some constitutions provide government duties to protect Nature, or both aspects (entitlements and obligations) concomitantly. From the perspective of the global environmental constitutionalism, as some authors have labelled it, one should deem "[…] *there is general agreement that no global (environmental) constitution or clear, self-standing international environmental right exists*", such as Kotzé holds. Global constitutional provisions "[…] *lie scattered across the global regulatory domain* […]". Therefore, he, joint with May and Daly, coincide that international environmental law is mostly soft.[147]

Under these circumstances, it turns out crucial what Dawson calls the "*constitutional dialogue*", understood as "[…] *a deliberation between the legislative and judicial branches over how constitutional commitments and general political objective can be integrated*" among countries. The dialogue will allow each constitutional court or tribunal gives an authentic interpretation of the right to a healthy environment, sharing their experiences with other international judicial forums and courts, and supporting the construction of an appropriate institutional system. Thus, for example, Boyd has pointed out some countries whose constitutions contain no provisions concerning the right to a healthy environment, but whose courts have ruled it is implicitly part of the right to life. Those countries are Bangladesh, El Salvador (limited to children), Estonia, Guatemala, India, Israel, Italy, Malaysia, Nigeria, Pakistan, Sri Lanka, and Tanzania.

To some extent, it turns out intriguing that the right to a healthy environment have not reached explicit world recognition yet. It turns out somehow inexplicable, having experienced abundant global diffusion, along with profuse environmental literature dedicated to it.[148] Both issues are undoubtedly a thought-provoking measure of its growing importance. John Knox himself, the former U.N. Special Rapporteur in this matter, has recommended to the General Assembly the official recognition of the right to a healthy environment at the world level. Moreover, as part of an interview, he has hold that "[p]*erhaps*

[146] Knox (2018) 6; Boyd (2018) 18-23 [The author includes a detailed list of constitutions]; Boyd (2017) 222; Taylor (1998a) 345-51.
[147] Boyd (2012) 297; Kotzé (2018) 141; May and Daly (2015) 21.
[148] See, for example, the numerous references existing in Downs (1993) 351ff; Rogge (2001) 33ff; Shelton (2006) 129ff; Daly and May (2018) 42ff; Lewis (2018) 15-39; Knox and Pejan (2018) 1-16, among others.

the simplest way of expressing the interdependence of human rights and the environment was through the recognition of a human right to a healthy environment".[149]

Given the circumstances, the notion of environmental protection as a warranty to the accomplishment of other human rights is not only an anthropocentric manner of understanding the natural world, but also gives rise to a perverse effect in ecological terms. Thus, for instance, when one gets wondered if the achievement of human welfare, indispensable for people's subsistence, requires or not a certain degree of exploitation of Nature, in the form of "*natural goods and services*", the answer will tend to be [a priori] affirmative, i.e., human welfare does link directly to certain levels of environmental exploitation. There is a relationship virtually conventional.

In consequence, environmental protection is useful for humans to continue to exploit natural resources on their benefit, which curiously describes a kind of circular reference where the anthropocentric view underlies: "*environmental protection for the human sake*". *Ergo,* although it could sound a little bit weird, the experiment of associating environmental protection with human rights would have become over time a mechanism to perpetuate the exploitation of Nature.

2.1.7 The right to a healthy environment as a solidarity right

Up to now, the analysis of the rights-based approach has only comprised an individual dimension. Notwithstanding there is a holistic facet of environmental human rights, which the authors often tackle under the notion of "*collective, solidarity or third-generation rights*". Indeed, if one scrutinises her work, Taylor herself prefers addressing the question of an "*independent norm under customary international law*"; from this "cooperative" standpoint.[150] Other authors, like Birnie, Boyle, and Redgwell, share this opinion, emphasising that it deals with the most contested alternative about associating environment and human rights.[151]

As mentioned above, the right to a healthy environment corresponds to the *third-generation rights.* Pursuant to Karel Vašák, the idea seems to be pretty straightforward. Based on the Universal Declaration, the author argues that human rights attain a threefold rank, in which every category gets called "*generation*". The first one corresponds to the

[149] Knox (2018) 6; Human Rights Council (2018) para. 3rd.
[150] Taylor (1998b) 200-2.
[151] Birnie, Boyle, and Redgwell (2009) 272-3.

exercise and respect of individual liberties, civil and political ones, without the intervention of the state. The rights to life and freedom can be examples. The second generation refers to the social, economic, and cultural rights, such as health and education, for instance, which do require the state intervention to be implemented. Finally, in addition to the right to a healthy environment, the third-generation rights are generally comprised of the rights to development, peace, and ownership of the common heritage of humanity.[152]

Likewise, as previously also uttered, one cannot refer to an exhaustive list of third-generation rights, given they have not been yet "*formalised*", so to speak, in international law. As Kotzé explains, not even the United Nations General Assembly, to which he terms as the "*final arbiter on the formal creation and inclusion of international human rights*", has been able to pave the way for their proclamation utilising a binding instrument on a planetary scale.[153] In the aftermath, this lacking formalisation has spawned–as one could suppose–a broad field for different theoretical approaches and diverse legal interpretations.

So, for example, Burns Weston particularises the right to development in economic and social terms, and does the same with the common heritage of mankind at mentioning exclusively the participation and benefit in "[…] *shared Earth-space resources; scientific, technical, and other information and progress; and cultural traditions, sites, and monuments*". Additionally, Weston includes expressly the rights to political, economic, social, and cultural self-determination, likewise the humanitarian disaster relief.[154]

In perspective, each generation of rights got inspired by the three pillars of the French Revolution, i.e., *liberté*, *égalité* and *fraternité*, as appropriate, where the first category could be seen fundamentally under an individualist dimension, the second one under the umbrella of an idealistic social scope (somehow as a kind of *transition* to the next group), and the last one characterised by an apparently collectivist facet.

To Taylor and Weston, whose views in this point attach great importance to the objective of the present study, Vašák's proposal follows a chronological path. Thus, the first-generation rights arose from the ideologies concerning the liberal individualism and economic *laissez-faire*, propounded mainly during the seventeenth and eighteenth centuries. The second-generation rights emerged initially been from the socialist traditions in the early nineteenth century. Nonetheless, one should also say they became a claim coming from the developing countries during part of the twentieth century. Finally, the third-generation rights

[152] Vašák (1977) 29.
[153] Kotzé (2018) 138.
[154] Weston (1984) 266.

possess a much more recent origin, having grown out around the second half of the twentieth century.[155] Maybe because of its novelty and rawness, it would be inappropriate to say they are a finished output, but rather their contents are still under construction. According to Knox and Pejan, this last statement seems to be accurate, particularly in the case of the right to a healthy environment. Indeed, as mentioned, its contents are not yet part of the international binding framework.[156]

If one profoundly scrutinises this historical trail of human rights, one will notice the somehow systematic inclusion of new entitlements in the social sphere. It has happened beyond the chronological order and the correspondence to one or another period. Firstly, the civil and political rights appeared and later the social, economic, and cultural ones. Yet the latter did not replace the former, but rather both categories get gathered. Ultimately, the collective rights came, but neither have they substituted the previous ones. Instead, they were also included in the discursive range of human rights. Some authors, such as Weston, have come to affirm that collective rights are interconnected with the other two dimensions of rights or even represent a reconceptualisation of them.[157] Notwithstanding, the truth is that these assertions are purely interpretative because the three categories have kept their conceptual independence among them.

Interestingly, Imre Szabo shows a similar interpretation. For him, the historical development of the collective rights has occurred at the expenses of the individual ones, the only two categories of citizens' rights he genuinely admits. "*What was involved here* [Szabo alleges] *was a development which, historically, led, concomitantly with the development of society, to the* ***extension*** *of collective rights at the expense of individual rights*".[158] This manner of describing the gradual establishment of the collective rights, and the particular allusion to the word "*extension*", fits quite appropriately with the ethical connotation of *extensionism,* especially in terms of method. Indeed, one could affirm that the *extensionism of rights* constitutes a methodological strategy for granting different degrees of moral and legal importance to specific beings. It has made it possible to bestow rights on actors who have been historically isolated from legality and morality, such as slaves from the anthropocentric perspective, or animals from the utilitarian one.

[155] ibid 264-7; Taylor (1998a) 317-9.
[156] Knox and Pejan (2018) 1-2.
[157] Weston (1984) 266.
[158] Szabo (1982) 17-8, emphasis added.

Thus, the appearance of collective rights as from individual rights has been outstandingly explained by Szabo through the emergence of newer social elements in the ordinary course of events of human life. The new social conditions make it increasingly difficult for alone persons to exercise their rights exclusively by themselves. In consequence, the author expounds fellow collaboration [solidarity] has become unavoidable. Moreover, although the joint exercise of rights does not mean that people lose their individuality, it does require a minimum level of association. From a more lawful viewpoint, the author even highlights the role of the "*cooperation*" of the social group as the only manner to exercise solidarity rights.[159]

Beyond the pertinence of Szabo's examples, there are some cases accurate enough to illustrate solidarity in matters of rights. The repercussions of air pollution, for instance, could describe pretty efficiently the effect of collective rights over time, particularly in the context of the right to a healthy environment. At the outset, an isolated effort to prevent or, at least, hindrance a particular source of carbon emissions could be momentous, mainly for whom has been directly affected as a consequence. Nevertheless, those isolated attempts will get increasingly useless over time because the effects of air pollution are both cumulative and impossible to converge statically within a specific area. The pollutants spread in the atmosphere through the wind, by which harmful impacts can also occur far beyond the source. Under these circumstances, the personal exercise of environmental rights and reparation of focused damages, exclusively in favour of affected people, turn out insufficient. It would be necessary a joint action for encompassing the emergence of new indirectly affected people because their identification is quite complicated most of the time, namely individuals do not lose their right to claim for damages, although they have to count also on a recourse to defend the collective right of the group. Thus, roughly speaking, solidarity rights tend to work out around this purview.

The precedent reasoning leads to imagine that the right to a healthy environment has also responded to the same historical track of collective rights. The association between environmental protection and human rights has sprung from an individual dimension which now coexists with the collective one, giving rise to a normative dualism. Therefore, its scope is not exclusively restricted to the realm of collective rights or excludes each dimension from the other. In this state of affairs, it is not probably worth casting doubts on the suitability of

[159] Szabo (1982) 18-9.

the dichotomy. Instead, one should highlight their particular relevance, chiefly in the empirical ambit.

Therefore, Vašák indicates that these third-generation rights entail a life in community, which could solely be achieved by the agency of the "*combined efforts of everyone*", including individuals, public and private institutions, and states.[160] A conventional interpretation of his words seems to have a twofold character, concerning the collective perspective and the international one. Therefore, the idea of solidarity–consisting of the assistance of several actors to achieve life in community–is entirely holistic. Meanwhile, the intervention of different states denotes an evident idea of internationalisation. Weston does not only agree with this argument but upholds that both features are interconnected. To him, the cooperation among all social forces to attain the life in community drives directly to a "*planetary scale*", predicated on the search of generalised community interests.[161] In any case, the comprehensive logic behind the interconnection between both elements turns out understandable, being tight in practice admitting any argument in contrast. Environmentally speaking, there is no probably anything more all-inclusive than the very planet.

In one way or another, the holistic sphere in which the collective rights to a healthy environment are unfolding gives rise to thinking about certain parallelism with the rights of Nature, the core of this research. Therefore, one should take into account that, although they have various aspects in common, both categories are fundamentally dissimilar as far as their philosophical bedrocks are concerned. In effect, while the former sturdily found on anthropocentric stances, where humans are at the centre of everything, as the most important beings, the latter are conceived under ecocentric criteria, where humans are other more fellows equal to the rest of the creatures.

The differentiation between both approaches is crucial in so far as their philosophical patterns are distinct, that is, the anthropocentric view is substantially individualistic as it refers only to human beings. Meanwhile, the ecocentrism is holistic as it represents a more comprehensive view regarding other nonhuman fellows. So, they are in antipodal directions. In consequence, although a good number of authors correctly refer to the solidarity rights under a holistic approach, they rather belong to an individualistic perspective, derived from human rights doctrine. One should not confuse this scope with the holistic development of the ecocentrism.

[160] Vašák (1977) 29.
[161] Weston (1984) 266. The reference is also in Taylor (1998a) 363.

To conclude, what William T. Blackstone called "*the right to a livable environment*" is an illustration of how the theoretical roots of the collective right to a healthy environment get settled in the human-centred insight. To him, it dealt with a full-blown human right, either in philosophical or legal terms. Thus, it could not be a mere "*desirable state of affairs*", but rather an entitlement in the strict sense. What does it mean? In essence, it stands for "[…] *a correlative duty or obligation on the part of someone or some group* […]" to respect the quality of the environment in which human beings will fulfil their capacities and minimise the effect of placing the human existence in jeopardy. In other words, the author emphasises the presence of mutual entitlements and duties. As in any fundamental right, they are intended to meet optimum living conditions for the wellbeing of current and forthcoming human beings. Although this premise could be clear enough to reveal his anthropocentric perspective, one can identify other utilitarian features in his discourse about people's welfare. The intrinsic value and the dignity of "*all human life*" could be examples. Later, Blackstone himself expressly admits he is "[…] *not prepared to say* ***all life***".[162]

2.2 Environmental rules and regulations in the ambit of International Law

As a complement of the right to a healthy environment, both the concept of "*sustainable development*" and the notion of "*future generations*" constitute other anthropocentric modes of addressing the relationship between human beings and Nature altogether. The intergenerational idea regarding the "*satisfaction of human needs*", expressed as such in the *Brundtland Report*, denotes the idea that Nature is an array of things to meet human necessities in the present and the future. Thus, the interconnectedness among these three conceptions, a healthy environment, sustainable development, and future generations, comprise the best scholar guidelines and the analytic framework to unfold the legal status of Nature and its implications in the international arena.

Given the vast number of international environmental instruments currently in force, it would be virtually impossible to analyse all existing documents. Therefore, the selection of lawful sources has prioritised those conventions, agreements, soft law, and the like which best fit with the interplay between protection of Nature and anthropocentrism.

In Annexe # 2.1, there is a detailed list of the binding instruments and soft law, with their respective descriptions, employed in the present research.

[162] Blackstone (1973) 55-65.

2.2.1 The extensionism of the right to a healthy environment

The notion of a healthy environment represents a relatively new variety of human rights, in comparison with other traditional entitlements. To comprehend how fresh it is, in principle, one should bear in mind that both the right to a healthy environment and the right to property are considered human rights. Nevertheless, while the latter was expressly proclaimed worldwide by means of the Universal Declaration of 1948,[163] the former barely appeared as such in the World Conservation Strategy (WCS) of 1980.[164] Even though the Strategy is undoubtedly a valuable document in the environmental sphere, however, it does not stand for the same transcendence as the Universal Declaration. Indeed, the WCS resembles more a scientific report than a statement of principles.

Consequently, one could easily imagine there are no explicit references about the right to a healthy environment in any of the analysed instruments, especially in those that form part of the International Bill of Rights. Even so, various authors have elaborated their legal hypotheses, predicated particularly on the interpretation of the Economic Covenant, whose concept of environmental hygiene[165] somehow epitomises the dawn of the environmental rights in the field of international law.

In context, the right to a healthy environment is often assumed as an extension of the "*inherent right to life*", closely connected with health, wellbeing, and the like. Indeed, the U.N. Human Rights and denotes, in Committee (HRC) arguably contends that states' interpretation of the right to life is "*narrow*" everyday language, a sort of insufficiency. Consequently, states should adopt "*positive measures*" to protect this right better. These "*positive measures*" would include a set of utterly human-centred actions, such as the reduction of child mortality, the augmentation of life expectancy, or the elimination of malnutrition and epidemics.[166] In other words, the inherent right to life is not enough for people's welfare, if states do not protect and maintain also living standards.

There is a second step that follows a similar interpretative line regarding the Committee's opinion mentioned above. Some authors take it for granted it contains a demand to improve environmental conditions, as a "[…] *requirement for the proper*

[163] Universal Declaration (1948) Article 17.
[164] World Conservation Strategy (1980) Priority 9, para. 13th.
[165] Economic Covenant (1966) Article 12 (2b).
[166] Human Rights Committee (1982) para. 5th.

development of the individual".[167] If truth be told, however, one has to point out that there are no express exigencies thereon on the HRC's text, although this scholar perception seems to be [at least partially] accurate. In effect, human life would not be feasible without accomplishing minimum standards of exogenous components (e.g., clean air and water, availability of natural resources, suitable climate settings, and so on). And, as one can notice, those exogenous components only could be handled through environmental parameters. By way of explanation, professors Alfredsson and Ovsiouk expound that "[…] *the realization of certain well-established rights, such as those relating to life, food, health, and development, only to mention examples, is inherently dependent on the successful management of the environment. The right to life is especially dependent on* [a] *sound environment*".[168]

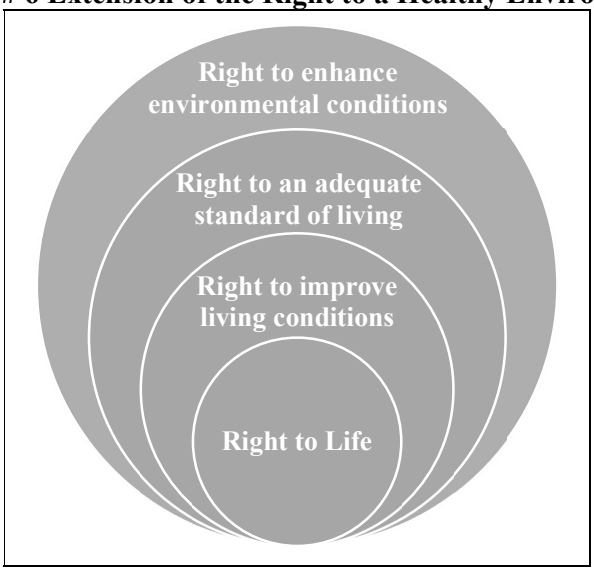
If one applies the same logic of thought to the realm of international law, the starting point would be the acknowledgements of the rights to life and to a standard of living adequate for the health and well-being, included in the Universal Declaration. Subsequently, this right to life should extend towards "[…] *the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions*", recognised by the Economic Covenant.[169]

Concomitantly, the Economic Covenant also focuses on the "*right of everyone to the enjoyment of the highest attainable standard of physical and mental health*", which constitutes living conditions as well, liaised with human welfare. Eventually, it turns out to be the link with the right to a healthy environment, given that one of the "*steps*" required to achieve the full realisation of the alluded right consists precisely of: "*The improvement of all aspects of environmental and industrial hygiene*".[170]

To recapitulate, chart # 6 illustrates the expansion of the right to life towards the right to enhance environmental conditions in the international legal framework, just as the authors explain it within the academic field. In methodological terms, this process of expansion would turn out to be a mechanism employed to obtain a substantive reinterpretation of pre-existing human rights, intended to regulate the environmental sphere, as already seen in the previous subsection.

[167] See, for example, Borràs (2016) 116.
[168] Alfredsson and Ovsiouk (1991) 22.
[169] Universal Declaration (1948) Articles 3 and 25; Economic Covenant (1966) Article 11 (1).
[170] Economic Covenant (1966) Article 12 (2b).

Chart # 6 Extension of the Right to a Healthy Environment



Based on the International Bill of Human Rights

A couple of preliminary conclusions are feasible at this point before continuing to ponder some extra scholar and legal arguments. Firstly, it is worth emphasising the instrumental, maybe even anthropocentric, features of the standards of living, whose contents focus primarily on commodities (e.g., food, clothing, and housing) and services (e.g., health) coming originally from natural resources, that is, there is a connotation of Nature as a supplier of goods and services.

Secondly, the interrelation between adequate living standards (e.g., physical and mental health, food, clothing, and housing) and the enhancement of ecological conditions (i.e., environmental hygiene) could consist of a valid premise *per se* in favour of the planet, and consequently makes up an appropriate atmosphere to live. Nevertheless, this line of reasoning is unquestionably anthropocentric and represents the essence of the right to a healthy environment.

In other words, the environmental improvement it is not beneficial for any ecosystem in itself, but only in the function of human welfare. Thus, the Convention to Combat Desertification includes an explicit legal example, when it states that the combat of desertification and the mitigation of the effects of drought involve, inter alia, concentrating on "*leading to improved living conditions*". Within this framework, the support of research

activities is intended "[…] *to the identification and implementation of solutions that improve the living standards of people in affected areas*" as well.[171]

Moreover, although the amelioration of the environment possesses a broader legal and discursive scope than the improvement of living conditions in principle, the structure of the Economic Covenant's text does not describe this interplay. Indeed, it sets out an upside-down depiction, i.e., the better living standards do not favour a clean ecosystem but quite the opposite. The enhancement of all aspects of environmental hygiene implies just one of the steps to reach the highest attainable standard of physical and mental health. Thus, if one scrutinises the other actions proposed by the covenant in the same provision, one will notice all refer to human-centred measures, namely (i) the reduction of the stillbirth-rate and infant mortality, (ii) the prevention, treatment, and control of epidemic, endemic, occupational and other diseases, and (iii) the creation of conditions which would assure to all medical service and medical attention in the event of sickness.[172] Each one aims at achieving the full realisation of physical and mental health.

From this point on, one can count on a series of theoretical nuances and legal examples regarding the expansion of the right to a healthy environment. Thus, for instance, Susana Borràs suggests an alternative interpretation, skipping over the alluded methodological process and going directly to the association between the right to life and the enhancement of environmental conditions. She argues that Article 6 of the Political Covenant "[…] *expressly identifies the need to improve the environment as a requirement for the proper development of the individual*".[173]

Notwithstanding, if truth be told, a simple first reading of the passage does not allow understanding of Borràs' argument entirely. Hence, Alfredsson and Ovsiouk display a more intelligible explanation instead. They start from the HRC's opinion regarding the fact that the right to life is narrow and immediately link it with Article 6 of the Political Covenant. To them, "[…] *political rights, popular participation, fair trial and procedural guarantees are respected in the process of making policies and taking decisions relating to the environment*".[174] Consequently, the alluded civil and political rights recreate the necessary standards to improve environmental conditions, and vice versa.

[171] Convention to Combat Desertification (1994) Articles 2 (2) and 17 (1b).
[172] Economic Covenant (1966) Article 12.
[173] Borràs (2016) 116; Borràs (2017) 228-9; Political Covenant (1966) Article 6.
[174] Alfredsson and Ovsiouk (1991) 23.

Furthermore, in a similar line of thought, one could perhaps draw a broader conclusion through a more flexible than a literal interpretation of Article 6, together with the third recital of the Political Covenant. Therefore, if Article 6 proclaims that every human being has the inherent right to life, one should consider its exercise requires the accomplishment of certain conditions, which condense into the set of civil and political rights, among others. In consequence, "[…] *the ideal of free human beings enjoying civil and political freedom* […] *can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights*".[175] Those are the adequate living conditions, which include the eco-friendly ones.

On her part, Audrey Chapman believes in an utterly opposite interpretation regarding the covenants' contents, in essence, a restrictive one instead of an expanding one. Hence, she proposes to impose limitations on state actions when they are hurtful with Nature. This constraint consists of combining the right to enjoy and utilise fully and freely the natural wealth and resources with the prohibition to deprive people of their means of subsistence. Additionally, Chapman considers that certain rights, such as environmental hygiene, work (including favourable labour conditions), and an adequate standard of living "*may be tapped*" for the substantive reread and reinterpretation of existing provisions, in which there are no explicit references to environmental issues.[176]

2.2.2 Normative references regarding the right to a healthy environment

Although not all the international environmental instruments include provisions related to the right to a healthy environment or its process of extension, it is possible to find specific allusions. There are references concerning the interaction among the rights to life, to adequate living standards, and to enhance environmental conditions.

By and large, the Aarhus Convention constitutes the international instrument that best represents the interplay between the environmental issues and the adequate living conditions, particularly concerning health and welfare. Indeed, both aspects constitute the goal to attain through the access to information, being the very objective of the convention. Furthermore, one can effortlessly notice that virtually any data related to the association between health and environment will be subject to access above all when there exists some threat.

[175] Political Covenant (1966) Preamble, recital 3rd, Article 6.
[176] Economic Covenant (1966) Articles 1 (2), 6, 7, 11 (1) and 25; Chapman (1993) 223-4.

On its part, the Convention on Climate Change maintains a similar approach regarding living conditions and environmental quality. Nevertheless, it curiously follows an inverse line of reasoning, namely it does not deal with the improvement of living conditions to enhance the environment or vice versa, but instead with the deterioration of ecosystems that affects the living conditions. To a certain degree, one can assert that the right to a healthy environment somehow hides within the definition of "*adverse effects of climate change*". In other words, there is an association between exogenous (weather) and endogenous (health and welfare) elements that influence human beings and their living conditions.

As far as the explicit allusions to right to a healthy environment, or in its synonymous expression "*sound environment*", is concerned, one should argue they deal solely with a superficial approach. If one reads the contents of the conventions on access to information and biodiversity thereon, one will undoubtedly notice they are more rhetoric statements than regulations in practice. Annexe # 3.1 shows up a schematic abridgement regarding all instruments.

On the other hand, various regional instruments on human rights also include allusions to the right to a healthy environment. The first and foremost aspect is worth highlighting consists of all quoted instruments associate suitable environmental conditions with adequate living standards. Thus, for instance, although one could argue that "*general satisfactory*", "*safe*", "*clean*", or "*healthy*" are qualifiers with distinct scopes, all of them eventually denote the need to improve the existing environmental conditions.

In a similar vein, despite the divergences among the approaches of "*development*", "*well-being*", "*decent life*", or "*human dignity*", it turns out undeniable they all intend to obtain an amelioration of living standards. However, those living standards depend more or less explicitly on the provision of goods and services, such as food (livelihood), clothing, housing (habitat or home), public services (education, health), and the like. Thus, the regional instruments on human rights also conceptualise the idea of Nature as a supplier of goods and services (anthropocentrism). Annexe # 3.2 shows a summary thereon.

From all these mentioned concepts, the notion of "*development*" is quite probably the broadest and the most abstract in terms of scope. Indeed, the very African Charter defines it throughout economic, social, and cultural dimensions.[177] For this reason, it does not weird this expression denotes an idea of national welfare instead of individual benefit for an individual person or set of persons. Consequently, one can appreciate a subtle insinuation to

[177] African Charter on Human and People's Rights (1981) Article 22. Hereinafter African Charter on Human Rights.

the question of sovereignty (discussed later) regarding the prevalence of environmental reasons versus developmental ones in the implementation of public policies.[178] The writing of the article thereon leads to thinking about the predominance of development over Nature.

Summing up, the enhancement of living standards is often a kind of prerequisite for the improvement of environmental quality of ecosystems, and vice versa, which implies that both aspects are patently linked. Nonetheless, if one painstakingly ponders the regional instruments thereon, it is quite probable to read between the lines that the betterment of living conditions is feasible without considering any environmental amelioration, but the opposite does not occur. Thus, there is no room for ecological enhancement without human benefit. It eventually means the existence of a hierarchical relationship between humans (including their living standards) and Nature.

In parenthesis, although sexist vocabulary of the international instruments is not part of this research, it is worth mentioning it briefly due to it constitutes another manner of exclusion from the exercise of rights. In other words, international instruments somehow exclude from their ambit the environmental improvement when it does not promote human benefit. Likewise, an exclusive male approach of language could exclude women from the exercise of human rights. There are some examples of thereupon.

Curiously, both the Universal Declaration and the two covenants are littered with numerous references to male expressions (e.g., he/his/him/himself), which would exclude expressly to women from the exercise of specific rights. However, the bill of rights is not the only case. This kind of allusion also appears in other regional instruments on human rights, such as the European Convention, the Pact of San José, the African Charter, and the Arab Charter. Likewise, the CITES contains a couple of male mentions.

Being a relatively recent agreement, the 2004 Arab Charter probably represents a different case among the indicated instruments due to its provisions could correspond to a deep-rooted cultural worldview. Indeed, Louise Arbour, former U.N. High Commissioner for Human Rights, has severely criticised the Arab Charter because of its inconsistencies with international norms and standards, emphasising the lack of recognition of or poor treatment of women's rights. In consequence, one could argue this discriminatory text is only a depiction of her concerns.[179]

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[178] In any case, it is quite curious that the African Charter on Human Rights has included a provision about environmental issues above all considering it dates from 1981, i.e., merely one year later than the appearance of the notion about the right to a healthy environment in the World Conservation Strategy.

[179] Translation of the Arab Charter on Human Rights (2004). Hereinafter Arab Charter on Human Rights; UN News (2008) paras. 1st and 2nd.

The other regional instruments on human rights and the CITES cannot be analysed under the same terms instead, mainly because they were issued before the 1970s, except for the African Charter (1981), when an equalitarian logic was not thoroughly spread worldwide. One should consider, for example, the Convention on the Elimination of All Forms of Discrimination against Women came out barely in 1979. In this regard, if one reviews newer instruments, one can notice they use both genres within their respective texts (i.e., he and she, his and her, him, and her). The Convention on Biological Diversity (1992), the Aarhus Convention (1998), the Asian Human Rights Charter (1998), and the Charter of Fundamental Rights of the European Union (2007) are examples.

In any case, to be fair, one should warn that some sexist expressions correspond to specific languages and their translations. The elements of Nature get even classified following the grammatical rules concerning the gender of things, objects, concepts, and so forth. Nevertheless, other languages, such as the Hungarian one, are examples of the fact that there is no gender in all grammatical structures.

With hindsight, one could argue there is discursive supremacy of the adequate standards of living over environmental conditions. Indeed, if one scrutinises the semantic sense of the writing coming from the instruments, especially the Economic Covenant, one can notice the improvement of environmental conditions (hygiene) is instrumental, even functional, to the adequate standards of living.

Without a doubt, the explicit references to nourishment, attire, and housing, as patterns of acceptable living conditions correspond quite probably to a contextual issue of the employed language. One should have in mind environmental concerns barely began to flourish and influence the legal parlance later in time (the early seventies). It seems the international agreements, principally the covenants, embody the Aristotelian[180] or Thomistic[181] connotation of plants, animals, and other natural useful resources for human subsistence. Notwithstanding, when it is about health, one can occasionally feel an alike sensation regarding contemporary instruments.

To sum up, beyond the diverse eco-friendly interpretations one could utilise to promote the conservation, protection, or restoration of Nature, the literal sense of all these global instruments (the first ones in particular) profoundly embodies in the most classical Western

[180] Ellis (1895) 23.
[181] Parel (1979) 93.

traditions. From time to time, one can even appreciate the Lockean invocation of natural rights, life, liberty, and property.[182]

2.2.3 The principle of sustainable development and its components

In the realm of international law, although with punctual exceptions,[183] legal scholars and practitioners often consider the 1987-Brundtland Report as the starting point of the concept of sustainability. One cannot leave out the 1980-World Conservation Strategy, however, whose aim alludes to Sustainable Development explicitly. Whatever its origin, probably because sustainability constitutes a multidimensional notion, one should notice it has been gradually acquiring a variety of nuances, which have been outpacing the idea concerning the satisfaction of present needs without compromising the future ones,[184]

Initially, the idea of sustainable development has passed from being a mere declaration of intent in technical documents, such as the Brundtland Report or the WCS, to be a principle of international law. This recognition has frequently occurred since their first appearance in the preamble of a binding instrument, i.e., the 1992-Agreement on the European Economic Area. This treaty described it as a combination of preservation, protection, and improvement of the environmental quality with the warranty of prudent and rational utilisation of natural resources.[185]

Likewise, a host of authors has coincided with the idea concerning sustainable development is a principle of international law.[186] Nevertheless, there is not, as a matter of fact, a consensus about how to conceptualise it. Indeed, one can observe an attractive debate of diverse theoretical positions. Thus, for instance, some scholars conceive sustainable

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[182] Mack (2009) 3.

[183] Weiss and Scherzer, for instance, point out the first reference to the principle of sustainable development occurred in a U.N. Resolution of 1980. Nonetheless, the terminology does not appear expressly. It reads: "*There is need to ensure an economic development process which is environmentally sustainable over the long run and which protects the ecological balance*". See Weiss and Scherzer (2015) 52; U.N.G.A. Resolution No. 35/56 (1980) para. 41st.

[184] World Commission on Environment and Development (1987) Chapter 2, para. 1st. Hereinafter Brundtland Report; Conservation Strategy (1980) IV.

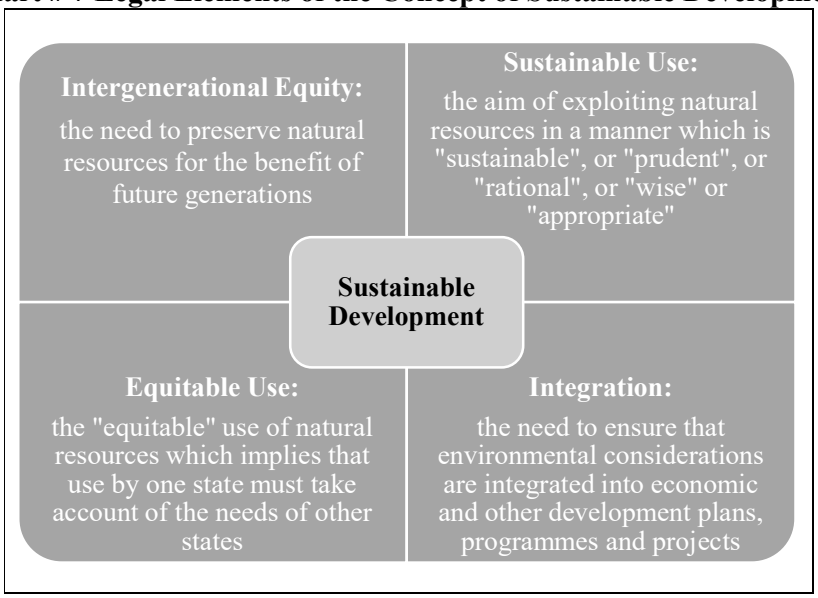
[185] Agreement on the European Economic Area (1994) Recital 9th (emphasis added).

[186] In this line, see for example the works by Weiss and Scherzer (2015) 53; Nanda and Pring (2013) 25-6; Zengerling (2013) 7; Voigt (2009) 1; Bosselmann (2008) 2; Craik (2008) 77, 80-1; Kiss and Shelton (2007) 97-8; Singh (1987) 289.

development as customary international law,[187] while others think it is too early to grant it such a category.[188]

Furthermore, one cannot forget the importance of the 1992-Earth Summit in the articulation of the concept of sustainable development. Some of the most remarkable world environmental instruments arose there in Rio de Janeiro, whose contents have decisively contributed to the construction of its legal framework. Similarly, one should not brush aside other treaties signed after 1992, whose provisions also refer to sustainability and its regulation in specific matters. As a complement, one should consider that the ICJ's decision regarding the case Gabčíkovo-Nagymaros constitutes an express acceptation of the conceptual scope of sustainable development, from a judicial standpoint.[189]

Chart # 7 Legal Elements of the Concept of Sustainable Development



Based on Sands (2003) 253

In any case, beyond the numerous definitions and interpretations that one can find around the notion of sustainable development in the specialised literature, it seems the concept currently encompasses, at least, four integral elements: intergenerational equity,

[187] For example, Barral (2012) 388; Sands (2003) 254.

[188] Lowe, for instance, believes sustainable development is not a norm of international law. At best, it "[…] *looks like a convenient umbrella term to label a group of congruent norms, much as we might seek a single term to label the set of disparate rights and obligations* […]". Wälde, Handl, Birnie, Boyle, and Redgwell hold similar opinions. See Lowe (1999) 26; Handl (1990) 25; Wälde (2004) 120; Birnie, Boyle, and Redgwell (2009) 127.

[189] Case 92, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (1997).

sustainable use, equitable use,[190] and integration. Chart # 7 showed a schematic summary, taken from the outstanding work by Philippe Sands.

By way of summary, the analysis of sustainability comprises two sources, the international legal framework currently in force, and the existing jurisprudence–which in this case refers exclusively to the Gabčíkovo-Nagymaros case, given the key role it has played in the international arena.

2.2.4 The legal scope of sustainable development

In the field of international law, there are multiple manners to define sustainability, either as a principle, right, duty, or as a mere goal to reach and so forth. In this regard, Annexe # 3.3 shows up a schematic compilation of the more frequent references to sustainable development existing within the international legal framework.

From its origins, Sustainable Development has been an anthropocentric concept in the light of international law. Indeed, the 1972-Stockholm Declaration, considered by several scholars as to the starting point of the legal debate between environmental protection and development,[191] illustrates it. Thus, the instrument redirects the discursive tensions between development and ecological protection towards human sake. One can explicitly read: "[…] *States should adopt an integrated and co-ordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve* [the] *environment* ***for the benefit of their population***".[192]

In the same line, the 1992-Rio Declaration, deemed as one of the cornerstones of soft environmental law, proclaims the anthropocentrism of sustainability by affirming that human beings are ***at the centre*** of concerns for sustainable development. As has been the case of the Stockholm Declaration, the association between ecological protection and development in the Rio Declaration turns out sort of indissoluble. In this regard, it announces that "*Peace, development and environmental protection are interdependent and indivisible*".[193]

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[190] Birnie, Boyle, and Redgwell prefer speaking about the "*right to development"*, limited by equity, and environmental law, as mechanisms to reinforce prevention and mitigation of potential ecological harms. Nevertheless, the sense of their arguments is somehow parallel to Sands'. See Birnie, Boyle, and Redgwell (2009) 119.

[191] For example, Weiss and Scherzer (2015); Nanda and Pring (2013) 29; Barral (2012) 379; Bosselmann (2008) 27; Sands (2003) 257; Sachs (2000) 71.

[192] Declaration of the United Nations Conference on the Human Environment (1972) Principle 13 (emphasis added). Hereinafter Stockholm Declaration.

[193] Rio Declaration (1992) Principles 1 and 25.

Moreover, principle 4 of the Rio Declaration explicitly declares that "[…] *environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it*", which does not conversely occur. The writing of this paragraph somehow connotes a pre-eminence of development over environmental protection, given its broader scope. The notion of development makes up the whole, while environmental protection is merely one part. Furthermore, development could individually operate, unlike environmental protection.[194]

This kind of preference for development and human benefit over ecological issues does not show up isolated merely in a few principles. On the contrary, the Rio Declaration is littered with convergent aspects toward development, such as the alleviation of poverty, the elimination of unsustainable patterns of production and consumption, the search of economic growth in all countries, and the participation of people (chiefly women, youth, and Indigenous). A relatively remarkable provision corresponds to the promotion of an open international economic system, highlighting the protection of international trade through the implementation of policy measures, and even the provision of financial resources. In this framework, the instrument attaches particular importance to interstate cooperation and interchange of technology and scientific knowledge, as mechanisms to attain global sustainability in its diverse nuances.[195] In sum, as one can notice, this instrument favours a full-blown anthropocentric discourse.

Nonetheless, the Rio Declaration was not the only lawful and discursive upshot of the 1992-Earth Summit. The truth is that the conference gave rise to some of the most representative international treaties in the subject matter in question. One of those instruments was the Convention on Climate Change, whose predisposition towards development over the environment is also visible from the outset. Within the very preamble, one can read that the responses to climate change should comprise social and economic development, chiefly oriented to the attainment of "*sustained economic growth*" and the "*eradication of poverty*". Moreover, the convention acknowledges the need to access to "*resources required*" for reaching the mentioned sustainable social and economic development.[196] In context, the use of the expression "*resources required*" is ambiguous,

[194] ibid Principle 4.
[195] ibid Principles 5, 7, 8, 9, 12, 20, 21, 22, and 27.
[196] United Nations Framework Convention on Climate Change (1992) Recitals 21st and 22nd. Hereinafter Convention on Climate Change.

given it leads to thinking about a variety of interpretations, which could encompass indistinctly or altogether economic, social, and even natural resources.

In a similar line of reasoning, other international treaties contain analogous statements. Thus, for one, the Convention on Biological Diversity–another output of the 1992-Earth Summit–proclaims that "[…] *economic and social development and poverty eradication are the first and overriding priorities of developing countries*", particularly with reference to the provision of financial resources or the transfer of technology. Oddly enough, unlike other treaties, it turns out a little difficult to find explicit interactions between environmental and economic aspects, save the topic of investments within the preamble. Effectively, it reads that "[…] *substantial investments are required to conserve biological diversity and that there is the expectation of a broad range of environmental, economic and social benefits from those investments*". In parenthesis, they are not the only human-centred propositions within the instrument, as the vast majority of allusions to sustainability refer to the use of biodiversity and genetic resources. In either event, the question of sustainable use will get analysed in the next chapter, apropos of property rights.[197]

Likewise, the Convention to Combat Desertification states that "[…] *sustainable economic growth, social development and poverty eradication are priorities of affected developing countries, particularly in Africa, and are essential to meeting sustainability objectives*". Given there is no trace of any environmental aspect within this recital, despite the fact that it theoretically forms a part of the concept of sustainable development, one can perceive an underlying anthropocentric connotation, which manifests through the exclusive emphasis on economic and human issues. Later in the text, the promotion of trade and the economic environment as paths toward sustainability confirms the last assertion regarding the prevalence of chrematistic and human elements over environmental ones. Thus, within the realm of desertification and drought, the notion of sustainable development constitutes an achievement to meet in affected areas. Besides, it comprises the framework to formulate and implement strategies, priorities, programmes, plans, and policies to cope with this ecological problem.[198]

Within the framework of sustainability, the notion of economic development in the international legal parlance is of such magnitude that forms part of the general objective of the Convention on Climate Change. Thus, it even states explicitly that "[…] *economic*

[197] Convention on Biological Diversity (1992) Recitals 18th and 19th, and Article 20 (4).
[198] Convention to Combat Desertification (1994) Recital 8th; Articles 2 (1), 4 (2b), 5 (b), 9 (1), 10 (2a), 17 (1f), and 18 (1).

development is essential for adopting measures to address climate change". In light of the treaty, sustainable development constitutes a principle of cooperation to promote an open international economic system that would lead to "*sustainable economic growth*". Indeed, this instrument highlights "[…] *the need to maintain strong and sustainable economic growth* […]". Similar to the Rio Declaration, the Convention on Climate Change brings into question any restriction of international trade, no matter if that constraint aims at fighting against climate change. At this point, the contents of both instruments are virtually identical.[199]

Correspondingly, the Convention to Combat Desertification also underlines the importance of trade and economy within the ambit of sustainable development. Effectively, state parties should give due attention "[…] *to the situation of affected developing country Parties* ***with regard to international trade****, marketing arrangements, and debt with a view to* ***establishing an enabling international economic environment conducive to the promotion of sustainable development***".[200] It deals with an obligation intended to attain the objective of combating desertification through the promotion of sustainability, which does not incorporate any ecological variable, as it occurs in the rest of the treaties previously described as well.

The trend towards standing out development over the environment does not seem novel or isolated. Thus, for example, Sachs and Bosselmann, among others have warned about a sort of gradual transmutation from the original essence of "*sustainability*" to the concept of "sustainable development", especially since 1992. From then on, it "[…] *seems to have lost its contours*", Bosselmann argues. Furthermore, he continues, "[i]*ts popularization in the term 'sustainable development' created an invitation to use it for all sorts of objectives purported to be desirable ('sustainable economy', 'sustainable growth', 'sustainable policies', etc.)*". This conceptual "*transformation*", predicated firmly on the idea of economic growth, usually shows up, Sachs affirms on his part, a "[…] *long-frustrated southern desire to change the balance of power of the world in* […]" development's favour.[201]

In practice, one could also visualise the propensity to highlight development (especially economic one) from the concept of sustainability within the *Sustainable Development Goals*

[199] Convention on Climate Change (1992) Articles 2, 3 (4 and 5) and 4 (2a); Rio Declaration (1992) Principle 12.
[200] Convention to Combat Desertification (1994) Articles 4 (2b).
[201] Sachs (2000) 73-4; Bosselmann (2010) 102; Bosselmann (2008) 40.

(SDGs) or *Global Goals*, a set of actions conforming to the 2030 Agenda for Sustainable Development, agreed by the U.N. member states in 2015. Annexe # 3.4 contains the Sustainable Development Goals (SDGs). In particular, goal # 8 describes probably better this tendency, by declaring the promotion of "[…] *sustained, inclusive and* ***sustainable economic growth****, full and productive employment and decent work for all*'. Moreover, if one peruses the rest of the goals, one can perceive a robust anthropocentric perspective. Hence, virtually all goals refer to some aspect of human welfare, such as poverty, hunger, health, education, gender, water, sanitation, energy, infrastructure, industrialisation, inequality, human settlements, consumption, production, and access to justice. However, it is fair to say there are various goals intended to attain environmental challenges related to climate change, conservation, protection, and restoration of Nature (including, oceans, seas, forests, biodiversity, and other ecosystems).[202]

Conversely, although it does not deal with a mandatory instrument but soft law, the Asian Human Rights Charter interestingly conceptualises sustainable development as a sort of limitation to economic growth. Therefore, one can read: "*Economic development must be sustainable. We must protect the environment against the avarice and depredations of commercial enterprises to ensure that the quality of life does not decline just as the gross national product increases*".[203] In context, nevertheless, the paragraph denotes a thoroughly implicit invocation of the anthropocentric bias towards the warranty of living conditions, i.e., the protection of Nature in favour of the human benefit.

Summing up, after semantic scrutiny of the international treaties' texts, where one can find references regarding sustainability, one might notice an overall tendency toward stressing the role of economic development over environmental protection, including a sort of emphasis upon the international market and financial resources. Furthermore, green policies, programmes, and projects are not valid in themselves, given the fact that there is an association between ecological issues and human welfare.

2.2.5 The role of the Gabčíkovo-Nagymaros case in the concept of sustainability

Broadly speaking, the Gabčíkovo-Nagymaros Project case represents a milestone of international law, although not only because of the application of a precautionary approach, the recognition of the "*ecological necessity*", or the association between environmental risks

[202] Transforming our world: the 2030 Agenda for Sustainable Development (2015) 14/35.
[203] Asian Human Rights Charter (1998) para. 2.9.

and projects, as Philippe Sands has asserted. Annexe # 2.2 includes a brief review of the case. The adjudication is also transcendent for the subject matter in question, as affirmed above, owing to it represents the acceptation of the concept of sustainable development in the international arena, independently of whether it forms part of a treaty or not.[204] In effect, the Court invoked this aspect by holding that:

> *Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind - for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past.* ***This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development***. [sic][205]

Moreover, the ICJ went far beyond, pointing out the parties had to "[…] *loo[t]k afresh at the effects on the environment of the operation of the Gabčíkovo power plant* [and] *find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river*".[206] According to Sands, this statement summarises a twofold legal posture promoted by the Court. On the one hand, it implies a *procedural* function represented by the order to "*look afresh*" at the ecological effects. And, on the other hand, it also constitutes a *substantive* proclamation, which requires a conceptual agreement concerning how both parties should define the "*satisfactory solution for the volume of water*".[207] Notice the parallelism with the rights-based approach addressed in the previous section.

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[204] Nanda and Pring (2013) 610; Zengerling (2013) 182-3; Abass (2012) 642; Barral (2012) 386-7; Birnie, Boyle, and Redgwell (2009) 115-6; Craik (2008) 80-1; Hildering (2004) 418-9; Sands (2003) 11, 477; Shaw (2003) 778; Lowe (1999) 19.
[205] Case 92, *Hungary/Slovakia* (1997) para. 140th.
[206] ibid.
[207] Sands (2003) 255.

Among the judgements of the case, the separate opinion of Vice-President Weeramantry has been particularly remarkable. The significance of his view concerning the idea of sustainable development has some ramifications. Firstly, he attributes the emergence of the concept to ancestral wisdom, employing as examples the ancient regulations of the irrigation-systems coming from Sri Lankan, African, Iranian, Chinese, and Incan civilisations and cultures. To him, the human need to reconcile development and environment did not come into being from modern sources of law exclusively. It responds to a transmission process of traditional wisdom, which inspired those ancient legal systems capable of handling ecologic problems. In parenthesis, the theoretical positions regarding the rights of Nature are coincident with this argument. Consequently, according to the interpretation of Klaus Bosselmann, "[t]*he idea of sustainability has its roots in the history of humankind*". In contrast, other authors, such as Weiss and Scherzer, do not share this argument, even stating its origins trace barely to the 1970s.[208]

Secondly, in accordance with the previous statement, Weeramantry emphasised that human need for living in harmony with Nature has been present virtually in every single civilisation around the world. In his words, the Judge asserted that "[i]*n relation to concern for the environment generally, examples may be cited from nearly every traditional system, ranging from Australasia and the Pacific Islands, through Amerindian and African cultures to those of ancient Europe*". Moreover, he seems to believe in the interdependence between Nature and people, arguing even the own subsistence of people relies on the harmonic interplay them. In this regard, he states that "[…] *harmony between humanity and its planetary inheritance is a prerequisite for human survival*".[209]

In this line of reasoning, Judge Weeramantry's criteria have been decisive to complement the legal conceptualisation of sustainability in the global range. The former Vice President of the International Court of Justice asserted that the notion of sustainable development goes beyond the present generations and the ambit of the law. It deals with a historical construction, whose origins trace to ancestral wisdom over time. It does not definitively respond to a contemporary emergence or a legal elaboration exclusively. He states:

> *Sustainable development is thus not merely a principle of modern international law. It is one of the most ancient of ideas in the human heritage* (sic)*. Fortified by the*

[208] Weeramantry (1997) 98-107; Bosselmann (2008) 12; Weiss and Scherzer (2015) 52.
[209] Weeramantry ibid 107, 110.

rich insights that can be gained from millennia of human experience, it has an important part to play in the service of international law.[210]

Thirdly, based on the understandings of irrigation Justice Weeramantry criticised what he called the "*formalism of modern legal systems*". His reproach predicated on the fact that it could cause that humans discard those "*pristine and universal values*" that should govern the interplay between people and Nature; i.e., love of Nature, desire for its preservation, and respect its maintenance and continuance. In his words, "[…] *the time has come when they must once more be integrated into the corpus of the living law*". To Bosselmann, one could explain the alluded formalism through the "*positivism*" of law, which arose as a separation between moral values and legal contents since the eighteenth century. In response, Weeramantry suggests that contemporary legal systems concerning environment should incorporate the "*experience of the past*" following the so-called "[…] *congruence of fit between traditional tribal methods* […] *and the nature of the land, water and climate* […]", a terminology taken originally from Fernea[211].

To recapitulate, despite the scholar endeavours to endow sustainability with an eco-friendly character in the light of international law, such as Judge Weeramantry's opinion, it is apparent that sustainable development deals with a principle deep-rooted in the tradition of anthropocentrism. It is also hardly separated from the search of human welfare and subsequent economic growth. Its central idea regarding the benefit of future generations is the quintessential example, considering it involves an intergenerational responsibility between the present and next ***people***, let alone the recurrent allusions to the uses of natural resources (either sustainable or equitable), and the integration of environmental and economic aspects.[212] All these components constitute a vision thoroughly human-centred, which gets deepened when one analyses the legal framework.

2.2.6 Future generations within the international law

The conceptual handling of "*future generations*" is not isolated from the conception of sustainable development. Indeed, there is a considerable number of scholars who argue it

[210] ibid 110-1.
[211] Weeramantry ibid 108-9; Bosselmann (2008) 12-3; Fernea (1970) 152.
[212] Sands (2003) 253.

[undoubtedly[213]] forms a part of the definition of sustainability, under the umbrella of the principle of "*intergenerational equity*"[214]. Sands, for example, assures that the idea regarding present generations "[…] *hold the earth in trust for future generations is well known to international law*",[215] a statement quite parallel to the avoidance of compromising forthcoming needs.

In practice, the legal statements on future generations do not seem to imply any operational effects of importance upon Nature. On the contrary, they have rather anthropocentric repercussions in the field of international law. Thus, the concerning instruments do not go beyond the frequent mention of the cliché regarding that the enhancement of ecological conditions is useful "*for the benefit of present and* ***future generations***". The notion of forthcoming people merely evokes an expectation commonly alluded to within the preambles or secondary provisions coming from the conventions about the trade of endangered species, climate change, biodiversity, desertification, and access to environmental information, among others. Annexe # 3.5 encompassed some provisions thereon.

If the truth be told, the experts point out and acknowledge the importance of future generations as one of the crucial pillars of sustainability, as mentioned above, coming even to describe it as one of the main reasons to protect current natural resources. It is at least what one can read between the lines in the Brundtland Report and other parallel documents. Likewise, international instruments also include the concept within their provisions. Therefore, one cannot definitively bring into question the intergenerational equity, although one always has to keep in mind that future generations do not exist in the present.

Nonetheless, one should take into account that future generations are eventually human beings so that their anthropocentric connotation turns out undisputable to some extent. In other words, when one reads that global or regional laws concerning conservation, protection, or safeguard of Nature intends to benefit present and future generations, legislation is attributing a higher value to humanity than Nature. Consequently, the legal framework defends–in essence–a human-centred outlook.

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[213] Bosselmann (2008) 31. On his part, Daniel Bodansky affirms sustainable development puts intergenerational equity front and centre. See Bodansky (2010) 34.

[214] For example, Weiss and Scherzer (2015) 53-4; Nanda and Pring (2013) 32-3; Fitzmaurice (2009) 68-9; Voigt (2009) 104-6; Birnie, Boyle, and Redgwell (2009) 119-22; Kiss and Shelton (2007) 106; Campins-Eritja and Gupta (2004) 257; Weiss (1990) 199 [quoted also by Sands]; Handl (1990) 27.

[215] Sands (2003) 256. There is a similar assertion in Barral (2012) 380.

2.3 Conclusions

The present chapter principally enquired into two scholarly issues, derived from the efficiency of law and legal representation. Effectively, the first one consisted of determining the sufficiency of existing legal mechanisms to protect the environment. Instead, the second one involved the need and subsequent feasibility of recognising the legal representation of Nature as a subject of international law. In this regard, this chapter comprises of two sections to ease the analysis of each topic separately.

Regarding the first research question, i.e., ***if the existing legal mechanisms are enough to protect and respect Nature in itself, and not necessarily for human sake,*** one should argue there is abundant evidence otherwise, namely international treaties –either global or regional ones– continuously emphasise the importance of people's welfare over Nature.

Thus, for example, it has been said the regulations of the right to a healthy environment attempt to enhance ecological conditions to favour adequate living standards (e.g., physical and mental health, food, clothing, housing, and so on). Therefore, no environmental improvement is exclusively eco-friendly in itself, given that it aims at benefitting human wellbeing. Indeed, authors often assume this right is an extension of the inherent right to life, closely associated with health and suitable standards of living.

In the conflict between fundamental rights and human rights (e.g., the right to life v. property rights, or environmental protection v. development) the restriction of rights constitutes a legitimate solution. In this regard, for example, the limitation of property rights could make up a manner to promote the protection of Nature as an inseparable component from the right to life. Notwithstanding, for meeting this goal, Nature must compose an independent legal entity because the traditional application of the anthropocentric, individual human rights approach has failed to preserve the environment for decades, as a result of the exploitative, hegemonic operation of global capitalism. The reason lies in the fact that the anthropocentric principles, along with its procedural boundaries, have not been able to improve the efficiency of environmental protection, even with the use of procedural [human] rights. Although the sustainability would offer a kind of compromise, self-restraint of States and markets do not work, so one must find an alternative solution to protect the ecosystems.

In principle, although ecological measures based on the right to a healthy environment do enhance the ecosystemic conditions, they do not operate if there is no demonstrable welfare for people, according to international law. Whether it is not for human sake, it does not seem justifiable to take any measures to protect Nature. Consequently, current

international environmental normative concerning the right to a healthy environment is not sufficient to warrantee the protection and respect of Nature. It possesses a mere instrumental function, where natural resources get represented as suppliers of goods and services.

Likewise, the principles around sustainability tend toward guaranteeing anthropocentric conditions instead of green ones. The profuse references concerning the eradication of poverty, social development, the increased participation of women, youth, and Indigenous, among others, as constitutive elements of sustainable development illustrate very well its propensity for preferring human sake over Nature's.

In a similar vein, several instruments show decisive support of international trade within the framework of sustainability. They bring into question any restriction to its regular operation, even when the mentioned constraints concentrate attention on environmental objectives (Convention on Climate Change is particularly illustrative thereof). Furthermore, they also emphasise the "*sustained or sustainable economic growth*" as one of the priorities of development and as an essential mechanism to reach sustainability.

Accordingly, the existence of various social and economic preferences over Nature signifies that sustainability international laws' promote a human-centred standpoint and, above all, the achievement of sustainable development in practice does not necessarily imply the enhancement of ecological conditions *per se*. Human welfare will be the clue aspect to consider when one should apply politics, programmes, and projects intended to reach sustainable development.

There is a parallelism between future generations and the previously alluded cases. As mentioned, the notion of forthcoming people is conceptually anthropocentric, given it refers to human beings in principle. It is true those people do not exist at present, but they are going to be humans in the future. Consequently, the protection of Nature on behalf of persons-to-come does not represent an ecological end in itself, it rather constitutes an instrumental aim, useful for the search of human wellbeing. Following this logic, it would not be justifiable the application of environmental provisions if it does not entail any benefit for upcoming people. Therefore, this schema of protection is neither enough to protect Nature.

As an overall conclusion, whether black-letter law does not offer enough warranties to protect Nature, let alone its enforcement in practice. The application of eco-friendly policies, programmes, action plans, and so forth will not be significantly efficient to avoid ecological devastation if their legal sources are neither enough to accomplish green aims. To some extent, the association with human welfare could mean an obstacle concerning conservation, protection, or restoration of Nature, among other favourable actions. Notwithstanding, it

does not mean international legislation is thoroughly useless to cope with the environmental crisis, owing to many treaties ['*specific provisions*' to be exact] have turned out to be successful. Unfortunately, this is not the case of the whole global or regional legislation. Hence, one cannot conclude ***the existing legal mechanisms are sufficient to defend and respect Nature in itself*** in the ambit of international law.

The second research question consisted of establishing ***how necessary the representation of Nature as a bearer of rights and a subject of international law would be in the current state of legal affairs.*** The response to this query initially derives from the previous one, namely if international environmental law cannot be satisfactorily employed to protect Nature, it becomes imperative to represent its interests in the juridical arena. As a result of this assertion, someone could wrongly believe there is not any form to defend Nature legally. It is not the case, however, given the fact that States have been traditionally in charge of protecting natural resources.

Effectively, the first section of the present chapter contains many indications regarding the existence of States as the most ancient and traditional subjects of international law. For a long time, they have even constituted the only ones. In this regard, although historical regulations have recognised the legal personhood of other participants, actors, or stakeholders–such as NGOs, confederations, and even human beings, among others–States have been customarily the institutions responsible for environmental protection.

Nevertheless, the relationship between State and Nature does not correspond to a couple of actors interacting on an equal footing. Their interplay resembles what occurs between owner and ownership, meaning the notion of property or any other associated form of control, such as sovereignty, links both concepts together. The implications of property rights, however, will get examined in the next chapter. For the time being, one has to keep in mind that Nature has been historically a set of goods, or even commodities, intended to meet human needs. As a result, States have managed Nature as things under their control and will continue to do it, instead of considering it as a group of beings endowed with specific interests. Thus, the representation of Nature, based on the current international legislation, merely reproduces the anthropocentric connotation of the right to a healthy environment, sustainable development, or future generations.

Likewise, as mentioned before, the rights-based approach predominantly implies the incorporation of environmental issues into the international system of human rights. Not on the contrary. It deals with a thoroughly anthropocentric standpoint. Therefore, no matter the employed method–either the green reinterpretation of existing entitlements or the creation

of new ones–international law will tend to prioritise people's welfare over Nature's. In other words, instruments of human rights will emphasise detrimental impacts on people rather than on the wild itself, because it is their original essence. Accordingly, one cannot pretend the protection of Nature predominate in front of social interests within this ambit of the law.

Moreover, as argued throughout this chapter, one cannot lose sight of the fact that States have an obligation to protect both human beings and Nature. States are even responsible for the respect of human rights, mainly through the justice system. In this regard, it turns out quite difficult to believe that States are knowingly going to enforce international treaties in favour of Nature; even though their provisions generally cherish the inherent values of human beings more than purely environmental interests.

As mentioned, the last assertion definitively does not mean the international legal framework is thoroughly useless to protect Nature. It only implies that the enforcement of international law is going to support human beings instead of Nature in case of any conflict between their respective interests. In such circumstances, one could conclude States are not always the best protectors of ecosystems. Therefore, by way of a response to the second research question, it is worth acknowledging the need to count on an independent and legitimate actor [different from State], someone who can be legally capable of representing Nature in front of harmful human activities. Who is it? It is coming next.

Chapter Three
The ubiquity of property rights in the sphere of International Environmental Law

The present legal analysis posits the hypothesis concerning humanity subdues Nature through an ongoing process of objectification, commodification, and subsequent acquisition of ownership, under the shelter of the rule of law. In other words, the relationship between human beings and Nature unfolds principally in the function of property rights, where the former is the owner of the latter.

The argument, however, does not represent a novel idea. Quite the contrary, David Boyd recalls that, as early as 1765, Sir William Blackstone assured "[t]*he earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the creator*". According to Boyd himself, this condition persists until these days, due to humans have virtually laid claim the property of almost every piece of land and species, especially animals, on earth. "*Everything in* [N]*ature, animate and inanimate, constitutes our property*", he alleges.[216]

In this line of reasoning, the methodological premise of this chapter supports the idea that the international legal system establishes the prevalence of property rights above environmental protection, an assertion held by a bulk of anthropocentrism's opponents[217]. Nevertheless, it does not necessarily mean that global and regional juridical regulations solely promote or bring about the current ecological devastation or have had to do with it in the past. Indeed, some of the treaties mentioned earlier regarding threatened species, biodiversity, desertification, among others, have shown favourable ecological results. In any case, one cannot deny either the international discourse of the law, currently in force, tends unfailingly to benefit people to the detriment of Nature much of the times.

Additionally, one cannot forget the analysis of state-owned or public ownership, which beyond its name, conception, or scope, eventually belongs to humans, as Boyd points out. Furthermore, one should take into account that the exercise of this public property predicates principally on the sovereign authority of States. Thus, the notion of sovereignty suggests the idea of property rights because, as Schrijver contends, it brings on a list of associated

[216] Blackstone (1876) 2; Boyd (2017) xxvi–xxvii.
[217] In this line of thought, for example, see Borràs (2016) 113-4; Boyd (2017) xxiii; Kotzé and French (2018) 14; Sands (1994) 294; Taylor (1998a) 383.

entitlements emanating from it, such as the "[…] *rights to possess, use, freely dispose of, explore, exploit, market, manage, and conserve the natural resources*"[218].

In consequence, two research questions will guide the scrutiny of the diverse themes associated with this hierarchical strain between property rights and environmental protection. So, the first point at issue will consist of tracing back ***if Nature is or not considered as a set of things, subject to property rights, in the light of the international legal framework.*** The response to this enquiry purports to take it for granted that international law deems Nature as an assemblage of things, given this aspect appeared in the last chapter, being useless revisit the question once again. Moreover, it is worth mentioning the commercialisation of natural resources will comprise a significant element of study to keep in mind for this point.

Secondly, the next research question pretends to supplement the previous one, given that suggests the comparison between property rights and Nature as well, in terms of hierarchies. As announced in the introduction, the question deals with confirming the assumption that ***property rights are more important than Nature, within the international legal framework.*** To some extent, the enquiry also aims at corroborating if ecocentrists and other anthropocentrism's critics are right when they argue that environmental crisis is somehow the consequence of a human-centred administration of natural resources, based on a supposed superiority of property over Nature.

One additional methodological aspect is coming. In the realm of international environmental law, there are a couple of severe hindrances of study: quantity and scope of information. Effectively, the enormous number of existing conventions and other agreements makes an exhaustive analysis exceedingly difficult (one can find a little more than one hundred documents). Likewise, in terms of range, the contents of instruments about environmental issues are quite heterogeneous. Thus, while some materials encompass concerns of a global spectrum, such as climate change or public participation, others embrace a much more concrete topic. Among the latter, there are regulations concerning specific ecosystems (air, water, soil) or even resources (ozone layer, biodiversity, watercourses). Furthermore, one could find precise rules dedicated to potentially harmful actions or events (movement of hazardous waste, industrial accidents, illegal trade), environmental impacts (desertification, pollution), and so forth. Much of the times, two or more issues even appear overlapped.

[218] Boyd (2017) xxvi; Schrijver (2015) 26

Under these conditions, one-by-one scrutiny of treaties would turn out useless due to the fact that the bulk of the instruments do not even encompass relevant contents regarding the specificities of the theme posited in this chapter. Indeed, the examination of most of the international conventions concerning property rights would turn out bland because they do not even mention environmental issues. The gist of the argument consists of discovering how property rights have permeated international laws concerning the environment, not the other way around.

Accordingly, the best option to minimise repetition and facilitate the exploration of relevant documents seems to be the selection of the most representative treaties and other instruments in the international environmental sphere (to the extent feasible), emphasising the topics regarding the management of natural resources and global ecological problems. In the same vein, the role of the regional conventions on human rights is crucial for the study because they conceptualise property as a human right.

As one can notice, the selection of pertinent international conventions and other non-binding instruments has followed analogous guidelines with the previous chapter. Consequently, the materials of the study are identical. Moreover, the choice does not comprise any methodology in particular, but only a review based on the experts' criteria, such as Zartner. The documents come from the lists published by the United Nations in its Web Site about the Treaty Collection[219].

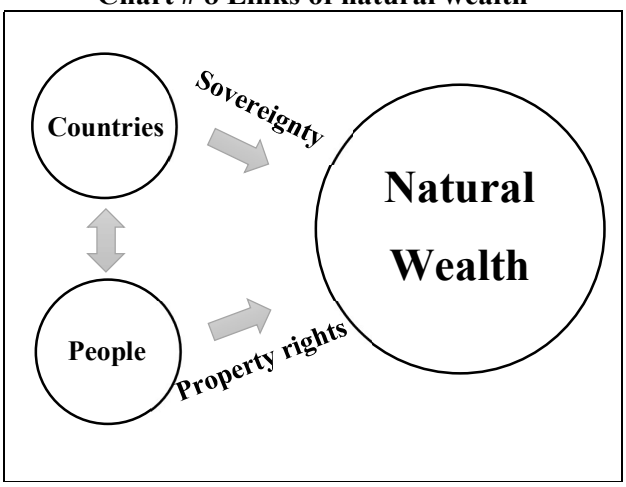
3.1 Nature as the property of humanity

One of the most apparent forms of illustrating the human-centred perspective seems to swirl around the interrelationship among three concepts: natural wealth, property rights, and sovereignty. In effect, both people and States keep a linkage regarding natural wealth, understood as the set of natural resources. Thus, property rights primarily constitute the connection in the case of persons, while sovereignty comprises the link regarding States, although this kind of property eventually belongs to humans as well. Chart # 8 below shows a brief scheme.

In this way, the first section of the chapter will address the interplay between people and natural wealth through the concept of property rights.

[219] United Nations Treaty Collection (2019) Status of Treaties § 1-29; Zartner (2014) 12-3.

Chart # 8 Links of natural wealth



3.1.1 Nature as a set of wealth and resources

The use of the expression "*natural wealth*" interestingly has a straightforward economic connotation, which is present in the 1966-covenants but not in the Universal Declaration. From the outset, these covenants contain a curious match between the words: "*wealth*" and "*resources*", qualified by the adjective "*natural*" as if both terms were somehow equivalent. As a recapitulation of the criticism coming from the ecological economists, this provision seems to suggest certain interchangeability (substitutability) among "*natural resources*" (natural capital) and "*natural wealth*" (human-made capital).[220] So, in the first article of each instrument (whose contents are identical, by the way), one reads:

> *All peoples may, for their own ends, freely dispose of their* ***natural wealth and resources*** *without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.*[221]

This comparative interpretation, nevertheless, is not too rare as one could think so. Indeed, the most understandable denotations of "*wealth*" and "*resources*" are quite analogous, even within the ordinary language. Thus, according to the Oxford Dictionary's authors, the word "*wealth*" refers to abundant possessions and money. Meanwhile, the term

[220] See Costanza and Daly (1992) 38-42.
[221] Political Covenant (1966) Article 1 (2); Economic Covenant (1966) Article 1 (2), emphasis added.

"*resource*" means a stock or supply of money, materials, staff, and other assets. As one could infer, both definitions constitute indisputable insinuations to ownership, save the peculiar allusion to people, derived from the term "*staff*", as part of the concept of "*assets*". In the very dictionary, one of the multiple significances of "*wealth*" corresponds to "*plentiful supplies of a particular resource: the* ***country's mineral wealth***". Moreover, another less intricate dictionary explanation –coming from Longman– relates to "*wealth*" as "*a large amount of money, property, etc. that a person or country owns*'. Likewise, "*resource*" is "*something such as useful land or minerals such as oil or coal that exists in a country and can be used to increase its wealth*".[222]

As a complement, there are two additional identical provisions, one in each covenant, where it is possible to identify the same matching between both expressions. They provide that: "*Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their* ***natural wealth and resources***".[223] Nevertheless, beyond this matching, the principal idea consists of it is perhaps the first time– chronologically seen–that one can notice a hierarchical relationship between humans and Nature enshrined expressly in the international law. In other words, as one is going to review later, it would be possible to affirm that nothing can obstruct the exercise of property rights over natural resources for human benefit.

However, one of the most significant examples in this matter is undoubtedly the anthropocentric concept of "*biological* resources", whose scope encompasses both their benefit for humanity and their economic value. Effectively, the Convention on Biological Diversity states that "*Biological resources includes genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems* ***with actual or potential use or value for humanity***". As one can notice, this definition even seems to suggest a sort of goods' list to use for human sake. The whole document is, in fact, replete with references to the sustainable or customary use of biodiversity. Moreover, one of the very objectives consists precisely of its sustainable use, including the sharing of benefits–a straightforward economic connotation–which constitutes a reaffirmation about the human-centred outlook that characterises the convention's contents.[224]

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[222] Concise Oxford American Dictionary (2006) 761, 1026; Longman Dictionary of Contemporary English Online (2018) search for: wealth and resource.
[223] Political Covenant (1966) Article 47; Economic Covenant (1966) Article 25 (emphasis added).
[224] Convention on Biological Diversity (1992) Articles 1 and 2 (para. 3rd) emphasis added.

Curiously, the Convention on Biological Diversity is probably one of the few international instruments in environmental subject-matter, in which there is an explicit mention of the "*intrinsic value*" of Nature, in contrast to what usually occurs in traditional Western parlance. Indeed, the first statement of the preamble begins by this recognition: "*Conscious of the **intrinsic value** of biological diversity and of the ecological, genetic, social, **economic**, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components*".[225] As one can see, however, two of the most conflicting terms regarding the disjunction between biocentrism and anthropocentrism, i.e., "*intrinsic*" and "*economic*", form interestingly part of this recital.

This proclamation, however, contradicts the overall sense of the convention, whose core objective does not aim just at "*biodiversity conservation*", as mentioned, but also "*sustainable use*". Consequently, it is not rare that economic value and the importance of ecosystems, habitats, communities, species, genomes, and genes be together part of the critical factors to identify and monitor them, in order to accomplish their purposes of conservation and sustainable use. It deals with a practical illustration of how international law does not promote conservation of Nature in itself, but rather for human welfare (e.g., scientific, medicinal, or agricultural usages), just as it happened with the traditional ethical discourse.[226]

In the same line of reasoning, the instrument comprises the recognition of investments for biodiversity conservation and the expectation of gaining profits from them. Therefore, the contracting parties should adopt, since possible, economic measures to incentive conservation and sustainable use of biological resources. The convention, in sum, places the economic, social, and environmental benefits, at least, at the same level of significance. Furthermore, economic development makes up explicitly one of the first and overriding priorities of developing countries. The continuing slant toward profitable outputs seems to be persistent.[227]

Likewise, the employment of the term "*production*" and its derivative words–such as productive or productivity–within the ambit of the Convention to Combat Desertification leads to thinking about Nature–especially land–as a good or a set of goods. In that regard, it turns out curious that the concept of "*land*" comprises the idea of a "*terrestrial bio-productive system*", instead of the association with natural habitat, environment,

[225] ibid Recital 1st.
[226] ibid Article 7 (a); Annex I.
[227] ibid Recitals 19th and 20th [in concordance with Article 20 (4)]; Article 11.

surroundings, or something alike. Of course, it is not a strict conclusion, given the definition of land effectively suggests the idea of an ecosystem in context, including some of its core elements, such as soil, vegetation, and ecological processes, among others.[228]

In consequence, one could argue that the role of the word "*production*" and the associated terminologies refer to biological implications of land (there is a similar approach in the definition of drought). Nevertheless, the continuing connotations regarding the economic repercussions of production and security of food, the guarantee of living conditions, and the improvement of financial situation end up granting a chrematistic –even with a sense of marketability– character to the whole document. It would be enough to check the definition of "*land degradation*", in which the mention of economic productivity is explicit, to confirm the commercial feature of the convention and the anthropocentric penchant to deem land as a permanent supply of goods for human sake.[229]

One can find another illustration of the commercial sense of international law in the Treaty on the Functioning of the European Union. It reads: "*Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited*". This prohibition includes any limitation to acquire or transfer lands to any other European citizen or company, being land one of the capital goods. In other words, the buy-and-sell of lands and real state constitutes fundamental freedom and is part of the free movement of capital in Europe.[230]

Accordingly, when one thinks about the connotation of Nature, taken from the context of international instruments, it would turn out pretty tricky not to think about natural wealth or resources as a string of goods or commodities, available for people's benefit.

3.1.2 Property as a human right

As mentioned before, the property makes up a human right recognised by virtually all [regional] treaties regarding human rights. Indeed, the self-same Universal Declaration of Human Rights proclaims that "*Everyone has the right to own property alone as well as in association with others*". Generally, this declaration denotes that the margins of

[228] Convention to Combat Desertification (1994) Article 1 (e).
[229] ibid Recital 9th; Articles 1 (c and f), 2 (2), 4 (1b), 10 (3c and 4), 17 (1a and 1b), 19 (1i); Annex I, Article 8 (3a and 3e-ii); Annex II, Article 2 (a, and d); Annex III, Articles 2 (b, and c), 4 (c).
[230] Treaty on the Functioning of the European Union (2012) Article 63.

acknowledgement and acceptance of property rights, either explicitly or implicitly, within the international legal framework are very extensive.[231] As an illustration, Annexe # 3.6 shows a series of definitions concerning the property coming from the instruments on human rights worldwide.

The international instruments on human rights define and regulate the right to property under more or less the same criteria, this is, they address its classical elements (possession, use, and disposition) and establish analogous restrictions for its exercise. These constraints ground mainly on public, general, or social interests (also utility), and a variety of specific legal conditions (e.g., taxes, contributions, penalties, money-lending, and so on). Furthermore, the instruments lay down economic compensations in those cases in which the property rights must be constrained, according to law.

In parenthesis, the Asian Human Rights Charter poses a different approach. The property merely aims at highlighting the problem of security, derived from violence and conflict. In addition, it alludes to the acknowledgement of women as bearers of property rights on the land. This recognition pretends to avoid the violations against women's rights and cope with the patriarchal structure of the social system. However, as mentioned before, the Asian Charter constitutes merely soft law, meaning it is only referential given it is not currently in force.[232]

Revisiting the issue in question, no scholar scrutiny regarding property rights is complete if it does not address the components integrating it. Consequently, one should unfold, of necessity, the three key elements alluded to in the legal parlance, i.e., the exclusive rights to "*possess*", to "*use*" (including to "*enjoy*"), and to "*dispose of*".[233] Thus, the next pages refer to it.

3.1.3 The entitlement of possession as a part of property rights

Initially, the contents of the 1966-covenants represent a useful and adequate mechanism to describe property rights' implications because one may identify very clearly its three components, despite the fact that there is not any explicit mention concerning them. Moreover, although the instruments' bodies do not even mention the concept, its degree of

[231] Universal Declaration (1948) Article 17.
[232] Asian Human Rights Charter (1998) paras. 1.4 and 9.4.
[233] Gifis (2003) 405; Garner (2004) 3841.

discursive influence over Nature turns out undeniable, *ergo*, these treaties will be the guidelines of the whole section.

At the risk of seeming redundant, it would be adequate to rewrite once again an already quoted provision coming from both covenants, given it constitutes the starting point for the analysis of the topic at issue. In this sense, the instruments state: "***Nothing*** *in the present Covenant shall be interpreted as impairing the inherent right of* ***all peoples*** *to enjoy and utilize fully and freely* ***their*** *natural wealth and resources*".[234]

So, the notion of "*possession*", understood as "[t]*he fact of having or holding property in one's power* [or] *the exercise of dominion over property*",[235] lies semantically in the possessive determiner "*their*", which assigns the belonging of the "*natural wealth and resources*" to the noun "*all peoples*", namely "***their*** *natural wealth and resources*". Moreover, when one reads that "*nothing*" in the covenants shall be interpreted as impairing that inherent right (enjoy and utilise), it gives somehow the impression about the existence of a precise control excluding others, in the same legal sense that possession requires.

The discursive effect derived from the fact that no circumstance can obstruct the exercise of these inherent rights illustrates quite well the hierarchical influence of property rights upon Nature in the field of international law. Furthermore, one can find an allusion to the state possession of genetic resources within the concept of "*country of origin*", alluded to in the Convention on Biological Diversity, as a straightforward reference to the notion of state property. All of it suggests a kind of prevalence of the extractive perspective over the conservationist one, which concurs with the predominance of property rights upon the environmental concerns.[236]

To further make sense, both covenants reads: "*In no case may a people be deprived of its* ***own*** *means of subsistence*". Initially, being a possessive adjective, the word "*own*" linguistically reinforces the sense of belonging, which reaffirms the concept of "*possession*". In the end, this means property rights. Nonetheless, the affair goes beyond. By placing both expressions at the same level, this provision in some way leads to thinking about "*means of subsistence*" as "*natural wealth and resources*", i.e., as parallel ideas. This interpretation aligns with the working hypothesis regarding Nature is deemed a set of goods, according to international law.

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[234] Political Covenant (1966) Article 47; Economic Covenant (1966) Article 25, emphasis added.
[235] Garner (2004) 369.
[236] Convention on Biological Diversity (1992) Article 2 (para. 4th).

A thought-provoking interpretation, apropos of this last statement, is open. According to Sierra Club, the proscription of any attempt to deprive peoples of their means of livelihood represents a prohibition of specific state activities, namely it deals with those activities that "[…] *would degrade the natural environment to such an extent that peoples* […] *could no longer provide for themselves*". The phrase corresponds to an unpublished Sierra Club's manuscript by Audrey Chapman. Nonetheless, there is evidence this document got distributed during the 44th session of the Sub-commission on Prevention of Discrimination and Protection of Minorities in 1992. Furthermore, Barbara Johnston narrates how its submission to the Sub-commission was, as one of the contributions to the urgency for examining the relationship between human rights and environmental problems.[237]

Notwithstanding, given the extensive scope of the phrase, other and opposite interpretations could emerge from the same provision. For example, one could think about an unlimited guarantee of resources' exploitation, aimed at meeting people's basic needs. Indeed, if one examines this alternative possibility very carefully, it could suit even better to the human-centred essence of the covenants' texts.

In any event, heeding Taylor's argument, both scenarios could be seen as precise examples of what she termed as the reinterpretation of pre-existing substantive human rights.[238] Under these circumstances, one would be speaking about the protection of Nature since an anthropocentric outline.

3.1.4 The entitlement of the use as a part of property rights

The right to "*use*" may imply several connotations. Steven Gifis, for instance, considers the "*use*" is "*the right to enjoy the benefits flowing from real property or personal property*" or also the "*equitable ownership as distinct from legal title*". Likewise, from another legal entry, the authors of the Black's Law Dictionary conceptualise the "*use*" as the exercise of "*a long-continued possession and employment of a thing for the purpose for which it is adapted*".[239] In any case, whatever the theoretical scope is, the right of utilisation entails the existence of a good or a series of goods to employ, whose objectives link closely to human benefit.

[237] Chapman (1993) 223; Ksentini (1994) para. 4th; Johnston (1994) xi-xiv.
[238] Taylor (1998a) 338. See also: Cullet (1995) 25; Chapman (1993) 223-4.
[239] Gifis (1998) 522; Garner (2004) 4789.

In matters of natural resources, Nature's function of being a supply for production, i.e., a set of inputs for other goods' fabrication, is perhaps one of the best examples of the right to use. In that regard, it is worth quoting the preamble of the Convention on Biological Diversity, which reads that "[…] *conservation and* ***sustainable use*** *of biological diversity is of critical importance for meeting the food, health and other needs of the growing world population*". Moreover, the recurrent allusion to the *sustainable use* of biodiversity and genetic resources (including the fair and equitable sharing of benefits, whose connotation is undoubtedly economic) makes up a singular example of the instrumental approach of Nature, within the field of international law. Its significance comes to the point of being one of the fundamental objectives established in the corresponding convention, even at the same level as conservation.[240]

Notwithstanding, the persistent association between *conservation* and *use* along the Convention on Biological Diversity leads the belief that the protection of Nature (e.g., biodiversity and genetic resources) is not an ecological challenge in itself, but rather a mechanism to guarantee the satisfaction of human needs (e.g., food or health). To some extent, this idea is somehow contradictory, because it suggests that conservation is crucial as long as it allows extending through time the logic of exploitation of Nature, on behalf of individuals.

Likewise, following virtually the same logic as the Convention on Biodiversity, the ultimate objective of the Convention on Climate Change contains a specific warranty to protect nourishment, which comprises an explicit reference about the utilisation of Nature for people's benefit. Indeed, the instrument's core aim involves achieving stabilisation of greenhouse gas concentrations, inter alia, to ensure that food production is not threatened. In other words, it deals with safeguarding the raw material (natural resources) to avoid any risk concerning a potential lack of foodstuff.

In parallel, one can also perceive within the Convention on Climate Change a propensity to encourage a lessened human intervention to facilitate the natural resilience of ecosystems, combined altogether with a kind of promotion of economic development (growth?), and [of course] with the assurance of food production. The Convention states as follows:

> *The ultimate objective of this Convention* […] *is to achieve* […] *stabilization of greenhouse gas concentrations in the atmosphere at a level that* […] *should be*

[240] Convention on Biological Diversity (1992) Recital 20th (emphasis added), Article 1.

achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, ***to ensure that food production is not threatened*** *and to enable economic development to proceed in a sustainable manner.*[241]

Furthermore, the Convention on Climate Change shows incessant mentions regarding Nature as an array of things to use for human sake, especially in terms of yield. So, for instance, there is a specific recognition of fossil fuels as goods to produce, ***use***, process, and export within the framework of international trade, particularly from the perspective of developing countries. Similarly, the potential repercussions of the "*adverse effects of climate change*" in the welfare of humankind concerning the productivity of natural ecosystems encompass the idea of an anthropocentric and instrumental utilisation of Nature within the agreement's provisions.[242]

Within this framework, the Convention to Combat Desertification is perhaps the example *par excellence,* given it counts on several references to conservation and sustainable management and use of natural resources (especially land and water). The very objective of battling against desertification and drought aims at the improvement of land productivity and living conditions, among other human needs, instead of being inclusive also with the ecological worries. Likewise, the establishment and strengthening of food security are often suggestions for national action programmes, capacity-building, education, and public awareness.[243]

Despite the quoted references, the point concerning the "*use*" of Nature does not come barely from the 1990s. Truthfully, it has represented the *status quo* from earlier times. Effectively, it is possible to find its direct antecedent in both 1966-Covenants, and the recognition of the peoples' inherent rights to "*enjoy and utilize fully and freely their natural wealth and resources*".[244]

In summary, the logic beneath the conservation of biodiversity or the amelioration of the climate system to yield nourishment and foster health denotes a kind of circular reference, namely the protection of Nature and its resilience are essential as long as they aim principally at human interest. These correlations are quite similar to what one can read within

[241] Convention on Climate Change (1992) Article 2 emphasis added.
[242] ibid Recitals 2nd and 20th; Article 1 (1).
[243] Convention to Combat Desertification (1994) Articles 2 (2), 10 (3c and 4), and 19 (1c, 1i, and 3e).
[244] Political Covenant (1966) Article 47; Economic Covenant (1966) Article 25.

the context of the Economic Covenant, in which the provision of food, clothing, and housing, or the improvement of the methods of production constitutes entitlements.[245]

In this regard, the assumption that protection of Nature is legally and discursively valid as long as it promotes people's benefit constitutes a semantic hypothesis, which could be corroborated by both the preamble of the Convention on Biological Diversity and the first principle of the Convention on Climate Change. Thus, meanwhile the former establishes that conservation and sustainable use of biodiversity are intended to "[…] *the benefit of present and future generations*", the latter provides that "[p]*arties should protect the climate system* ***for the benefit of present and future generations of humankind***".[246]

3.1.5 The entitlement of disposition as a part of property rights

Disposition constitutes the "[…] *act of transferring something to another's care or possession, esp. by deed or will*". When the transference refers to property rights, it is called "*alienation*". Consequently, according to Gifis, alienation deals with "[…] *voluntary transfer of title and possession of real property to another person*". Moreover, the author states that: "*The law recognizes the power to alienate (or transfer) property as an essential ingredient of fee simple ownership of property and generally prohibits unreasonable restraints on alienation*".[247]

In a certain sense, alienation or disposition represents the essence of property in the framework of the relationship between human beings and Nature. Transfer does not only make up the mechanism by which the former owner relinquishes his/her entitlement in favour of the new one or new ones, but it also implies the existence of a bundle of goods (usually natural ones), which ultimately belong to people. In other words, the transfer of the property upon "*natural things*" from old owners to new ones depicts a clear picture of anthropocentrism in legal practice, i.e., the hierarchical interplay between subjects and objects of law.

Within the specific realm of international law, the concept of alienation/disposition is entirely visible in the ambit of the 1966-covenants, which contain unambiguous allusions about the inherent right to "*freely dispose of*" natural wealth and resources.[248]

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[245] Economic Covenant (1966) Article 11.
[246] Convention on Biological Diversity (1992) Recital 23rd; Convention on Climate Change (1992) Article 3 (1).
[247] Garner (2004) 1421; Gifis (1998) 18.
[248] Political Covenant (1966) Articles 1 (2); Economic Covenant (1966) Articles 1 (2).

Notwithstanding, one should take into account these instruments are not genuinely dedicated to environmental issues in its origins, so that one can find better examples in this subject matter, notably regarding the practice of the trade.

Effectively, commerce is quite probably the best example concerning how property rights get transferred among owners. In this framework, the CITES represents the epitome. From the own title, the CITES contains probably one of the most human-centred discourses of the whole international arena. The recognition of a system of trade around biodiversity does not only mean considering flora and fauna as interchangeable commodities but mainly acknowledging the possibility of fixing prices and paying costs, essential characteristics of property rights, without setting aside the existence of owners. Indeed, the majority of the twenty-five articles comprising the convention possess regulations regarding the trade of species, the commercial purposes, or, at least, evocative references in practice. Similarly, this terminology fills up the appendices.

The wide range of normative standards encompasses theoretical and abstract definitions, as well as concrete and empirical applications regarding Nature, understood as a set of goods. The legal conception of "*trade*", for example, could embrace virtually all possibilities of business with species of fauna and flora in the international legal framework. The CITES reads: "*Trade means export, re-export, import and introduction from the sea*". Likewise, the convention makes the existence of property rights upon Nature clear, when it states there are "[…] *specimens that are personal or household effects*", in practice. Moreover, it raises explicitly the possibility that the owners can acquire, import, and export their specimens.[249]

Scrutinising the provisions, one can even notice a thoroughly utilitarian/instrumental approach, such as the option to breed and propagate species of animals and plants for "*commercial purposes*". Not only this but, by way of a further example, one of the convention's appendix also includes the establishment of "[a]*nnual export quotas for trade in bones, bone pieces, bone products, claws, skeletons, skulls and teeth* [of lions] *for commercial purposes, derived from captive breeding operations in South Africa*".[250]

Curiously, the circumstance of trading species in parts suggests that it is not so significant if animals and plants are alive or dead to be deemed specimens in the light of international law. Being alive is not a requisite to be subjects of commerce.[251] In the end,

[249] Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973) Articles I (c) and VII (3). Hereinafter CITES.
[250] ibid Article VIII (4), Appendix II, Felidae spp. 10.g.
[251] ibid Article I (b.i), Appendix, Interpretation # 7.

this interpretation depicts one of the most self-evident manifestations of anthropocentrism because the condition of being alive could become unimportant in terms of trade. Animals and plants would be notably commodities to be purchased or sold.

Summing up, although the CITES' core principles are literally oriented to establish a series of strict regulations protecting, preventing, and constraining the exploitation of endangered species, they wind up facilitating the commerce in the function of different degrees of restrictions, going from the more severe to the laxer ones.

On its part, although the Convention on Climate Change does not engage the question of commerce directly with the effects of global warming, it does emphatically restrict the scope of environmental measures if they somehow obstruct the international market. This forthright anthropocentric provision reads: "*Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or* ***a disguised restriction on international trade***". At least in a discursive manner, it means guaranteeing a predominant relationship between commerce and environment, wherein the former depicts a more significant role than the latter within the international arena.[252]

Moreover, the instrument establishes "*a certain degree of flexibility*" regarding the implementation of national green commitments in favour of those countries that undergo the process of "*transition to a market economy*". It denotes once again a kind of favouritism towards a commercial outlook. The Convention on Biological Diversity contains a similar reference concerning the voluntary assumption of obligations by those countries involved in this process of transition to a market economy.[253]

Another reference regarding commerce consists of intellectual property rights. Within this field, one can even read between the lines a sharp propensity to grant more value to property rights than to Nature. Accordingly, for instance, adverse effects upon intellectual property rights constitute one of the legitimate causes to deny access to environmental information. Indeed, the Aarhus Convention lays down "[t]*he confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a* ***legitimate economic interest***".[254] One should wonder, however, what the meaning of "*legitimate economic interest*" is. The answer could be importantly ambiguous, given it would refer to property rights, mere possession, or financial profits, among other

[252] Convention on Climate Change (1992) Article 3 (5) emphasis added.
[253] ibid Article 4 (6); Convention on Biological Diversity (1992) Article 20 (2).
[254] Aarhus Convention (1998) Article 4 (3d and 4e).

alternatives. In any case, once again this provision constitutes another example in which economic interests prevail over Nature's.

Similarly, perhaps due to desertification and drought constitute environmental effects, closely associated with the human needs of soils' production and subsequently of nourishment, the Convention to Combat Desertification could be a perfect example. In fact, it contains a couple of sturdy references about the protection of intellectual property rights, especially in the realm of technology.

Moreover, there is certain logic of the market when the instrument stipulates that the owners of the knowledge, know-how, and other practices should directly be beneficiaries from any commercial utilisation of them or any technological development derived from them.[255] By mentioning the idea of commercial use, one immediately can image the possibility of buying and selling knowledge, which means favouring the operationalisation of trading intangibles (rights) through alienation.

Beyond its anthropocentric tendency, however, the fact that this commercial utilisation would also encompass ancestral wisdom, under the umbrella of local and traditional knowledge, could become dangerous for people and Nature. The potential negotiation of these kinds of experiences, know-how, and practices could imply the utter ravage of community property rights in favour of private owners. In principle, this circumstance should not be unfair, given the transference of property is perfectly legal in most countries. So, why would this be a problem? The answer involves the fact that traditional knowledge is regularly a common, or a shared-ownership good. Therefore, its collective character permits free access to the community members, free access that could be restricted if its legal status becomes private.

One might think, for instance, about traditional or folk medicine. There are a lot of therapeutic uses of plants and animals, whose practice has been transmitted from generation to generation for centuries, principally within indigenous peoples. What would happen if those peoples would suddenly lose control over their natural resources? Usually, they do not even come up to sanitarian services owing to that their treatments of illness are deeply rooted in lengthy traditions. Consequently, an undesirable lack of access to traditional knowledge would place their very existence in jeopardy. Something similar occurs when speaking about agriculture.

[255] Convention to Combat Desertification (1994) Article 18 (b, and e).

Among other objections, the critics of the free trade agreements (FTA) have alluded to these concerns recurrently. Thus, for one, Beatriz Busaniche argues that "*By imposing private intellectual property rights on collective knowledge and resources such as seeds and plant varieties, FTAs are in effect modern tools* ***for enclosing the commons***". From an economic perspective, not necessarily regarding native peoples, Peter Linebaugh has been quite more radical in his criticism towards this idea of resources' privatisation–he speaks of "*enclosure*"–branding it as "[…] *inseparable from terror and the destruction of independence and community*".[256] That is one of the reasons why authors from Latin America, such as Rodrigo de la Cruz, are claiming the acknowledgement of collective ownership and intergenerational and integral character of traditional knowledge, innovations, and practices for indigenous peoples and local communities. They are the suppliers and possessors of that wisdom, he argues.[257]

The Convention to Combat Desertification is an instrument largely inclined towards highlighting trading, economy, and production of soils. Nevertheless, the preamble seems to suggest both commerce and international economy influence on desertification adversely. The writing of the alluded recital allows inferring a somehow negative connotation, namely "*Considering the impact of trade and relevant aspects of international economic relations on the ability of affected countries to combat desertification adequately*".[258]

In any case, a critical overview is not the general approach of the instrument, but otherwise. Thus, to accomplish with the agreement's aim, member-states should

> […] *give due attention, within the relevant international and regional bodies, to the situation of affected developing country Parties with regard to international trade, marketing arrangements and debt with a view to establishing an enabling international* ***economic environment*** *conducive to the promotion of sustainable development.*[259]

One should notice the treaty curiously underlines the establishment of an "*economic environment*" exclusively, leaving out any reference to "*natural environment*". It occurs even though the concept of sustainable development frames the provision, as mentioned in

[256] Busaniche (2012) Part two, essay 16th, emphasis added; Linebaugh (2010) 12. In a similar sense, see Zückert (2012) Part two, essay 2nd. Linebaugh and Zückert are quoted by Busaniche.
[257] De la Cruz (2010) 93; De la Cruz et al. (2005) 25
[258] Convention to Combat Desertification (1994) Recital 7th.
[259] ibid Article 4 (2b), emphasis added.

the previous chapter, and it does not take into account that desertification and drought are primarily ecological impacts.

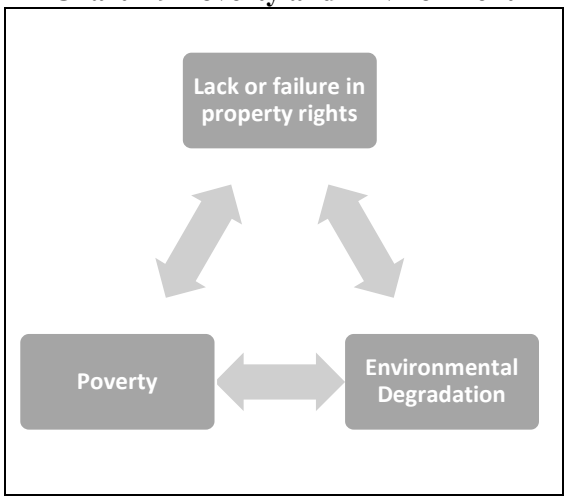
3.1.6 The interplay among property, poverty, and environmental degradation

In general, when one analyses the implications of property rights, especially regarding the human welfare [incidentally an anthropocentric view], it is difficult to put aside the severe effects of its absence or flaw among the population. Furthermore, one should consider the unequal distribution of wealth. All these elements configure the issue of poverty, which would not be significant if it were not because a good number of scholars associate the impoverished conditions with environmental exhaustion.

Effectively, as mentioned in the introduction, some neoclassical economists often bond unsustainable management of Nature, and even environmental degradation, with lack or failures in property rights. According to them, the absence of owners brings about a faster depletion of "*natural resources*", derived from the subsequent uncontrollable access.

On the other hand, any deficiency of property rights also drives hopelessly to deprivation of means of subsistence, which undermines people's decent existence and diminishes their living standards. In plain language, this incapability to possess and use livelihoods tends to become in poverty. Within this framework, people in the condition of the poor could readily draw upon the quicker extraction of natural resources–given their "*free access*"–to intend satisfying their needs. See Chart # 9 below.

Chart # 9 Poverty and Environment



Consequently, if one combines both premises, the correlation between environmental deterioration and poverty, as a result of absence or flaws in ownership, does not turn out eco-friendly. Furthermore, impoverishment is a potential source of ecological depletion. Effectively, from an economic view, Pearce and Barbier affirm that "[…] *widespread global is also thought to be a major cause of environmental degradation because poor people are often caught in a cycle that forces them to deplete and degrade natural resources, because their subsistence livelihoods are dependent on such exploitation*".[260]

Within the field of International Law, professor Krämer shares the mentioned opinion, by asserting that "*Poverty is the biggest environmental pollutant* […]".[261] Likewise, one could claim that this relationship was already visible–chiefly for developing countries–in the international arena, even in 1972, when the Stockholm Declaration announced that "[…] *most of the environmental problems are caused by under-development. Millions continue to live far below the minimum levels required for a decent human existence, deprived of adequate food and clothing, shelter and education, health and sanitation*".[262]

In principle, the response to the problem consisted of "*development*", a valid alternative instead of the exclusive economic growth, promoted during that interval, which even included the environmental variable. "*Therefore, the developing countries must direct their efforts to development,* [the Stockholm Declaration asserted] *bearing in mind their priorities and the need to safeguard and improve the environment*".[263]

If one reads between the lines, however, the environmental concern appears only in a marginal fashion, after national priorities have been borne "*in mind*". Thus, if these national priorities consisted of the exploitation of natural resources, in pursuit of development, the protection and improvement of environment remained paradoxically in the background. Indeed, according to the Declaration, states have the sovereign right to exploit their natural resources, beyond the environmental restrictions they are to respect in light of international law. If necessary, they could even accelerate the "development", as the very instrument declares. Thus,

> *Environmental deficiencies generated by the conditions of under-development and natural disasters pose grave* ***problems and can best be remedied by accelerated***

[260] Pearce and Barbier (2000) 130.
[261] Krämer (2016) 19.
[262] Stockholm Declaration (1972) Proclamation 4th.
[263] ibid.

development through the transfer of substantial quantities of financial and technological assistance *as a supplement to the domestic effort of the developing countries and such timely assistance as may be required.*[264]

The connection between poverty and environmental deterioration as well as the response to trouble also appear–perhaps not so explicit–in the Rio Declaration. The alleviation of poverty comprises, in fact, an "*indispensable requirement*" for economic growth and sustainable development. According to the Rio Declaration, "*States should co-operate to promote a supportive and open international economic system that would* ***lead to economic growth*** *and sustainable development in all countries, to better address the problems of environmental degradation*". To Cullet, the instrument allows inferring that economic growth takes precedence over environmental protection, human rights and even development.[265]

Although both the Stockholm Declaration and the Rio Declaration are not binding instruments in the international sphere, their principles adequately express the trends of the global legislation and the legal parlance.

In this scheme of things, if poverty represents an obstacle for guaranteeing adequate environmental conditions, it is understandable that international law promotes its preferential elimination. In this regard, the Convention on Climate Change declares explicitly that poverty eradication is one of "[…] *the first and overriding priorities of the developing country Parties*", which has to be kept in mind such so into any response against climate change. Likewise, identical provisions form part of the Convention on Biological Diversity.[266]

On its part, the Convention to Combat Desertification constitutes virtually the quintessence of the correlative connexion between poverty and ecological depletion, counting on numerous references everywhere. For instance, one can read explicit statements, such as the following recital: "*Mindful that desertification and drought affect sustainable development through their interrelationships with important social problems such as poverty* […]". Likewise, state parties should underpin research activities that *"*[…] *take into account, where relevant, the relationship between poverty, migration caused by environmental*

[264] ibid Principle 9.
[265] Rio Declaration (1992) Principles 5 and 12 (emphasis added); Cullet (1995) 29.
[266] Convention on Climate Change (1992) Recital 21st, Article 4 (7); Convention on Biological Diversity (1992) Recital 19th; Article 20 (4).

factors, and desertification". Nevertheless, the most precise allusion is perhaps one of the obligations of affected country parties, namely "[…] *address the underlying causes of desertification and pay special attention to the socio-economic factors contributing to desertification processes*". Summing up, its overall approach denotes the idea that financial impoverishment comprises implicitly one of the kernel sources of desertification and drought, particularly in Africa.[267]

The Convention alludes to the eradication of poverty continuously to solve the problem. Once again, notwithstanding, the mechanism employed to attain that aim consists paradoxically of economic growth [the document refers more strictly to "*sustainable economic growth*"]. Effectively, the Annex I includes a special section regarding the measures to improve the economic environment and mitigate poverty. Among them, one could mention the improvement of incomes and employment opportunities (through markets for farm and livestock, financial instruments, diversification in agriculture, and so on), enhancement of long-term prospects of rural economies (through incentives for production, tax, and price policies, and promotion of growth), reduction of the population pressure on lands, and promotion of the use of resistant crops, among others.[268]

Therefore, it deals with a clear-cut anthropocentric response, which is on a straightforward collision course with the non-anthropocentric standpoints, above all, when the latter ones affirm that the origin of ecological crisis is precisely the human-centred perspective. One could even speak about a circular reference, i.e., the economic growth as the source of environmental crisis and the same economic growth to outpace it. In either event, both environmental depletion and economic growth are "*priorities*" throughout the instrument.[269]

The question of soils' production also complements the argument concerning the triangle among economic growth, reduction of poverty and improvement of environmental conditions. By way of explanation, economic growth promotes the alleviation of poverty throughout the enhancement of land production. There are explicit allusions in this sense. Thus, for one, the convention lays down the amelioration of soil productivity is one of the strategies to achieve the objective to combat desertification and mitigate drought. Nonetheless, it is also possible to find out a thoroughly opposite interpretation about the role of production, i.e., as a cause of the problem. In Annex II, for instance, one reads "[…] *the*

[267] Convention to Combat Desertification (1994) Recital 9th, Articles 5 (c), 17 (1e).
[268] ibid Annex I, Article 8 (3a).
[269] ibid Recital 8th; Articles 4 (1c), 10 (4), 20 (7).

existence of production systems, directly related to widespread poverty, leading to land degradation and to pressure on scarce water resources".[270]

In a certain sense, the combination of both interpretations is, at least, a little confusing; owing to it denotes the existence of two types of production of land, one for the poor and the other for the market. The former promotes desertification, while the latter helps to resolve the problem. Nevertheless, the agriculture of the poor is usually a sort of production just for subsistence. It does not have typically to do with extensive farming. In sum, it turns out a kind of contradictory arguing the cause of a problem could be its solution.

Moreover, a scrutiny of the text makes one think about the key difference lies in the "*improvement of production*". Indeed, the contextual sense of the convention denotes that inadequate production of land promotes its environmental degradation and poverty, among other impacts. That is why, perhaps, the enhancement of soil productivity constitutes a mechanism to combat desertification, as mentioned above. Nevertheless, one enquires oneself, what means the improvement of production? Within the framework of the document, one could define it–for instance–in terms of enhancement of technology, knowledge, know-how, and other practices. There is a good number of references within the text to support this argument.[271]

In the end, however, a comprehensive reading of the convention allows understanding that no matter the measure state-parties should take to improve the production of soils, all of them subtly intend to increase the quantity of output. The very concept of "*combating desertification*" proves that prevention, reduction, rehabilitation, and reclamation of lands are not the only ways of protecting soils from desertification. They also consist of forms to increase the capacity of yield. Furthermore, one could argue the rise of productivity solely has biological purposes. Nevertheless, several mentions concerning the security and production of food, just like the warranty of living conditions or the enhancement of the economic environment, confirm the anthropocentric penchant to deem land as a permanent supply of goods for human benefit and promote economic growth.[272]

To conclude, although alleviation of poverty might have a variety of ramifications concerning human rights, it is not a common theme within the ambit of the regional instruments. The only statement, more or less related to the topic in question, can be found

[270] ibid Article 2 (2); Annex II, Article 2 (c).
[271] ibid Articles 2 (2), 17 (1a and 1f), 18 (2c); Annex I, Article 5 (c), 8 (3d), 11 (g).
[272] ibid Recital 9th; Articles 1 (b), 2 (2), 4 (1b), 10 (3c and 4), 17 (1b), 19 (1i); Annex I, Article 8 (3a and 3e-ii); Annex II, Article 2 (d); Annex III, Article 4 (c)

in the preamble of the non-binding Asian Human Rights Charter. Conclusively, the document shows up poverty as one of the direct results of a contradictory process of Asian development. To some extent, it explains the deterioration of human living conditions, and the ensuing impoverishment of people, on account of environmental degradation. It indicates that "[…] *our natural resources are being depleted most irresponsibly and the environment is so degraded that the quality of life has worsened immeasurably, even for the better off among us*". Curiously, nevertheless, the charter maintains the trends of the mentioned international instruments, i.e., promotes the elimination of poverty as a "*more equitable form of development*".[273]

Other references regarding poverty can be found in both the 1994 Arab Charter on Human Rights (which is not currently in force) and the EU Charter of Fundamental Rights. However, none of them has to do with environmental issues. The former posits the eradication of poverty as a mechanism to achieve economic development, while the latter links poverty with social security.[274]

3.2 Sovereignty as a mannerism of state property

One of the peculiarities that both sovereignty and property rights have in common is the control over goods and commodities. Indeed, the manner how States dispose of the things under their charge often resembles the way owners manage their belongings. The situation does not change in the case of natural resources, given they are goods in the light of international law, primarily speaking about land and certain species of flora and fauna. Already in 1979, for example, a U.S. Court argued "[t]*he control over a nation's natural resources stems from the nature of sovereignty. By necessity and by traditional recognition, each nation is its own master in respect to its physical attributes*".[275]

In this line of reasoning, the present section pretends to equate the relationship State–Nature with the interplay owner–ownership, through the link of sovereignty, within the ambit of international law. Taking for granted that environment constitutes a set of things, according to the global environmental legal framework, the analysis will emphasis those

[273] Asian Human Rights Charter (1998) paras. 1.3, and 2.4.
[274] Arab Charter on Human Rights (1994) Article 37; Charter of Fundamental Rights of the European Union (2012) 34 (3). Hereinafter EU Charter of Fundamental Rights.
[275] Case 477 F. Supp. 553, *International Association of Machinists and Aerospace Workers (IAM) v. the Organization of the Petroleum Exporting Countries (OPEC)* (1979) 568. Alexander Orakhelashvili also alluded to the quotation. See Orakhelashvili (2015) 184.

regulations oriented to promote the attainment of benefits, derived from the exploitation of natural resources, to search the economic development and human welfare. Thus, the first step will consist of establishing the conceptual parameters of the expression state sovereignty over natural resources. Later, the study will embrace the examination of its constitutive elements.

3.2.1 A general definition of sovereignty

Within the traditional doctrine of international law, sovereignty is a paramount element to the point of having been one of the conditions for the existence of the State (others have been people, territory, and government). Oppenheim used to define it as the supreme authority, "[…] *an authority which is independent of any other earthly authority*", i.e., implying–in his words–"*independence all around, within and without the borders of the country*".[276]

Nowadays, one cannot assure this way to understand the concept had changed so much. In its strictest sense, some internationalists–like Peters–affirm that States do not only have to satisfy the effectiveness of legal personhood to be considered as such (that is people, territory, and governance). Furthermore, they must demonstrate its government's legitimacy, an aspect closely related to the recognition, even to the point of legality. In her opinion, the contemporary debate focuses on the erosion of the concept as a consequence of globalisation. Then, one understands why recognition from others is so significant. In this regard, Peters warns that "[a]*lthough recognition by other states has only a declaratory effect, and therefore* ***de jure*** *does not constitute or* ***make a state****, it has important practical effects*".[277]

Therefore, the concept of sovereignty has transmuted from the strict idea of *power* toward "[t]*he right of a state to self-government*". However, its scope usually gets still associated with "*the supreme* [political] *authority exercised by each state*". In everyday language, it is not rare to think about a connotation of the supremacy of State over the body of people which belongs to it, i.e., within the framework of a hierarchical relationship (internal). Likewise, it refers to the "[…] *power of dealing on a nation's behalf with other national governments*", i.e., on an equal footing (external).[278]

In the realm of international environmental law, the idea of state power persists. Thus, for example, the doctrine of state sovereignty holds "[…] *that, within its territory, each*

[276] Oppenheim (1905) 118-9.
[277] Peters (2009) 180-81.
[278] Garner (2004) 4361, 4415.

nation-state has complete, supreme, and independent political and legal control over persons, businesses, entities, and activities, and ***over "its" environment and natural resources***", according to Nanda and Pring. This assertion does not only bring to the fore the fact that States exercise their authority over people and human activities inside their territories, but a property rights-like relationship with their natural resources lies at the bottom as well. It turns out inevitable to notice a discursive closeness with Lynn White's biblical interpretation concerning humans subduing the earth with dominion over everything [anthropocentrism?].[279]

In any case, when one examines the scholar notion of sovereignty, as Timothy Endicott so appropriately points out, at least three aspects protrude regarding its value within the ambit of international law: a) *statehood*, in front of other actors of the world scenery; b) *self-determination*, to make its own decisions, and c) *independence*, to avoid potential interventions coming from third parties. All these elements have repercussions for the status of States at different ranges, principally concerning its recognition as legal persons, its existence, and its *raison d'être.*[280] In other words, a series of characteristics closely related to the legitimacy of the States.

Due to the importance of statehood, self-determination and independence, their legal implications will get perused in the following sections. Nevertheless, one should warn there is a singular aspect concerning the parallelism between these mentioned features of sovereignty and property rights. At a given moment, themes will even look the same because the legal repercussions are also quite similar. In either event, the academic discourse encompasses the resemblances painstakingly, attempting to avoid redundancy and tautology to the extent feasible.

Moreover, before passing that analysis, it would be useful to describe the origin and context of the power exercised by countries over their natural resources, through the notion of "*permanent sovereignty*".

3.2.2 The legal roots of sovereign use and exploitation of natural resources

In matters of natural resources, one could affirm state sovereignty has its origins in discussions of economic and commercial development, i.e., a common link with property rights. According to Nico Schrijver, one of the most enthusiastic and expert scholars in the

[279] Nanda and Pring (2013) 20 (emphasis added), White (1978) 108-9.
[280] Endicott (2010) 255. In the same sense, see Shaw (2003) 231; Ziemele (2015) 279-80.

subject matter, this coincidence would lie in the very origin of the permanent sovereignty over natural resources. Professor Schrijver affirms that:

> *Since the early 1950s, this principle was advocated by developing countries in an effort to secure, for those peoples still living under colonial rule, the benefits arising from the exploitation of natural resources within their territories and to provide newly independent States with a legal shield against infringement of their economic sovereignty* ***as a result of property rights or contractual rights claimed by other States or foreign companies.***[281]

A couple of comments regarding Professor Schrijver's assertion would be worth mentioning. Firstly, one of the key reasons why the exercise of state sovereignty often shows up in the form of property rights is perhaps due to it precisely arose to protect own natural resources against property's claims coming from alien third parties. Secondly, as one will notice ahead, the developing countries' interest in the definition and exercise of permanent sovereignty over their natural resources constitutes a continuous and recurrent remark in several international instruments associated with this theme until these days.

On the other hand, in addition to economic development, some authors[282] often include and describe other sources concerning the emergence of state sovereignty over natural resources, as a principle of international law. They especially allude to self-determination, although interstate cooperation and even the tenet *pacta sunt servanda*,[283] among others, are part of the academic reflections. All of them play a specific role within the relationship between States and Nature, which will be the subject of analysis throughout this section.

Focusing on particular regulations, one can trace the initial roots of state sovereignty in a 1952-resolution, issued by the U.N. General Assembly, whose contents precisely referred to "*integrated economic development and commercial agreements*". The instrument promoted the idea that commercial agreements could facilitate the "[…] *development of natural resources which can be utilized for the domestic needs of the underdeveloped countries and also for the needs of international trade*". Consequently, as one can see, the historical subordination of Nature to the market has been well established in the international

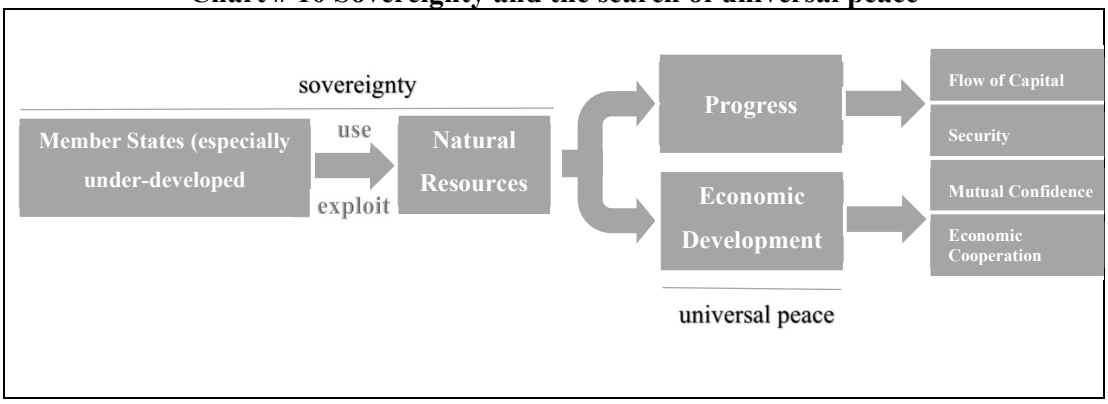
[281] Schrijver (2008) 3, emphasis added.
[282] For example, Hobe (2015) 3; French (2004) 64
[283] Principle *pacta sunt servanda*: "*Every treaty in force is binding upon the parties to it and must be performed by them in good faith*". Vienna Convention on the Law of Treaties (1969) Article 26.

arena during a considerable period.[284] Some months later, through the resolution concerning the "*Right to exploit freely natural wealth and resources*", the U.N. General Assembly more specifically resolved to recommend

> […] *all Member States, in the exercise of their* ***right freely to use and exploit their natural wealth and resources*** *whatever deemed desirable by them for their own progress and economic development, to have due regard,* ***consistently with their sovereignty****, to the need for maintaining the flow of capital in conditions of security, mutual confidence and economic co-operation among nations.*[285]

Curiously, this resolution No. 626 (VII), regarding the right to exploit freely natural wealth and resources, suggested the exercise of sovereign use and exploitation of natural resources indirectly leads to universal peace. The mechanism was economic development, as long as no country restricts or hinders the use or exploitation of natural resources of others. The fact that global peace gets defined in terms of economic development shows how transcendent this last concept used to be in the international parlance at the time[286]. Chart # 10 illustrates a schematic synopsis.

Chart # 10 Sovereignty and the search of universal peace



The association between the exercise of sovereignty and the people's right to use and exploit natural resources constituted one of the aspects that resolution No. 626 (VII) explicitly exposed for the first time in the ambit of international law. Indeed, today it is clear-

[284] U.N.G.A. Resolution No. 523 (VI) (1952) para. 1st (b[ii])
[285] U.N.G.A. Resolution No. 626 (VII) (1952) para. 1st, emphasis added.
[286] ibid para 2nd; Recital 2nd.

cut they are inherently interrelated, as the very instrument recognised.[287] Moreover, it characterised, in turn, the manner in which sovereignty influenced [and influences until these days] the state management and decision-making of the environment.

An additional remark consists of parallelism between sovereignty and property rights regarding their exercise. As one can notice, exerting sovereignty represents an atypical form of property rights, say state ownership, given that the resolution confers the States the entitlements to use and exploit natural resources. Unlike the right to use, which is similar in both cases, the right to exploit could be another way to define the right to dispose of, in context, namely the two components are eventually the same. In practice, therefore, it means States are virtually the owners of natural resources.

Some years later, as part of the "*Recommendations concerning international respect for the right of peoples and nations to self-determination*" of 1958, the U.N. General Assembly decided to appoint a commission to conduct a full survey of the status of the permanent sovereignty of peoples and nations over their natural wealth and resources, as to a complement of the two draft covenants elaborated by the Commission on Human Rights (the future economic and political covenants of 1966). For obvious reasons, the resolution also comprised of a full survey of the right to self-determination.[288]

Subsequently, the "*1960-Declaration on the granting of independence to colonial countries and peoples*" proclaimed a predictive recital, whose content appeared in the two 1966-covenants, with verbatim text. That paragraph came to ratify and strengthen the interaction between sovereignty and the use of natural resources, and other elements already alluded to, such as economic cooperation and mutual confidence (expression replaced by "*mutual benefit*"). It read: "*Affirming that peoples may, for their own ends, freely* ***dispose of*** *their natural wealth and resources without prejudice to any obligations arising out of international* ***economic co-operation****, based upon the principle of* ***mutual benefit****, and international law*".[289] In addition, as one can warn, this instrument employs the expression "*dispose of*" instead of "*exploit*", somehow insinuating a particular affinity with property rights.

Just with one day of difference, in 1960, a new resolution about the "*Concerted action for economic development of economically less developed countries*", came out. It aimed at

[287] ibid Recital 3rd.
[288] U.N.G.A. Resolution No. 1314 (XIII) (1958) Recital 1st, para. 1st.
[289] U.N.G.A. Resolution No. 1514 (XV) (1960) Recital 8th (emphasis added); Political Covenant (1966) Article 1 (1); Economic Covenant (1966) Article 1 (1).

recommending the respect of the sovereign right of every nation to dispose of its wealth and resources in conformity with the rights and duties of States under international law. Maybe because of its central theme was the acceleration of economic growth in developing countries, its overall contribution to the question of sovereignty looks somehow irrelevant. Effectively, the resolution oriented to the diversification of productive activities, provision of capitals, technical training, investment assistance, commodity trade, industrialisation, and so forth.[290]

In 1962, the U.N. General Assembly issued probably the most important resolution concerning the "*Permanent sovereignty over natural resources*", whose orientation is thoroughly biased the national development and human welfare of the country related. It deals with an anthropocentric instrument; however, whose contents are understandable owing to the time when it came out.[291]

In Shaw's opinion, it constituted a kind of support for the "*economic self-determination*" of States, coming from the United Nations. Moreover, in context with the already mentioned Declaration on the granting of independence to colonial countries and peoples, the author argues it represents a significant development of the twentieth century in matters of economic regulations. To Shaw, "[…] *the creation of the General Agreement on Tariffs and Trade, the United Nations Conferences on Trade and Development, and the establishment of the International Monetary Fund and World Bank*" is evidence.[292]

In essence, this resolution suggests every nation possesses complete freedom to establish its own rules for the exploration, development, and disposition[293] of its natural resources. They could include even specific legal actions to restrict private property, if necessary, such as the nationalisation, expropriation[294], or requisitioning, predicated on reasons of public utility, security, or national interests. Nevertheless, private interests should get protected through the payment of appropriate compensations, according to local and international laws. Furthermore, the instrument seems to denote that natural resources could represent one of the valid financial sources for state objectives, recommending even that

[290] U.N.G.A. Resolution No. 1515 (XV) (1960) paras. 1st to 5th.
[291] U.N.G.A. Resolution No. 1803 (XVII) (1962) Declaration 1st.
[292] Shaw (2003) 40. In the same sense, see Hobe (2015) 7.
[293] Notice the curious reminiscence of property rights through the use of the word "*disposition*" within the ambit of sovereignty.
[294] One should understand expropriation as the "[…] *inherent power of a governmental entity to take privately owned property, esp. land, and convert it to public use, subject to reasonable compensation for the taking*". The concept is also known as "*eminent domain*" or "*compulsory purchase*". See Garner (2004) 1585.

national laws govern the entrance of foreign capitals and earned profits.[295] As one can notice, the exercise of state sovereignty holds growing parallelism with property rights.

In 1966, the U.N. General Assembly delivered a new resolution principally aimed at reaffirming the [this time so-called] "*inalienable*" right of all countries to exercise permanent sovereignty over their natural resources in the interest of their development. It had the same identification name than 1962's, i.e., "*Permanent sovereignty over natural resources*". By and large, the instrument seems more explicit than the previous ones concerning the utilisation of natural resources for developmental ends, especially by developing countries. It brings out the third recital, which undoubtedly confirms this approach. It reads: "***Recognizing*** *that the natural resources of the developing countries constitute a basis of their economic development in general and of their industrial progress in particular*". Furthermore, the resolution, for instance, refers to aspects already addressed in the past, such as foreign investors, capitals, profits, among other questions derived from the exploitation of natural resources. However, it also regards new themes, such as the marketing of the environment or the know-how.[296]

In 1973, a new resolution arose to "[s]*trongly reaffirms the inalienable rights of States to permanent sovereignty over all their natural resources, on land within their international boundaries as well as those in the sea-bed and the subsoil thereof within their national jurisdiction and in the superjacent waters*".[297] This instrument, also named "*Permanent sovereignty over natural resources*", generally did not contribute with anything novel to the topic, although it has been part of passionate debate, briefly explained in the following paragraphs.

One year later, in 1974, the Charter of Economic Rights and Duties of States enshrined the right to permanent sovereignty over natural resources under a set of terminologies, which liaised it explicitly with the components of property rights. It reads: "*Every State has and shall freely exercise full permanent sovereignty, including* ***possession, use and disposal****, over all its wealth,* ***natural resources*** *and economic activities*".[298] The writing is undoubtedly a determinant. In international parlance, once again, countries are owners of Nature.

[295] U.N.G.A. Resolution No. 1803 (XVII) (1962) Declarations 3rd and 4th.
[296] U.N.G.A. Resolution No. 2158 (XXI) (1966) Recital 3rd, paras. 1st, 5th, 6th, 7th.
[297] U.N.G.A. Resolution No. 3171 (XXVIII) (1973) para. 1st.
[298] Charter of Economic Rights and Duties of States (1974) Article 2 (1).

As a kind of confirming the last affirmation, the charter establishes that States must cooperate to exploit shared natural resources, through previous consultations and information, avoiding any damage to the "*legitimate interest of others*". Likewise, countries are economically accountable for any depletion, exploitation, or damages generated to natural resources in other foreign nations, peoples, or territories. Moreover, all States have to extend assistance to them.[299] In a certain sense, as in property rights, if one possesses something with others, one should request permission for carrying out any activity. However, if one harms alien natural resources or territories, one has to redress the situation, especially in monetary terms.

To conclude, there is a thought-provoking debate regarding the scope of the compensation for expropriation or nationalisation of natural resources. The charter and the already mentioned resolution No. 1803 (XVII) contain contradictory rules, which come from–in a certain way–the parallelism between sovereignty and property rights or, at least, from the manner how States should impose restrictions on ownership. Lung-Chu Chen explains the controversy refers to the authoritative effect of both instruments and the establishment of a new international economic order.[300]

In either event, while the charter establishes that every country should determine the compensation "[…] *taking into account its relevant laws and regulations and all circumstances* ***that the State considers pertinent***", the resolution lays out that redress has to consider "[…] *the rules in force in the State taking such measures in the exercise of its sovereignty and* ***in accordance with international law***". As a complement, resolution No. 3171 also contains a provision concerning this question, which leans more toward the sense of the charter, i.e., it provides that national legislation of each nation should settle the compensation's amount and the mode of payment.[301] In short, given the three resolutions come from the same origin, that is, the U.N. General Assembly, their prevalence would be what is in question. In other words, one should wonder what the applicable regulation is, considering they are openly opposite.

Although there is not yet a generally accepted agreement about what normative prevails, one can find at least a hint to address the issue in a 1977-arbitration concerned Libya's decision to nationalise two American oil companies. In his award on the merits in dispute,

[299] ibid Article 3, 16 (1).
[300] Chen (2015) 432.
[301] U.N.G.A. Resolution No. 1803 (XVII) (1962) Declaration 4th; Charter of Economic Rights and Duties of States (1974) Article 2 (2c); U.N.G.A. Resolution No. 3171 (XXVIII) (1973) para. 3rd.

the sole arbitrator Rene-Jean Dupuy decided the Libyan Government (the defendant) had breached its obligations arising from the "*Deeds of Concession*" in adopting measures of nationalisation in 1973 and 1974. In consequence, he ordered Libya to accomplish the contracts and give them full effect.[302]

As to the issue of compensation, arbitrator Dupuy interestingly focused his analysis on "[…] *the legal validity of the above-mentioned Resolutions and the possible existence of a custom resulting therefrom*" (sic). To him, their legal value varied and relied primarily on the type of resolution and the conditions linked to its adoption. In that regard, the arbitrator opted to employ for the evaluation of validity what he called the "[…] *criteria usually taken into consideration, i.e., the examination of voting conditions and the analysis of the provisions concerned*". As a result, after comparing the voting conditions of all resolutions within the ambit of the U.N. General Assembly, Dupuy concluded "[…] *that only Resolution 1803 (XVII) of 14 December 1962 was supported by a majority of Member States representing all of the various groups*". Oddly enough, the arbitrator discarded the other resolutions assuring that, although they "[…] *were supported by a majority of States* […]", none "[…] *of the developed countries with* ***market economies which carry on the largest part of international trade***" did it instead.[303] In practice, as one can notice, this argument illustrates how strong the bias toward economic issues and international trade used to be, not only in the realm of law but also regarding its enforcement. For informative ends only, Annexe # 3.7 shows the results of the voting alluded to by Dupuy.

Additionally, as a mechanism to support the presence of a customary rule, Dupuy deemed it fit to distinguish between those regulations stating the existence of a right with agreement's expressions coming from the generality of States, and those introducing new principles rejected by some representative groups of nations. In this framework, the arbitrator deemed that resolution No. 1803 (XVII) did not create custom but confirmed one by formulating it and specifying its scope. In consequence, he concluded the alluded "[…] *Resolution 1803 (XVII) seems to this Tribunal to reflect the state of customary law existing in this field*".[304]

Summing up, as one can infer, during the earlier stages of the relationship between sovereignty and Nature, in the realm of international law, the tendency of the legal parlance

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[302] Texaco Overseas Petroleum Company and California Asiatic Oil Company v. the Government of the Libyan Arab Republic (1977) Operative part, paras. 2nd and 3rd. One can find an analysis of the case regarding this point in Chen (2015) 433-4.
[303] ibid para. 82nd, 86th.
[304] ibid para. 87th.

is entirely biased toward economic development, progress, benefits, cooperation, and the like, instead of the environmental protection. Indeed, eco-friendly discourse is conspicuously absent from the instruments alluded to. Moreover, one can identify a similarity between the conceptual components of sovereignty and property rights', principally due to their common origin, as explained. All these features allow thinking about a generalised human-centred conception of sovereignty when it applies to Nature.

3.2.3 Statehood as a question of legitimacy

In general terms, statehood is the capability of being considered a legal person by other States and other actors of the international arena. It means that, without statehood, a country does not possess legal personality in practice and, consequently, it does not exist in the ambit of global legal relationships.

As mentioned in the previous chapter, the criteria to determine statehood comes primarily from the Montevideo Convention, in the function of four conditions: 1) a permanent population, 2) a defined territory, 3) a government, and 4) capacity to enter into relations with the other States,[305] a guideline usually taken for granted by several internationalists[306], despite the fact that it is only referential (it corresponds exclusively to American nations) and there is not a generalised consensus about its applicability.

In that regard, although some authors[307] see the proposal by Schwarzenberger and Brown as an alternative view, the difference regarding the components of statehood seems to be only superficial, i.e., it varies merely on the form, given that population, territory, and government are part of the criteria. However, striking dissimilarity consists of an additional requirement. They argue the existence of a claim for recognition coming from the concerned State toward other nations, an aspect debated in the ambit of international law, as explained in the next lines. In the authors' words:

> *Before recognising an entity as an independent State, the existing subjects of international law usually require a minimum of three conditions to be fulfilled. The State in quest of recognition must have a stable government, which does not*

[305] Montevideo Convention (1933) Article 1.
[306] See, for example, Chen (2015) 26; Abass (2012) 117; Aust (2005) 16-7; Sands (2003) 71; Shaw (2003) 177-8; Raič (2002) 24-5; Hillier (1998) 181; Akehurst and Malanczuk (1997) 75; Department of the Army (1979) 3-1.
[307] See, for example, Hillier (1998) 183; Jackson (1996) 53.

recognise any outside superior authority; it must rule supreme within a territory - with more or less settled frontiers - and it must exercise control over a certain number of people. These features have come to be taken as the essential characteristics of independent States.[308]

Lung-Chu Chen recollects the existence of that controversy concerning the recognition of States, depicted by the debate between two positions, the declaratory and constitutive theoretical schools, respectively. The gist of the difference lies in the formalism of the acknowledgement. For the declaratory theorists, a proclamation is useless for all intents and purposes, given that the objective existence of the State predicates on the announced conditions of statehood (population, territory, government, and capacity of interrelationship with others). For the constitutive ones instead, those conditions are not enough, so that a formal recognition must come from other members of the international community if the concerned State wants to form part of it.[309]

The heated discussion is not new, existing even before the 1933-Montevideo Convention, and has counted on the participation of respected personages of international law, such as Oppenheim or Crawford, on opposite sides. In this regard, as early as 1905, Oppenheim asserted that "[t]*here is no doubt that statehood itself is independent of recognition*", but it is not enough. He promoted the constitutive theory, affirming that a "[…] *State is and becomes an International Person through recognition only and exclusively*".[310] As one can infer, the recognition acquire validity when it comes from pairs.

On his part, James Crawford, celebrated Australian judge and scholar, has suggested the indicated conditions are sufficient to obtain international acknowledgement. For him, neither theory of recognition explains the practice of modern States satisfactorily in this area. The writer believes "[…] *statehood is not 'simply' a factual situation but a legally defined claim of right, specifically to the competence to govern a certain territory*". The author assumes the alluded conditions are workable criteria for statehood.[311]

Although Crawford wrote from the perspective of declaratory theory, he also showed up a critical argument against its postulates. In effect, despite the fact that the author makes out the States would require a recognition one can infer, it does not need to come from other

[308] Schwarzenberger and Brown (1976) 44.
[309] Chen (2015) 42.
[310] Oppenheim (1905) 109-10. In a similar sense, for instance, see Strang (1996) 22; Klabbers (2010) 32-33.
[311] Crawford (1976) 95, 119. In the same line of thought, for example, see Murphy (2010) 300; Amerasinghe (2010) 144; Portmann (2010) 253-4.

nations. A mere declaration of statehood is not enough too. For him, statehood is a "*claim of right*", and claims to statehood "[…] *are not to be inferred from statements or actions short of explicit declaration*". Hence, recognition should be express, and "[…] *in practice discretionary, as well as determinative and the constitutive position will have returned, as it were, by the back door*".[312]

To get an idea regarding the intensity of the debate, it would turn out useful to quote the words of Ti-Chiang Chen, who adduced that the operation of the law was what defined the legal personality of States, not the mere recognition. "*By assuming that a State, once having satisfied certain objective tests, ipso facto becomes a person in international law,* [the author argued] *the declaratory theory is spared the logical absurdities which embarrass constitutive writers*".[313]

In either event, beyond the theoretical stance, the truth is that countries are able to exercise their sovereignty only in the function of their statehood; *ergo,* both concepts are inseparable. Indeed, as David Bederman asserts, the essence of statehood is sovereignty, "[…] *the principle that each nation answers only to its own domestic order and is not accountable to a larger international community, save only to the extent it has consented to do so*".[314] The objective capability of nations to impose their power upon their population and territory, and interact with other international legal persons, therefore, lies in their statehood and their exercise of sovereignty.

Following this logic of reasoning, statehood would confer sufficient legitimacy on countries to represent Nature's interests in front of both local actors and other nations. Notwithstanding, it could eventually signify a restriction for environmental protection as well, principally regarding judicial disputes. Effectively, the International Court of Justice constitutes an example, given it only admits States as parties of trials. Moreover, according to its statute, the only non-state entities whose participation the ICJ accepts are the international public organisations that could contribute with relevant information to cases. In practice, however, it does not change the *status quo*, but it just brings back the jurisdiction to the public ambit because States are usually members of those institutions. Consequently, as mentioned before, if the claims come from an entity other than the State, the ICJ simply does not start any procedure.[315]

[312] Crawford (2007) 211; Crawford (1976) 107.
[313] Chen, T. (1951) 13.
[314] Bederman (2001) 50. Also quoted by Garner (2004) 4360.
[315] Statute of the International Court of Justice (1945) Article 34 (1 and 2).

Accordingly, this Court's constraint becomes a factual barrier [to protect Nature] because the bulk of the potential claimants are usually out of the State's field of action, i.e., they are individuals, non-governmental organisations, private companies or the like. The ICJ does not have jurisdiction in their cases. Indeed, Anthony Aust holds that people and institutions out of the state orbit submit approximately one thousand applications per year, which means more than five times–in just one year–the total number of 177 cases that the Court has entered into its list between 1947 and 2019.[316]

A conceivable alternative to overcome this hurdle, as the very Court recognises, consists of States take up the cases on behalf of their nationals and invoke their rights against other nations. Under this circumstance, despite its usefulness, the dispute continues to be in the exclusive sphere of States. In this line of reasoning, some time ago, Guenther Dahlhoff was explaining the feasibility to avoid the obstacle of statehood through the application of article XII of the Statute of the Administrative Tribunal of the International Labour Organization (ILO). According to this provision, the Governing Body of the ILO was entitled [it alone] to submit a question regarding the validity of the Tribunal's decision to the advisory opinion of the ICJ. The Court's opinion was curiously binding. This procedure, as Dahlhoff accurately pointed out, gave rise to the fact that "[…] *advisory proceedings take the place of contentious proceedings which would not be possible under the Statute of the Court*".[317]

In 2016, however, the General Conference of the ILO decided to repeal both article XII of the Tribunal's Statute and article XII of its Annex "[…] *to ensure equality of access to justice for employing institutions and officials alike*". As part of the news, ILO's spokespersons associated the amendment with an ICJ advisory opinion of 2012 concerning Judgement No. 2867. The alluded judgement No. 2867 referred to a dispute between the Administrative Tribunal of the ILO and the International Fund for Agricultural Development (IFAD) regarding the payment of monetary compensation to an IFAD's former staff member. Consequently, this alternative does not exist anymore.[318]

Another valid [and in force] alternative would consist of bringing a suit [or being claimed] before the Court of Justice of the European Union. Thus, the Treaty on European Union does not only confer CJEU the jurisdiction to address different aspects of

[316] ibid Article 34 (2); Aust (2005) 451; International Court of Justice (2020) List of all cases.
[317] International Court of Justice (2013) para. 10th; Dahlhoff (2012) 203; Statute of the Administrative Tribunal of the International Labour Organization (1946) Article XII (currently repealed provision).
[318] Resolution concerning the Statute of the Administrative Tribunal of the International Labour Organization (2016) Recital 2nd; International Labour Organization (2016) para. 2nd; International Court of Justice (2012) para. 1st.

environmental protection, but it also allows judicial actions coming from the Member States, institutions, individuals, and legal persons, as already mentioned. For the time being, it is not necessary to deepen in this aspect, given it will get examined in the next chapter.[319]

In matters of human rights, for instance, if one guides the procedure towards an environmental approach, it would also be possible to litigate before the European Court of Human Rights (ECHR).

Chart # 11 Environmental cases before the ECHR 1980-2019 (%)

Sources: ECHR [Factsheet] (2020) 1-30 and ECHR [Manual] (2012) 143-7

Effectively, as Loukis Loucaides points out, despite the fact that European convention on the subject-matter does not establish expressly any right or regulation to protect the natural resources, "[t]*he case-law has extended protection of the environment under the Convention by means of two different methods: (a) as part of individual rights, and (b) as a legitimate restriction on the exercise of such rights*". As a result, the very Court has reported a total of 126 cases regarding environmental issues between 1980 and 2019, in which the claimants have alleged different kinds of human rights. Chart # 11 above illustrates the percentages of provisions coming from the European Convention on Human Rights' that plaintiffs have invoked between 1980 and 2019. It emphasises the rights to a fair trial and respect for private and family life and home, as well as the protection of property (a curious

[319] Treaty on European Union (2016) Articles 3 (3), 19 (3a), and 21 (2d and 2f).

reference, above all, if one thinks of the abundant evidence about how international normative prioritise property rights over Nature).[320]

It is worth clarifying the category so-called "*other provisions*" comprises the rights to life, liberty and security, freedom of expression, freedom of assembly and association, an effective remedy, and the prohibition of inhuman or degrading treatment.[321]

On its part, although the Protocol of San Salvador does establish the right to a healthy environment, the Inter-American Court of Human Rights (IACtHR) possesses the same restriction of jurisdiction than the ICJ, given that only the State parties and the Inter-American Commission of Human Rights (IACHR) are able to submit cases. However, there does exist an exception. Effectively, any person, group, or nongovernmental organisation, legally recognised, "[…] *may lodge petitions with the Commission containing denunciations or complaints of violations of* [the] *Convention*". This mechanism allows a particular person or entity to sue to member States before the Court.[322]

In practice, the IACtHR has been much less active than European tribunals in environmental matters, as transpires from the information available on its website. Indeed, they have recorded four cases in total, between 2004 and 2019, concerning community and indigenous claims. Thus, in April 2020, the International Justice Resource Centre strangely enough posted, as a piece of remarkable news, the first Court's decision against Argentina regarding an environmental rights case. In its decision, the Court held Argentina responsible for violating several human rights of the indigenous community of the *Lhaka Honhat* Association. Those entitlements included property, participation in government, progressive development, fair trial, juridical personality, freedom of thought and expression, freedom of association, and freedom of movement and residence.[323]

In terms of normative, the African system of human rights is somehow similar to the Inter-American one, namely the Charter enshrines the right to a satisfactory general

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[320] Loucaides (2007) 167-8; European Court of Human Rights [Factsheet] (2020) 1-30; European Court of Human Rights [Manual] (2012) 143-7; Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, and supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16 (1950) Articles 6 and 8. Hereinafter European Convention on Human Rights; Additional Protocol to the European Convention on Human Rights (1952) Article 1.

[321] European Convention on Human Rights (1950) Articles 2, 3, 5, 10, 11, and 13.

[322] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (1988) Article 11. Hereinafter Protocol of San Salvador; American Convention on Human Rights (1969) Articles 44 and 61.

[323] Inter-American Court of Human Rights (2020) Jurisprudence Finder; International Justice Resource Center (2020) para. 1st; Case 12.094, *Comunidades indígenas miembros de la Asociación Lhaka Honhat (Nuestra Tierra) v. Argentina* (2020) para. 370th; American Convention on Human Rights (1969) Articles 3, 8 (1), 13, 16, 21, 22 (1), 23 (1), 25 (1), and 26.

environment. Likewise, its protocol allows individuals and relevant nongovernmental organisations to file a suit before the Court, as long as the country had made a declaration accepting its competence to receive cases. Of course, State parties and the African Commission on Human and Peoples' Rights may bring a suit before the Court as well. In practice, nevertheless, there is only one reference to environmental issues in the Court's reports between 2006 and 2018, which accounts for the weakness of the system.[324]

At all events, the different procedures and jurisdiction of the regional courts well-illustrates the direction of international legal personality. States do indeed have been traditionally the only subjects of international law, which makes sense considering they have created the rules historically, by issuing the treaties or pursuing the custom, i.e., the fundamental sources of law, as Abass argues. Nevertheless, what was utterly understandable in an initial scenario of development, i.e., the existence of a law created for States to regulate States, proves out to be inapplicable these days, perhaps even old-fashioned. As a consequence, the range of international law has gradually widened in the contemporary world, so that it is accurate to ponder also about the extension "[…] *of its subjects to include international organizations and, in some cases human beings*".[325]

Malcolm Shaw coincides with the last assertion. In his opinion, the scope of international law has experienced an "*immense*" expansion, beyond territory and jurisdiction, since the middle of the twentieth century. It does not mean, though, its primary aim had changed; it still grounds somehow on the "*international political system*", whose characteristics of co-existence and hostility are typical of the general political systems.[326] For him:

> *International law reflects first and foremost the basic state-oriented character of world politics. Units of formal independence benefiting from equal sovereignty in law and equal possession of the basic attributes of statehood' have succeeded in creating a system enshrining such values.*[327]

[324] African Charter on Human Rights (1981) Article 24; Protocol to the African Charter on Human and People's Rights on the establishment of an African Court on Human and People's Rights (1998) Articles 5 and 34 (6). Hereinafter Protocol to the African Charter on Human Rights; African Court on Human and Peoples' Rights (2019a) 193-6; African Court on Human and Peoples' Rights (2019b) 9-64.
[325] Abass (2012) 112-3.
[326] Shaw (2003) 42-3 (emphasis added).
[327] ibid 44.

3.2.4 Self-determination and its implications on State independence

Pursuant to Abass, self-determination is one of the principles of contemporary international law, which consists of the "[…] *ability of a people to govern themselves, a process that must be preceded by the people being able to form an independent State*". In its most basic form, it is directly associated with statehood because, as Crawford suggests, self-determination deals with a principle concerned with the right to be a State.[328]

The historical transcendence of self-determination, principally in recent years, spread around the globe, allowing its inclusion in the 1945-U.N. Charter as one of the fundamental principles supporting the development of friendly relations among States. In the words of Lung-Chu Chen, it has been the "[…] *driving force behind the rapid and vast proliferation of new states after World War II*". Further developments occurred in practice, Kilangi asserts, in the wake of a request coming from the General Assembly, for the U.N. Commission on Human Rights, to prepare recommendations concerning international respect for the right of peoples to self-determination.[329]

After 1945, as Professor Crawford points out, diverse theoretical tendencies debated about whether self-determination was a principle or a legal right. The discussion evoked "*changes in the political geography of the world*", emphasising the fact that the adoption of an overtly political principle could raise worries about the character of international law and the justiciability of political disputes. Ultimately, however, it seems the international legal instruments tipped the scales in favour of the second option, considering both covenants enshrined self-determination as a right of people. They lay down: "*All peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development*".[330]

In context, the power to govern diverse spheres of development should include the management of natural resources, according to their advisability. One could corroborate this aspect through the reading of the second paragraph of the covenants' first articles, already quoted, regarding the disposition of the State's natural wealth and resources. In this case, countries virtually operate as owners, predicated on their authority to decide what to do with their natural assets [so to speak].

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[328] Abass (2012) 119; Crawford (2007) 107.
[329] Charter of the United Nations (1945) Article 74; Chen (2015) 31; Kilangi (1962) Introductory Note, paras. 1st and 2nd.
[330] Crawford (2007) 108; Political Covenant (1966) Article 1 (1); Economic Covenant (1966) Article 1 (1).

Nevertheless, the state power to dispose of the natural wealth and resources is not unlimited, as announced by the same covenants. Self-determination seemingly has restrictions regarding especially the avoidance of harming any commitment derived from international regulations or economic cooperation, grounded on the principle of mutual benefit. In any case, as one can see, the exercise of the right to self-determination is not much different from the use of conventional property, that is, there are liberties with certain limitations. Beyond the hair-splitting of legal classifications, some authors reaffirm that Nature constitutes the property of individuals, legal entities (public and private) and States in the field of international law.[331]

Concomitantly, the interrelation between States and Nature, in terms of a sort of property, as it were, shows up even more evidently through the so-called "*principle of permanent sovereignty over natural resources*" addressed above. This tenet "[…] *has its roots in the claim for self-determination of* [especially] *newly independent States and in the question of economic development of developing countries* […]". As Hobe argues, the prerogative of independence, firmly alleged by developing countries, rarely is claimed alone. It is usually proclaimed joint with territorial sovereignty and self-determination. The exercise of all these entitlements altogether seems to endow States with a kind of discretionary privilege to make decisions concerning their environment. Therefore, as Hobe concludes, "[…] *the core of this principle is the territorial sovereignty of any State over its* [natural] *resources and the obvious entitlement to decide within the confines of international law, how to deal with these resources*".[332]

Nonetheless, as pointed out above, the exercise of national sovereignty over the territory is not utterly free, owing to the existence of some constraints, which are primarily determined by "*sovereign equality*". Thus, resolution No. 1803 (XVII) sets out that: "*The free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality*". There exists concordance between the "*mutual benefit*" (of the Economic and Political covenants) with the "*mutual respect*" (of the declaration coming from resolution No. 1803). In the end, they are just two different ways to express somehow the same idea.[333]

[331] For instance, see Borràs (2016) 113-4; Taylor (1998a) 393-4. Regarding the specific case of energy resources, see Nanda and Pring (2013) 236-8.
[332] Hobe (2015) 1 and 11.
[333] U.N.G.A. Resolution No. 1803 (XVII) (1962) para. 5th.

To recapitulate, as one can notice, the exercise of state sovereignty to dispose of natural resources as appropriate gets visualised through self-determination, i.e., the power to rule the "*state belongings*" willingly. This prerogative induces States to experience a sense of freedom, even independence in front of other pairs. Consequently, it is undeniable the existence of a concurrent interplay among sovereignty, self-determination, and independence, whose implications get showed in the manner how every country manages its natural resources.

In practice, however, the amalgam among the mentioned trilogy (sovereignty/self-determination/independence) has not been adequately carried out. In effect, Hunter, Salzman, and Zaelke explain there has been a "[…] *fundamental tension between a State's interest in protecting its independence (i.e., its sovereignty) and the recognition that certain problems, in this case regional and global environmental problems, require international cooperation*". In the same vein, Abass shares this assertion pointing out that the development of international law has been "*painstakingly slow*". The reason does not only lie in the intricate qualities of green regulations, the difficulties in detecting ecological impacts, and so on but also it is due to international laws ground on compliance, which requires enforcement. "*The very notion of enforcement makes States very uncomfortable,* [Abass argues] *since they see it as a violation of their sovereignty by other States, which are equal to them in the eyes of international law*". Consequently, States usually see environmental normative as an intrusion into their sovereignty.[334]

By way of criticism, nevertheless, one should argue that the exercise of self-determination, the defence of national sovereignty, and the assertion of independence in front of other States do not apply for all countries or all circumstances equally, at least, in practice. Moreover, sometimes the very existence of legal personality is not even enough to States bring their rights to bear in the international arena. Most of the cases, it depends on the real power or influence a nation can exert over others, which means that a lot of "*small*" countries are not able to claim for the respect of their rights or interests in the same conditions as their pairs. The effect of this restriction is particularly meaningful in environmental matters because it usually entails a new barrier against the protection of Nature. To illustrate the described situation, by way of example, it would be worth mentioning the recognition of the International Court of Justice's jurisdiction in all legal disputes. To that end, the reference

[334] Hunter, Salzman, and Zaelke (2007) 472; Abass (2012) 628, 658.

will be a suit brought by the Republic of the Marshall Islands [a perfect stereotype of a "small" country] before the ICJ.

Effectively, the States parties "[…] ***may*** *at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other* [S]*tate accepting the same obligation, the jurisdiction of the Court in all legal disputes* […]". The use of the verb "*may*" could lead to the thinking that this acknowledgement is optional. Nevertheless, as Anthony Aust explains, the fact that all U.N. members are parties of the statute, without any other requirement, does not mean they had accepted the intervention of the Court to decide any dispute regarding them and other U.N. members. "*As with any other international tribunal,* [Aust asserts] *the Court can exercise jurisdiction only if that has been conferred on it by the parties*".[335]

Accordingly, even if Nature were in serious jeopardy, neither the assertion of national sovereignty and self-determination nor the accomplishment of the requirements of statehood and legal standing *per* se would be sufficient to exercise environmental rights or to act on their behalf. Whether the concerned State has not recognised the Court's jurisdiction, the intervention of the ICJ would not be valid. It occurred in 2014 when the Republic of the Marshall Islands filed an application against a set of nations that, in its opinion, possessed nuclear weapons, i.e., China, France, Russia, the United Kingdom, and the United States of America, among others, invoking the Treaty on the Non-Proliferation of Nuclear Weapons (NPT).

In parenthesis, no threat against humanity and the environment in the world today is probably as grave as the uncontrollable propagation of atomic energy without peaceful ends. For this reason, several states adopted the Non-Proliferation Treaty in 1968, aimed mainly at avoiding the transfer, reception, assistance to introduce, or encouragement and induction to use any kind of nuclear weapons or explosive devices.[336]

The Marshall Islands accessed the Treaty in 1995. Within the defendants instead, the United Kingdom of Great Britain and Northern Ireland had ratified the Non-Proliferation Treaty in 1968; likewise, the United States of America and the Russian Federation did it in 1970; while China and France accessed to the Treaty in 1992. On its part, North Korea became a party in 1985 although quitted it in 2003. Furthermore, the plaintiff also filed the lawsuit instituting proceedings against India, Pakistan, and Israel that did not sign the Treaty.

[335] Statute of the International Court of Justice (1945) Article 36 (2) emphasis added; Aust (2005) 452.
[336] Treaty on the Non-Proliferation of Nuclear Weapons (1968) Articles I and II. Hereinafter Non-Proliferation Treaty (NPT).

In any case, save Israel, whose government has denied its possession, the other countries have confirmed the existence of an arsenal inside their respective territories, and they have even carried out nuclear tests.[337]

In essence, the claimant held that its counterparts did not "[…] *pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament,* […]". Nonetheless, having declared the compulsory recognition of the Court's jurisdiction in 1969, only the case against the United Kingdom initially entered to General List, while the other cases were not even taken into account, owing to the lack of the said declaration. Later, the U.K.'s recognition had two amendments in 2014 and 2017. Likewise, the cases against Pakistan and India entered the list as well, having admitted the Court's jurisdiction in 1960 and 1974, respectively. A new Pakistan's recognition in 2017 revoked the old one, and the same happened with India's declaration in 2019. Summing up, from the total of nine proceedings initiated by the Marshall Islands, just three entered to the list. In contrast, the ICJ discarded the others due to the lack of recognition of the compulsory jurisdiction.[338]

Regarding the proceedings against India, Pakistan, North Korea and Israel, even though they were not parties to the Non-Proliferation Treaty, the Marshall Islands claimed that they had not fulfilled their duties concerning the cessation of the nuclear arms race and disarmament. Moreover, the plaintiff asserted that certain obligations "[…] *also exist*[ed] *separately* […] *and applied to all States as a matter of customary international law*"; being possible, therefore, to enforce the provision about the negotiations in good faith towards the cessation of the nuclear arms race and disarmament.[339]

For the time being, the critical issue refers to how a series of restrictions on state interdependence to make their decisions concerning natural resources, through the exercise of sovereignty, self-determination, statehood, and even legal personhood brings about

[337] See: Office for Disarmament Affairs (2018) deposit date; Office for Disarmament Affairs (2003) Republic of Korea's withdrawal; Siracusa (2008) 59-60.
[338] Case 158, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)* (2016) para. 1st; Case 159, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)* (2016) para. 1st; Case 160, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)* (2016) para. 22nd; Government of United Kingdom of Great Britain and Northern Ireland (1969) 335; Government of United Kingdom of Great Britain and Northern Ireland (2017) para. 1st; Government of the Islamic Republic of Pakistan (1960) 127; Government of the Islamic Republic of Pakistan (2017) para. 1st; Government of the Republic of India (2019) para. 1st; Government of the Republic of India (1974) 15; Non-Proliferation Treaty (1968) Article VI.
[339] International Court of Justice (2016) 41 and 43 (paras. 9th and 10th).

limitations of representation. In other words, it is not sufficient to demonstrate the legal standing to sue before the Court, what means precisely to be acknowledged as a state (statehood), whether one of the parties has not declared the acceptance of its jurisdiction explicitly. If it occurs, both claimant and defendant simply do not have the power to act on behalf of Nature, natural resources, or environmental rights, given their lack of capacity to represent them. States are not independent enough to claim for their interests that also depicts an intromission in the exertion/use of sovereignty and self-determination. This assumption is particularly preoccupying in the Marshall Islands' case because this absence of legal standing could be used as a valid objection even though the ecosystem or even humanity is under threat. To conclude, the analysis of the Court's decision of this case gets shown in the next sections because its features are more useful to examine the questions of the no harm-rule and cooperation.

3.2.5 The exercise of state independence through cooperation and no-harm rule

The exercise of permanent sovereignty over natural resources constitutes one of the expressions of the State's independence within the international sphere. In essence, such sovereignty bestows a certain degree of autonomy upon States to make decisions about the destiny and administration of national ecosystems. As mentioned, however, countries should not exert their authority limitless but get framed on the respect of their pairs' rights, which primarily consists of avoiding any harm in foreign territory.

Thus, the respect of the others' rights materialises through the so-called principle "*sic utere tuo ut alienum non laedas*", meaning "*use your own property in such a manner as not to injure that of another*", according to Brunnée. The scope of this tenet corresponds to the transnational implications of environmental harm in other national circumscriptions. Some authors, such as Oppenheim and Sands, usually identify it with the principle of "*good faith*" or "*good-neighbourliness*" as well, associated with the idea of cooperation. Its importance lies mostly in constituting a determiner of the state responsibility in front of other States.[340]

Within the instruments of international law, the principle "*sic utere…*" forms a part of the provisions dedicated to the principle of sovereignty, as one can notice–for example–from the reading of the preamble of the Convention on Climate Change or the body of provisions coming from the Convention on Biological Diversity. More specifically, it deals with the

[340] Brunnée (2010) § 1; Oppenheim (1905) 346; Sands (2003) 151, 249.

responsibility that States have "[…] *to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction*". Save the Convention on Biological Diversity, the bulk of binding international treaties include this statement solely within their preambles, not within their operative sections.[341]

Every state is the key responsible for the environmental policy and management of its natural resources within its very jurisdiction, especially since the signature of the 1972-Stockholm Declaration. Nevertheless, when state actions have potentially trans-boundary effects over the other's territory, including ecosystems, the aforesaid environmental management turns out virtually impossible without the notion of cooperation [mutually respectable] among countries. This "*cooperation*" encompasses the general idea regarding the restrictions of permanent sovereignty.[342] At present, nevertheless, other provisions lay down measures of cooperation to face the environmental crisis. Annexe # 3.8 shows a brief scheme.

The normative origins of the cooperation principle are not exactly environmental ones. They refer either to the social, economic, and commercial wellbeing of the other countries or nations, pursuing the U.N. Charter.[343] Likewise, the judgement about the famous "*Corfu Channel case*", issued by the International Court of Justice (ICJ), has also played a substantial role in the development of this principle. In effect, the Corfu Channel dispute comprises a British claim against Albania regarding the harm of two vessels and the death of various members of the crews, due to the explosion of mines in Albanian territorial waters of the Corfu Channel in 1946. The ICJ held Albania liable for the damages and deaths, grounded mostly on the government's knowledge of the minelaying and the omission of its authorities to prevent the disaster, namely lack of cooperation.[344] Some years later, the U.N. General Assembly included the principle into two of the most remarkable environmental instruments of soft law at a global level, i.e., Stockholm and Rio declarations.[345]

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[341] Convention on Climate Change (1992) Recital 9th; Convention on Biological Diversity (1992) Recital 4th and Article 15 (1). There are additional references in the different legal instruments quoted in Annexe # 2.9.
[342] Stockholm Declaration (1972) Principles 11, 13, 21 and 22.
[343] Charter of the United Nations (1945) Article 74.
[344] Case 1, *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)* (1949) pp. 18, 23. Legal analyses of the Corfu Channel case regarding environmental issues, for example, in Nanda and Pring (2013) 82; Sands (2003) 249; Viñuales (2008) 238-42; Fitzmaurice (2008) 296-7; The Harvard Law Review Association (1991) 1562; Birnie (1977) 175-6. Environmental Case Law reports, including the Corfu Chanel case, in UNEP (2004) 271-2; Shelton and Kiss (2004) XIII, 19.
[345] Stockholm Declaration (1972) Principles 21 and 24; Rio Declaration (1992) Recital 2nd and Principle 2.

A direct and current concordance concerning this principle can be traced precisely to the Rio Declaration. Accordingly, States should notify others–in good faith–of any natural disasters, emergencies, and relevant information of trans-boundary characters that are likely to produce harmful or significant adverse effects on the environment of those States. In theory, although Rio Declaration lacks enforceability, being soft law, its principles have been recognised by international tribunals of justice, such as the ICJ.

In that regard, for instance, Nanda and Pring recall the role played by the International Court of Justice with respect to the international legal acceptance of the "*no-harm rule*", mainly employing its explicit recognition of lawfulness through the advisory opinion about the "*Legality of the Threat and Use of Nuclear Weapons*" of 1996.[346] The U.N. General Assembly in 1995 requested that advisory opinion, after the Court refused to a previous request by the World Health Organization (WHO), due to a lack of jurisdiction. The Court affirmed explicitly: "*The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control* ***is now part of the corpus of international law relating to the environment***".[347] However, the Court's general opinion was riskily vague in practice, given the conclusions about the lack of customary or conventional law that prohibited the possession or use of nuclear weapons. In other words, it means somehow the possibility to bring about any potential damages–not only environmental ones–in the territory of other states.

Therefore, in the environmental ambit, neither the principle of cooperation nor the no-harm rule seems to work out equally for all countries, at least in practice. As limits of sovereignty, both aspects should contribute to protecting Nature, given that they avoid any undesirable intromission within the territories of other States. Nonetheless, most of the time the adequate application of these tenets of international law relies on external circumstances, once again, such as the range of influence exerted by a specific country over others or the strategic interest upon determined natural resources. As announced before, one can find an accurate illustration of this last assertion by revisiting the Marshall Islands' experiences before the International Court of Justice. In parenthesis, by way of clarification, some authors employ better-known exemplifications to describe the scope of the interplay between sovereignty and cooperation, such as Corfu Channel (U.K. v. Albania) or Nuclear Tests

[346] Nanda and Pring (2013) 24-5. About the same topic, see also Leib (2011) 118; Dailey (2000) 337-8.
[347] Legality of the Threat or Use of Nuclear Weapons (1996) p. 226, 241-2, 266-7 (emphasis added).

(Australia v. France).[348] In this case, though, it would seem the examination of a procedure, in which one can notice the different weight or capacity of influence among countries, could be a more accurate academic contribution.

To recapitulate, as mentioned in the last section, the Marshall Islands had brought a lawsuit against nine countries for avoiding negotiations in good faith to cease the nuclear arms race and lead to nuclear disarmament. Ultimately, the ICJ decided to include only three separate cases into the general list: U.K., India, and Pakistan, i.e., those cases in which the defendants had recognised the Court's jurisdiction.

Beyond the reasons exposed by the Marshall Islands and the arguments alluded to by the three defendants, objectively speaking, it would be possible to explain or even hint the claimant's trepidation by arguing its territory had already been a location for nuclear tests in the past (between 1946 and 1958). Likewise, its inhabitants had experienced the consequences of radiation exposure.[349] It did not mean the atomic tests were necessarily going to occur once again within Marshall Islands' territory. However, the possibility was latent, above all, considering both the antecedents and the suspicions about India and Pakistan undertaking certain nuclear activities around the claim's time.[350]

Although the described facts could objectively get discussed as a potential threat to the plaintiff's survival, the Court did not do it because it decided to reject the lawsuit, supporting the first preliminary objections to jurisdiction, based on the "*absence of a dispute*". Consequently, one is not able to know what the Court's decision about the merits would have been, and it probably would also be challenging to infer so. In either event, the argument turned out to be an effective legal strategy for the three defendants' interests, because they could quash the indictment without proceeding to the merits.[351] To understand the situation comprehensively, nonetheless, it would be worth wondering what the "*absence of a dispute*" means.

To all intents and purposes, a legal dispute constitutes a traditional concept within the realm of international law, whose origins could trace back even in the files of the Permanent Court of International Justice (PCIJ), the predecessor of the ICJ. Indeed, Ademola Abass has

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[348] For example, Abass quotes the case between Australia and France. See Abass (2012) 54; Case 58, *Nuclear Tests (Australia v. France)* (1974) para. 1st.
[349] Case 158, *Marshall Islands v. India* (2016) para. 15th; Case 159, *Marshall Islands v. Pakistan* (2016) para. 15th; Case 160, *Marshall Islands v. United Kingdom* (2016) para. 16th; Zak (2015) para. 6th; MacDonald (2016) para. 1st; Abadi (2016) paras. 2nd and 3rd.
[350] Panda (2014) para. 1st; Craig and DeYoung (2014) para. 7th; Zahra-Malik (2013) para. 16th; Krepon (2013) para. 1st; Timmons and Yardley (2012) paras. 1st and 2nd.
[351] Case 158, *Marshall Islands v. India* (2016) paras. 54th, 55th; Case 159, *Marshall Islands v. Pakistan* (2016) paras. 54th, 55th; Case 160, *Marshall Islands v. United Kingdom* (2016) para. 58th.

formulated a definition, predicated on a PCIJ's ancient 1924-judgement between Greece and the U.K. The author argues the dispute is "[…] *a disagreement on points of law or facts—a conflict of legal views or interests* [which] *may relate to* [the] *determination of legal rights, interest, duty, or obligations; or to* [the] *interpretation of treaties; delineation of boundaries; and so on* […]". In addition, one could also describe legal disputes in terms of the "[…] *opposite views concerning the question of the performance or non-performance of certain treaty obligations*", following a more recent ICJ's criterion coming from a 1950-advisory opinion. Finally, Abass has also pointed out that the existence of a contentious case is not enough to speak about a dispute. Regarding a couple of 1962-cases in South West Africa, the writer–quoting the Court–has asserted that it "[…] *must be shown that the claim of one party is positively opposed by the other*". After reviewing the definitions, due to the legal connotation of the cases, it is worth mentioning the notion of the legal dispute does not seem to include at all any potential intention to harm, such as threats or menaces, understood in their more straightforward sense (e.g., in a dictionary form) in the field of international law.[352] Nevertheless, within other branches of law, one should also argue any kind of intimidation often constitutes a component of unlawful and proscribed conducts and even of crimes.

Consequently, if there is not a disagreement on points of law or facts, or a conflict of legal views or interests, or opposite opinions concerning a specific legal obligation, one can affirm it deals with an "*absence of a dispute*". Moreover, as a complementary criterion, the existence of threats would neither constitute a dispute.

In context, while it is true, the applicant's core procedural deficiency could probably consist of having been unable to prove the existence of a dispute, the character of the Court's reasoning is also pretty debatable in the judiciary sphere. With respect to the first point, one can notice an evident lack of forcefulness in the Marshall Islands' argument. In essence, their representatives supported their allegations in three fundamental aspects: (1) what themselves had proclaimed in international forums, (2) the very filing of the application and the ensuing positions of the parties, and (3) the defendants' conduct both before and after the filing of

[352] Abass (2012) 490-1, 525-6; Case A02, *Mavrommatis Palestine Concessions (Greece v. United Kingdom)* (1924) 11; 13; Case 8, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (1950) 13; Case 46, *South West Africa (Ethiopia v. South Africa)* (1962) 13; Case 47, *South West Africa (Liberia v. South Africa)* (1962) 13. For a dictionary form of threat, see Martin and Law (2006) 535.

the application. In the case of the U.K., one should include a fourth one: British voting records on nuclear disarmament in multilateral forums.[353]

Instead, if one reviews the dissenting opinions, one can notice that not all the judge shared the Court's criteria regarding the absence of a dispute. The most recurrent criticisms consisted of (1) the Court required the respondents had to be "*aware*" that their views were "*positively opposed*" by the applicant, which somehow implied a shift of the traditional concept of dispute; (2) the inclusion of new requirements into the definition of a dispute did not correspond to the jurisprudence of the ICJ; and (3) the Court did not consider the customary nature of Article VI of the Non-Proliferation Treaty, in which the claimant based its suit on, implying the real existence of a conflictive situation.[354]

Moreover, the own results of the voting were quite demonstrative regarding disagreements among the judges and illustrated how difficult was defining the absence of a dispute. Thus, the Court upheld the objections of jurisdiction by nine votes to seven in the cases against India and Pakistan. In the case against the United Kingdom, the result was even tighter, i.e., eight votes to eight, requiring the President's casting vote to decide it.[355] Indeed, in his dissent opinion, the judge Bedjaoui wrote what could be a summary of the criticisms against the ICJ's decision concerning its excessive formalism. So,

> *Today's decision by the Court that it does not have jurisdiction on the grounds of the supposed absence of a dispute between the Parties is, in my view, all the more unwarranted in that it moves away from the Court's traditional legal philosophy in the area described below. Indeed, in its aim of serving the international community and fostering peace between nations, the Court has always taken care to avoid becoming focused on procedural defects which appear to it to be reparable. In so doing, it has shown understanding, allowing for a touch of flexibility in order to deliver justice that is more accessible, more open, and more present. It has always rejected the simplistic and unhelpful solution of sending the parties away, leaving*

[353] Case 158, *Marshall Islands v. India* (2016) para. 43rd; Case 159, *Marshall Islands v. Pakistan* (2016) para. 43rd; Case 160, *Marshall Islands v. United Kingdom* (2016) para. 46th.
[354] Yusuf (2016) paras. 1st-5th; Bennouna (2016a) 314; Bennouna (2016b) 608; Bennouna (2016c) 900; Cançado Trindade (2016a) paras. 29th-32nd; Cançado Trindade (2016b) paras. 26th-29th; Cançado Trindade (2016c) paras. 27th-30th; Robinson (2016a) paras. 61st-63rd; Robinson (2016b) paras. 61st-63rd; Robinson (2016c) paras. 68th-70th; Crawford (2016a) paras. 24th-28th; Crawford (2016b) paras. 24th-28th; Crawford (2016c) paras. 25th-31st; Bedjaoui (2016a) paras. 65th-84th; Bedjaoui (2016b) paras. 63rd-82nd; Bedjaoui (2016c) paras. 71st-90th.
[355] Case 158, *Marshall Islands v. India* (2016) para. 56th; Case 159, *Marshall Islands v. Pakistan* (2016) para. 56th; Case 160, *Marshall Islands v. United Kingdom* (2016) para. 59h.

to them the task, and the trouble, of repairing the formal defects which have been identified and then returning to the Court, if they are still in a position to do so[356].

In one way or another, the Court's decision leads to thinking that the cooperation principle and the no-harm rule solely operate when *the damage is done*, but they do not have preventive ends. It is probably one of the reasons why the dispute's concept does not seem to include threats, not even imminent ones. Indeed, the Court rejected the lawsuit despite the fact that it recognised the potential menace, arguing the Marshall Islands, "[…] *by virtue of the suffering which its people endured as a result of it being used as a site for extensive nuclear testing programs,* [had] ***special reasons for concern*** *about nuclear disarmament*". Curiously, the Court used the expression "*special reasons for concern*", instead of "*interest*", which would also apply accurately in this case. Nonetheless, one should recall the ICJ was avoiding any reference to the existence of "*a conflict of legal interests*" because it constituted a component of the dispute's definition.[357]

To some extent, when one comprehensively analyses the Court's reasoning, it is possible to find out a clear-cut contrast with its prior view concerning the legality of the threat or use of nuclear weapons, expressed through a 1996-Advisory Opinion. The ICJ replied unanimously to the U.N. General Assembly that "[t]*here exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control*" [sic]. The Court did not interestingly clarify if this obligation was applicable or not to those countries that are not part of the Non-Proliferation Treaty, i.e., exactly one of the claimant's arguments.[358]

Moreover, if one reads between the lines, one could infer the applicant brought its claims, not least because it took for granted the respondents possessed nuclear armaments (including those nations whose proceedings did not get included in the ICJ's general list). This fact involved other controversial actors in the scenario, e.g., North Korea, which implied a severe environmental risk in practice. Accordingly, it turned out indisputable the existence of an ecological menace at that time, not only against the petitioner and its territory, but also against the international community and, of course, the planet. It is sufficient to take a glance at the news about North Korea from 2013 on to realise the earnest of the situation

[356] Bedjaoui (2016a) para. 39th; Bedjaoui (2016b) para. 37th; Bedjaoui (2016c) para. 37th.
[357] Case 158, *Marshall Islands v. India* (2016) para. 41st; Case 159, *Marshall Islands v. Pakistan* (2016) para. 41st; Case 160, *Marshall Islands v. United Kingdom* (2016) para. 59h. para. 44th.
[358] ICJ, *Case 95: Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, Reports 1996, p. 226, para. 105th.

thereon. CNN's journalist, Joshua Berlinger, narrated its last nuclear test was barely late 2017.[359]

In conclusion, if the proponents–whatever the reason was–have not been able to demonstrate the existence of a dispute, they cannot bring a lawsuit despite the threat of potential harm against the natural resources or people be an imminent peril. The Court would not have jurisdiction to decide. Under these circumstances, no country could adequately represent the defence of its natural resources although they locate within its territory. Curiously, this reasoning possesses odd parallelism with an inconvenient application of the precautionary principle, understood as the fact that an "[…] *action to counter a serious threat to human health or the environment should not be delayed merely because of scientific uncertainty*", according to Caroline Foster[360]. In other words, despite the existence of an ecological menace, who must apply measures does not take action or does delay them.

In the same vein, there is at least one antecedent concerning the ICJ's reluctance to apply the precautionary principle. It deals with the Gabčíkovo-Nagymaros case, in which the Court did not accept Hungary's argument about ecological necessity, based on the precautionary principle, among other reasons. The Court summarised Hungary's stance in this manner:

> *Finally, Hungary argued that subsequently imposed requirements of international law in relation to the protection of the environment precluded performance of the Treaty. The previously existing obligation not to cause substantive damage to the territory of another State had, Hungary claimed, evolved into an erga omnes obligation of prevention of damage pursuant to the "precautionary principle". On this basis, Hungary argued, its termination was "forced by the other party's refusal to suspend work on Variant C".*[361]

3.2.6 The environmental and developmental clauses

Finally, within the ambit of state sovereignty, there is a disjunctive option concerning the right of nations to exploit their natural resources, which consists of deciding if the activities of exploitation should carry out predicated on environmental guidelines or developmental

[359] For example: BBC News (2013) paras. 1st and 2nd; McCurry and Branigan (2013) para. 2nd; Sanger and Sang-Hung (2013) para. 1st; The Associated Press and Agence France-Presse (2014) 2nd and 4th; Berlinger (2017) 1st to 3rd.
[360] Foster (Foster 2011) xiii.
[361] Case 92, *Hungary/Slovakia* (1997) para. 97th.

ones. Annexe # 3.9 illustrates the different conventions, declarations, resolutions, and so forth, which allude to various contents thereon.

More specifically, the soft law initially suggested exploitation of Nature had to adjust exclusively to environmental policies; however, from 1992 on it responds to environmental and developmental issues. To better scrutiny the discordance, the analysis will set off from the eighth recital of the Convention on Climate Change, which reads:

> *Recalling also that States have, in accordance with the Charter of the United Nations and the principles of international law, the* ***sovereign right to exploit their own resources*** *pursuant to their own environmental* ***and developmental*** *policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction*.[362]

In the history of international law, the sovereign right to exploit natural resources appeared initially in the 1972-Stockholm Declaration, i.e., as soft law. Nevertheless, the original text of the Stockholm Declaration contained a transcendental difference regarding the writing of the 1992-Convention on Climate Change, in which the phrase "*and developmental*" was included, as one could see in the last quotation. Consequently, except this expression, both texts are identical. In parenthesis, though, it is worth clarifying this information corresponds solely to long-lasting and pivotal international instruments, given there exists a previous reference in a 1952-U.N. resolution concerning the "*Right to exploit freely natural wealth and resources*". It recommended States the use and exploitation of their natural resources according to their "*progress and economic development*".[363]

In any case, the inclusion of the words "*and developmental*" is not a shallow or secondary aspect. On the contrary, it determines a strongly biased change from an environmental approach towards a mainly economic and political one. By and large, the idea that any State can pursue its policies to exploit its natural resources denotes, by itself, discretionary power to decide how, when, and where managing those resources. In this regard, when the Stockholm Declaration suggested only an environmental motive to lead the exploitation of natural resources, it was clear that the exercise of state sovereignty could get restricted to ecological reasons. Nevertheless, with the inclusion of developmental purposes,

[362] Convention on Climate Change (1992) Recital 8th emphasis added.
[363] Stockholm Declaration (1972) Principle 21; U.N.G.A. Resolution No. 626 (VII) (1952) para. 1st.

the approach becomes ambiguous, due to it is quite tricky to figure out what public policy's feature–environmental or developmental–outweighs for who is the decision-maker.

In effect, the possibility of choosing between environmental and developmental reasons to exploit natural resources impedes certainties and contributes to vagueness. By way of example, despite the fact that Nigerian law imposed the enforcement of international standards for the oil exploitation within its territory, one of the board members of the transnational SHELL U.K. Limited recognised, during an annual meeting in 1997, that the application of "[…] *higher environmental standards could harm local economies*". To him, a more expensive operation would not only be uncompetitive, but it would also deprive "[…] *the local work-force of jobs and the chance to development*".[364] Then, it turns out too ambiguous–and even paradoxical–that the disjunction between environmental and developmental reasons to make a public decision could tilt towards economic aims, under the same discursive influence often used to justify a solely eco-friendly measure.

Ileana Porras remarks the insertion of what had been formerly the principle 21st of the Stockholm Declaration (1972) into the upcoming Rio Declaration (1992) or the Convention on Climate Change (1992), whose contents are identical. It provoked a series of criticisms as well as favourable opinions. On the one hand, developed countries were reluctant to the inclusion of the whole paragraph due to its redundancy, above all considering the Stockholm Declaration's principles were going to be reaffirmed within the Rio Declaration's preamble. On their part, developing nations, primarily gathered in the G77, were insistent about the addition of the text, including the phrase "*and developmental*", given they were particularly afraid of potential globalisation of natural resources, such as tropical forests, a recurrent theme within the developed countries' rhetoric. Other authors, such as Foo and Taylor, have a similar interpretation about the developing countries' unwillingness to accept a potential violation of the state sovereignty over their natural resources and a decline of their development.[365]

Moreover, Porras herself explains that natural resources become common goods of humanity under this "*new globalising rhetoric*", which turns the State a guardian of its resources, on behalf of the planet, that is, the restriction to exploit natural resources considering exclusively environmental motives flies in the face of the traditional conception of sovereignty. Developing countries, the author affirms, were not ready to accept such a

[364] Manby (1999) 57.
[365] Rio Declaration (1992) Principle 2; Convention on Climate Change (1992) Recital 8th; Porras (1992) 251; Foo (1992) 353-4; Taylor (1998a) 335.

shift because it implied to strike down the freedom of nations to manage their natural resources according to their convenience. In other words, it meant passing from a condition of a kind of state ownership to a trusteeship, where every governmental action regarding natural resources should "[…] *consider the interests of, and probably consult with, the international community before taking any action affecting the resource*".[366]

This last reasoning widely coincides with the argument asserting that the classical concept of sovereignty depicts somehow a species of property, exclusively exercised by nations over their resources. Furthermore, it constitutes another way to affirm the natural resources are to satisfy human interests, which turns out a clear-cut anthropocentric outlook.

In more detail, the debate regarding the inclusion of the referred phrase has focused mainly on the effect of having reaffirmed traditional sovereignty over green considerations or having put them at the same level, at least. Thus, while some authors saw positively how the Declaration equated environmental and developmental policies and rights,[367] others replicated more gravely that the change was a "*skillfully masked*"[368] or even "*a reactionary*"[369] step backwards.

Among the latter, Pallemaerts inquisitively elaborates his argument, assuring there was a disruption of the "[…] *delicate balance struck in Stockholm between the sovereign use of natural resources and the duty of care for the environment*". On her part, Leib emphasises the idea of state sovereignty as a hindrance to the implementation of public environmental policies, weighing up the suggestive Judge Weeramantry's speech, in which he affirms that states should surrender part of their sovereignty in favour of the environment and forthcoming generations.[370]

Additionally, there is a sort of neutral position, in which authors do not emit any profound critical comment about the tenet at issue, but instead assume an analytical stance relating to the function of state sovereignty over natural resources, from an insight of customary law.[371] Sands, for example, believes this shift reflected merely an "*instant*" variation in the rule of customary international law. He argues this added phrase did not appear in the Convention on Biological Diversity, whose text is the same as the one of the

[366] Porras (1992) 251.
[367] See Wapner (1998) 278-9; Jurgielewicz (1996) 56.
[368] Pallemaerts (1992) 256.
[369] Porras (1992) 252.
[370] Pallemaerts (1992) 256; Leib (2011) 117; Weeramantry (2002). Quoted also by Corell (2002) 3-4.
[371] For example, see Dailey (2000) 342; Condon (2006) 291.

Stockholm Declaration.[372] Both instruments are parallel because they invoke solely environmental reasons for the application of public policy to exploit natural resources. Nevertheless, they are concurrently different regarding their respective mandatory character. Effectively, while the declaration constitutes soft law, therefore without any compulsory power, the convention does possess a binding feature within the international law. The fact that the Convention on Biological Diversity has been agreed during the same 1992-Conference, where the Convention on Climate Change and the Rio Declaration were accorded as well, reinforces Sands' argument, owing to the last instruments do include the already referred phrase "*and developmental*".

Other allusions regarding exclusively environmental policies (and excluding developmental ones) can be found, for example, in the Vienna Convention for the Protection of the Ozone Layer or in the Convention on the Transboundary Effects of Industrial Accidents. Likewise, some further mentions regarding both environmental and developmental policies are, for example, in the Stockholm Convention on Persistent Organic Pollutants, in the Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, and in a couple of U.N. resolutions (1994/65 and 1995/14).[373]

In context, there are two cases one should emphasise, given the highly contradictory character of the theme. Firstly, the case of the "*Non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests*" is quite curious due to its ambiguousness. Even though the statement contains a verbatim text to the Stockholm Declaration's one, i.e., excluding the reference to development,[374] it promotes it at the same time, actively highlighting on developmental needs, including socio-economic and even sustainable nuances. The tenet in question reads as follows:

> *State have the sovereign and inalienable right to utilize, manage and* ***develop*** *their forests* ***in accordance with their development needs*** *and levels of socio-economic*

[372] Sands (2003) 54. More or less in the same sense Freeland and Gordon (2012) 12-3; Convention on Biological Diversity (1992) Article 3.

[373] Vienna Convention for the Protection of the Ozone Layer (1985) Recital 2nd; Convention on the Transboundary Effects of Industrial Accidents (1992) Recital 8th; Stockholm Convention on Persistent Organic Pollutants (2001) Recital 10th. Hereinafter Stockholm Convention; Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1999) Article 5 (c); Resolution No. 1994/65 (1994) Recital 9th; Resolution No. 1995/14 (1995) Recital 12th.

[374] Non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests (1992) Principle 1 (a).

> ***development*** *and on the basis of national policies consistent with sustainable* ***development*** *and legislation, including the conversion of such areas for other uses within the overall socio-economic* ***development*** *plan and based on rational land-use policies.*[375]

Another thought-provoking example refers to the Convention on Long-range Transboundary Air Pollution of 1979, whose preamble originally included the paragraph in question, but only mentioning the environmental policies to exploit natural resources. However, at least three of its subsequent protocols (on heavy metals, persistent organic pollutants, and reduction of acidification, eutrophication, and ground-level ozone) already include the expression "*and developmental*" within their respective preambles.[376] The shift of perspective is rather evident in this case.

In general terms, it seems there was a kind of breakpoint around 1992, after the Rio Conference, given that the whole instruments which include the words in question date from that year and later.

3.3 Conclusions

The two hypotheses formulated within this chapter followed a logic pattern structured in the function of interconnections between property rights and Nature. In this regard, to the extent that the study goes forward, the scope of each query gradually becomes more and more intricate in hermeneutic terms. Thus, the initial and most straightforward research question aims at ascertaining if Nature could be the property of someone. Once determined whether Nature could be subject to property, the next step consists of establishing the hierarchical significance of Nature in comparison with ownership. In other words, the second hypothesis looks for corroborating if property rights predominate over Nature in the ambit of international law. Finally, although it initially did not get planned, the scrutiny cast doubt on the representation of Nature before international tribunals and–in general–the global sphere, as a result of the previous analysis.

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[375] ibid Principle 2 (a).

[376] Convention on Long-range Transboundary Air Pollution (1979) Recital 5th; Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Heavy Metals (1998) Recital 9th; Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants (1998) Recital 8th; Protocol to the 1979 Convention on Long-range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-level Ozone (1999) Recital 12th.

Hence, the first research question searched for corroborating ***if it is true or not that the international legal framework, currently in force, merely considers Nature as a set of goods subject to property***. The response did not set off from scratch, because there was an assumption concerning Nature does constitute an array of things and commodities, an aspect analysed and somehow concluded in the previous chapter. Consequently, once reviewed the most noteworthy binding and non-binding instruments of international law, currently in effect, one can indubitably determine that Nature is thoroughly susceptible to be the property of human beings.

Effectively, everything that exists on Earth, especially lands and species, belong to human beings, either by private means or public ones. Moreover, the international legal framework, from the older instruments to the more recent ones, is littered with references to property rights over Nature. As mentioned, the very fact that some conventions contain allusions to "*natural resources*", instead of other expressions, such as Nature, environment, or ecosystem, for example, evokes the ideas of commodification and objectification of the wild, i.e., the conceptualisation of flora, fauna and ecosystems as goods, things or commodities. In this line of reasoning, the Conventions on biodiversity, climate change, access to information, and combating desertification allude to biological, genetic, water or land resources, indistinctly. In some way, they have followed the course set by earlier treaties, such as the economic and political covenants, which established the people's right to fully and freely exploit and use their natural resources.

In particular, the influence of the covenants concerning the handle of Nature has turned out decisive, not least because they defined the overall conditions of the so-called principle of permanent sovereignty over natural resources. As a result, one of the most powerful conclusions derived from the present analysis consists of the fact that the exercise of State sovereignty grants to nations a legal right easily comparable with property rights, that is, in practice, countries participate as owners of Nature in the international sphere but sheltered and supported by the normative framework.

As announced in the first pages of the chapter, the examination of property rights over Nature was going to be guided by the ownership's constituent elements, i.e., possession, use, and disposition. In consequence, pursuant to the mentioned structure, this chapter counts on a compilation in detail of plentiful legal exemplifications regarding ownership upon natural resources. Thus, the commerce of wild species, regulated by the CITES, represents perhaps the archetype of Nature as merchandise, where its purchase and sale pursue the logic of traditional property rights. Nevertheless, the trade of endangered species is not the only

regulation of the international market, given there is a series of provisions oriented to protect it. Sundry treaties even bring into question any restriction of international trade, based on environmental measures, or promote greater flexibility in the application of green actions to those countries tending to market economies. Within this commercial ambit, the Convention to Combat Desertification plays a controversial role, by warranting to the owners of traditional knowledge and know-how the economic profits derived from their uses and technological applications. As mentioned, any potential commercialisation of ancestral practices and native cultural elements, such as folk medicine, for example, could represent a threat to the very survival of indigenous peoples.

Another remarkable result concerns the incontrovertible association between poverty and environmental degradation, being property rights, once again, the common thread running within both aspects. In context, several economic experts, and even sundry conventions causally link poverty with the environmental crisis through the failures or the lack of property rights accurately defined. The response coming from the international legal framework, however, seems to be a little bit confusing. Some treaties usually propose economic growth as a valid response to ecological problems despite the fact that various critics of economic growth often consider it as the root of environmental catastrophe.

In practice, it is possible to describe the interplay between any failures or lack of property rights with poverty, and with the environmental detriment (characterised by the free access). Nonetheless, the interconnections between poverty and environmental problems are not always clear-cut and determinant. It is probably the reason why does not permanently work out the attempts to employ similar solutions for both situations. In other words, as asserted throughout the correspondent section, the continuous breakdown of environmental policies, grounded on economic growth, shows how the application of anthropocentric measures upon ecological problems does not always succeed.

On the other hand, the second research query attempted to establish the pecking order between Nature and ownership. In plain language, the question looked for determining ***if property rights are more important than Nature in the light of international law in force***. The answer, however, cannot tilt the balance toward one side or another thoroughly, as one could easily infer from reviewing the whole chapter. Admittedly, for example, several passages of the law denote a strong predominance of international trade over Nature, which constitutes in itself a confirmation of the hypothesis. Still, one cannot entirely assure the treaties bias toward the prevalence of property rights regarding other themes, such as overexploitation or pollution on private property, for instance. As explained, various

conventions forbid any kind of restriction of global commerce in the name of environmental policies and measures. Moreover, they even promote the flexibility of their actions in favour of the market economy. Nevertheless, it is not the general principle operating for all other cases, where green issues are of greater importance.

In practice, the environmental instruments declare as their objectives diverse ranges of the protection of Nature and struggle against critical ecological problems, such as pollution, global warming, desertification, among others. Moreover, it draws attention to how the European Court of Human Rights has invoked property rights to decide more than 15% of the "*green*" case law.

A further element of analysis, derived from the exercise of state sovereignty, consists of the disjunction between the application of environmental or developmental policies to use and exploit natural resources. In one way or another, there was a preponderance of ecological motivations supporting any country's decision to utilise their natural resources until 1992, at least in discursive terms. Nonetheless, after the Earth Summit, where some of the most significant international binding and non-binding instruments in matters of environmental law came out, the legal and academic discourses dramatically shifted. Effectively, the inclusion of the phrase "*and developmental*", within the clauses regarding the sovereign exploitation of natural resources, constitutes an inflexion point. The reason was that developmental policy became a justification for exploiting Nature comparable with the environmental one, i.e., at the same level.

As a result, the decision to exploit national ecosystems entirely depends on States, predicated on environmental or developmental reasons, an aspect that could have repercussions on the hierarchical position of property rights over Nature, given that development gets often associated with economic growth and commerce. Therefore, from this point of view, the potential supremacy of ownership over Nature is uncertain and ambiguous. One should warn, additionally, that the bulk of treaties issued from 1992 include this option within their texts merely as a part of their preambles and not of operative sections.

To recapitulate, there cannot be a determinant conclusion regarding the prevalence of property rights over Nature because, despite there is evidence of the supremacy of the international market in sundry green treaties, it does not deal with a general principle governing the interactions between humans and Nature. Furthermore, the responsibility to choose between the application of environmental and developmental policies to use and exploit natural resources corresponds to each State. It means that every country is accountable for deciding what aspect is more important. Under this circumstance, the

international legal framework does not play any role to determine pecking orders, in which property rights occupy a higher position than Nature. Other local or global entities and persons are neither liable, solely the States.

Ultimately, although the present chapter did not include any hypothesis concerning the representation of Nature, the analysis of sundry elements of state sovereignty, such as statehood, self-determination, and cooperation, it allowed arriving at complementary conclusions in this subject matter. Thus, one of the findings coming from the previous chapter consisted of bringing into question the historical capacity of States to act on behalf of Nature. The main criticism had to do with the responsibility of States to protect human rights and natural resources at the same time. The argument was that it would turn out virtually unviable to believe that States were knowingly going to enforce the international legal framework in favour of Nature and detriment to humans if the case. This presumption was focussing primarily on the judicial interventions of countries before the international tribunals of justice, although it could also apply to their participation within the global community.

Notwithstanding, it seems to be evident that the fact of accomplishing all the requirements to be recognised as a sovereign State–i.e., statehood, self-determination, independence, and so forth–is neither sufficient to exercise the right to protect the national ecosystems. The analysis of the lawsuit brought by the Marshall Islands against a group of nations, alleging they have not pursued negotiations in good faith to cease the atomic arms race and go forth the nuclear disarmament, proved it. Curiously, one of the criticisms against the jurisdiction's restriction imposed by International Court of Justice deals with allowing claims coming only from States, setting aside other participants, such as NGOs, confederations, or human beings, for example. They could even represent better off Nature's interests most of the time. Nonetheless, the mentioned experience demonstrated that not even the sovereign States are capable of protecting the environment under unfavourable legal circumstances.

Another deduction hailing from the examination of sovereignty refers to the inequalities in the application of principles of international law. Sometimes, for instance, the tenet of cooperation or the no-harm rule in environmental matters only works out when the country that alleges its enforcement counts on enough political [or perhaps economic] influence to attain it. Otherwise, it could be useless.

Summing up, the legality of statehood, the strength of self-determination, and the warranty of state independence do not confer legitimacy to represent Nature's interests, in

practice. At best, one should admit that, under adequate legal conditions, States [and even other entities or people] could have success acting on behalf of Nature. Still, one also ought to keep in mind that States could opt for the defence of property rights or the promotion of development, affecting directly or indirectly conservation and protection of Nature. Moreover, one has to recall that the State is in charge of the local administration of justice, which usually would place it in the position of judge and jury, discrediting its environmental actions.

Chapter Four
The Court of Justice of the European Union and its environmental decisions

The present chapter principally aims at confirming, from the judicial standpoint, the legal hypotheses already proposed in the function of the international legal framework, currently in force. Therefore, once again, the common thread running with this study will be the interplay between Nature and property rights, joint with their implications in ecological protection. In consequence, the analysis does not only search for determining the influence of ownership within the judicial adjudications in environmental matters but also reflecting on the scope of representation of the wild. As a guideline, the unit counts on a series of four research questions chosen, as follows:

1) *Do international courts of justice rule in favour of property rights and individual interests to the detriment of Nature?*

2) *Is it necessary to be the owner of natural resources or exercise any kind of associated rights for obtaining eco-friendly rulings before international courts?*

3) *Is there anybody who can represent Nature's interests before international courts within the international legal framework currently in force?*

4) *Are there enough warranties to protect natural resources in the current international system of justice?*

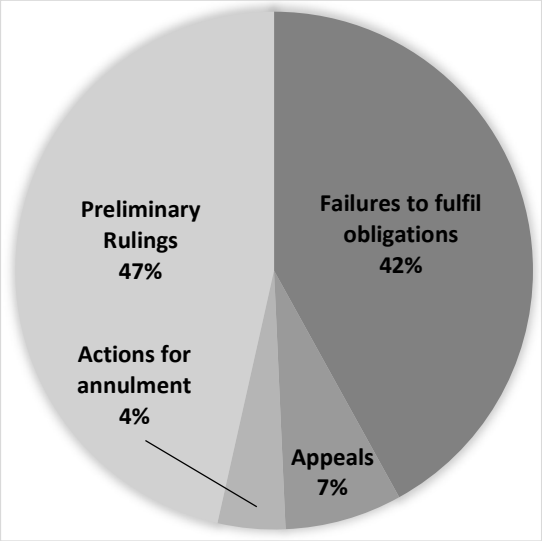
Moreover, the study will utilise the judgements issued by the Court of Justice of the European Union to fulfil the foreseen goals, according to the selection explained in the corresponding methodological section. The structure of the subsections follows the order established for the research questions.

4.1 Characterisation of the sample

Starting from the number of records that forms part of the sample (455 items), it would turn out useful to take into consideration some of the most important features derived from the adjudications. They essentially have to do with the types of judicial actions, as well as the applicants and defendants involved in the course of events concerning the judgements.

1.4.4 Type of judicial actions

Chart # 12 Types of Actions (CJEU)



Source: CJEU (2019)

According to the regional legal framework, the Court is able to rule on suits brought by the member States, institutions or natural and legal people, or even other cases provided for in the treaties, such as–for instance–the failures by the member States to fulfil their obligations under the Union law. In addition, the CJEU has the power to give a preliminary ruling on the interpretation of Treaties or the validity of acts at the request of tribunals coming from the Member States.[377] In consequence, as one can notice in chart # 12, there are four types of judicial actions within the selected set of cases:

(1) Declarations of failure by a member State to fulfil its obligations.
(2) Appeals.
(3) Actions for annulment; and

[377] Treaty on European Union (2016) Article 19 (3a and 3c); Consolidated Version of the Treaty on the Functioning of the European Union (2012) Articles 258 and 267. Hereinafter Treaty on the Functioning of the European Union.

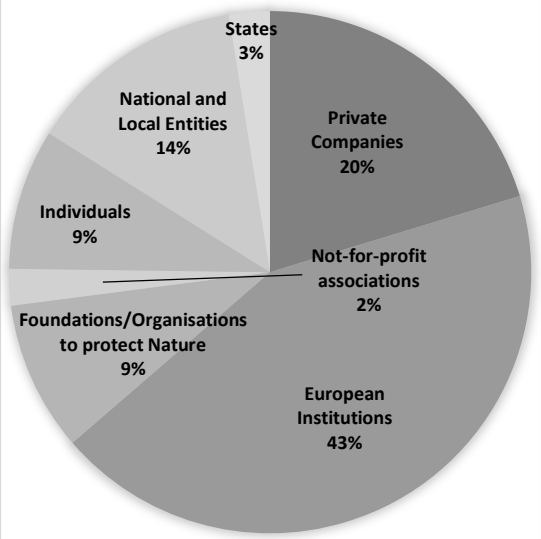
(4) Requests for preliminary rulings.

Focusing on the sample, the fact that preliminary rulings represent in percentage almost half of the cases (165 records) turns out advantageous, environmentally speaking, to the extent that the court acts, in a certain way, as an impartial beholder, who keeps its distance from the final resolution of each case. This relative independence of the judge permits one to get hold of a somehow more neutral idea about what his/her criteria are regarding each subject matter.

On the other hand, the high incidence of cases regarding countries' failures to fulfil environmental obligations (149 cases) shows, in turn, the frequent tensions between human activities and the protection of Nature. As one will notice, there is a host of situations in which the lack of legal observance depicts real threats to the integrity of ecosystems.

1.4.5 Type of applicants

Chart # 13 Types of Applicants



Source: CJEU (2019)

The percentage shown under the label of European institutions in chart # 13 includes the European Commission, which has been applicant in 153 cases, the Council of the European Union, and the European Parliament. The two latter have participated as claimants in two procedures each. These figures virtually coincide with the number of declarations of failure by a member state to fulfil its obligations, which constitutes a first indicator of the lack of fulfilment concerning the environmental directives of the European Union.

The private companies and associations (producers and consumers) comprise the second group of importance in quantitative terms (72 records in total), which evidences a couple of striking aspects. Firstly, it confirms the bulk of plaintiffs possess direct interests in the subject matters of the proceedings. And, secondly, a myriad of lawsuits is not intended to protect Nature but to counteract the influence of the environmental legal framework upon production, commerce, and other parallel human activities.

States and their domestic institutions (national and local) constitute the third group of importance (57 judgements). This category primarily includes local governments, such as municipalities, states, and regions. Likewise, it embraces national tribunals, prosecutors, and general attorneys. Moreover, it also comprises other governmental authorities, such as ministries, agencies, departments, and offices. The participation of public and municipal companies, just like States' as such, is marginal.

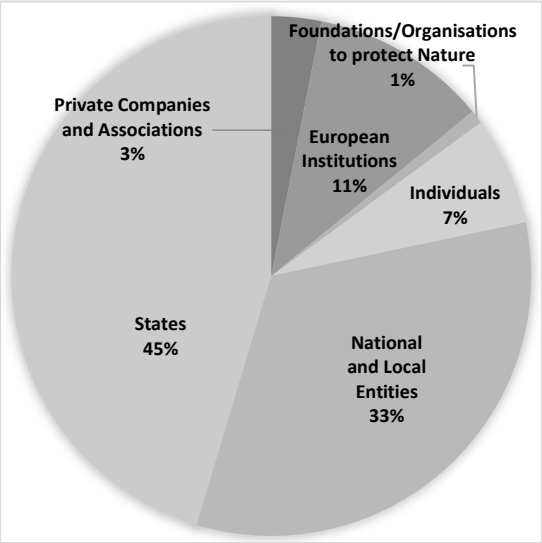
One could group the foundations and organisations of environmental protection (33 records) with the not-for-profit associations (8 cases) in one single category. The low incidence of their participation as litigants of the proceedings somehow contradicts the initial expectancy of Nature's representation. Indeed, if one aggregates their interventions, either as applicants or as defendants, one can notice these entities only represent 29.55% of the total cases. In the other proceedings, they appear jointly with other interveners, either institutions or people.

Finally, individuals form part of the last set of applicants (31 judgements). Contrary to the assumptions coming from the initial hypothesis, only half of the claimants are effectively owners of any kind of assets (not necessarily lands or other natural resources). Property rights also correspond to private companies and associations, environmental and not-for-profit organisations, and even local governments and public authorities.

1.4.6 Type of defendants

In a similar vein to the case of applicants, the reason why States register the highest rate of participation as defendants (161 judgements), within judicial procedures, is due to the also large number of lawsuits regarding failures by member states to accomplish environmental duties. Curiously, the second-highest fraction corresponds to national and local entities (117 records), which allows perceiving a certain sense of nonconformity concerning the public management of ecological issues. Effectively, if one combines both features, the result reaches a determinant 78,31% of the total defendants.

Chart # 14 Types of Defendants



Source: CJEU (2019)

Although with less intensity, European institutions occupy the third position in terms of quantity (39 items). In this section, however, one should add the European Chemicals Agency (ECHA) in addition to the already mentioned Commission, Council, and Parliament. In this case, the whole judgements refer to actions for annulment and appeals. The next clusters, arranged by size, correspond to the following categories: individuals (24), private companies (11), and organisations to protect Nature (3).

4.2 The judicial interplay between property rights and Nature

4.2.1 Does the Court really rule in favour of ownership over Nature?

Depending on the context, the fact that a judge considers property rights as more important than environmental ones could imply innumerable interpretations. At first glance, nevertheless, those members of the Court of Justice of the European Union who participated in the preliminary ruling requested by the High Court of Justice from England and Wales, in 1999, seem to disagree. In effect, the request took place in the framework of two cases among ***Harry Auger Standley, David George Metson, and others v. the Secretary of State for the Environment and others***. The CJEU expressly upheld thereon that "[…] *while the right to*

property forms part of the general principles of Community law, it is not an absolute right and must be viewed in relation to its social function".[378]

From the outset, the Court held a clear-cut opinion against the prevalence of property rights over Nature, to the point of rejecting the plaintiffs' argument. They claimed that the declaration by which the British public authorities had identified the rivers Waveney, Blackwater, Chelmer, and their tributaries as waters which could be affected by agricultural pollution infringed their right to property. Likewise, they were at odds with the designation of areas of land draining into those waters as vulnerable zones because they believed it brought about the same harmful effects against the property on their farms. According to the owners, both governmental actions restricted the agricultural use of their lands. Moreover, although it explicitly recognised that the application of some measures restricted the farmers actually from exercising their property rights, the Court affirmed that those constraints corresponded "[…] *to objectives of* ***general interest*** *pursued by the Community and* [did] *not constitute a disproportionate and intolerable interference* […]".[379]

Within the technical context in which the British Tribunal raised their questions, the query concerning property rights did not occupy a predominant place. Notwithstanding, for the research's purpose, both the legal arguments and the European directives alluded to in the judgement turn out useful to discuss the legal implications of the dichotomy between property rights and Nature.

In this sense, when one reads the measures to be adopted by landowners, in the framework of the action programmes established in Annex III of the so-called Nitrates Directive,[380] it turns out undeniable they represent a limitation to property rights. In practice, the measures taken by the Secretary of State, especially the establishment of vulnerable zones within the boundaries of the claimants' lands do factually affect their economic interests.[381] Although there is not an explicit reference within the judgement, it is not hard to imagine those farms will undergo a drop in value because no farmer would purchase them with a restriction concerning agricultural activities, at least with the cost they had before the decision. In the same line of reasoning, the constraints concerning pollution constitute an increase in the expenses, which affects the incomes coming from their farming business.

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[378] Case C-293/97, *The Queen v. Secretary of State for the Environment and Ministry of Agriculture, Fisheries and Food, ex parte H.A. Standley and Others and D.G.D. Metson and Others* (1999) para. 54th.
[379] ibid paras. 2nd, 17th, and 55th.
[380] Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources (1991) Article 5(4a). Hereinafter the Nitrates Directive.
[381] Case C-293/97, *The Queen v. Minister of Agriculture and others* (1999) para. 15th.

Indeed, if the lawmakers designed legislation to prevent the employment of fertilisers during certain periods or limit their application to soils under specific conditions, including climatic ones, there is no way to argue that production was not going to be directly affected.

The last statement does not definitively imply a defence of the prevalence of property rights over environmental ones. It pretends to affirm that the restrictions to the exercise of property rights are a real given instead. In other words, an eco-friendly policy–justified or not–could bring about detriments to owners. It is what the Court has called the social function of property, and its application determines a tension between property rights and protection of Nature, materialised through the idea of preventing the pollution of water. Nevertheless, it is not the only case. For example, parallel interpretations would apply to the special conditions provided for the storage and use of livestock manure.[382]

From the reading of the arguments alluded to by the British High Court of Justice in order to require the preliminary ruling, however, one could infer its opinion was closer to the applicants', this is, the British judges did believe that the Nitrates Directive infringed the right to property of farmers. In fact, the fashion in which they asked their questions was quite suggestive owing to the expected conditional interpretation [by the British Court] regarding the identification of waters affected by pollution and the subsequent designation of vulnerable areas. They perhaps aspired both measures had only been taken "[…] *where the discharge of nitrogen compounds from agricultural sources itself accounts for a concentration of nitrates in those waters* ***in excess of 50 mg/l*** *(i.e., leaving out of account any contribution from other sources)*".[383] Otherwise, i.e., less than 50 mg/l, it would be an infringement of the right to property. The explicit query was:

> ***If Question 1 is answered otherwise than in sense (ii) above****, is the Nitrates Directive invalid (to the extent of its application to surface freshwaters) on the grounds that it infringes:* […] *the fundamental property rights of those owning and/or farming land draining into surface freshwaters required to be identified under Article 3(1), being areas of land which are then designated by Member States as vulnerable zones under Article 3(2)?*[384]

[382] ibid para. 5th; Nitrates Directive (1991) Annex III, para. 1st. subpars. 1st, 2nd, and 3rd.
[383] Nitrates Directive ibid para. 20th (1ii).
[384] ibid para. 20th (2iii), emphasis added.

Summing up, the dispute revolves mainly around a set of *technicisms*, such as if the level of concentration of nitrates should come from only agricultural sources or if the regulation should apply solely to potential sources of drinking water, among others. Therefore, Krämer prefers speaking about a problem of "*wording*", originated in the very directive, with respect to the scope of what one should understand concerning the expressions "*affected by pollution*", "*pollution*" or "*agricultural source*".[385] In practice, beyond their discursive scope, none of the arguments displayed by the parties, and not even by the CJEU, represents the ecological issues totally, despite the fact that it undoubtedly deals with an environmental dispute. While it is true that, it should be recognised, the Court decided in favour of Nature, the lack of a committed defence of its interests would lead aprioristically to thinking about the need to count on a representative.

Another example about the pre-eminence of green reasoning over property rights, grounded on the social function of ownership, can also be found among the rulings by the General Court. In ***Romonta GmbH v. European Commission (2014)***, for instance, the limits to the property rights–based on its social function–constituted one of the key reasons why the Court dismissed the appeal concerning an action for the annulment of a Commission Decision. In its claim, *Romonta GmbH*, a private German company dedicated to the production of crude montan wax from the extraction of bitumen-rich lignite,[386] asked the annulment of a decision concerning the national implementation measures for the transitional free allocation of greenhouse gas emission allowances.[387] The company claimed unsuccessfully that:

> […] *by rejecting free allocation of emission allowances in case of undue hardship, the Commission infringed the principle of proportionality and its fundamental rights*, […] *namely its freedom to choose an occupation, its freedom to conduct a business and its right to property* […].[388]

The central allegation of the claimant consisted of its economic and financial difficulties constituted *undue hardships,* and they stemmed from the Commission's rejection to specify a benchmark for montan wax in the contested decision, whose only producer in Europe was

[385] Krämer (2002) 92-3.
[386] Case T-614/13, *Romonta GmbH v. European Commission* (2014) paras. 1st.
[387] Commission Decision 2013/448/EU (2013).
[388] Case T-614/13, *Romonta v. Commission* (2014) paras. 40th and 41st.

precisely Romonta GmbH. In the CJEU's opinion, however, the applicant could not prove how disproportionate was the lack of that specific hardship clause.[389]

Unlike the previous case, one should assert that the assumed infraction of the property rights does not visualise so clearly. It turns out hard to believe that the lack of free allocation of emission allowances can affect the financial structure of a specific company, above all if one considers its commercial activity as monopolistic, being the only producer in the whole continent. Therefore, the Court dismissed the action, upholding–once again–that the right to property is not absolute and should be deemed in relation to its social function. So, the CJEU alleged that:

> […] *restrictions may be imposed on the exercise of those freedoms and on the right to property, provided that those restrictions in fact correspond to objectives of general interest pursued by the European Union and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights.*[390]

Another compelling case, in whose judgement there is a legal discussion concerning the social function of property rights, is ***European Commission v. the United Kingdom (2014)***. Although the subject matter does not correspond to the theme in question, there is an argument coming from the respondent State concerning a potential restriction of the exercise of property rights. Effectively, the procedure referred to the failure of the United Kingdom to transpose fully and correctly to its national legislation a couple of provisions coming from the Directive 2003/35/EC concerning public participation in respect of the drawing up of certain plans and programmes relating to the environment.[391]

According to the European Commission, the British courts usually required plaintiffs to give "*cross-undertakings*" in return to interim reliefs in the ordinary course of a dispute. The Commission considered this regime prohibitively expensive for people who bring a lawsuit. On its part, in the framework of the environmental cases, the United Kingdom justified this procedure on the fact that the mere opposition "[…] *to the grant of consents suspends, in*

[389] ibid paras. 79th and 90th.
[390] ibid para. 59th.
[391] Case C-530/11, *European Commission v. United Kingdom of Great Britain and Northern Ireland* (2014) para. 1st; Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment (2003) Articles 3 (7) and 4 (4).

practice, the commencement of works or of other activities until the dispute has been decided". Consequently, those suspensions or delays of activities infringe property rights.[392]

In response, following the same pattern of the previous judgements, the Court denied the respondent's argument, clarifying one more time that property rights are not absolute, they must get exercised in their social function, and they correspond to objectives of general interest, among other arguments. Furthermore, it explicitly declared that: "*Protection of the environment is one of those objectives and is therefore capable of justifying a restriction on the exercise of the right to property*".[393]

In a certain sense, it calls attention the stance adopted by the United Kingdom regarding this point, favouring openly the economic interests above public participation, which in the end constitutes an environmental dimension. As one could see also in the first case of this subsection, *Standley, Metson, and others v. Minister of Agriculture and others* (Case C-293/97), the possibility to bring actions before the CJEU depicts somehow more independence in the administration of justice. Nonetheless, although the participation of the Court seemed more decisive in this case–one should recognise it–there remains a subtle demand for representation on behalf of the ecological interests.

Among the analysed cases within this subsection, ***Arcelor SA v. European Parliament and Council of the European Union (2010)*** is probably the best example of a dispute between property rights and environmental protection. In the main, the application aimed at a twofold objective. On the one hand, the company requested the annulment of a directive concerning the establishment of a system for trading allowances concerning greenhouse gas emissions within the European Union. And, on the other hand, it also demanded compensation for the damage suffered for the adoption of that directive.[394]

In context, Arcelor SA is a steel producer, raised from the merge of several companies. During the proceedings, among other arguments, it held that lawmakers did not take into account the economic impacts concerning its activities by issuing the Directive 2003/87/EC. The gist of its assertion was the defendants did not include in Annex I to the contested directive the competing non-ferrous metals and chemicals sectors. In that sense, the company

[392] Case C-530/11 ibid paras. 18th and 28th.
[393] ibid para. 70th.
[394] Case T-16/04, *Arcelor SA v. European Parliament and Council of the European Union* (2010) paras. 32nd and 33rd; Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (2003) Articles 4, 6 (2e), 9, 12 (3), and 16 (2, 3, and 4), in conjunction with point 2 of Annex I, and criterion 1 of Annex III. It is worth clarifying this directive experienced several amendments between 2003 and 2018. One can find a list of them and the consolidated version of the Directive 2003/87/EC in EUR Lex (2018) 1ff.

claimed the infringement of its property rights owing to neither the European Parliament nor the Council envisaged "[…] *the technical and economic impossibility for steel producers to reduce CO_2 emissions any further*". Moreover, the applicant adduced the directive did not include any control mechanism regarding the price or the cross-border transfer of allowances within similar companies. In consequence, that lack of transfer options was going to impact severely the company's structuring efforts and competitiveness, and hence its property rights.[395]

The response of the Court was not unknown. As already mentioned, its members usually address their findings firstly recognising that "[…] *the right to property and the freedom to pursue an economic activity form part of the general principles of Community law* […]". Nonetheless, among other reasons, those rights are not absolute and should get exercised respecting their social function and the general interest. Of course, environmental matters constitute "*general interest*". In other words, once again, the Court often endows the highest importance to environmental issues than ownership. Consequently, the CJEU dismissed the action for the annulment of the contested directive.[396]

The core objective of the Directive 2003/87/EC consists of fostering the reductions of greenhouse gas emissions through a "*cost-effective and economically efficient manner*", i.e., an emission trading scheme (ETS). In principle, being a measure of general scope, one should assume it corresponds primarily to the tenets of proportionality and equal treatment. One should bear in mind that allowances are interchangeable. Notwithstanding, if a company or any other actor of commerce does not count on the possibility to intervene in that market of those authorisations to emit, it will have to cope with an immediate lack of financial instruments to control its costs. Consequently, it will experience an economic disadvantage in front of its competitors, with the subsequent impact upon its property rights.

Under these circumstances, one may wonder why lawmakers decide to exclude someone from the overall normative if that exclusion harms its [property] rights. This question seems to be what the applicant posed. The response is not hard to suppose. It concerns environmental reasons, a very understandable aspect if one thinks about the claimant's activities and its high pollutant character: "steel production". Accordingly, although it turns out undeniable the intrusion upon the ordinary exert of ownership, its social function and the general interest determine the prevalence of environmental reasons in case of conflict. The Court states that:

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[395] Case T-16/04, ibid paras. 30th and 75th.
[396] ibid paras. 153rd and decision.

> *Even if the resulting obligations for the applicant constitute restrictions in that respect, those restrictions cannot be regarded as a disproportionate and intolerable interference with those rights in the light of the general interest pursued by the contested directive and by the allowance trading scheme, namely protection of the environment.*[397]

Ultimately, in the preliminary ruling required by a Regional Administrative Tribunal of Sicilia, Italy, concerning the judicial dispute between the companies ***Raffinerie Mediterranee (ERG) SpA, Polimeri Europa SpA, and Syndial SpA v. the Ministry of Economic Development (Ministero dello Sviluppo Economico) and others (2010)***, the applicants in the main proceedings claimed the unilateral determination of measures, by the administrative authorities, for remedying the environmental damages to the Priolo [Gargallo town] Site of National Interest.[398]

Additionally to the denial of their responsibilities about the contamination, the companies alleged that these administrative acts of determination of environmental measures imposed excessive restrictions on their property rights and were contrary to proportionality because "[…] *where land has been decontaminated or has never been polluted, the competent authority does not in any way have the power to make use of that land subject to the carrying out of environmental remedial measures on another site* […]". Moreover, they upheld that the operator's interest to remedy the harms rested on the prospect that their productive activities were resumed,[399] i.e., their reasons clearly grounded on a merely instrumental view of natural resources.

Unsurprisingly, the CJEU responded virtually in the same terms as those averred in the foregoing adjudications, this is, property rights do not constitute an immutable principle but a prerogative that should correspond to its social function. Thus, the Court rejected the point of contention, giving the reason to the national tribunal, predicated upon the power of competent authority to alter substantially the actions to redress ecological damages, under the Directive 2004/35/CE. Consequently, whether general interest requires a justified

[397] ibid paras. 151st.
[398] Case C-379/08, *Raffinerie Mediterranee (ERG) SpA, Polimeri Europa SpA and Syndial SpA v. Ministero dello Sviluppo Economico and others* (2010) para. 19th.
[399] ibid para. 69th.

constraint of its exercise, it will be possible so long as it is balanced and does not unbearably interfere with the effective implementation of the right.[400]

As one can see, the five quoted cases correspond to the whole different types of actions existing in the sample. Nevertheless, they are not the only ones concerning the interplay between property rights and environmental protection. There are two more cases, i.e., seven in total, which match to three preliminary rulings, one appeal, one failure of a member State to fulfil its obligations, and two requests for annulment. The main arguments related to violations to property rights, employed in the last two adjudications, consisted of the revocation of a permit authorising the construction and operation of a landfill site for waste,[401] and the disclosure of information.[402] Once again, the Court of Justice and the General Court decided both judgements against property rights, arguing its social function and the general interest, under similar terms than those quoted in this subsection.

It is worth elaborating a reflection at this point. The idea of exercising property rights, restricted by its social function or the general interest, is not a rare provision in European national legislations, or even around the globe. Both themes exist, sometimes with the same label and sometimes with different ones.

If one scrutinises, for example, the national legal frameworks alluded to in here, one can figure out that all juridical systems include some explicit reference thereon. Thus, the German Constitution establishes that expropriations are permissible for the *public good*, and their compensations should correspond to the *public interest*. Likewise, the Constitution of Luxemburg lays down that property can be limited only for reasons of *public utility*. On its part, the Italian Constitution does expressly recognise the social function of property. Given the United Kingdom does not possess a constitution in the strict sense, so to speak, but rather an "uncodified" one, the reference corresponds to the Law of Property Act. It declares that the discharge or modification of a restriction to the reasonable use of land can base on *public interest*.[403]

Correspondingly, similar allusions appear in other legislations. The Spanish Constitution, for instance, also mentions the social function and public utility of the property,

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[400] Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage (2004) Articles 7 and 11 (4); Case C-379/08, *ERG and others* (2010) paras. 80th and decision.

[401] Case C-416/10, *Križan and others v. Slovenská Inšpekcia Životného Prostredia* (2013) paras. 2nd and 47th (5).

[402] Case T-189/14, *Deza, a.s. v. European Chemicals Agency* (2017) para. 167th.

[403] Official Translation of the Basic Law for the Federal Republic of Germany (1949) Article 14 (3); Luxembourg's Constitution (1868) Article 16; Constitution of the Italian Republic (1947) Article 42; Law of Property Act of the United Kingdom (1925) Provision 84 (1A-b);

while the Hungarian Constitution recognises the social responsibility and public interest. On their part, the French Constitution incorporates the concept of public necessity, and the Belgium Constitution mentions the idea of public purpose.[404]

All these different labels comprise parallel concepts to the Court's notions concerning the social function of property and the general interest. For this reason, it turns out strange that some national tribunals often disagree on this point with the CJEU, deciding in favour of property rights instead of environmental protection. Indeed, it sounds contradictory that governments and the very Court use both aspects, but especially general interest, once to protect ownership and at other times to defend the environment.

In any case, the overwhelming result (100% of the cases) concerning the prevalence of environmental issues over property rights within the CJEU's adjudications could lead wrongly to the perception that there exists a genuine concern for Nature in itself, within the ambit of the Court. Nevertheless, one should keep in mind the conceptions of "social" function of property and "general interests" do not focus on Nature exclusively but rather on human beings. Consequently, if one scrutinises principal subject matters of all cases, one can notice they do refer to environmental issues but related to people's welfare, such as pollution of water and soils, allowances for greenhouse gas emissions, or payments of cross-undertakings. In this line of reasoning, therefore, it is not weird there be any kind of allusion to public and human health as arguments in, at least, five of the seven judgements.[405]

4.2.2 The question of trade

Starting from what one has argued, and recapitulating the idea of the "*disposition*" as a component of the right to property, according to the reasoning set out in chapter three, it is possible to draw a graphic to contrast the results of this section concerning the presumed eco-friendly bias of the Court's adjudications. The chief objective is not necessarily to contradict the upshots already exposed but count on an alternative vision instead, based on a more extensive set of records. Methodologically, it prevents tendentious interpretations by offering the reader more options for analysis.

[404] Spain's Constitution (1978) Article 33 (2): Hungary's Constitution (2011) Article XIII; France's Constitution (1958) Article 17; Belgium's Constitution (1831) Article 16.
[405] Effectively, save the Case C-416/10, *Križan and others*, and the Case T-614/13, *Romonta v. Commission,* all cases include mentions of health.

As mentioned in chapter three, one of the manifestations of the entitlement to "*dispose of*" ownership was the notion of "trade" because it alluded to the transference of property rights from an individual to another. Hence, if one selects those judgements in which one can find any reference to the expressions: "trade", "market", and "commerce", along with their associated terminologies, it is possible to construct a respectable sample of 185 records.

On the other hand, the complete sample includes a variable related to the qualification of the Court's decisions as eco-friendly or not. Evidently, one should warn the criteria to label a judgement as a favourable to Nature, or not, are mostly subjective, given they depend on many factors associated with the eye of the beholder. One empirical example is the authorisation to construct several kinds of public works (e.g., roads, dams, power lines, among other infrastructures). Some people surely deem the existence of an environmental impact assessment warranties the eco-friendly character of the project, while others perhaps believe the mere construction of this sort of installations (despite counting on an accurate ecological analysis) are harmful to Nature. Thence, from this point on, the green character of any judicial resolution, in the assumption of a legal conflict, will rely on the observer's criteria. However, one should bear in mind that, by no means, the label of "non-eco-friendly" must be understood as a *contra legem* decision (i.e., *against the law*). All interpretations got formulated thereon under the assumption of full legality.

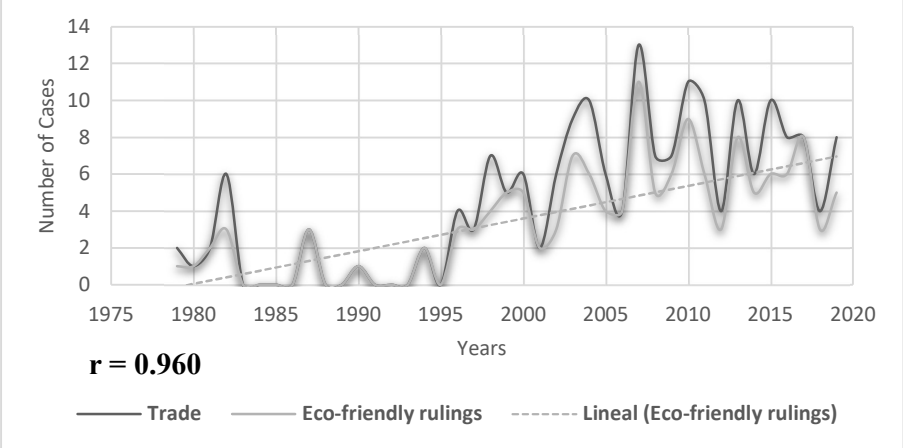
Now, there is a special kind of CJEU's decisions, in which it is feasible to minimise that subjectivity, the declarations of failures by a member State to fulfil its obligations. Effectively, given they usually have to do with breaches of European normative, one could determine as a green variable the accomplishment of European regulations concerning the environment.

In any case, following the general terms of the methodology, chart # 15 reveals the correlation coefficient concerning the set of judgements combining both variables: "trade" and "eco-friendly decisions". As mentioned, the central idea is to confirm the level of their association from an alternative standpoint, a statistical one in this case, given that the quoted application of the social function of property and the principle of the general interest somehow demonstrated the Courts tendency toward the human and environmental valuation of disputes.

A priori, if one considers the entire sample of 185 records, the judgements would be 75% eco-friendly (140) and 25% non-eco-friendly (45), approximatively. Moreover, the chronological bond of variables reaches a remarkably high level of correlation, quite close to 1 ($r = 0.960$), an aspect that definitively corroborates–in practice–the results of the legal

analysis unfolded at the beginning of this subsection. Indeed, as one can notice, it is very illustrative to see how both curves overlap each other in several segments.

Chart # 15 Correlation of eco-friendly judgements concerning trade



Source: CJEU (2019)

In parenthesis, to avoid any methodological misunderstanding or arbitrariness concerning the results of the coefficient, to the extent feasible, one must specify that the series of data related to the environmentally friendly adjudications exclusively corresponds to the sample associated with the variable of "trade" (135 items), namely it does not refer to the complete sequence of eco-friendly rulings (285 items). The reasoning to use the former lies in the very scope of research. The central idea consisted of outlining the ecological behaviour of the Court respecting the judgements of "trade"; consequently, the use of cases with other subject matters would have turned out nonsensical. Anyway, one should be conscious that it is inevitable the existence of some range of biased criteria whatever be the statistical information one chooses.

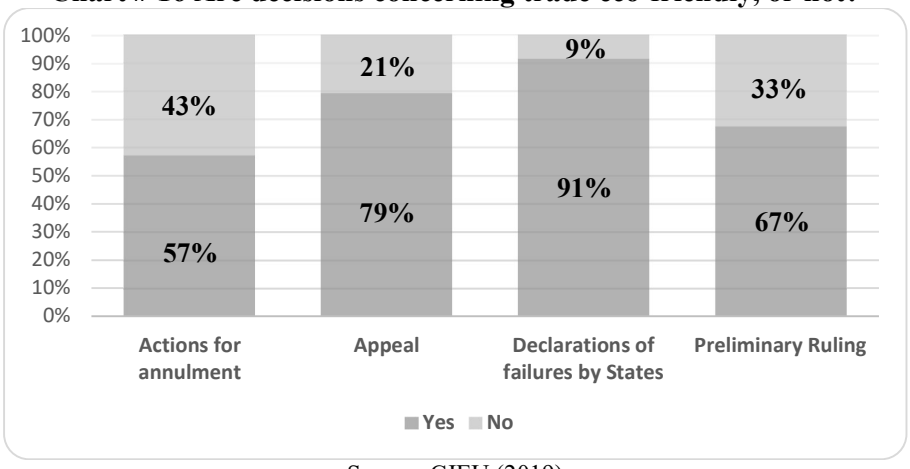
Therefore, for the purpose of maintaining the impartiality of upshots, it is worth pointing out the correlation coefficient between the concepts of "*trade*" and "*eco-friendly judgements*" (the complete sampling) also reached a high standard (r = 0.871). Certainly, this outcome does not attain the levels of association shown in chart # 15; however, the interplay between both variables continues to be remarkably close. It depicts a kind of confirmation concerning the social and environmental tendencies of the Court.

In other words, the most paramount conclusion one can reach, from these results, has to do with the level of conceptual consistency of the Court. In a certain way, the high ranges of correlation are not an isolated statistical effect, but rather they could get linked with the

CJEU's recurrent criteria concerning the prevalence of the social function of property and general interest over ownership and other associated conceptualisations, such as the "trade".

Notwithstanding, if one disaggregates the database in the function of the judicial actions, information adopts a series of quite thought-provoking peculiarities. Thus, for example, requests for annulments and preliminary rulings seem to be more balanced. Instead, the category of appeals experiences a more biased effect than the other groups and the complete set of data, let alone the declarations of failures to fulfil state obligations. As mentioned, though, the presence of the high rate of eco-friendly adjudications within the last category can get explained for the existence of numerous state breaches of European directives. Chart # 16 illustrates the corresponding percentages.

Chart # 16 Are decisions concerning trade eco-friendly, or not?



Source: CJEU (2019)

Other relevant aspects to bear in mind are both the size of each category and the type of action. All entail different effects. Thus, the larger one, in terms of the number of records, is "Preliminary Rulings", with 89 pieces of data. The fact that most judgements (60) correspond to green decisions may positively influence future measures of public policy to protect Nature, at a local level. Although they are solely binding to the specific case in which they were asked for, the Court's interpretations pass to form a part of the provisions and principles of the European law.[406] Likewise, the effects of the preliminary rulings are indirect and not immediate, given they must be applied by the local tribunal or authority that requested them, within the corresponding period. Notwithstanding, they could be useful as references for new proceedings.

[406] ACA-Europe (2013) Effect of the preliminary ruling, para. 2nd.

The declarations of failures by a member State to fulfil its obligations occupy the second place in the function of the number of judgements (58 records). Nonetheless, its scope is quite different from the previous category. As mentioned, its overwhelming quantity of eco-friendly rulings (53 items) is due principally to the high level of legal breaches coming from European countries. The most remarkable difference respecting preliminary rulings lies in the fact that these declarations do not necessarily apply to specific cases in the State of origin. Depending on every situation, therefore, it could represent an environmental advantage if the order from the Court refers to general measures of public policy. Otherwise, it would remain in the orbit of individual circumstances, with limited effects.

Lastly, both appeals (24 judgements) and requests for annulments (14 cases) depict a marginal quantity in front of the total. However, the fact they somehow represent the Court's criteria underlies their importance, especially the former, due to its high rate.

In either event, one must recognise the European Court of Justice depicts better overall conditions to defence the environmental interests than national systems of justice. Still, the lack of a certain commitment concerning the protection of Nature in itself, beyond the human benefits, leads to thinking about a subjacent but constant need for representation.

To conclude, there is jurisprudence endorsing the Court's legal yardstick, which although does not correspond precisely to environmental issues but agricultural ones instead, alludes to and reinforces the notion of the right to property as one of the general principles of European law and its social function. The Court has utilised them as precedents of different adjudications.[407] In addition, albeit they do not have to do with environmental issues at all, there is another set of rulings also employed by the CJEU, as precedents for the valid restrictions of property rights. They mainly refer to taxes, methods of production, fisheries, impounding of goods, copyright, destruction of stocks, trade, security policy, and so forth.[408]

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[407] Case C-44/79, *Liselotte Hauer v. Land Rheinland-Pfalz* (1979) para. 23rd; Case C-265/87, *Hermann Schräder HS Kraftfutter GmbH & Co. KG v. Hauptzollamt Gronau* (1989) para. 15th; Case C-280/93, *Federal Republic of Germany v. Council of the European Union* (1994) para. 78th; Case C-22/94, *The Irish Farmers Association and others v. Minister for Agriculture, Food and Forestry, Ireland and Attorney General* (1997) para. 27th. They have also been quoted indistinctly by Krämer (2002) 95-6.

[408] Case C-5/88, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft* (1989) para. 18th; Case C-177/90, *Ralf-Herbert Kühn v. Landwirtschaftskammer Weser-Ems* (1992) para. 16th; Case C-306/93, *SMW Winzersekt GmbH v. Land Rheinland-Pfalz* (1994) para. 22nd; Case C-44/94 *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte National Federation of Fishermen's Organisations and others and Federation of Highlands and Islands Fishermen and others* (1995) para. 55th; Case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transport, Energy and Communications and others* (1996) para. 21st; Case C-200/96, *Metronome Musik GmbH v. Music Point Hokamp GmbH* (1998) para. 21st; Joint Cases: *Booker Aquacultur Ltd* (C-20/00) *and Hydro Seafood GSP Ltd* (C-64/00) *v. The Scottish Ministers* (2003) para. 68th; Joint Cases *Di Lenardo Adriano Srl* (C-37/02) *and Dilexport Srl* (C-38/02) *v. Ministero del Commercio*

4.2.3 Ownership as a prerequisite to obtaining an eco-friendly decision

As mentioned in the introductory section of this chapter, one of the research hypotheses had to do with the relationship between ownership, as a specific feature of litigants, and the achievement of a ruling favourable to environmental interests. Hence, the procedure of analysis consisted of a perusal, case-by-case, of the whole sample, searching for relationships of property between the parties and natural resources. In contrast to the initial assumptions, the number of owners who have been part of litigation, even within requests for preliminary rulings (indeed those cases are the majority), is quite marginal, that is, only 14.65% of the petitioners and defendants were owners.

Another preliminary presumption one would have to dismiss corresponds to the idea that litigants were owners of natural resources. In practice, save specific cases in which the parties of the disputes were landowners, the relationships of property referred instead to diverse economic interests, businesses, and other related commercial activities. Under this perspective, although it could sound meaningless, the shipload of boats prosecuted for fishing without a license in the early eighties could have been probably the closer examples to the ownership over natural resources. Therefore, when one speaks about property rights, within the ambit of the sample elaborated in the present research, it means a genuine connection of ownership between one of the litigants, or parties in the main dispute, and lands, companies, shares, and other similar businesses.

Furthermore, one should also consider the warning about the subjectivity of labelling a judgement as eco-friendly, under the same terms explained in the preceding subsection, i.e., the qualification depends on the perspective of the observer, without including *contra legem* decisions. In this line of thought, one should also deem if owners, either applicants or defendants, are trying to attain eco-friendly rulings as their goal or not. Indeed, most of the time, holders of property rights do not mind for environmental aspects. They are merely attempting to protect their interests.

All these methodological restrictions lead to rethinking about the premises of the initial hypothesis. To meet that purpose, for the time being, the first step would be to stop thinking

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con l'Estero (2004) para. 82nd; Case C-347/03 *Regione Autonoma Friuli-Venezia Giulia and Agenzia Regionale per lo Sviluppo Rurale (ERSA) v. Ministero delle Politiche Agricole e Forestali* (2005) para. 119th; Joint Cases: *Yassin Abdullah Kadi* (C-402/05 P) *and Al Barakaat International Foundation* (C-415/05 P) v. *Council of the European Union and Commission of the European Communities* (2008) para. 355th.

about a probable association between ownership and the green character of the adjudications. So, the obvious question would involve figuring out if owners – due to such condition – are or not capable of obtaining a favourable decision, more frequently than those litigants who do not possess any belonging concerning the subject matter of the judgement. Notice one does not refer to specific resolutions biased towards ecological implications. It deals with a much simpler assumption, with far-reaching repercussions, i.e., property rights somehow influencing the result of a judicial proceeding.

Before presenting the graphic, one should warn that the case C-315/16 got excluded from the sample. For informative purposes, the judgement refers to a preliminary ruling for ***József Lingurár v. Miniszterelnökséget vezető minister (2017)***, requested by the Supreme Court of Hungary (*Kúria*). In the main dispute, the claimant demanded compensatory support for his forest plots, the principal object in conflict, predicated on the network Natura 2000, which the Chancellery of the Prime Minister initially had refused.[409]

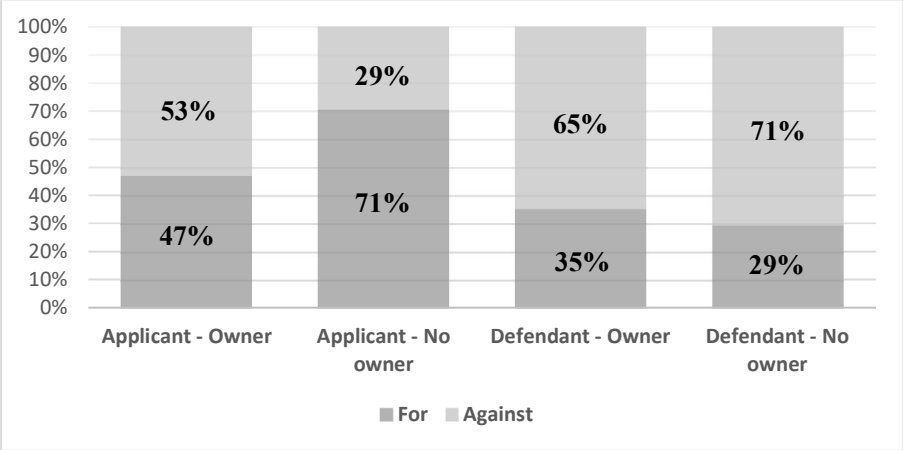
The core methodological issue consists of both litigants share the property of the forest lands. Consequently, the inclusion of this judgement into the database employed to draw the chart would bring about duplication of records, altering the results wrongly. In that regard, it would turn out preferable to reduce the sample in one solely item to obtain more adequate results, than to maintain it entirely and acquire inexact outcomes. In any event, the exclusion of the adjudication is merely temporal and applicable only to this specific situation. It does not mean a definitive elimination from the sample.

In addition, as one will notice in the next illustration, the information corresponding to "no-owners" experiences a "mirror effect", owing to the fact that the data for applicants and defendants is evidently the same. So, chart # 17 below shows the initial upshot.

Curiously, as one can observe, the condition of the holder of property rights does not warranty any success concerning the application or defence, as appropriate. Quite the opposite, the data evidence it is more probable that claimants, who dispose of the condition of owners, lose the disputes, or obtain unfavourable decisions. Indeed, in 52.94% of the cases, the plaintiffs-owners lost the judgements or received an adverse ruling. In any case, the difference is not too significant (only two records) and could vary the forthcoming years. The situation is entirely opposed when the applicants are not owners. They have obtained successful results in more than 70% of the proceedings.

[409] C-315/16, *József Lingurár v. Miniszterelnökséget vezető minister* (2017) para. 16th.

Chart # 17 Court's decisions for and against the litigants (%)

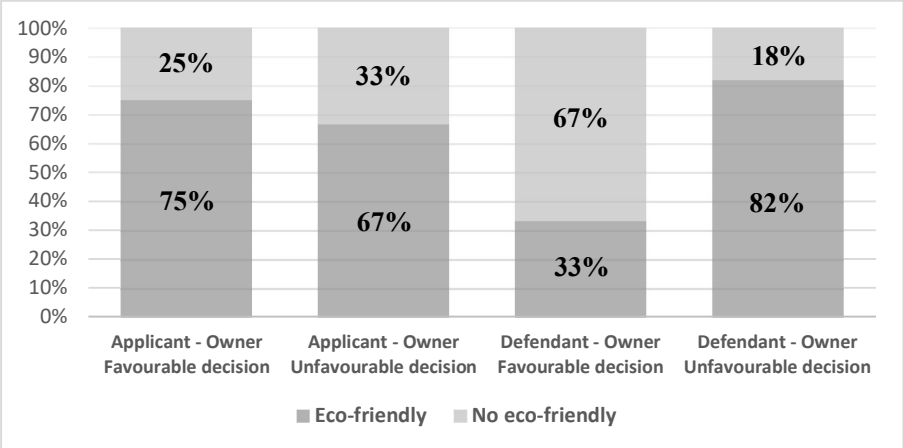


Source: CJEU (2019)

Likewise, the circumstance of respondents is not too different when they are owners. It is even more disadvantageous. Thus, in 64.71% of the occasions, defendants-owners have lost the judgements, or received an adverse ruling. Unlike the applicants, the defendants are worse off when they are not owners, winning the trials or obtaining favourable decisions only in 29.37% of the times.

Now, if one compares the data concerning the judicial actions brought by owners (in this point it is possible to know precisely the number of records) with the information about the eco-friendly decisions, one could speculate, as it were, on the original intentions of the claimants. One should recall, one more time, the qualification of the environmental character of adjudications is subjective. Something similar applies to defendants.

Chart # 18 Eco-friendly rulings when litigants are owners (%)



Source: CJEU (2019)

The bar chart above could have various readings. In that regard, one should begin mentioning the more self- evident ones. Firstly, something one knows beforehand is that when the owner is the claimant, most decisions are environmentally friendly. It does not mean, nevertheless, the proprietor always obtains adjudications favourable to its interests. So, if one takes a glance at hard data, one can figure out the proportion is virtually half-and-half. A second visible aspect is that when the owners are the respondent, the adjudications are also ecologically benign but involving a radical difference: the rulings often includes adverse conditions to their interests most of the time. Moreover, the gap is much more extensive.

Now, there is a set of attractive nuances that one cannot deduce directly from what the previous charts show. So, for example, proprietors who bring lawsuits do not always search for decisions in favour of Nature. Indeed, just a little more than half of the applicant-owners were looking for green sentences (52.94%). By the way, this last percentage comes from the addition of eco-friendly rulings, either favourable or not so, in which the owners were petitioners. This affirmation also constitutes, however, a subjective argument because most of the time the environmental interests are only ancillary of the personal ones. If one scrutinises the database, one confirms those applicants are primarily individuals and private companies defending their lands or businesses. There are also one environmental organisation and one municipality, and that is it. Placing this reasoning in statistical terms, one may assert that only half of the petitioners attempt to achieve an eco-friendly ruling before the CJEU. Still, from that segment, 67% of plaintiffs reach an environmentally successful adjudication. It deals with relatively encouraging figures for Nature.

When owners occupy the place of defendants, they hardly acquire favourable adjudications, let alone ecologically successful ones. Tellingly, although most rulings are eco-friendly, they come mainly from adverse decisions to respondents, that is, 64.71% of the judgements are environmentally fruitful, but in more than 80% of those cases, the defendants lost the proceedings. Additionally, only 23.53% of defendant-owners were seeking green adjudications. Among them, one can identify individuals, a private company, and a local government.

Summing up, although one could relatively associate the condition of proprietor with environmentally friendly rulings, especially in the case of applicants, from the statistical perspective, it is not entirely clear if the original intention of the litigants gets oriented toward the achievement of such an objective. Quite the opposite, the context of the disputes appears to demonstrate the ancillary character of the ecological interests respecting private ones.

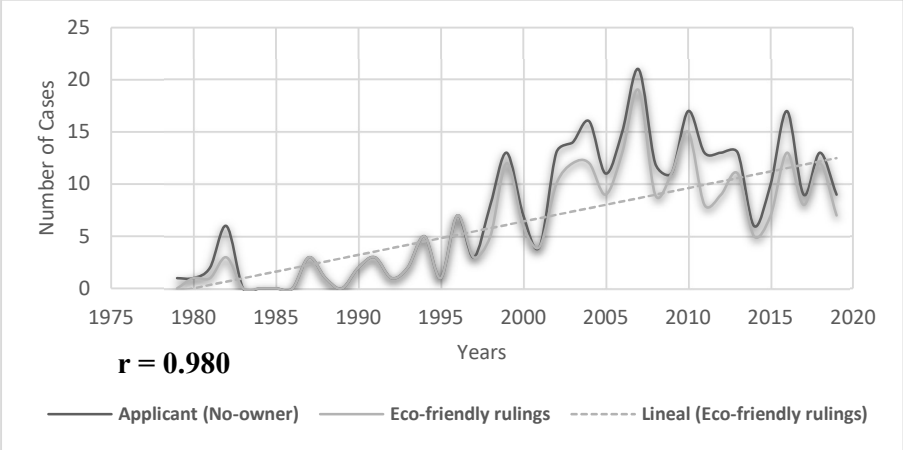
4.2.4 What happens when the litigants are not proprietors?

Although this subsection did not initially aim at describing the relationship between non-owners and eco-friendly rulings, both the result of the correlation coefficient (r = 0.980) and the tendency of the curves provide thought-provoking material to comment. Firstly, it calls attention the dramatically high level of the coefficient, whose explanation has to do with the elevated incidence of declarations of failure by the member States to fulfil their obligations (54.80% from the total sampling).

As usual, within these proceedings, the European Commission participates as claimant, while the European countries do as respondents. Obviously, none of these litigants intervenes as proprietors in the disputes. Under these circumstances, the European Commission claims genuinely for environmentally friendly decisions, predicated on the breaches of European Law, without any particular interest in property rights. If one takes into account that 93.84% of the favourable adjudications, obtained by the Commission, are eco-friendly ones, so it is possible to draw an explanation concerning why the coefficient is so high.

On its part, preliminary rulings are 34.40% of the total sampling, being 71.07% its rate of favourable eco-friendly decisions. Therefore, as one can see, its contribution to the results of the coefficient is also remarkable. Ultimately, one could affirm the percentages of appeals (7.60%) and requests for annulments (3.20%) turn out marginal. Chart # 19 below illustrates the curves.

Chart # 19 Correlation between eco-friendly judgements and non-owners



Source: CJEU (2019)

As already expounded in the case of "trade" database (chart # 15), one should consider the precedent graphic does not refer to the complete sequence of eco-friendly rulings (285 records), due to parallel reasons. The core idea consisted of describing the interplay of claimants and defendants who do not possess any right to property (250 records). Consequently, information about owners would have turned out impractical. Nevertheless, to warranty impartiality as far as possible, one should report a correlation coefficient of r = 0.962, which continues to be highly illustrative of a close association between both variables.

Lastly, the information about defendants does not display, given the data experienced a "mirror effect", as mentioned some lines above so that the illustration would be the same but upside down.

4.3 Representation of Nature

4.3.1 Who does defend the interests of Nature before the CJEU?

The third judicial hypothesis of the present research aims at enquiring about if there is anybody capable to exercise any form of representation of Nature before international tribunals, through the application of the legal framework currently in force. To respond to this query, the analysis of judgements concerning the assessments of the environmental impacts (EIA) of projects was fairly valuable. Likewise, it is worth recalling that there was already a subtle suggestion about the need to count on Nature's representation at the beginning of this section.

The execution of public and private projects is quite probably one of the best examples of the tensions between property rights and environmental protection. Equally, it is the perfect scenario where the need for someone who takes over ecological interests becomes visible. Indeed, although the kernel of the judicial disputes does not always rest upon ownership or representation, both aspects often lie behind the motivation of lawsuits concerning revisions of permits and monitoring.

To illustrate this assertion, one can utilise the preliminary ruling petitioned by the Austrian Administrative Court (*Verwaltungsgerichtshof*) concerning the action brought by the ***Municipality (Marktgemeinde) of Straßwalchen and other 59 claimants against the Federal Ministry for Economy, Family and Youth (Bundesminister für Wirtschaft, Familie und Jugend)***. The main proceeding referred to a decision authorising the company *Rohöl-Aufsuchungs AG* to carry out exploratory drilling of natural gas up to a total quantity

of one million cubic metres, without counting on an environmental impact assessment. According to the national tribunal, the company foresaw the extraction of 150 to 250 thousand cubic metres of gas per day, on average. Moreover, the experimental production principally aimed at proving if it was economically viable,[410] i.e., it concerned to a dichotomy between ownership and environmental protection.

In this regard, the central query of the referred tribunal before the CJEU bore upon the pertinence of categorising the trial production of natural gas as an "*extraction for commercial purposes*".[411] In a certain way, the question was kind of suggestive; one could even say unnecessary. The reason was that Directive concerning Environmental Impact Assessment [EIA Directive, currently repealed] provided that this type of extractions had to count on an environmental impact assessment, so long as the extracted amount exceeds 500 thousand cubic meters per day.[412] As the very Court observed, however, the application of the standards established in the EIA Directive did not make sense, because the limit authorised to Rohöl-Aufsuchungs AG was unrelated to the Directive's threshold.[413]

In the end, the CJEU rejected the arguments formulated by the claimants, considering that drilling intended for establishing the cost-effectiveness of a natural source did not come within the scope of the invoked provisions. Nevertheless, it also ruled about the obligation of counting on an environmental assessment, alluding to a different article within the same Directive. The Court demanded that elaboration of the EIA, deeming the depth of the drilling operation (4,150 metres), instead of the quantity of production.[414]

To sum up, it seems clear this decision denotes the prevalence of environmental issues over property rights before the Court. Nonetheless, it also allows noticing that national public authorities and private entities align themselves with the notion of economic interests, even defending the scope of those arguments conceptually. Under these circumstances, at least during the administrative procedure, it turns out quite curious that, except for the

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[410] Case C-531/13, *Marktgemeinde Straßwalchen and Others v Bundesminister für Wirtschaft, Familie und Jugend* (2015) paras. 1st, 10th, and 12th.
[411] ibid para. 18th (1).
[412] In consonance with the CJEU's ruling, the allusion involves point # 14 of Annex I of the Council Directive 85/337/EEC (1985), which had been added through Article 1(15) of the Council Directive 97/11/EC (1997). This provision was amended by Article 31 of the Directive 2009/31/EC (2009) on the geological storage of carbon dioxide. At present, Directives 85/337/EEC and 97/11/EC are thoroughly abrogated, likewise Article 31 of the Directive 2009/31/EC, which had modified the aforesaid point # 14 of Annex I. The rest of the Directive 2009/31/EC is in force. In addition, Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment constitutes the legal framework in force, which repealed and replaced all quoted directives. Within this legal text, the normative reference of the case is still point # 14 of Annex I. See Directive 2011/92/EU (2012), Annex V, Part A.
[413] Case C-531/13, *Marktgemeinde Straßwalchen and others* (2015) para. 24th.
[414] ibid Resolution; Council Directive 85/337/EEC (1985) [repealed], Article 4 (2) and Annex II, point # 2(d).

Municipality (claimant accompanied by a group of potentially affected people), no public authority nobody seems to take over ecological interests. For this reason, one can argue the CJEU played a critical role in terms of representation, within this proceeding, by deciding against the original criteria coming from the Austrian Ministry that authorised the project without environmental warranties.

Another example concerning the building of projects, in which the Court neither aligned with the Member State's opinion, can be found in ***Commission v. Spain (2004)***. In its judgement, the CJEU decided against the Spanish government due to the lack of "[…] *an assessment of the effects on the environment of the project for a Valencia-Tarragona railway line, Las Palmas-Oropesa section. Roadbed*". As the chief argument of exculpation, the defendant affirmed that the environmental impact assessment was not necessary for those works implying an enhancement of existing infrastructure, that is, the installation of a single track did not constitute the construction of a new railway line.[415]

Beyond the environmentally friendly character of this ruling, what one should emphasise is the fact that the intervention of a supranational entity is sometimes required in order to avoid certain overindulgence in the application of national, and sometimes even international, legislation. In other words, it is crucial to count on an actor endowed with enough [political/legal?] power to influence local public decisions. From a brief analysis of the Spanish government's discourse, one can infer a marked bias in favour of the execution of public works. Interestingly, lexical uses are evidence. They characterise the recurrent employment of expressions such as "not necessary", "not required", "not applicable", "not intended", "not apply", or "not subjecting to".[416]

To continue, the already quoted proceeding of ***Jozef Križan and others v. the Slovak Environment Inspection [Slovenská Inšpekcia Životného Prostredia] (2013)*** constitutes other attractive judgement to analyse relating to the strains between property rights and environmental protection. Furthermore, it includes a couple of elements of dispute, public participation– understood under the terms of the Aarhus Convention– and the incomplete or incorrect development of processes to evaluate environmental impacts. The case has had such a level of repercussions among the environmentalists, to the point it got included in the

[415] Case C-227/01, *Commission of the European Communities v. Kingdom of Spain* (2004) Resolution, para. 37th.
[416] ibid paras. 17th, 36th, 37th, 39th, 41st, 44th, and 45th.

Global Atlas of Environmental Justice, an online platform aimed at documenting and cataloguing social conflicts regarding environmental issues.[417]

By and large, the judgement referred to a request for a preliminary ruling, asked by the Supreme Court of the Slovak Republic (*Najvyšší súd Slovenskej Republiky*), regarding the issuing of an authorisation to construct and operate a landfill site in a former quarry, located in Pezinok. Jozef Križan, along with other 43 residents, filed a lawsuit questioning the lawfulness of the permit, granted by the Environment Inspection in favour of the company *Ekologická Skládka.* The claimants principally invoked a breach of the Slovak law, by which the application coming from the waste company was incomplete as far as it did not include the urban planning decision on the location of the landfill site. Furthermore, they also argued the defendant has denied publishing the mentioned decision, based on its commercially confidential character.[418]

As one can read in the judgement, the proceedings underwent two phases. Firstly, during the administrative stage, the company lodged the waste permit before the Environment Inspection Authority of Bratislava (*Inšpektorát Životného Prostredia Bratislava*) in September 2007. In November, given the alluded lack of the urban planning decision, that local authority requested the company the submission of such a document. In December, *Ekologická Skládka* presented it but warning its commercially confidential character. So, the company did not publish it, according to the parameters of the Aarhus Convention. On its part, the authority neither conveyed that urban planning resolution to the plaintiffs. Lastly, in January 2008, the Authority of Bratislava conferred the company the authorisation. Disagreeing, the claimants appealed that authorisation before the second instance body, i.e., the Slovak Environment Inspection, who published the urban planning decision between March and April 2008 but dismissed the appeal as unfounded in August.[419]

Secondly, as part of the judicial stage, the plaintiffs brought a lawsuit against the mentioned dismissal before the Bratislava Regional Court (*Krajský súd*), which dismissed their action in December 2008. The petitioners appealed before the Supreme Court of Slovakia afterwards, whose result was favourable to them for the first time during the whole procedure. Effectively, this tribunal suspended and annulled the integrated permit in May 2009, predicated mainly on the fact that both administrative authorities "[…] *had failed to observe the rules governing the participation of the public concerned in the integrated*

[417] EJAtlas (2020) para. 1st.
[418] Case C-416/10, *Križan and others* (2013) paras. 1st, 2nd, 32nd, 33rd, and 36th.
[419] ibid paras. 31st to 37th; Aarhus Convention (1998) Article 9 (2 and 4).

procedure and had not sufficiently assessed the environmental impact of the construction of the landfill site".[420]

Nevertheless, in June 2009, *Ekologická Skládka* brought a claim before the Slovakian Constitutional Court (*Ústavný súd Slovenskej Republiky*), obtaining a revocation of the Supreme Court's ruling. Among other reasons, the Constitutional Court overruled the appealed decision arguing the infringement of the company's ***right to peaceful enjoyment of its property***, recognised by both the Slovakian Constitution and the Additional Protocol to the European Convention on Human Rights. Furthermore, it determined that the Supreme Court had exceeded its powers by examining the legal principles of the environmental impact assessment, "[…] *even though the appellants had not disputed them and it lacked jurisdiction to rule on them*". Ultimately, the Constitutional Court referred the case back to the Supreme Court so that it can give a fresh ruling.[421]

Under those circumstances, the Supreme Court decided to stay the proceedings and request the preliminary ruling, in which solely one of the five questions posed to the CJEU had to do strictly with property rights. Notwithstanding, one could affirm the second query was somehow relating to them as well, in terms of the commercial or industrial confidentiality. In any case, the national tribunal asked:

> *Is it possible,* ***by means of a judicial decision meeting the requirements*** *of Directive [96/61] or Directive [85/337] or Article 9(2) and (4) of the Aarhus Convention, in the application of the public right contained therein to fair judicial protection within the meaning of Article 191(1) and (2) [TFEU], concerning European Union policy on the environment,* ***to interfere unlawfully with an operator's right of property*** *in an installation as guaranteed, for example, in Article 1 of the Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, for example by revoking an applicant's valid integrated permit for a new installation in judicial proceedings?*[422]

There are several relevant regulations thereon. Firstly, the pertinent section of the Aarhus Convention lays down that each party should ensure that the public concerned has

[420] ibid paras. 38th to 41st.
[421] ibid paras. 43rd and 45th; Constitution of the Slovak Republic (1992) Article 20 (1); Additional Protocol to the European Convention on Human Rights (1952) Article 1.
[422] Case C-416/10 ibid para. 47th (5).

access to review any proceeding before an autonomous and neutral entity established by law and bring into question the legality of any ruling. For this purpose, the procedures should "[…] *provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive*". In context, beyond the favourable or disadvantageous nature of the administrative and judicial results, obtained by Mr Križan and the other plaintiffs, one can corroborate that both the Slovakian authorities and the legal system represented a warranty of the Aarhus Convention's provisions in this field. Indeed, they imply by no means a hindrance to the exercise of property rights. This was precisely the opinion of the CJEU to reply to the fifth question, i.e., the implementation of the international law was "[…] *not capable, in itself, of constituting an unjustified interference with the developer's right to property* […]".[423]

Secondly, within the text of the adjudication, there is an allusion to the [currently abrogated] Directive 96/61 with respect to the integrated pollution prevention and control, which contained a very similar provision to that one already cited as part of the Aarhus Convention. It establishes the same procedural guarantees of access to decisions, acts, or omissions concerning public participation so that both analyses turn out notoriously interconnected. Finally, one last reference corresponded to the EIA Directive regarding the necessary environmental assessment of the effects of the projects. This aspect neither alters the exercise of property rights in any shape or form.[424]

In either event, beyond the appropriate or inappropriate legal implications over public participation in projects, the lack of a national tribunal's jurisdiction to decide about environmental questions unfailingly leads to an absence of representation relating to ecological interests or, at least, the welfare of those people to whom the project could

[423] ibid para. 116th; Aarhus Convention (1998) Article 9(2) and (4).

[424] According to the text of the CJEU's ruling, the reference corresponds to the Article 15a of the Council Directive 96/61/EC concerning integrated pollution prevention and control (1996) [no longer in force], in its modified version by the Regulation 166/2006/EC concerning the establishment of a European Pollutant Release and Transfer Register (2006), which is currently in force. However, the extract quoted in the adjudication was not really incorporated by the alluded Regulation 166/2006/EC. Indeed, the correct reference about the insertion of Article 15a is located in the set of amendments to the Directive 96/61/EC, issued in the Article 4(4) of the Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment (2003), which is currently in force as well. Some years later, the Council Directive 96/61/EC was repealed by the Directive 2008/1/EC concerning integrated pollution prevention and control (2008), in which the provision at issue was codified in Article 16. Finally, this Directive 2008/1/EC was also repealed by the Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions [integrated pollution prevention and control] (2008), which is currently in force and whose respective provision is located in Article 2; Council Directive 85/337/EEC (1985) Article 2 (1 and 2), currently repealed.

potentially affect. Within the administrative phases, something similar occurs with decision-makers.

Without appearing too much exaggerated, the fact that a private company, such as *Ekologická Skládka*, had set conditions on information, illustrate quite clearly how a private interest could unfairly restrict the exercise of people's rights, let alone Nature's ones. Effectively, when the company submitted the missing document about the project's location, it did it under the prevention to be revealed, due to reasons of commercial confidentiality. In this regard, the CJEU has been strict in rejecting the use of trade secrets as a justification of any breach of the Aarhus Convention or the European law, even throughout different institutional reports.[425]

By way of conclusion, although the CJEU denied the arguments about the impairment of property rights, upheld by both the enterprise and the Constitutional Court, one should not completely ignore the fact that the representation of environmental interests, and even people's, are often ineffective at a national level. Therefore, the intervention of the CJEU turns out once again crucial to represent Nature, either invoking the general interest and the social function of property or prioritising the people's rights to participate in the public decision-making processes. Both aspects contribute to the protection of Nature over private interests.[426]

Another manner of exercising the representation occurs through the intervention of private entities. One can find an example in ***TestBioTech eV and others v. Commission (2016)***, a judgement that bears on a lawsuit aimed at the annulment of a 2013-decision by which the European Commission authorised to Monsanto Europe SA the "[…] *placing on the market of products containing, consisting of, or produced from the genetically modified soybean* […]", following the guidelines of the Regulation 1829/2003/EC.[427]

Within the administrative procedure, the European Food Safety Authority (EFSA) found "[…] *the modified soybean was, in the context of its intended uses, as safe as its non-genetically modified comparator with respect to potential effects on human or animal health or on the environment.*" The European Commission employed this assertion as a foundation

[425] For example, see Court of Justice of the European Union (2017) 10.
[426] Case C-416/10, *Križan and others* (2013) paras. 113th and 114th. The Court employed the recurrent case-law to support its judgement, i.e., Case C-379/08, *ERG and others* (2010) paras. 80th and 81st; Case C-240/83, *Procureur de la République v. Association de défense des brûleurs d'huiles usagées* (ADBHU) (1985) para. 13th; Case C-302/86, *Commission of the European Communities v. Kingdom of Denmark* (1988) para. 8th; Case C-213/96, *Outokumpu Oy* (1998) para. 32nd.
[427] Case T-177/13, *TestBioTech eV and others v. European Commission* (2016) para. 6th; Regulation 1829/2003/EC on genetically modified food and feed (2003) Articles 4 (2) and 16 (2).

to issue the authorisation in favour of distinct uses, except cultivation. On their part, the applicants claimed that this evaluation "[…] *was flawed, that the synergistic or combinatorial effects had not been taken into consideration, that the immunological risks had not been adequately assessed and that no monitoring of the effects on health had been required.*"[428]

During the judicial stage, the General Court ultimately dismissed the action, arguing the plaintiffs could not explain the "[…] *significant differences identified between the modified soybean and its conventional counterpart* […]", among other reasons. Despite the fact that the decision seemed to be unfavourable to environmental interests, at least indirectly, it yielded suggestive opinions on the contrary. Vesco Paskalev, for example, provocatively entitled his article: *Losing the Battle, but Winning the War?* He asserted that access to justice widened in terms of admissibility of actions towards non-governmental organisations, which meant an outstanding opportunity for promoting the representation of environmental interests, from the private sector. Furthermore, it was also good news the Commission not be necessarily obliged to authorise processes involving GMO, Paskalev himself pointed out, which have been scientifically approved by the EFSA. It would allow the Commission focusses more seriously on its responsibility of "[…] *determining the appropriate level of protection for society*" and, accordingly, also a level of protection for the ecosystem. There is another allusion concerning this aspect in the case of *Dow AgroSciences Ltd. and others v. Commission (2011)* as well.[429]

It is worth clarifying that the compulsory character of the EFSA's opinion, in compliance with the General Court's reasoning, relies on specific provisions of Regulations 1829/2003/EC and 178/2002, namely if the Commission adopts its decision according to Articles 7 and 19 of Regulation 1829/2003/EC, it is compelled to consider the EFSA's view. At the same time, if it issues an authorisation grounded on Articles 4 and 16 of Regulation 178/2002, it is not bound. The difference between both sets of provisions rests upon the regulation's literal sense. The former explicitly reads "*taking into account the opinion of the Authority*", while the latter does not include any express reference thereof.[430]

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[428] Case T-177/13, ibid paras. 5th, 6th, and 8th.
[429] ibid paras. 283rd and 292nd; Case T-475/07, *Dow AgroSciences Ltd. and others v. European Commission* (2011) paras. 87th and 148th; Paskalev (2017) 585.
[430] Case T-177/13, ibid paras. 100th and 103rd; Regulation 1829/2003/EC (2003) Articles 4, 7, 16 and 19; Regulation 178/2002/EC laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (2002) Articles 22(6) and 23(c).

On the other hand, the EFSA's competence to provide scientific opinions and technical support according to the areas of its mission is based on Regulation 178/2002/EC. In any event, it seems to be a merely procedural question, given that the Court itself highlighted the absence of provisions that compel the Commission to comply with EFSA's opinion. To put it simply, the Commission is probably to take into account the scientific assessment by EFSA, but it does not have an obligation to act in accordance.[431]

Summing up, the output coming from this proceeding has a twofold implication. Firstly, it constitutes valid evidence of how private institutions could, although under intermittent circumstances, be in charge of the defence of Nature in the international arena. If anything, it is an option. But, secondly, the judgement also illustrates that the environmental discourse does not always reach the forcefulness enough to cope with real ecological threats. Human health continues to be a more convincing argument than the protection of Nature before the Court.

4.3.2 The legal representation of Nature's interests in statistics

The judgements analysed in this section, compiled under the category of "environmental impact assessments", portrays just a small picture of the manner how countries cope with the environmental impacts, stemmed from the human activities, within their respective circumscriptions. In this regard, although the texts of decisions do evidence the failures to comply with the green requirements clearly, they do not seem to offer enough idea of the real frequency of occurrence, at least, in quantitative terms.

In other words, quantitatively speaking, statistics of judgements could afford a broader and better perspective of the situation, given that the series of data somehow allow seeing the timeline of the cases and not only a static image concerning a specific circumstance, namely the comprehensive set of records shows the performance of the countries in the fulfilment of environmental conditions. Moreover, the curves and graphics can also show the national tendencies respecting green requirements altogether.

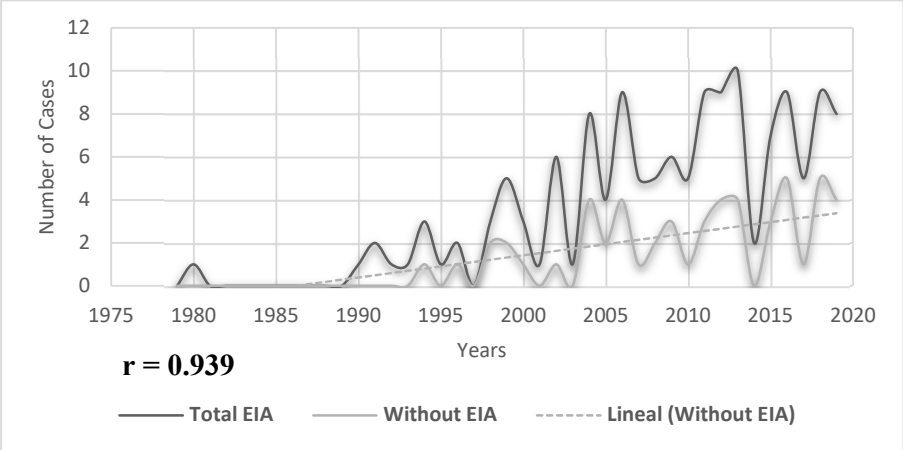
Consequently, the respective series of data comprises all the records concerning the category so-called "*Assessment of the effects of certain public and private projects*", in which the EIA Directive (85/337/EEC) and its amendments have been applied or alluded.

[431] Case T-177/13 ibid para. 102nd and 103rd.

The whole information evidently comes from the original environment/property sample of 355 records, resulting in a new sampling of 141 items in total.

By and large, the line chart below compares the total number of adjudications concerning the evaluation of the effects of public and private projects with the number of decisions in which there is any evidence of failures to fulfil the legal requirement of counting on an adequate environmental impact assessment. Thus, speaking about an "inadequate" EIA refers to three specific assumptions: (1) when national authorities had granted permits, licenses, or any other similar enabling document to construct or operate projects or works, without counting previously on an EIA, (2) the EIA was incomplete, or (3) the EIA did not observe the parameters of the European Directive.

Chart # 20 Public and private projects or works without adequate EIA



Source: CJEU (2019)

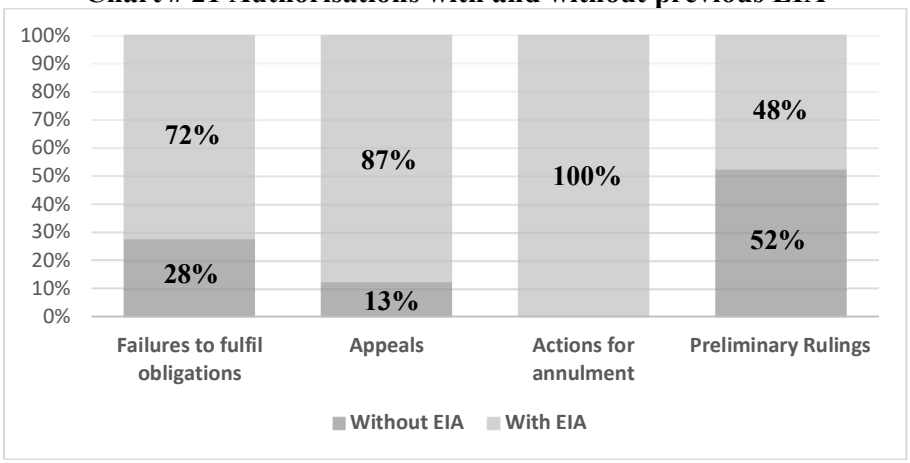
If anything, as one can see in chart # 20, although the line of tendency concerning those projects or works without EIA does not experience uniform or consistent growth but rather abrupt oscillations, it does show an ever-increasing trend. It is not good news, environmentally speaking, because it means more ecological breakdowns over the forthcoming years. Indeed, the increase in projects and works without EIA during the last five years has already been significant. In 2019, for example, that rate reached half of the records, while in 2016 and 2018 the absence of EIA was higher (56%). A final curious remark consists of the first environmental failure dates barely from 1994.

Unlike the case of eco-friendly rulings in trade, the results set out in this subsection are not subjective. The lack of EIA, its incorrect elaboration, or the overlooked requirements of the EIA Directive constitute textual references into the judgements, that is, there is evidence

of how litigants or authorities failed to fulfil those green obligations. As one will see in the bar chart # 21, the global rate of projects without EIA seems to be quite high (38.30%).

Someone could question, however the qualification of the severity of results, arguing that 38.3% is still far enough from the middle. In the end, one always could assert that qualitative reasoning depends on the eye of the beholder. In response, one should ponder that if national authorities granted permits to four out of ten public or private projects or works without an adequate EIA, their valuation of environmental issues differs substantially from the perspective of the Court. Moreover, it means that those governmental entities approving human interventions without EIA do not represent ecological interests at all at the local level.

Chart # 21 Authorisations with and without previous EIA



Source: CJEU (2019)

Furthermore, one can disaggregate the series of data by types of actions, which allows individualising the statistical outcomes. As one can notice in the bar chart below, the larger group corresponds to preliminary rulings with 67 records of 141 (47.52%). These decisions precisely represent the highest levels of breaching the European law in this subject matter. In fact, they are the only class of judgements in which the issuing of authorisations or permits to construct and operate projects or works without complying previously with environmental requisites constitute the most of the cases (52.24%) over the whole period. The upshot is particularly suggestive in this case because, as mentioned earlier, preliminary rulings are queries posed by national authorities before the issuing of a decision. Consequently, it illustrates the absence of public or private entities that can depict the interests or Nature at the local administrative level.

On the other hand, although the figures derived from the other judgements are not so much impressive as the previous ones, it is worth mentioning them, at least, as additional references. Thus, the second category in terms of percentage–almost so relevant as the preliminary rulings–was the declarations of failures to fulfil state obligations, with 65 records (46.09%). In this series of data, one can find 18 incongruities concerning the environmental impact assessment (i.e., in 28% of the cases). This category is admittedly high (3 out of 10 involving any kind of legal error). Nevertheless, one has to keep in mind the dependence on the eye of the observer.

Ultimately, the other two categories are merely marginal so that it is enough to say both only depict 6.38% of the sample and register solely one authorisation without a prior EIA out of nine in total.

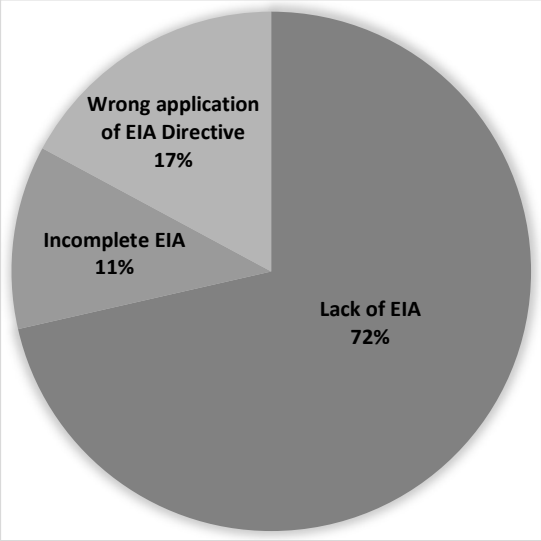
Now, considering the importance of preliminary rulings and declarations of failures to fulfil state obligations, it is worth displaying their individualised results in the function of the three categories described above of mismatches, (1) lack of EIA, (2) incomplete EIA, and (3) non-observance of EIA Directive.

As one can observe in the following chart # 22, the bulk of legal errors in the process of environmental impact assessment correspond to lack of EIA before the issuing of authorisations (25 records of a total of 35). It does not mean necessarily, however, negligence or non-observance of national and European law. When one reads the texts of the adjudications, it is not hard to find some answers, which usually are very simple but, in turn, persuasive.

So, the whole 25 judgements mentioned above involve the legal systems of Austria, Belgium, Germany, Greece, Italy, Lithuania, Luxembourg, and the United Kingdom. Coincidentally, save Lithuania, all those countries have faced more than one lawsuit, coming from the Commission, for having failed to fulfil obligations of transposition from European law to their respective national legal systems. Of course, that transposition is related to environmental impact assessments. Moreover, one can notice that all those countries have lost at least one proceeding thereon. In consequence, there is evidence that European law has not always applied in this subject matter at the national level, having not been transposed in time. And, on the other hand, it follows that the execution of EIA previously to the issuing of authorisations to construct or operate projects or works was not always a lawful requisite according to national laws. One can also corroborate this assertion by consulting the judgements. Therefore, under this logic, the fact that local authorities and judges have not

demanded the accomplishment of this step seems to be understandable, although maybe not entirely justifiable.

Chart # 22 Inadequate EIAs in Preliminary Rulings



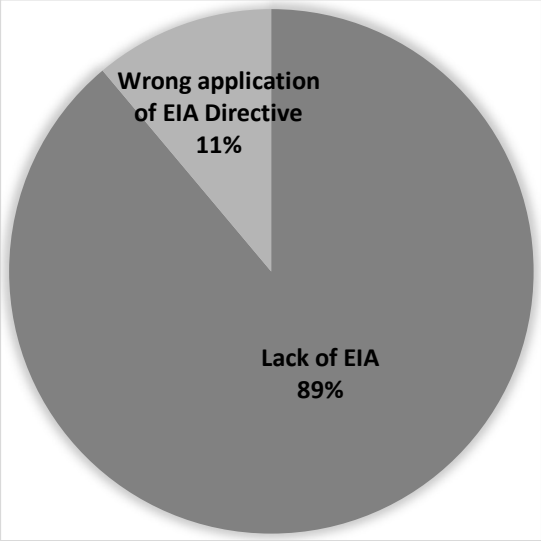
Source: CJEU (2019)

Thus, there is somehow an institutional tendency to the avoidance of ecological requirements in some public administrations and systems of justice, at the national range. The more one scrutinises the contents of the judgements, the more reasons about the inapplicability of law in this subject matter one finds in local legislation. It often seems there is somehow a systematic public policy biased to prevent the elaboration of EIA. As a consequence, one can perceive in the national ambit more strongly the lack of someone who represents the interests of Nature. Therefrom, the CJEU, as the archetype of an international tribunal, plays a transcendental role to balance the unfair inclination of institutional organisations at the state level.

Something similar occurs with the declarations of failures to fulfil the obligations by States. As mentioned, they depict the second group of importance (46.09%) within the series of data concerning the inadequate executions of environmental impact assessments. Unlike the preliminary ruling, its actual rate of missing green requirements (27.69%) is not so high as the previous one. Nevertheless, its upshot could be a much more severe determinant. The reason lies in the preceding explanation about the lack of transposition of European law to national legal systems. In this case, 11 out of 18 total judgements with observations about lack of or incorrect EIA involve issues about legal transpositions, i.e., 61.11%. Moreover, one should keep in mind this category does not necessarily apply to a specific case–it often

does but not always–but rather it concerns nationwide. Consequently, it means there could be much more individual failures in practice. Chart # 23 displays the percentages.

Chart # 23 Inadequate EIAs in Declarations of Failures



Source: CJEU (2019)

As one can notice in the preceding chart, lack of EIA before the issuing of authorisations or permits constitutes the vast majority of judgements (16 out of 18 in total). In this case, there were no allegations of incorrect EIA. These results depict the perfect preamble of the next subsection because they flawlessly describe, in short, the role of the European Commission in the representation of environmental interests before the Court.

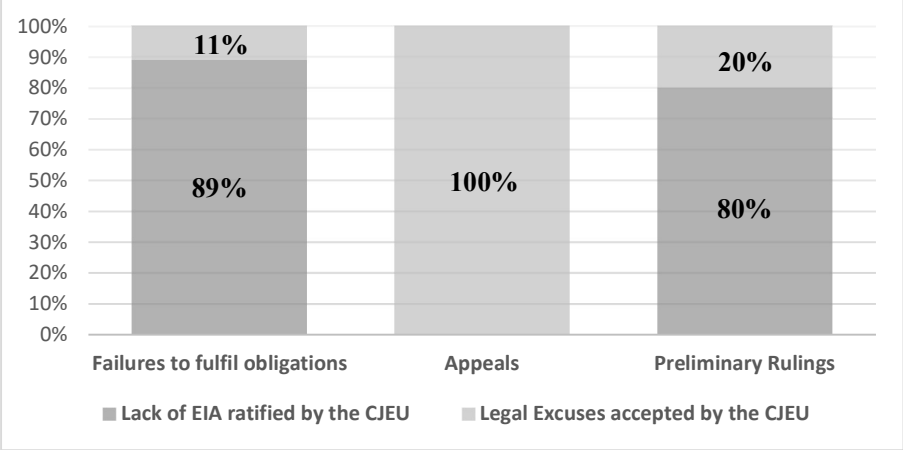
By way of corollary, any reader could argue all data set out within this subsection lacks legal foundations, given that their interpretation could be subjective. Indeed, as alluded, the understanding relies on the eye of the beholder but excluding *contra legem* decisions. Therefore, to avoid any misunderstanding or arbitrariness concerning the interpretation of information, it was necessary to corroborate the failures to comply with the environmental requirements, contrasting them with the material supplied by the very Court.

Consequently, the bar chart # 24 illustrates the percentages of times in which the CJEU pointed out the existence of any inconsistency with respect to the requirements of environmental impact assessments in comparison with the occasions in which the very Court legally accepted the excuses to avoid the correct execution of EIA, coming from national authorities.

In addition, it is worth emphasising the results showed below allows strengthening the role played by the Court of Justice of the European Union, as an instance of environmental

protection out of the national borders. Its intervention in the international arena undoubtedly bestows a balance on the interplay between human and natural interests. One cannot speak about representation, however, because of the function of the Court as an organism to administrate justice, whose doings should always be impartial.

Chart # 24 EIA incongruencies accepted and denied by the CJEU (%)



Source: CJEU (2019)

As one can see, the percentage of cases in which the Court points out the existence of legal errors concerning the execution of EIA previously to the granting of authorisations or permits is overwhelming (practically 9 out of 10 records of failures, and 8 out of 10 files of preliminary rulings respectively). Instead, the reference to appeals is virtually irrelevant, given that it only includes one item.

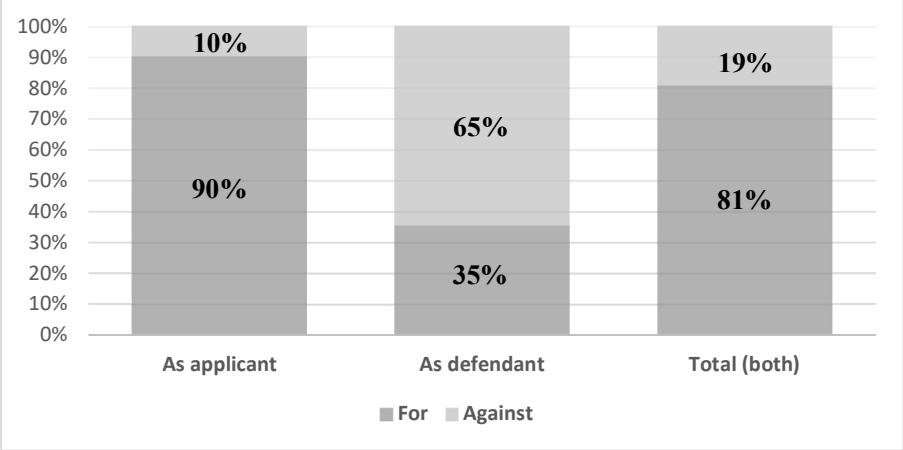
4.3.3 The European Commission and the environmental protection

As mentioned, one of the most active litigants in the international system of justice is the European Commission. Indeed, within the current sampling, it has been a party in the bulk of the disputes (51.55%), either as a claimant (42.82%) or as a defendant (8.73%). In hard data, from the 183 records, 148 corresponds to declarations of failure to fulfil state obligations (80.87%), 22 are appeals (12.02%), and 13 make up actions for annulment (7.10%). There are no preliminary rulings. Considering these figures, one cannot definitively overlook its participation before the Court, or prevent some words thereon.

The bar chart below illustrates the rate of Commission's successful judgements (80.88%), having been the petitioner (90.13%) or respondent (35.48%). If one scrutinises the proceedings, beyond these percentages, it is hard to attribute this performance merely to

a set of effective judicial strategies. Those favourable rulings also depict the high levels of European countries' failures to accomplish their environmental duties.

Chart # 25 Favourable rulings to the European Commission



Source: CJEU (2019)

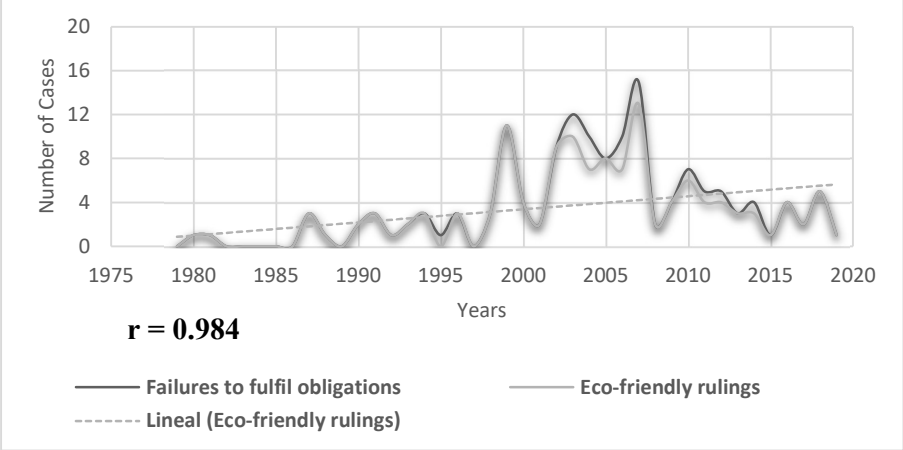
Furthermore, as also mentioned, there is a variable concerning the qualification of the Court's rulings as "eco-friendly" or not. This kind of "green label" possesses the peculiarity of being "subjective", given that it relies on the eye of the observer. In parenthesis, once again, this assertion must not be understood as the issuing of *contra legem* decisions (i.e., against the law). One should often answer the question: what aspects should one consider for determining if adjudication is eco-friendly or not? For example, some radical ecologists could deem the authorisation to construct public works, counting on previous environmental impact assessments, on special protection areas (SPA) is not definitively an eco-friendly decision. Instead, for some other less radical people, the mere existence of an EIA could enough prove genuine environmental concern.

In this regard, nevertheless, the declarations of failures to fulfil state obligations minimise that subjectivity, because the Court – within their reasonings – precisely points out the laws or rules were breached. Consequently, one could specify that any ruling that hands out punishments for disobedience of environmental law could be labelled as an eco-friendly decision. Thus, the next chart # 26 shows the rate of eco-friendly rulings.

As one can notice, the proportion of eco-friendly decisions in front of the total declarations of failures to fulfil environmental obligations is pretty high (89.86%), to say nothing of the correlation coefficient, given its closeness to 1 (r = 0.984). The rate of 9 out of 10 favourable rulings suggests a thought-provoking deduction. In practice, the European

Commission represents environmental interests, especially by assuming the role of supervising the accomplishment of green law among the European countries.

Chart # 26 Declarations of failures v. Eco-friendly rulings



Source: CJEU (2019)

In context, it would be possible that an existing international body, such as the Commission, can exercise the representation of Nature accurately. As European Union's institution, it counts on legitimacy and independence that the Member States recognise. Nevertheless, one should keep in mind that this assumption works out almost exclusively with the declarations of failures, which do not constitute the vast majority of judgements. When one analyses the other judicial actions, one can see that neither the Commission nor the other European institutions necessarily intervene in the proceedings.

In tandem with the last assertion, although one has mentioned that the role of the CJEU has been crucial to depict environmental interests on certain occasions, it is not a true representative. It is the tribunal of justice. Consequently, its participation should be impartial, fair, and equitable, among other features. In other words, unlike an international entity of administrative character, the Court could never exercise the representation of Nature in practice.

Thus, for instance, one of the archetypal cases in this subject matter is ***European Commission v. Spain (1993)*** because it allows to visualise explicitly how a country institutionally supports a stance against environmental interests. In this proceeding, the Court declared the defendant had failed to fulfil its obligations regarding the classification of the Santoña marshes, located in the Autonomous Community of Cantabria, as a SPA. Besides, it argued that Spain had not adopted the appropriate measures to avoid pollution and

deterioration of its habitats, according to the so-called "*Birds Directive*" (currently repealed).[432]

In addition, this judgement importantly contributes to the discussion of property rights because it includes a declaration backing up the supremacy of economic interests over environmental ones. In effect, the Spanish government upheld that "[…] *the **ecological requirements** laid down in that provision **must be subordinate** to other interests, such as social and **economic interests**, or must at the very least be balanced against them*", that is, among other reasons, the respondent adduced the classification was going to provoke a reduction of the industrial and fishery sectors in the region, becoming projects less profitable. Moreover, it pleaded the aquaculture activities had only a small ecological impact on the marshes compared with its economic repercussion. The Spanish government even affirmed to have classified Santoña and Noja as nature reserves, as an acknowledgement of their ecological value, in 1992.[433]

Notwithstanding these and other defendant's endeavours to contribute with convincing evidence, the Court finally denied its arguments, based primarily on a notion of lack of discretion. The Court stated:

> *That argument cannot be accepted. It is clear from the Court's judgment in Case C-57/89 Commission v Germany [1991] ECR 1-883 that, in implementing the directive, Member States are not authorized to invoke, at their option, grounds of derogation based on taking other interests into account.*[434]

Moreover, the Court has reiteratively demanded the accomplishment of technical requirements for the designation of SPA (e.g., ornithological criteria, such as the presence of specific birds). Nevertheless, at the same time, it has denied the application of autonomous

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[432] Case C-355/90, *Commission of the European Communities v. Kingdom of Spain* (1993) Resolution. The reference about the Birds Directive corresponds to the Council Directive 79/409/EEC on the conservation of wild birds of 1979, which the Commission Directive 97/49/EC amended in 1997. Later, in 2009, both regulations were abrogated by the Directive 2009/147/EC, which is the current normative in force concerning the conservation of wild birds. See Council Directive 79/409/EEC on the conservation of wild birds (1979) [repealed] Articles 3 and 4; Commission Directive 97/49/EC (1997) [repealed] Article 1; Directive 2009/147/EC of the European Parliament and of the Council on the conservation of wild birds (2010) Article 18 and Annex VI, Part A.

[433] Case C-355/90 ibid paras. 17th (emphasis added), 25th, 43rd, and 45th.

[434] ibid para. 18th; Case C-57/89, *Commission of the European Communities v. Federal Republic of Germany* (1991) para. 22nd. See also: Case C-247/85 *Commission of the European Communities v. Kingdom of Belgium* (1987) para. 8th; Case C-262/85, *Commission of the European Communities v. Italian Republic* (1987) para. 8th. The Court has used the forgoing rulings as jurisprudence indistinctly. Krämer, Jans and Vedder have also quoted them. However, they do not form part of the present sampling, save the Case C-247/85.

derogations (i.e., exceptions) to modify, reduce or even eliminate the extent of those territories from the classification. "*If that were not so*, [the CJEU has declared] *the Member States could unilaterally escape from the obligations imposed on them by Article 4(4) of the directive with regard to special protection areas*". The argument sounds somehow contradictory. To Krämer, Member States had the duty to designate special protection areas, according to the "[…] *clear and unambiguous wording of Article 4(1)*" of the Birds Directive. On their part, Jans and Vedder, who share Krämer's opinion, have added the argument about the lack of an express foundation allowing exceptions within the Directive.[435]

In either event, the Spanish reasoning illustrates quite well, not only the supremacy of property rights over environmental protection within its legal discourse but also the lack of an institutional stance in favour of nature conservation at the national level. The country has other concerns; it is worrying about the production of fish, the size of industries, among other economic interests. On its part, the Commission is who paradoxically emphasises the ecological value of Santoña marshes and its wetlands for endangered species of birds. Consequently, one can assert the country-applicant does not represent or defend any green right or interest, at least, in the present case.[436]

On the other hand, the alluded absence to environmental representation is more noticeable when the Court's rulings are in contradistinction to the Commission's opinion. In these proceedings, the Commission's endeavours to support eco-friendly postures do not seem to be sufficient. Thus, in ***Commission v. France (1999)***, the CJEU dismissed an allegation of ecological failure by France for having declassified a part of the SPA, known as *Marais Poitevin intérieur*, a zone of marshland located in the Western of the country.[437]

The applicant argued that France had reduced the surface of the special protection area in order to construct the motorway link between the communities of *Sainte-Hermine* and *Oulmes*. This project had been declared of *public utility* and urgent and had accomplished the requirements of compatibility with the land use, public enquiries, and the environmental impact assessment, according to the [currently repealed] Council Directive 85/337/EEC concerning precisely the latter.[438]

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[435] Case C-355/90 ibid paras. 26th and 35th; Case C-57/89 ibid para. 20th; Krämer (2002) 287; Jans and Vedder (2008) 452-4; Council Directive 79/409/EEC (1979) Article 4(1).
[436] Case C-355/90 ibid paras. 24th.
[437] Case C-96/98, *Commission of the European Communities v. the French Republic* (1999) para. 56th.
[438] ibid paras. 48th, 49th, 51st and 54th; Council Directive 85/337/EEC (1985), Articles 3, 6 (3).

France advocated itself from the accusation, alleging a mistake by which "[…] *a 300-metre wide area was included in the Marais Poitevin intérieur SPA when it was notified to the Commission in November 1993*". Moreover, the defendant assured this spot of land did not form part of the SPA in practice, and the final selected route avoided any existing or potential special protection area.[439]

Lastly, the Court corroborated France's explanations and accepted the respondent had committed an error of communication, therefore discarding the claim in this specific point. Moreover, as mentioned in Court's preceding interpretations, such as the previous judgement between Commission and Spain (1993) and other cases already quoted, there was no infringement of the Birds Directive because France had not discretionally reduced the extent of that area. That area simply did not integrate the SPA.[440]

Nevertheless, it draws attention to why the Court did not even spare a glance at the Commission's argument about the environmental effects of the motorway construction. There is only a brief mention about the disturbance of birds by virtue of the completion of works and, even more important, "[…] *the isolation of the remainder of the SPA east of the project towards Fontenay-le-Comte, which will be cut off entirely from the SPA by the motorway*".[441] In consequence, if the country of origin is not in the line of the ecological protection, and the Commission's reasoning is not enough to legally influence the Court's decision, Nature is thoroughly helpless.

Furthermore, drawing an analogy with property rights, although it did not deal with a private project, one could affirm there is also a tension against environmental protection when public interests are involved. Thus, as one can notice in this case, States sometimes impose their developmental agenda over the ecological one.

4.4 The Court and other supplementary environmental issues

4.4.1 The notion of a right to a healthy environment

Nowadays, as earlier mentioned, the notion of the right to a healthy environment constitutes one of the dominant legal discourses concerning ecological protection worldwide. Indeed, among its strengths, one could argue it has allowed the visualisation–lawful and academic–

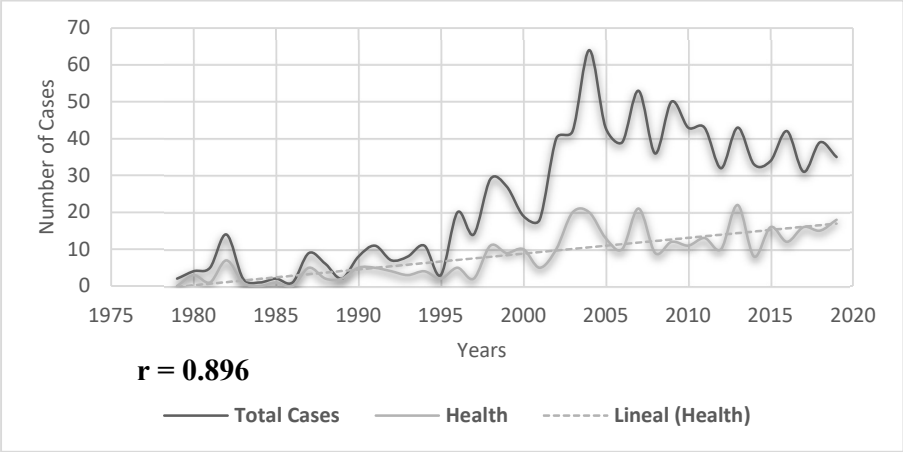
[439] Case C-96/98 ibid paras. 51st and 52nd.
[440] ibid 56th; Council Directive 79/409/EEC (1979) [repealed] Article 4 (4).
[441] Case C-96/98 ibid paras. 49th and 50th.

of the interconnectedness between Nature and human rights, both in the national ambit and in the international one.

For these reasons, acknowledging its global importance, and despite the fact that none of the initial hypothesis posed in this chapter bore on this issue, in particular, the remarkable number of statistical references makes necessary to sketch out some words about the right to a healthy environment and its relationship with the Court's adjudications. Moreover, the anthropocentric outlook emanating from the Court's sayings reaches such a level that it is worth analysing several decisions thereon.

So, for a start, one should affirm that the concept of "*healthy environment*", as it stands, only appears in six of the 965 records of the initial universe, i.e., it possesses less than 1% of discursive incidence. Nevertheless, this initial statistical outcome is deceptive for sure, given that, if one combines the universe concerning the category of "*environment*" with the expression "*health*" as the key term, one can obtain a new sampling. This new series of data is large enough to run a correlation coefficient and a percentage of comparable magnitude as the aggregate sample of property rights, i.e., 343 records in total. Nonetheless, long with the systematisation of information, one should warn, some tests disaggregating data had to take place.

Chart # 27 Universe of environmental cases v. Health



Source: CJEU (2019)

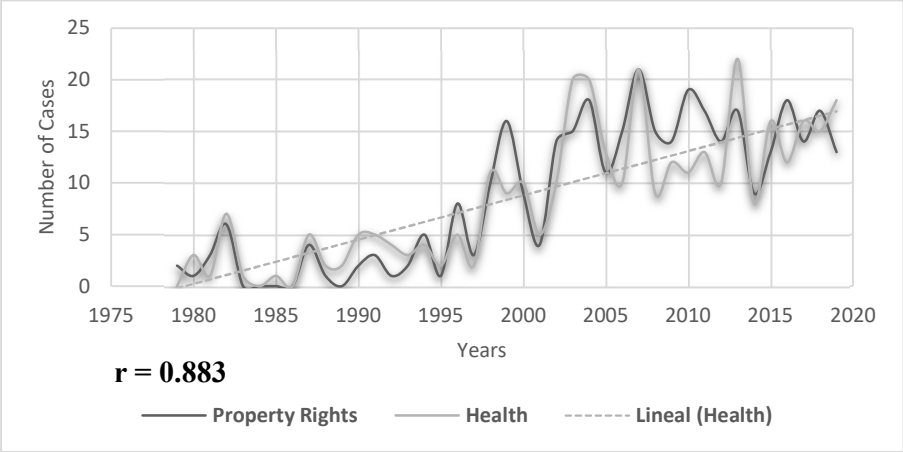
Effectively, the line chart above displays the trend of the timeline concerning the number of cases in which the term "*health*" has been mentioned, at least one time, within a Court decision. The sampling corresponds to the environmental adjudications, issued by the CJEU, between 1979 and 2019. The result of the correlation coefficient is somehow comparable to the aggregate version of the "*property rights*" matrix, i.e., it almost reaches 1 (r = 0.896),

implying a relatively strong association between both variables.[442] Likewise, the percentage of allusions corresponding to the word "*health*" is 35.5% with respect to the universe.

Before passing the analysis of the Court's decisions, it would be worth displaying a thought-provoking observation. As one will be able to confirm bellow, several Court's rulings show a tension between property rights and human health. Thus, although it is not the core theme of the present study, in the line chart beneath, one can observe an image regarding the interrelation health-property within the framework of environmental judgements. In the future, it could constitute another hypothesis to research.

In context, chart # 28 compares the chronological curves of the terminologies: "*health*" and "*property rights*" (including the associated terms of the latter). Albeit there are several intersections of data, graphically observable, which sometimes seem to overlap each other, the level of correlation between both variables is less robust than the previous comparisons between the universe and the sample concerning the expression "*health*". In any event, the result of the coefficient (r = 0.883) does not mean the existence of a weak interaction of variables. On the contrary, the correlation continues to be entirely consistent, given its closeness to 1.

Chart # 28 Property Rights v. Health



Source: CJEU (2019)

4.4.2 What does the Court say about health and the environment?

Retaking the case *Standley, Metson, and others v. Minister of Agriculture and others (1999)*, earlier examined, there is an additional remark one should formulate. Although the case

[442] This upshot is comparable with the chart concerning Universe v. Property (associated words included).

openly depicts the strains between property rights and environmental protection, as already mentioned, one cannot disregard the CJEU's reasoning to reply to the question of ownership because it is based on public health motives, instead of environmental ones. Thus, the Court ruled for the sake of humans, arguing that "[…] *the system laid down in Article 5 reflects requirements relating to the protection of public health, and thus pursues an objective of* ***general interest*** *without the substance of the right to property being impaired*".[443]

In principle, albeit one is able to affirm the adjudication settles the dispute through a persuasive anthropocentric discourse concerning public health, it turns out irrefutable that the effects derived from the resolution are eco-friendly to the detriment of property rights in practice. Someone could consider it an *a priori* conclusion if it were not for the existence of parallel opinions about the same case. So, for example, certain commentators have noticed already that "[t]*he Court has been firm in previous cases that economic interests do not have automatic primacy over protection of the environment*".[444]

Nonetheless, albeit what one has adduced contradicts somehow the beliefs of Sands, Taylor, Borràs, Leib, and the like, the CJEU's decision is still rare. It is grounded on public health reasons, though this terminology does not even appear in the Nitrates Directive. Effectively, while the Directive contains two particular references about "*human health*", the judges come to use both terminologies, "*human health*" and "*public health*", as equivalent expressions, albeit they are not conceptually similar. Krämer also remarks this point and analyses the difference of concepts in more detail. One could even interpret the case as proof that tribunals, at least transnational ones, do not always decide in favour of property over natural resources.[445]

In addition, Krämer is of the opinion that this argument is incomprehensible, and even hasty, within the ambit of the Court. He accounts for the existence of judicial precedents, in which the CJEU has expressly recognised the environmental protection as a question of the general interest of the Union. To support his comment, the author even employs a couple of judgements (*Procureur v. ADBHU* and *Commission v. Denmark*), already quoted in this research but which are not part of the sampling, however, because they do not address any conflict around property rights. In any event, one can read the recognition of environmental

[443] Case C-293/97, *The Queen v. Minister of Agriculture and others* (1999) para. 56th, emphasis added.
[444] Elworthy and Gordon (1998) 115.
[445] See Krämer (2002) 95-6; Nitrates Directive (1991) Recital 6th and Article 2(j); Case C-293/97, *The Queen v. Minister of Agriculture and others* (1999) para. 34th.

protection, Krämer warns, as one of the "*Community's essential objectives*". Furthermore, there are other similar precedents also quoted by the Court.[446]

Unlike the previous judgement, in the already quoted case *TestBioTech and others v. Commission (2016)*, the assertions concerning health as foundations for the legal action instead of environment ones did not sound weird. Recapitulating, the petitioners questioned the granting of a market authorisation to Monsanto Europe for its genetically modified soybean. As the United Kingdom argued thereon, the company did not ask permission to cultivate the modified soybean in Europe, so that "[…] *the environmental risk assessment* [was] *therefore limited to a consideration of the likely effects of accidental dissemination into the environment*". In parenthesis, both the U.K. and Monsanto participated in support of the Commission's stance.[447]

In other words, ecological reasons to claim in this case are merely ancillary with respect to the question of health. Potential effects against human welfare are the gist of the argument. Although this idea somehow distorts the scope of the healthy environment as a concept, one cannot deny it seems to be a recurrent manner to invoke it by and before the Court. Indeed, it reappears occasionally in the official discourse of the Commission, such as it happens apropos of a parallel case between the same litigants, but which the Court settled two years afterwards. Thus, within ***TestBioTech eV v. European Commission (2018)***, the parties put on the table their pro and against arguments to address the dimensions of human health and environmental protection separately, within the framework of the market authorisations for genetically modified organisms. In that regard, the Commission adopted its past position about the accidental damage, whose repercussions could place health, more than the environment, in jeopardy. Finally, unlike the previous decision, this time the General Court ruled the annulment of the challenged letter, recognising "[…] *it is clear that the scope of the concept of 'environmental law' is not as restricted as claimed by Commission in the contested decision*", a very well welcome statement by the activism.[448]

Summing up, it is possible to identify specific jurisprudence in which the litigants adduce the notion of human health as a foundation to defence environmental issues, i.e., as

[446] Krämer ibid 95; Case C-240/83, *Procureur v. ADBHU* (1985) para. 13th; Case C-302/86, *Commission v. Denmark* (1988) para. 8th; Case C-213/96, *Outokumpu Oy.* (1998) para. 32nd; Case C-176/03, *Commission v. EU Council* (2005) para. 41st; Case C-379/08, *ERG and others* (2010) para. 81st.
[447] Case T-177/13 ibid 14th and 40th.
[448] Case T-33/16, *TestBioTech eV v. European Commission* (2018) paras. 63rd, 70th and 80th. See Berthier (2018) 5th.

the application of the right to a healthy environment.[449] Nevertheless, the interplay between human health and environment within the ambit of reasoning of the Court requires undoubtedly a much more thorough reflection, which could be even matter of new entire research. Drawing to a conclusion based on the disposable information for this particular study would constitute a mere conjecture.

4.4.3 Dynamics of growth among variables

To conclude, it turns out evident that the number of lawsuits before the Court has increased between 1979 and 2019. Consequently, logic suggests that the number of cases involving the variables analysed within this chapter, such as property, trade, eco-friendly rulings, and health has also experienced a rise. Nevertheless, have the variables followed the same trends as the universe of cases, or have they had any deviation?

The response to this question implies an issue of data consistency, which could be satisfied through Pearson's correlation coefficient because its figures have been high throughout this chapter. In other words, the association among variables has been quite coherent so far. However, given that the coefficient is just a numeric value, it cannot be graphically visualised it, as it has happened with the curves of trends concerning the alluded variables. In this regard, not only as a corroboration but also as a means to picture the patterns of data, one will use a conventional growth rate, calculated in the function of the forthcoming formula:

$$Growth\ rate\ = \left(\frac{V_f}{V_o}\right)^{\left(\frac{1}{Y_{f-Y_o}}-1\right)}$$

Where,

V_f = *final value,*

V_o = *initial value,*

Y_f = *final year,*

Y_o = *initial year.*

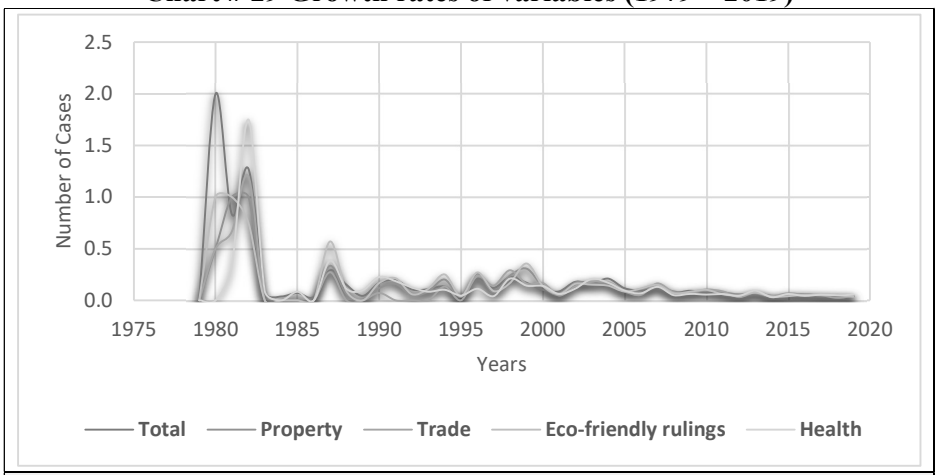
[449] See, for example, Case T-475/07, *Dow AgroSciences Ltd. and others v. Commission* (2011) para.143rd; Case T-158/03, *Industrias Químicas del Vallés, S.A. v. Commission of the European Communities* (2005) para 134th; Case C-180/96, *United Kingdom of Great Britain and Northern Ireland v. Commission of the European Communities* (1998) para. 67th; Case T-13/99, *Pfizer Animal Health SA v. Council of the European Union* (2002) para. 456th.

If one prefers to count on a rate measured in percentage, it will be just necessary to multiply the product of the function by 100. As a result, the growth rates between 1979 and 2019 for the whole mentioned variables are quite close between them. So,

The advantage of employing growth rates to draw the tendency lines, instead of hard data, lies in the fact that it equates the types of information, i.e., makes the records comparable among them. In plain language, for instance, one cannot compare two databases with a distinct number of records per each (e.g., between 965 and 185 items) as efficiently as one would do it with sets of rates or percentages, which are in determined range (e.g., between 0% and 100%).

For this reason, unlike the previous graphics concerning Pearson's coefficient, chart # 29 displays such minimal difference among the yearly growth rates that the curves virtually overlap each other. It essentially means that both the sampling and the variables generally increased at the same rhythm or experienced parallel dynamics. Furthermore, the data displayed in the table below the chart represent the same rate but calculated in the function of the forty years of the sample. One could affirm it deals with a kind of summary.

Chart # 29 Growth rates of variables (1979 – 2019)



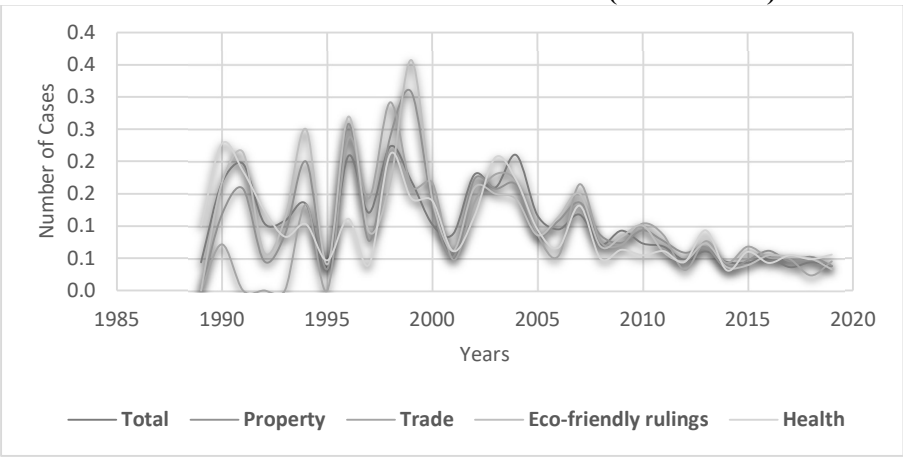
Total	Property	Trade	Eco-friendly rulings	Health
0.1391	0.1302	0.1115	0.1357	0.1292

Source: CJEU (2019)

In general, the tendency of the curves concerning the growth rates is continuously falling during the whole period, which does not mean fewer cases. It instead suggests the increase of judgements undergoes a deceleration or a slower rise over time. In any case, given that after 1988, the quantity of records does not allow accurately appreciate the curves of

tendency, chart # 30 illustrates an amplification of data since 1989 on, by way of referential information.

Chart # 30 Growth rates of variables (1989 – 2019)



Source: CJEU (2019)

Finally, one should emphasise that the rate of litigation is continuously increasing, which readily associates with the cumulative environmental impacts and detriment of natural resources. Nevertheless, it would be interesting to measure the effects of the adaptation to climate change in the trend of the curves. It would be quite probable the number of cases rises during the next years as a direct effect of the resilience to climate change. In any case, it could be a matter of further research.

4.5 Conclusions

The common thread of this chapter turned especially around the tensions between property rights and environmental protection, in the framework of the CJEU's adjudications. In this regard, four research questions were guiding the whole academic discourse, which are the same four queries that will be framing the presentation of the conclusions and findings.

Thus, the first hypothesis aimed at enquiring ***if international courts of justice were settling the environmental disputes in favour of property rights and individual interests to the detriment of Nature***. From the CJEU's standpoint, at least, one should recognise there is no evidence concerning the Court's likely biased trend to issue rulings favourable to property rights. On the contrary, in the totality of the proceedings in which there was any strain between ownership and environmental protection, the Court auspiciously ruled on the latter, arguing the social function of property and reasons of general interests.

Likewise, the statistical data concerning those judgements involving aspects associated with market showed a clear tendency, maybe even overwhelming, towards the emission of eco-friendly rulings (75%). As mentioned, however, this percentage is subjective, given the qualification of the category "eco-friendly" relies on the observer, without including *contra legem* decisions (i.e., against the law).

In any case, the precedent information constitutes an indicator that statistically contradicts the initial assumption, according to which the Court issued rulings promoting a sort of partiality for property rights. In plain language, the theoretical and legal predominance of property rights over natural resources, alleged by defenders and promoters of rights of Nature appears to be more rhetorical than empirically verifiable in the international field.

Secondly, the research also aimed at determining ***if it was necessary to be the owner of natural resources or exercise any kind of associated rights for obtaining eco-friendly rulings***. Even though the response, statistically speaking, could be emphatically negative, one should deem several nuances thereon. From the outset, one should remark that litigants are not often owners of natural resources, save certain cases concerning lands. They exercise property rights associated with diverse economic interests, businesses, and other commercial activities. Even in those cases, nevertheless, their judicial participation is marginal (14.65%) in front of the total.

By and large, being a proprietary does not warranty a successful result before the Court. Quite the opposite, the data have proved that the petitioners-owners obtained an unfavourable decision in almost 53% of the cases. The performance of the defendants-owners was even less fruitful by getting a disadvantageous judgement in nearly 65% of the cases.

From the previous assertions on, one could conclude that it is not a requirement to be the owner for obtaining a favourable eco-friendly ruling, mainly predicated on the marginal character of data. Notwithstanding, one cannot also assure that all proprietors are searching for a green judgement, as it were. Thus, presupposing the subjectivity of the information, as alluded to in the body of the chapter, one can deduce that only 52.94% of the claimants-owners looked for eco-friendly decisions. Furthermore, the scrutiny of the sample showed that, even in those cases in which claimants were looking for green sentences, environmental motives were ancillary of property rights. Those petitioners were primarily individuals and private companies defending their lands or businesses.

The third hypothesis referred to ***the existence of someone who could represent Nature's interests before international courts***. The central premise denoted the application of the legal framework currently in force. Interestingly, within the answer to this research question, the surprisingly high significance of the dissatisfactions by States plays a crucial role. Effectively, the redundant lack of environmental impact assessments at the national level and failures to accomplish green obligations constitute two clear indicators of the need to count on someone who can represent the environmental rights in the international arena.

In this framework, the heterogeneity of positions coming from States concerning the disjunctive between environmental protection and property rights has undeniable repercussions. In effect, while some national public entities firmly champion ecological protection over economic interests, others defend the opposite openly under the umbrella of the "public" or "general" interest as well. Moreover, while some States show divergences between their institutions of government and their entities in charge of the administration of justice, others even display aligned stances in defence of property rights instead. Under these circumstances, the manner of coping with the environmental crisis at the international level cannot be uniform and organised. Consequently, a representative of green interests could be useful to promote a more organic defence of natural resources at a global level.

In this regard, the European Commission arose as an attractive option, given its impressive judicial results. The entity reached a rate of almost 81% of favourable rulings between 1979 and 2019. The vast majority of proceedings corresponded to declarations of failures to fulfil state obligations, among which the proportion of eco-friendly decisions encompassed an overwhelming success rate of nearly 90%.

Consequently, it turns out unavoidable to think about the Commission, or any other similar international entity (even the very European Union), as a genuine possibility to exercise the representation of environmental interests. Nevertheless, one should bear in mind that those results are limited in terms of litigants and types of judicial actions. In other words, the Commission virtually intervened before the Court only as petitioner or respondent in those proceedings involving countries. When the participants are others (e.g., companies, NGOs, or even individuals), the intervention of the Commission is entirely marginal. This reason also applies to different kinds of actions. Its high rate of favourable judgements refers almost exclusively to the declarations of failure to fulfil obligations. So, its participation in other disputes is merely peripheral. Therefore, although the Commission's role as a representative of green business could be a possibility, it still stands in the field of speculation.

Moreover, one should emphasise the momentous contribution of the Court's rulings. In effect, there was a high percentage of opinions coming from different governments that the Court contradicted or modified, and a set of breaches of law that the CJEU observed and punished. In consequence, its judgements could wrongly lead to think about it is not necessary to count on a representative of environmental interests because its intervention is enough. Nevertheless, once again, one must consider the ambit of action coming from the Court is restricted to its part as the organism to administrate justice. It directly depends on the initiative of litigants, either States, or companies, or even individuals. The court, therefore, could not be a kind of guardian of Nature at all or constitute even the protection warranty. Its action should encircle in impartiality, fairness, and equity, among other characteristics.

One should formulate a twofold remark concerning the Court's part played in the environmental question. So, one has first to admit that the root of the balance between the independence and influential power of the CJEU lies chiefly in its regional character. Furthermore, one should mention the legitimacy it possesses in front of the Member States. Those particular circumstances endow the Court a peripheral vision about ecological issues that adapts in a better fashion to the comprehensive character of Nature and facilitates it more appropriate enforcement of community and international law.

On the other hand, one also has to acknowledge there is a second side of the same coin, which occurs when nobody chooses to bring a lawsuit before the Court. Under these circumstances, its mechanisms merely would not have to work out. Therefore, it would be crucial to count on a specific instance in charge of taking care of natural resources, without depending on other's goodwill.

In a certain sense, the response to the fourth question research could pose as a consequence of the previous ones. It referred to ***the existence of sufficient guarantees to protect natural resources in the current international system of justice***. In that regard, one can corroborate the presence of various elements that favour the protection of Nature and other ecosystems. For example, there is no prevalence of property rights over environmental protection within the CJUE's rulings. Additionally, the quality of the litigants (as proprietors or not) is not determinant to obtain a favourable decision. Likewise, there are entities capable of representing Nature's interests before the Court, such as the Commission. And, finally, the Court certainly provides a balance to the strains between property rights and environmental protection through its adjudications.

One could affirm that all these elements describe a favourable milieu to warranty the protection of natural resources. Nonetheless, one also has to warn they have restrictions and do not correctly operate all occasions. If one considers this argument, joint with the failures of the legal system (explained in the previous chapters), the conclusion could not be emphatical. In other words, there are legal and judicial warranties to protect Nature, but they do not always reach their objectives thereon.

Beyond those four conclusions, there are still a couple of significant findings to observe. The first of them comprise the question concerning the right to a healthy environment. As mentioned, the Court reiteratively employs it as an argument even to justify measures oriented to protect Nature. Although the concept, as it stands, does not appear regularly within the Court's adjudications, it turns out clear-cut that the emphasis on health constitutes an effective alternative to promote the settlement of environmental issues. In any case, as also alluded, its judicial and legal analysis implies a new dedication, maybe through another dissertation or research.

Finally, one should argue the increasing trend of the environmental cases before the Court between 1979 and 2019 is not in isolation. The totality of variables analysed in this chapter, i.e., property, trade, eco-friendly rulings, and health are consistent in terms of growth. This assertion got confirmed through the association between the Pearson's correlation coefficient and the growth rates. Furthermore, one could see the cumulative dynamics of records is decelerating over time, according to parallel percentages. In that regard, it would be interesting to consider the effects of the adaptation to climate change in the tendency of the lines. The influence of resilience in the increase of litigation could even be a matter of future research.

Chapter Five
The moral considerability of Nature from the perspective of Environmental Ethics

The previous chapters presented a critical outlook concerning the anthropocentrism of the international legal framework and the administration of justice. Indeed, they have recurrently been emphasising the widely spread assumption that the current environmental crisis is, in a certain way, the result of the anthropocentric management of natural resources.[450]

In this line of thought, Laitos, Okulski, and Wolongevicz ascribe a large part of the ecological disaster to the anthropocentric character of current laws and policies, whose main goal is to satisfy the human welfare exclusively. It accentuates the people's wellbeing superiority over Nature's and hence marks boundaries to their integral interdependence (fragmentation). Indeed, as Tóth points out, the fragmented and deficient character of some international standards is rarely useful to protect even people from ecological threats, for example, such as the displacement due to climate change and environmental degradation.[451]

More specifically, within the field of Ethics, the insight is not too different. According to Taylor, for example, the vast bulk of ethicists deems that human-centred ethics is the "[…] *motivating cause for behaviour that plunders the Earth's resources to meet the short-term interests of humanity*".[452] This anti-anthropocentric stance is not new, as one can figure out by paying heed to 1970's environmentalism. It came into being as a set of objections against those human-centred traditions[453] or, at least, against harmful human activities.[454] Either way, as one will see below, it turns out useful for understanding why some contemporary thinkers–particularly those who promote the rights of Nature–are firmly convinced of a paradigm shift.

Summing up, if the anthropocentric character of laws, public policies, and the judicial system constitute some of the principal sources of the current ecological crisis, one of the evident options would consist of changing that model. In that regard, one has argued, throughout the whole study, that an alternative to cope with the environmental problems

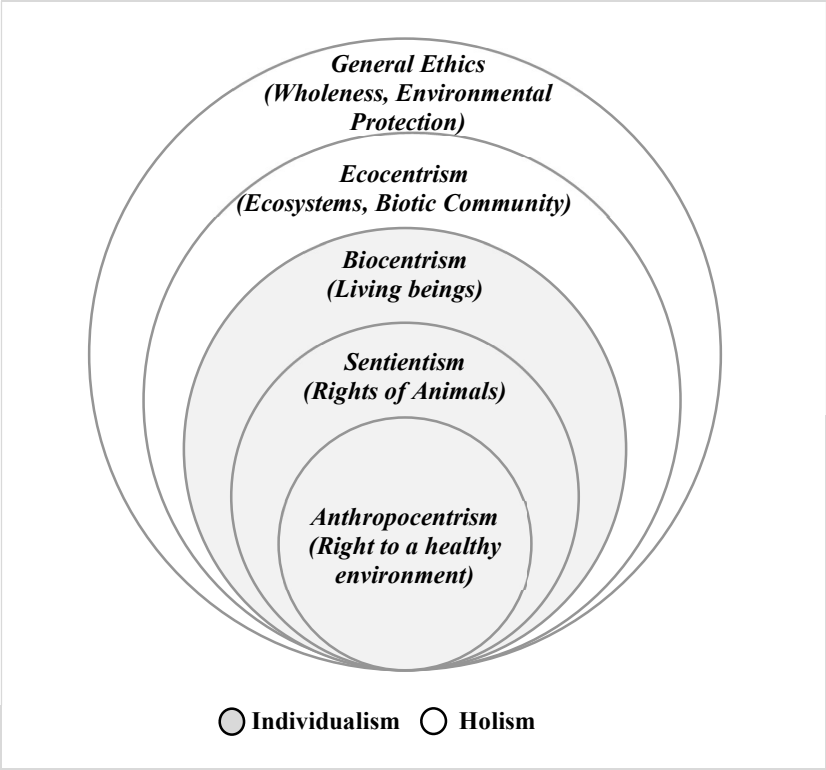
[450] Bányai (2019) 7.
[451] Laitos and Okulski (2017) 204-5; Laitos and Wolongevicz (2014) 1-2, 7-8; Tóth (2010) 131.
[452] See Taylor (2010) 198.
[453] Keller (2010) 1
[454] Jamieson (2008) 6-8

consists of attributing an internationally or universally accepted legal personality to Nature, a proposal coming from the ecocentric viewpoint.

This shift of juridical pattern comprises, at least, a couple of significant implications. Firstly, it requires a transmutation of the legal standing of Nature, passing from being deemed a set of goods, subject to property, toward being considered a holder of rights. And, secondly, it demands bestowing of legal representation, both before the courts of justice and within the international arena.

Nevertheless, before undertaking the analysis of this conferment of international legal personhood to Nature, it would turn out crucial to enquire about the ethical foundations of this possibility. One should know beforehand that ethics constitute the ideal branch of knowledge capable of explaining the implications of extending the limits of moral recognition out of people and towards other nonhuman living beings and entities. As one will see, those boundaries are parallel to what the legal framework establishes nowadays.

Chart # 31 Enlargement of rights



Based on Keller (2010) 11.

The preceding chart illustrates the two dimensions of ethics, individualism and holism, in which the extension of morality occurs. As one can notice, there is a close relationship

between the conferment of rights and the recognition of moral standing. According to every school of thought, the enlargement of rights will protect individually solely to humans (anthropocentrism), or humans and non-humans (animalism and biocentrism). Holistically speaking, it will take into account just to ecosystems (ecocentrism) or also to the wholeness, i.e., including human-built environment (general ethics). This graphic primarily aims at orientating and guiding the reader across the different stages of ethical recognition of morality, explained within both sections of this chapter.

So, the four research questions that will determine the approach of the present chapter will be the following:

1) Are the traditional human-centred principles sufficient to provide the ethical foundations for the recognition of international legal personality to Nature?

2) What is the moral status of Nature according to the principles guided by environmental ethics?

3) How feasible would be to enlarge the moral limits towards including Nature within them?

4) What would be the key ethical foundations with which the holistic perspective would contribute to enhancing the interplay between humans and Nature?

5.1 Individualistic approaches towards morality of Nature

5.1.1 An attempt to define moral considerability

Before passing to review the contents and scope of moral standing, it is worth indicating that the terms "*moral standing*", "*moral considerability*", "*morality*", "*moral status*", and "*moral patienthood*" are going to be used as synonyms, mainly to avoid misunderstandings. Their conceptual differences are so tiny in the philosophical parlance that one could ignore them

entirely. The expressions "*moral personhood*" or "*moral agency*", eventually used, are other alternative expressions but only in strict reference to humans.[455]

By and large, as Joseph DesJardins explains, moral standing "[…] *concerns questions of what things count, morally*". Therefore "[a]*n object has moral standing or deserves moral consideration if it is the type of thing that rationally must be factored into any moral deliberation*".[456] Strictly speaking, although Professor DesJardins mentions the objects figuratively, ***moral standing deals primarily with an ethical criterion, pattern, measure, or recognition of the level of importance, relevance, value, or significance that one entity possesses in front of others.*** This aspect generally becomes a dual process of granting rights and demanding duties.

As a result, one can find an extensive diversity of doctrinal positions, including new and varied actors in the sphere of morality. It has brought about some epistemological hindrances derived from the [sometimes extreme] conceptual diversity of opinions. Effectively, since the formal emergence of environmental ethics in the early 1970s, as a philosophical discipline oriented to deal with the relationship between humans and Nature, the idea of moral status has become more and more confusing. It has more frequently occurred in a contemporary context, primarily due to the expansion of the moral thresholds,[457] in the function of capacity to suffer,[458] the self-consciousness of its rights,[459] having a life[460] or being part of the biotic community,[461] *inter alia.*

Consequently, beyond the multiplicity of existing concepts, morality is not a feature coming from oneself or depends directly on self-awareness. In practice, one cannot define oneself as a moral agent or as a morally significant being. One necessarily relies upon the judgement of others to get convinced that one has acquired moral recognition.

The incoming chart # 32 is illustrative enough about how the plethora of criteria, patterns, and measures that form part of existing definitions contribute to the ambiguity and complexity of the concept, to the point that the contrasts are usually notable even within a small sample. Indeed, one could affirm that it is possible to find a different concept of moral considerability depending on almost every philosophical posture.

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[455] Jaworska and Tannenbaum (2018) § 2, 2.4, 5.5, and 6; Gluchman (2013b) 111ff; Bernstein (1998) 9; Scott (1990) 6-10; Schönfeld (1992) 353-4.
[456] DesJardins (2013) 269.
[457] Cahen (1988) 195.
[458] Singer (1999) 57.
[459] Regan (1983) 243-8.
[460] Rolston III (2012) 63-4; Taylor (2011) 14-24.
[461] Leopold (1970) 239; Callicott (1987b) 186-217.

Chart # 32 Complex Criteria of Moral Considerability

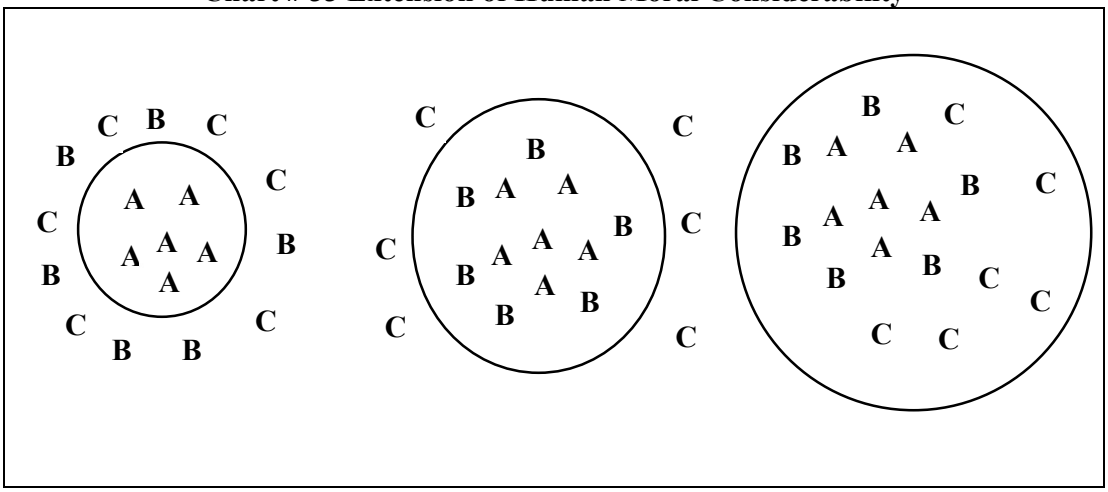
Nevertheless, whatever be the parameter, standard, or criterion employed to establish moral standing of entities, ***it is indisputable that human beings are subjects of moral recognition, from the anthropocentric perspective***. Nonhuman living beings are not instead. Nature is essentially deemed as a set of goods.

5.1.2 The extension of the human limits of morality

Imagine, for a little while, that moral considerability is metaphorically a circle, inside which there is solely a specific group of people, i.e., exclusively those who are able to meet certain conditions (e.g., race, gender, age). The extension of morality could be defined merely as the enlargement of that circle toward including other people who do not accomplish the original conditions.

By way of example, one can observe in chart # 33 that if the group of people named A is the only one who merits moral standing, the rest of people (B and C) will stay outside the circle. However, if the conditions vary or any other circumstance brings about the inclusion of new fellows, say group B, there will be an extension of the limits of morality. As one can notice, the process will gradually allow that group C also become part of the borders of moral standing.

Chart # 33 Extension of Human Moral Considerability



From the anthropocentric perspective, humans are the only beings who deserve moral standing. Nevertheless, it seems to be clear this condition has not always been an immutable essence of all human beings in its origins, neither at all times nor in all places. Hierarchically, moral status was only merited by freemen (e.g., group A) not by slaves (e.g., group B), by men not by women (e.g., group C), by adults not by children (e.g., group D), and more recently by alive people not by future generations (e.g., group E).

The history of knowledge is evidence. Just to remember, ***Aristotle*** deemed freemen held a different category than slaves', women's, and children's, occupying a superior locus over them, founded on their lacking determination, weakness, and imperfection, respectively. Furthermore, there neither was equality in regard to their moral virtues, due to they were connected directly to their position in the family or public sphere. Everybody possessed "*reason*", but only freemen's one was complete in an Aristotelian sense; the "[…] *others want only the portion of it which may be sufficient for their station* […]" he said. To him, slaves were merely things, "[…] *one of those things which are by nature what they are* […]".

Moreover, he believed a slave was "*a particular species of property*" that the owner could employ in what she or he wanted.[462]

Likewise, regarding women, Aristotle remarked that humans are endowed of "*courage"*, but "[…] *the courage of the man consists in commanding, the woman's in obeying* […]". Children had incomplete virtue instead, which "[…] *is not to be referred to himself in his present situation, but to that in which he will be complete* […]".[463]

In sum, Aristotle designed a hierarchical conception to recognise as the ruler to whom was in the higher position, while the others were the ruled.[464] Over the years, however, thinkers and activists have been enlarging the bounds of morality from their respective action fields, in order to include new subjects of recognition and endow them with the same virtues and rights that their historically "superior" fellows held. Slavery has been a prime example.

Effectively, slavery is the example *par excellence* of the expansion of that morality and the granting of rights. Nash recalls how Slaves experienced both legal and moral transmutation of their inherent nature, from being considered formerly mere objects or goods, the property of others, to being recognised like human beings–their rightful condition–within the social and legal spheres. Davis provides an explanation in detail about how moral perceptions were shifting during the eighteenth and nineteenth centuries regarding slavery.[465]

Moreover, slavery was not seen as an utterly corrupt practice under moral principles during centuries, above all referring to blacks, until groups of abolitionists called into question its ethical legitimacy to the point of going to war, such as the United States did it in 1861. Undoubtedly, there are older examples of abolition experiences, albeit with less historical resonance, such as the enactment of the decree to adopt the "*Freedom Principle*" by Louis X in France, in 1315, mentioned by Christopher Miller.[466]

Nowadays, although the Walk Free Foundation estimates about 40.3 million of people are in diverse modalities of modern slavery all over the world, this practice is penalised as a hidden crime, and consequently reproachable in a moral sense. Thus, it turns out undeniable that there has been a real expansion of the limits of morality in this particular case.[467]

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[462] Ellis (1895) 21, 33-4.
[463] ibid 33-4.
[464] Clayton (2017) § 7 (e).
[465] Nash (1989) 199-213; Davis (1966)
[466] Miller (2008) 20.
[467] Walk Free Foundation (2018) ii, 6.

Something similar could be said about women, starting from the criticisms against the classic asymmetric vision of male's and female's moral attributes. Mary Wollstonecraft wrote in 1790 that virtues and knowledge of both sexes were naturally equal, and the only scientifically verifiable difference could be the male physical strength. Later, other authors, such as John Stuart Mill, Catherine Beecher, Charlotte Perkins Gilman, and Elizabeth Cady Stanton, debated, reinforced, or supplemented her ideas. Feminist ethicists usually quote these works.[468]

The unbalanced female situation in society persists in regard to sexual violence,[469] employment opportunities,[470] political participation,[471] among other inequalities.[472] Nonetheless, it seems doubtless that women are currently part of the classic moral considerability at the present day, due to people ethically condemn all those discriminatory behaviours.

The experience of women makes up another case of moral frontiers' extension, in which it is enough to glance at contemporary feminist literature and social activism to realise that discourses against male chauvinism and anti-sexism are powerful and overwhelming. For instance, at the beginning of 2017, the feminist marches against Trump administration in the United States of America received full press coverage by national and international social media. Even Time magazine decided to feature the "*pussyhat*", a symbolic knitted red hat used by protesters, on its front cover. This image was re-tweeted more than ten thousand times.[473]

There is an enlargement of the moral boundaries of childhood as well. These days, no theorists would defend the ancient Aristotelian perception about children, as immature specimens, only expecting to reach the maturity with "[…] *the structure, form, and function of a normal or standard adult*".[474] Likewise, nobody would support the enormous power of "*life and death*" conferred by means of the Roman *Patria Potestas* on fathers, under which they could even sell their children.[475] As Butler affirms, children's moral status is not in

[468] Wollstonecraft (1833) 40-1; Tong and Williams (2009) § 1.
[469] Razavi (2015) 49-52.
[470] Cotter (2016) 15-36.
[471] Healey (2004) 1-2.
[472] An ethical compilation in Cudd and Jones (2006) 102.
[473] There are some compilations of works in feminism, for example, in: Tong and Williams (2009); Held (1995); Schott (2003). On the other hand, in relation to pussyhat, see Bain (2017) para. 3rd and image.
[474] Matthews and Mullin (2018) § 1.
[475] Maine (1908) 122.

serious question at present, beyond the varied opinions about its scope and meaning, due to infants and adolescents count on their moral interests and needs.[476]

Likewise, the extension of the limits of morality toward people with disabilities shows that moral standing is not a static concept but dynamic and progressive, to the point of counting on an express recognition of legal personality at international law. Effectively, the Convention on the Rights of Persons with Disabilities provides: "*States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law*".[477]

Summing up, as one can see, it has been necessary embarking on a journey, characterised by unsteadiness, long-standing periods, and complexity, in order to include an increasing number of members in the circle of moral considerability. It does not only deal with slaves, women, and children–who probably are the milestones–but also towards other human groups, such as natives, workers, or blacks, among others.[478]

To some extent, it even could be said that the borders of morality are still in progress of expansion towards other new fellows at the present day, such as foetuses[479] and embryos.[480] Their moral status and existence have been cast doubt on through the heated abortion debate, a controversial dispute between the recognition of foetuses' and embryos' rights and women's ones.[481] Another relevant set of surrounding philosophical disquisitions refers to future generations.[482]

Over time, this continuing practice of gradually extending the margins of morality has become an approach, so-called ***extensionism***, a label widely employed in the environmental parlance of ethics and philosophy.[483]

5.1.3 The extension of rights

Hitherto, the *extensionism* of the moral limits has primarily involved the perspective of considerability. Nevertheless, the analysis would not be complete if its repercussions in practice were side-lined, particularly in regard to the extension of rights. As mentioned

[476] Butler (2012) 196.
[477] Convention on the Rights of Persons with Disabilities (2006) Article 12.
[478] Nash (1989) 7.
[479] Payne (2010); Chervenak and McCullough (2014).
[480] Banchoff (2011).
[481] Lee and George (2005) 13ff; Little (2005) 27ff; Little (2006) 313ff.
[482] Baier (2010) 16; Attfield (1991) 88-114; Narveson (1967) 62ff.
[483] See, for instance, Kaufman (2003) 83; Nash (1989) 3ff; DesJardins (2013) 105; Keller (2010).

earlier, both aspects often display a close association. Furthermore, the expansion of rights, seen from legal and social terms, is frequently more illustrative than any ethical approach.

In that regard, one should affirm, as Christopher Stone magisterially suggests, that the interconnectedness between the conferment of [fundamental] rights to new subjects of law and the concomitant expansion of the frontiers of moral standing towards themselves responds to a parallel history. Thus, the holders of rights are usually deserving subjects of moral standing and vice versa. Nevertheless, one should take into account that this parallelism does not necessarily consist of temporality, i.e., it does not simultaneously occur in the laws and ethics. A perfect example concerning that parallelism is relating to the case of children. Professor Stone recounts that, although the rights of children had been legally protected just recently in the United States of America (by recently he means between 1967 and 1970), they had counted on an overall moral acknowledgement a long time ago in theoretical terms. "*We have been making persons of children* [Stone alleges] *although they were not, in law, always so*". It also occurs at the international level. For instance, although one can trace some references about the children's protection from the nineteenth century, according to the chronology prepared by the International Catholic Child Bureau, the Convention on the Rights of the Child was barely adopted in 1989.[484]

In any event, a more or less similar argument Stone employs, although admitting certain incongruences, to elucidate the cases of prisoners, foreigners, women (especially married ones), mentally ill people, blacks, foetuses, and Indians. To him, their legal recognition once was "*unthinkable*", but along the history, it became morally, and above all legally, feasible.[485]

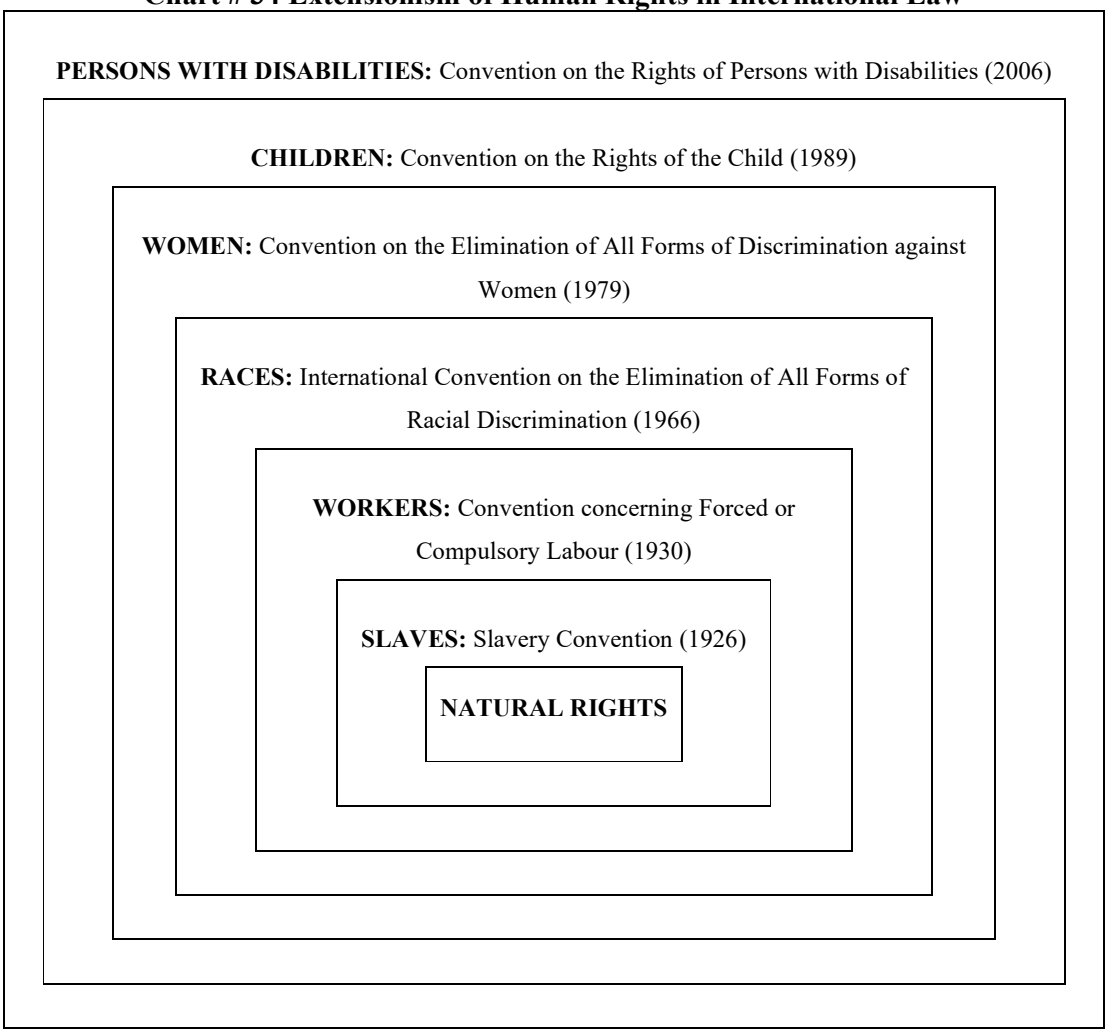
This idea of the "*expanding concept of rights*" has been illustrated in an outstanding work by Roderick Nash. He initially referred to the cases of the United States and the United Kingdom. Nonetheless, to the best benefit of the present dissertation, chart # 34 below displays an adaptation to international law.

So far, the idea about the expansion of rights seems to be relatively simple to the extent that the subjects at stake have been historically human beings. That is to say, although they possessed a legally different status, both free people and slaves shared the same human nature. Therefore, when their instrumental attributes (legal status) equated or overcame by means of the expansion of rights, their human essence (ethical value) manifested in itself

[484] Stone (1972) 450-1; Convention on the rights of the child (1989) Status at 2 September 1990; International Catholic Child Bureau (2014) para. 5th.
[485] Stone ibid 451.

identical before the law [at least in principle]. Presently, save extremely controversial cases described above about abortion, foetuses, and embryos, it has occurred more or less the same with women, children, people with disabilities, and the like.

Chart # 34 Extensionism of Human Rights in International Law



Based on Nash (1989) 7

5.1.4 Rejecting the anthropocentric outlook

When thinkers advocate humans as the only deserving ones of moral considerability, their ethical stances are undoubtedly within the ambit of anthropocentrism. In context, their philosophical worldview places humans at the centre of a whole (e.g., ecosystem, planet,[486]

[486] Boslaugh (2013) para. 1st.

or even cosmos[487]). Under a much more pragmatic outline, DesJardins holds, its scope probably "[…] *involves simply applying standard ethical principles to new social problems*". Indeed, John Passmore believed that a "*new ethics*" was useless, given that traditional tenets were solid enough to face up contemporary environmental threats, such as pollution or overpopulation; or even to promote the preservation of the wild world under a utilitarian conception.[488]

According to the taxonomy proposed by Callicott, this human-centred perspective refers to the Western traditional and protracted *Humanism*, in which there is no extension of rights in favour of any non-human being. Moral standing can prolong, as long as it deals with humans, even towards future generations.[489] In this regard, the recognition of moral status towards forthcoming people entails in itself ontological and epistemological incongruence,[490] which lies principally in determining if there is or there is no human duty to help them to meet their prospective needs.[491]

Summing up, the discussion about moral considerability, from an anthropocentric point of view, does not involve Nature, given that natural resources constitute a set of goods that provides nourishment, attire, and other services for human welfare. In this case, the right to a healthy environment would encompass a better ambit of analysis, considering the advantage of being the most well spread constitutional mechanism of Nature's protection worldwide.[492]

Consequently, under no circumstances, the bestowal of legal personhood or the concession of rights on Nature can be categorised inside this anthropocentric outlook.

5.1.5 Expanding rights to other living beings

The second category proposed by Professor Callicott is termed "*Extensionism*" and consists of enlarging the limits of moral consideration towards creatures and other living non-human organisms, deemed individually.[493] In principle, the mechanism to extend the borders of morality follows the same patterns of the Western classical traditions, i.e., every ethical category and its respective authors respond to its particular world view. Nevertheless, the

[487] Keller (2010) 59.
[488] DesJardins (2013) 17; Passmore (1975) 262.
[489] Callicott (1986) 392-3.
[490] Partridge (2001) 377-8.
[491] DesJardins (2013) 77ff.
[492] Borràs (2016) 124-6.
[493] Callicott (1986) 395ff

massive number of authors and schools of thought often obstruct a comprehensive and uniform classification. Either way, as seen in the precedent chart, biocentrism, animalism, zoocentrism, sentientism, and psychocentrism, among others, are just some examples of the heterogeneous terminology at stake.

Table # 3 Individualistic approaches

Individualism (Polycentrism)

Biocentrism	***Zoocentrism***
- Goodpaster - Varner - Bernstein - Gudynas (?)	***Sentientism (psychocentrism)*** - Singer - Regan
Egalitarian biocentrism - Taylor - Sterba (?) - Næss (?)	***Animalism*** - Snowdon - Liao - Shoemaker - Olson

Based on Blatti (2014) § 1; Kaufman (2003) 194-245; Keller (2010) 149-53; Varner (2001) 192ff; Vilkka (1997) 37ff.

For that reason, certain ethicists prefer a simplification of lexis, employing the generic name of "*biocentric ethics*", in which the typical idea consists of bestowing an "*intrinsic value*" on life, whether it refers to humans or non-humans, of course, under specific conditions. In this regard, Professor DesJardins defines intrinsic or inherent value as a characteristic of people or things, valuable in itself, which does not depend on outside factors or judgements. In other words, intrinsic or inherent value is opposite to instrumental one, whose worth depends on the function of usefulness.[494]

5.1.6 The doctrines of animal liberation and the rights of animals

By and large, Callicott explains that one can analyse extensionism in two levels. The first phase comprises the concession of rights to those living beings with the capacity to experience pleasure and pain. In effect, based on the utilitarian Bentham's discourse, ***Peter Singer*** has built the moral considerability of beings on their capacity to suffer and enjoy,

[494] DesJardins (2013) 125ff, 275.

i.e., he has proposed broadening the "*moral circle*" of humans towards animals, motivated by "*altruism*". Nevertheless, this expansion of morality does not encompass all living organisms, as Singer himself clarifies, because "[…] *there comes a point* […] *when it becomes doubtful if the creature* […] *is capable of feeling anything*", e.g., oysters. In that sense, animal liberation promotes the bestowal of moral status only on higher mammals.[495]

On his part, ***Tom Regan*** contributed to the analysis with an approach grounded on "*rights*", in a certain sense chastising Singer and other thinkers, both utilitarian and contractarian, for denying the rights of animals. Regan believes in the intrinsic value of the so-called "*subjects-of-a-life*", who are beings endowed of capacity to feel but also to become aware of their desires, pleasures, perceptions, memories, future, preferences, welfare, and so forth. They are conscious individuals of "[…] *what transpires "on the inside", in the lives that go* […] *on behind their eyes*". Accordingly, his perspective is even more restrictive than Singer's, considering the category of subjects-of-a-life would be reserved only for "*mentally normal mammals of a year or more*". If a non-human being does not form part of this category, it will not deserve moral status in practice.[496]

Philosophical adversaries of both authors have detracted from their ideas, arguing the excessive narrowness of their conditions for deserving moral considerability principally. According to Keller, their critics state that sentientism and self-awareness perpetuate the arbitrariness of the anthropocentric hierarchies they pretend to combat. In a similar vein, Callicott points out that Singer and Regan ascribe mere instrumental value to plants or other animals that cannot qualify inside any of their categories. Likewise, Rodman does not see any difference between what he calls "*zoocentrist sentientism*" and the selected rights that the British aristocracy endowed to the upper-middle class, by means of the Reform Bill of 1832. To him, the arbitrariness of conditions to deserve moral considerability is analogous in both circumstances.[497]

To summarise, the dogmatic teachings of animal liberation/rights ethics would encompass much better the idea about rights of Nature than anthropocentric doctrines do, even epistemologically, from an individualistic standpoint. Nevertheless, one cannot back up the conferment of international personhood, based upon their philosophical premises, because both schools of thought keep a restrictive structure of moral recognition, which is

[495] Callicott (1986) 395-401; Singer (1991) 7; Singer (2011) 120.
[496] Regan (1986) 15-6; Regan (1983) 78, 243; Regan (2003) 93. Concerning fundamental elements of contractarianism, see Cudd and Eftekhari (2017).
[497] Keller (2010) 13-4; Callicott (1986) 397; Rodman (1977) 91; Act to amend the Representation of the People in England and Wales (1832) 154ff.

only a little bit wider than the anthropocentrism's one. The high degree of uncertainty about a latent simplification or trivialisation of relevant criteria around the inherent value of the natural world represents a too much risky option that does not worth it to take, at least, for the time being.

On the other hand, although it is necessary to examine the arguments in favour of possible recognition of animals as legal subjects very carefully, that is not the objective of this dissertation. Nevertheless, any future review should avoid the emphasis on the repetition of outdated and already overcome practices, relating to trials and punishments of animals, as a consequence of their supposed "*actions*".[498] After all, if there is not enough preoccupation with the arguments, animals could experience a mere aesthetic transfiguration from being historically defendants to being plaintiffs before contemporary courts, which does not undoubtedly seem to be the aim of any theorist or doctrinal position.

To conclude, the overall postulates of zoocentrism, through its different theoretical stances (psychocentrism/sentientism and animalism), do not seem to fit with the expected line of argument concerning the rights of Nature. Sentientism, in particular, brushes aside the moral status of a significant group of living beings and other abiotic elements of the ecosystem. Therefore, from the outset, one has to discard this academic approach from the analysis.

5.1.7 The intrinsic value of life

Some compilers, such as Engel and Keller, have categorised the enlargement of the moral thresholds towards the whole living beings, mainly proposed by ***Paul Taylor***, as "*egalitarian biocentrism*". Nevertheless, there is not a consensus regarding this name among the ethicists in practice. For instance, while Carter prefers the complicated expression "*egalitarian deontological biocentrism*", Attfield merely writes about a "*biocentric egalitarianism*". Taylor himself even speaks about "*biotic egalitarianism*". In any case, these somehow tangled definitions denote only a brief sample of the conceptual complexity of the environmental literature about biocentrism. Effectively, one can find a countless multiplicity of expressions comprised of numerous combinations of words, such as biocentrism,

[498] There are numerous ancient examples of animals as defendants in Evans (1906). Likewise, there are modern examples of animals as plaintiffs before tribunals in the Harvard Law Review Association (2009) 1205-6.

biocentric, biospherical, biological, biotic, equal, equality, egalitarian, egalitarianism, sameness, ecology, ecological, and so forth.[499]

Something similar occurs in the opposed ethical postures, such as the "*inegalitarian consequentialism*" or the "*hierarchical biocentrism*". Effectively, the former is an expression employed by Carter to categorise the superiority of higher animals over the other living beings, mainly depicted by Singer, Regan, and Attfield. Instead, the latter corresponds to what Keller has pigeonholed into "*weak holism*", which endows different degrees of intrinsic value, depending on how high or low is the position of the living being within the hierarchy. The use of "*hierarchical biocentrism*" is also shared by Brennan. Nevertheless, other ethicists, like Kaufman and DesJardins, do not label them expressly inside any particular class, although they do point out their hierarchical character.[500]

The emergence of the second-phase extensionism, characterised by a life-centred insight, could correspond to a dichotomy between correctness and complementarity. In effect, some thinkers, such as Callicott, see the enlargement of morality margins (towards a broader range of living beings) as an attempt to rectify the arbitrary conditions of moral considerability, imposed by both anthropocentric and psychocentric worldviews. Others believe in, Keller suggests, the necessity to complete what fell short. To achieve their ends, either correcting the errors or adding what is missing, biocentrists appealed to a quite suitable tool, teleology.[501]

In this regard, the conception about that every organism is a "*teleological centre of life*", endowed of uniqueness, individuality and whose final cause is the pursuit of its own good on its own way, makes up one of the pillars of Taylor's *egalitarian biocentrism*, and maybe even its backbone. In contrast to Regan, Singer, and even some *hierarchical biocentrists*, the fact of believing that all entities have a value in itself makes Taylor's stance much more inclusive, in terms of moral considerability. Moreover, if one thinks about humans as fellows of nonhuman living beings, instead of a ranked relationship where humans are superior, it is unarguable that Taylor's objective consists of the elimination of categories between them. In other words, he promotes the "[…] *belief that humans are not inherently superior to other living things* […]", which means equality. Taylor seems to ponder on community membership characterised by vital interdependence among its fellow-members. In addition,

[499] Engel (2009b) 398; Keller (2010) 14-5; Carter (2005) 63; Attfield (1991) xvi, 208; Taylor (2011) 306.
[500] Carter ibid 63; Attfield ibid xvi; Keller ibid 11-2; Brennan (2009) 375; Kaufman (2003) 67; DesJardins (2013) 162.
[501] Callicott (1986) 401-3; Keller ibid 14-5.

the "*Respect for Nature*", his own book's title, sturdily reinforces his theory so that those who have the normative duty of adopting an "*ultimate moral attitude*" (moral agents) towards other nonhuman living beings do it.[502]

In short, Taylor's proposal anchors in four tenets: (1) humans and other living beings are fellow-members of the Earth's community of life; (2) humans and other living beings are integral components of a system of interdependence; (3) humans and other living beings are teleological centres of life; and (4) humans are not superior to other living beings.[503]

According to several essayists, another vital contribution to egalitarian biocentrism has come from ***Kenneth Goodpaster***'s thinking, whose work arose primarily in contradistinction to humanism and sentientism.[504] To him, neither reason nor the capacity of feeling was necessary for configuring moral standing. He prefers speaking about the "*life principle*", in which the sole "[…] *condition of being alive seems* […] *to be a plausible and nonarbitrary criterion*" of morality. This aspect makes possible to include a wider range of living beings, such as plants, for example, expanding somehow the verges of the "*conative life*" formerly proposed by Feinberg through his "*interest principle*". However, to be fair, Goodpaster stops short of affirming if moral importance is the same for all living beings or if there is any difference, Keller explains. Indeed, there is no explicit reference to this issue within Goodpaster's proposal.[505]

In Latin America, ***Eduardo Gudynas*** is probably the most respected scholar in matters of biocentric ethics. Notwithstanding, it turns difficult to pigeonhole his work entirely within the ambit of biocentrism, due to his continued allusions to Pachamama, the Indigenous terminology to define the Mother Earth or Nature, with regard to the conferral of legal rights. Although he severely questions the anthropocentric notion of Nature as a "*mere aggregate of commodities or capitals*", he instead visualises it as a "*conglomerate of living species*", whose intrinsic value emerges from each constitutive element. One cannot infer the existence of an interplay among living beings, above all, because he barely "assumes" but does not assure the presence of systemic or organicist attributes.[506]

In sum, his ethical stance could condense into one single paragraph: "[…] *there is a biocentric equality: all living species have the same importance, and all of them deserve to*

[502] Taylor (2011) 80, 99-100.
[503] ibid.
[504] Kaufman (2003) 217-8; DesJardins (2013) 132; Engel (2009a) 303. Keller (2010) 9.
[505] Goodpaster (1978) 310, 320; Feinberg (1980) 178; Keller ibid 9.
[506] Gudynas (2016) 66-7, 132-4.

be protected. One will conserve both useful and useless species, those ones with and without economic value, likewise the attractive and disgusting ones".[507]

Additionally, Attfield believes that Arne Næss and James Sterba can be deemed as part of this philosophical stance, although with some nuances. On his part, Keller agrees with Næss and includes other deep ecologists, such as Bill Devall and George Sessions. There is a coincidence of opinions about the three latter authors between Keller and Mathews. Nevertheless, being a radical posture, deep ecology will be addressed later within a different subheading.[508]

By way of criticism, if the fact of conferring moral standing to specific animals was controversial per se, let alone the case of ascribing such recognition towards a more general category of nonhuman living beings individually. In this sense, the theories concerning the intrinsic value of life, in general, brings about a series of ethical objections and distortions of morality. Among the most recurrent ones, it is possible to identify the lack of a correlative duty among all living beings, their individualism, the increasing conflict derived from the excessive interests at stake within the sphere of the biotic community, among others. Nevertheless, the most complex hindrance perhaps consists of the ontological essence of the moral struggle between complete organisms (e.g., humans, plants, or animals) and other living agents, organs, or parts of them (e.g., virus, bacteria, archaea). The problem lies in the fact that all of them would deserve moral consideration under the sole condition of life.[509]

In consequence, the proposal regarding the amplification of the limits of moral standing towards the whole living beings neither represents the best moral support for the legal doctrine of Nature as a subject of law. It does not only deal with its controversial character, but also with the fact that it brushes aside the abiotic component of the ecosystem, contrasting severely with the legal scope of the present dissertation. So, one should abandon the analysis of these postulates as well.

5.2 Holistic approaches towards the morality of Nature

In addition to *humanism* and *extensionism*, the final approach proposed by Callicott consists of *ecocentric ethics.* Indeed, one could affirm that the holistic purview of environmental ethics refers mainly to *ecocentrism*, whose hypotheses focus on the recognition of moral

[507] ibid 64.
[508] Attfield (2009) 98-9; Mathews (2001) 220; Keller ibid 14.
[509] Keller ibid 15; Callicott (1986) 402.

considerability towards the wholes, although Keller proposes a brief digression. Effectively, the author differentiates between what he names "*weak holism*", referring to the collectiveness of living beings, from "*robust holism"* regarding the "*wholes in themselves*", which in the end implies the inclusion of the abiotic elements of the ecosystem, i.e., non-living things.[510]

In contrast to the previously addressed doctrines, the inherent moral value does not correspond to an individualistic assignment, but rather to a collective one. In philosophical terms, the moral importance falls upon species, mountains, rivers, or other ecosystems, even the planet. Thus, it would not turn out rare to think about moral values underlies the recognition of legal personhood of rivers, glaciers and watersheds in Colombia, India, and New Zealand. Something similar one could argue about the bestowal of rights on Nature in Bolivia and Ecuador or the legal acknowledgement of natural environments in the United States.

In essence, Callicott defines ecocentric ethics as the "[…] *moral consideration for the ecosystem* ***as a whole*** *and for its various subsystems as well as for human and nonhuman natural entities severally*". Methodologically, ecocentrism constitutes a new paradigm for moral philosophy, given that it does not follow the schematic standards of humanism and extensionism towards an increasing enlargement of moral limits. In other words, Keller explains that ecocentrism does not deal with the process of expanding the moral circle toward different polycentric individuals, depending on each theoretical tendency. It does not follow the same logic of anthropocentrism, by expanding morality from people to people, or the biocentrism, extending moral status towards subjects-of-a-life, sentient beings, or just living beings. Ecocentrism is holistic rather and opposed to polycentric individualism.[511]

Nevertheless, it is worth making clear the technique of extending the thresholds of morality was actually one of its methodological antecedents in the beginning and currently is an escape route for the criticisms. Indeed, Callicott uses this argument to champion the land ethic against the accusations of *ecofascism.* Aldo Leopold, probably its more prominent forerunner, has stated that "[…] *land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land*".[512] Nowadays, authors like Næss, Rolston III, Sessions, and Callicott took over shaping the theory.

[510] Keller ibid 15-6; Callicott ibid 403ff.
[511] Keller ibid 15; Callicott ibid 392.
[512] Callicott (1999b) 70-1; Leopold (1970) 239.

The starting point, however, is Leopold himself and his widely known work "*The Land Ethic*". His celebrated statement, a "[…] *thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise*",[513] constitutes an outstanding condensed version of his perspective about the biotic community, where an array of interdependent parts interacts among them, but also somehow of the general postulates of holism in its purer form. Here precisely lies its importance.

Given the significant number of authors addressing ecocentric outlooks, a simple classification of ethical trends is often handy support to expose the ideas in a more precise fashion. In this case, Keller's taxonomy seems to be entirely accurate in didactic terms. As mentioned, he proposes a bifurcation between a "*weak holism*" and a "*robust*" one. Thinkers like Rolston III and Ferré, among others, would comprise the former, while the latter in turn split into two groups, the "*deep ecologists*", such as Næss, Sessions, and Devall; and the "*land ethicists*" with Leopold and Callicott. On his part, Frederick Ferré presents an alternative arrangement, in which he refers to Leopold as the "*founder-patron of robust environmental ethics*", where he also includes to Callicott, Rolston III, and himself. In addition, Earth Jurisprudence should come under *Ecotheology*, according to the categorisation by Sideris.[514] However, once its contents are analysed, Earth Jurisprudence constitutes an ethical branch much wider. Table # 3 displays an exemplificative classification.

Table # 4 Holistic approaches

<table>
<tr><th colspan="3">Holism (Ecocentrism)</th></tr>
<tr><th>Weak Holism</th><th colspan="2">Robust Holism</th></tr>
<tr><td>(Hierarchical biocentrism)

- Rolston III
- Ferré
- Jonas</td><td colspan="2"><table><tr><th>Deep Ecology</th><th>Land Ethic</th></tr><tr><td>- Næss
- Sessions
- Devall</td><td>- Leopold
- Callicott
- Midgley</td></tr></table><table><tr><th>Earth Jurisprudence</th></tr><tr><td>- Berry (Ecotheology)
- Cullinan (Wild Law)
- Shiva (Earth Democracy)</td></tr></table></td></tr>
</table>

Based on Cullinan (2012a) 18; Keller (2010) 15-6; Sideris (2009) 294; and Ferré (1996) 15-6.

[513] Leopold ibid 262.
[514] Keller (2010) 15-7; Ferré (1996) 16; Sideris (2009) 294.

5.2.1 The ancient roots of holism

Various contemporary ethicists[515] identify ***Aldo Leopold*** as the initiator of the ecocentric theories, or at least as one of their most transcendental exponents, to the point that his philosophical repercussion often equates with Rachel Carlson's concerning science. Nevertheless, it is feasible to track the academic and historical pedigree of the holism in much more ancient times, mainly hand in hand with scientific developments. Indeed, some authors, such as Davis, have even pondered the contradictions of *molecular biology*, based on the teleological origin of the conflict between Democritus' atomism and ***Aristotle's holism***. In short, atomism characterises by the individuality of the atoms merely moving by virtue of neighbouring forces in a void, in front of the holism, in which the final causation of objects and systems subordinate their behaviour to a general plan or destiny. Moreover, in an aesthetic interpretation of holism, Anthony Price argues the value of each part is a contribution to the value of the wholeness.[516]

From the ethical point of view, however, this idea is not necessarily shared by ethicists, such as George Sessions, whose outstanding essay, "*Ecocentrism and the Anthropocentric Detour*", has been useful to guide this section, by the way. He attributes the early ecocentric developments to "[…] *the Nature-oriented* […] *cosmological speculations of the* ***Pre-Socratics*** […]" rather than the philosophical strand of Aristotle, which ends in the well-known hierarchical structure of the "*Great Chain of Being*". In either event, it would turn out paradoxical the possibility of both anthropocentrism and ecocentrism could share the same epistemological Greek roots, at least in theory.[517]

Greek wisdom, though, is not the only reference about holistic views of Nature in the past, particularly regarding the question of moral values. Effectively, American Indian tribes, such as *Micmac* or *Sioux*, and especially ***Ojibwa***,[518] one of the largest indigenous peoples settled in Canada and the United States, have lived governed by a close intimacy with the natural world.

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[515] For example, DesJardins (2013) 24-5; Keller (2010) 151; Jamieson (2008) 22.
[516] Davies (2004) 6-7, 100; Price (1980) 344; Berryman (2016) sub-s 2.
[517] Sessions (1995b) 159-60 (emphasis added).
[518] *Ojibwa*, also known as *Ojibwe*, *Ojibway*, or *Chippewa*–self-name *Anishinaabe*–is a tribe that used to live in what are now Ontario and Manitoba in Canada, and Minnesota and North Dakota in the United States. See Encyclopædia Britannica (2016) para. 1st.

In that sense, Callicott narrates the worldview around the "*Indian's social circle*"–Steiner prefers the expression "*circle of life"*–where nonhuman entities, like the "[…] *Earth itself, the sky, the winds, rocks, streams, trees, insects, birds, and all other animals* […]" were "*enspirited*" [sic] and possessed personalities, consciousness, reason and, volition as well as the human beings.[519]

Despite his critical attitude, Calvin Martin somehow seems to concur with this Callicott's social interpretation of Indian cosmology initially. In effect, one can notice the affinity of ideas when Martin assures that Nature, for *Ojibwa* peoples, was a "[…] *congeries of societies* [where] *every animal, fish and plant species functioned in a society that was parallel in all aspects to mankind's. Wildlife and plant-life had homes and families, just as man did*". Nevertheless, later, Martin oddly casts doubt on the ethical validity of the eco-friendly attitude of Indians, arguing that the ecological impairments caused by them contrasted with their presumed "[…] *pristine sentiments toward Nature* […]", among other arguments. This opinion has been stringently criticised by Callicott, who has even branded it as "[…] *another unjustifiably skeptical remark* […]", despite admitting its extensive influence.[520]

According to Sessions, one can trace another remote reference about ecocentrism in the thirteenth century, by means of ***Saint Francis of Assisi***'s thought. In this regard, Lynn White Jr. deems that Saint Francis depicts a radical Christian view, mainly owing to his ideas about setting up "*a democracy of all God's creatures*". White interprets this aspect as "[…] *a unique sort of pan-psychism of all things animate and inanimate, designed for the glorification of their transcendent Creator* […]". In the same vein, Augustine Thompson evokes some stories about Francis speaking to animals and other nonhuman creatures, calling them brothers or sisters (e.g., brother sun, sister moon, brother fly, sister bird, brother fire, sister cricket, and so on). This habit denotes in some way perception of parity among human and nonhuman beings.[521]

White asserts that Assisi failed in his attempt to promote equality among all creatures, including humans, and to substitute the notion of man vastly governing the whole creation. However, one of the most memorable remembrances of his thoughts and feelings remains until present times. Thompson, one of Assisi's biographers, compiled this verse, included in the "*Canticle of Brother Sun*", among whose lines one can read: "*Praised be you, my Lord,*

[519] Callicott (1989a) 189; Steiner (1976) 111ff [quoted also by Sessions (1995b) 158].
[520] Martin (1978) 71, 188; Callicott (1989a) 198.
[521] Sessions (1995b) 160; White (1967) 1206-7; Thompson (2013) 70-2, 158-9.

through our Sister, Mother Earth, who sustains and governs us, and produces fruit with colored flowers and herbs".[522]

Another transcendent contributor of holism was ***Baruch Spinoza***. One proper manner to stress his philosophical contribution could consist of affirming, as Sessions has done, the philosopher constituted the second opportunity–three centuries after Saint Francis–to shift the anthropocentric course of Western culture. Nevertheless, the reading of Spinoza is not readily comprehensible, so that has brought about numerous interpretations, at least as far as his relationship with Nature is concerned. Anthony Smith's elucidations, for example, could illustrate how wide the range of views regarding Spinoza could be. To Smith, Spinoza's work concerning ecology depicts an opposite manner of understanding. On the one hand, it deals with a reductionist form of scientific reason. But, at the same time, it is a holistic source of deep ecologism.[523]

Moreover, there is who adduces that one of the most eventful affirmations of Spinoza was the so-called "*incremental naturalism*", which would consist basically of the comprehensive study of humans (including their mind) and their interactions with other elements, within the ambit of Nature and under the same governing principles. This interpretation, coming from Garrett, grounds on a statement taken from Spinoza's Ethics. In a sort of sarcastic tone, one can read that those who "[…] *have written about the affects*[524] [sic] *and man's conduct of life seem to discuss, not the natural things which follow the common laws of nature, but things which are outside her. They seem indeed to consider man in nature as a kingdom within a kingdom.*" As a consequence, under the umbrella of this incremental naturalism, one could explain certain human feelings–such as intentionality, desire, belief, understanding, and consciousness–from their most rudimentary expressions in the natural world. In other words, "[…] *humanity can be seen as a complex and sophisticated expression of nature* […]", which somehow implies an interpretative reminiscence of anthropocentric extensionism.[525]

In any event, Arne Næss is who has principally stood up for the ecocentric connotations from Spinoza's philosophy, as one can observe through various essays and other works published the late twentieth century. The core idea rests on how both Spinoza and deep ecologism define and interpret the term "*Nature*", emphasising its connection with the

[522] White ibid 1207; Thompson ibid 158.
[523] Sessions (1995b) 162; Smith (2012) 50.
[524] In context, the word "*affects*" should be understood as "*emotions*".
[525] Garrett (2008)18-9; Spinoza (1883) 104

theological notion of "*God*". In his words, "[…] *that eternal and infinite Being whom we call* ***God or Nature*** [Spinoza asserts] *acts by the same necessity by which He exists; for we have shown that He acts by the same necessity of nature as that by which He exists*." It drives to muse on some epistemological and semantic aspects, explained by Arne Næss mainly in his celebrated article "*Spinoza and Ecology*".[526] Those concerning holism gets emphasised below.

Firstly, as one can notice, it seems that the words "*God*" and "*Nature*" had the same meaning for Spinoza or, at least, were quite close. There are several references in his work, *Ethic*. This semantic correlation is crucial to Næss because it allows him to unfold the subsequent idea concerning the perfection of Nature.[527]

Secondly, therefore, Næss believes that Spinoza's Nature "*is perfect in itself*", like God, which implies the existence of an entity inherently "*creative*", "*infinitely diverse*", "*alive*" and "*structured*", according to the general "*laws of nature*", namely it deals with a notion of "*Nature*", very close to the gist of the deep ecology's one. Indeed, Næss writes the word "*Nature*" with capital N to emphasise the depiction of God, maybe as a form of "[…] *secular divinity perfect in itself that has been unbalanced by the actions of humanity*", following Smith's reading.[528]

Thirdly, under the conception of deep ecology or ecosophy[529], all things are interconnected. In that sense, Næss asserts there is a "[…] *network of cause-effect relations connecting everything with everything*." To him, nothing is causally inactive. Moreover, he even supports his argument on what Barry Commoner has called the *first law of Ecology,* i.e., "*everything is connected to everything else*". In his discourse, in effect, Spinoza seems to encompass a relationship of cause-effect in what he calls the *order and connection of ideas and things,* which for him are the same, by the way. *"For the idea of anything caused* [he asserts] *depends upon a knowledge of the cause of which the thing caused is the effect*". Later, he explains that the "*circle*" of things existing in Nature, according to God's idea, follows the same order, the same connection of causes, and the same sequence of things. This series of arguments, interpretatively, allows understanding to some extend how Næss reaches his conclusion of interconnectedness in deep ecology.[530]

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[526] Spinoza ibid 177; Næss (1977) 46ff.
[527] Spinoza ibid 177-8, 183-4; Næss ibid 47-50.
[528] Næss ibid 46; Smith (2012) 52.
[529] Ecosophy is used by Næss as an alternative terminology of philosophy of ecological harmony or equilibrium. See Næss (1973) 99.
[530] Spinoza (1883) 52-3; Næss (1977) 48; Commoner (1974) 29.

Finally, one last element of analysis refers to how Spinoza sees the relationship between humans and animals. Although he recognises the differences altogether, he interestingly points out that the same right which animals have over people, people have over animals. Though, to him, "[…] *since the right of any person is limited by his virtue or power, men possess a far greater right over brutes than brutes possess over men*."[531] At first glance, the idea about the balance of rights between animals and humans does not need too much explanation, at least from an ecological insight, although Næss has attempted to contextualise some extra elements, mainly concerning the differences.

Effectively, apropos of his comments about Genevieve Lloyd's article, Næss displays several examples to demonstrate a particular license of Spinoza to admit some similar, and even identical, characteristics shared by humans and animals. He refers, for instance, to the desires of procreation, lusts and appetites, which eventually denotes an idea of moral community or fellowship, where humans can treat animals as valuable in themselves, such as it occurs in ecology with each "*living thing*".[532]

In the same line, one aspect that Næss does not take into account, perhaps just incidentally, comprises the semantic sense of what one should understand by the expression "*natural objects*", in which Spinoza seems to include both animate and inanimate things. There is somehow an instrumental connotation as well. It occurs, for instance, when Spinoza asserts that natural objects are a means to obtain what is profitable and usable by humans. Thus, "[…] *the eyes, which are useful for seeing, the teeth for mastication, plants and animals for nourishment, the sun for giving light, the sea for feeding fish* […]", among others. Moreover, it underlies the idea that God created those things for humans, and they are different from artificial ones.[533]

Summing up, Spinoza's stance inevitably suggests the constant interaction of humans and Nature, especially those living beings, within an orbit of balanced links. Nevertheless, one cannot deny the author often recognises, and even highlights sometimes their differences. There is an overall sense of coexistence, as in a community or a membership.

5.2.2 Holistic tendencies of Nineteenth and Twentieth Centuries

[531] Spinoza ibid 209.
[532] ibid 157; Næss (1980) 317-8, 320.
[533] Spinoza ibid 38-9, 177.

Once in the nineteenth century, the philosopher ***Henry David Thoreau*** came on the scene. Callicott has even recognised his transcendence as one of the predecessors of Leopold himself, together with Charles Darwin and John Muir. Despite the criticisms about the superficial character of Thoreau's writings in matters of the natural world, Roderick Nash has also asserted he was one of the *ecologists before ecology*, in reference to the argument set out by Worster, regarding the appearance of the term "ecology" barely in the 1860s but after Thoreau passed away.[534]

In effect, Worster explains that the word "*oecology*", and later "*ecology*" as its current spelling, has been attributed to Ernst Haeckel in 1866 (Laferrière and Stoett affirm it occurred in 1867). Effectively, it refers to "[…] *the science of the domestic side of organic life, of the life-needs of organisms and their relations to other organisms with which they live* […]", which one can read in Haeckel's works.[535]

Broadly speaking, his book of experiences in the woods, "*Walden*",[536] reflects much of Thoreau's convictions regarding the environmental matters. Nonetheless, his opinion about the morality of Nature could be better summarised probably in the widely quoted phrase from his Journal, "[w]*hat we call wildness is a civilization other than our own*".[537] To him, this declaration contradicts the generalised connotation of reading the terms wildness and civilisation as antonyms, as the depiction of sin (*wildness*) and virtue (*tameness*), so that pines, hen-hawks and other similar living beings are consequently his "*friends*".[538]

Apropos of Thoreau's stories, one can find numerous references concerning this kind of "*wild community*", so to speak, disseminated around his prolific academic production. In his Journal's notes, for instance, Thoreau also refers to animals as "*companions*" or "*fellow-creatures*", even suggesting they could constitute some kind of *society* with humans. He came to equate cats and humans, affirming that albeit the latter "[…] *do not go to school, nor read the Testament; yet how near they come to doing so!* [Thoreau stated] *How much they are like us who do so!*" As part of his often-figurative discourse, he treats certain natural elements like his peers, either allies or enemies of labour. Adequately, while describing some of his summer activities in the woods, the author accounts that his "[…] *auxiliaries are the dews and rains which water this dry soil,* [while his] *enemies are worms, cool days, and*

[534] Callicott (1987a) 157; Nash (2014) 89; Nash (1989) 36; Worster (1994) 192.
[535] Worster ibid; Laferrière and Stoett (1999) 24; Haeckel (1904) 98.
[536] Thoreau (2008).
[537] For example, Nash (1989) 37; Cafaro (2004) 165; Gibblet (2011) 115.
[538] Thoreau (1906c) 450.

most of all woodchucks". It deals with a sort of metaphor that turns around the ecocentric symbolism, by including not only biotic elements.[539]

Finally, Thoreau complemented his vision about the relationship between Nature and humans quite well, through another assert also taken from his Journal, "[t]*he earth I tread on is not a dead, inert mass. It is a body, has a spirit, is organic, and fluid to the influence of its spirit,* [s]*he is not dead but asleep*",[540] which to some extent anticipated to the Gaia hypothesis.

Another remarkable figure of the ecocentric philosophy is undoubtedly ***John Muir***. He felt attracted strongly to Nature after observing a group of rare white orchids, as it has been well-documented by his commentators.[541] Muir published his copious scholar work between the late nineteenth and early twentieth centuries. He also co-founded and exercised the first presidency of Sierra Club,[542] one of the oldest and most prestigious environmental organisations of the United States. Muir, like Thoreau, used to write in an evocative language and kept a journal, where one can discover some of his unrevealed beliefs and attitudes toward Nature.

When he is speaking about his experiences in Yosemite Park, for example, one distinguishes precise ecocentric parlance supported on characteristic expressions, such as brother or fellow, for referring to nonhumans. "*Your animal fellow beings,* [Muir emphasises] *so seldom regarded in civilization, and every rock-brow and mountain, stream, and lake, and every plant soon come to be regarded as brothers; even one learns to like the storms and clouds and tireless winds* […]".[543]

In terms of environmental ethics, his narration about the quest of a vessel in *Cedar Keys*,[544] chapter six of his "*A thousand-mile walk to the Gulf*" is quite probably the most alike portrayal of his beliefs regarding the interplay between Nature and humans. Beyond the descriptions of the place [he even shows a hand-made picture by himself], the core of the text contains a severe criticism of the anthropocentric connotations of traditional ethics. Muir holds the planet has not been exclusively made for humans, as one could corroborate through the existence of venomous beasts, thorny plants, or deadly diseases, which he

[539] Thoreau (1906b) 178, 440; Thoreau (2008) 204-205.
[540] Thoreau (1906a) 165.
[541] See, for instance, Nash (1989) 39; Sessions (1995b) 165.
[542] Sierra Club (2016) Section: *Our roots.*
[543] Muir (1938) 350.
[544] *Cedar Keys* is a cluster of small islands in Florida, USA. Muir uses the town's name as the title of his chapter.

invokes as incontrovertible evidence. He assures that humans and other creatures are made from the same material so that they are "*earth-born companions*" and "*fellow mortals*".[545]

In this line of reasoning, Muir poses the core question of ecocentrism, bringing into question the existence of specific values for humans. He asks, "*why should man value himself as more than a small part of the one great unit of creation?*" Moreover, he even casts doubt on the complete absence of sensations in abiotic elements, such as minerals, arguing the lack of mechanisms of communication with humans, which allow corroborating this circumstance. Muir also highlights the functional role of people, in comparison with other living beings, affirming that "[a]*fter human beings have also played their part in Creation's plan, they too may disappear without any general burning or extraordinary commotion whatever*".[546]

To conclude, some authors, such as Mighetto or Nash, have emphasised Muir's "*intense love of animals*" in a manner that could lead to pigeonholing him within the defenders of the rights of animals, i.e., under a biocentric connotation. Indeed, there is an explicit reference about the recognition of rights of animals in a 1904-letter to Henry Fairfield Osborn, member of the Boone and Crockett Club, the oldest wildlife conservation organisation in North America, founded in 1887 by Theodore Roosevelt and George Bird Grinnell. Muir called the practice of hunting the murder business "[…] *because the pleasure of killing is in danger of being lost from there being little or nothing left to kill, and partly, let us hope, from a dim glimmering* ***recognition of the rights of animals*** *and their kinship to ourselves*". The same paragraph appears quoted in the compilation of random thoughts by Edwin Teale. Moreover, Muir affirms ironically that doctrine has "[…] *taught that animals* […] *have no rights that we are to respect, and were made only for man, to be petted, spoiled, slaughtered, or enslaved*".[547]

In that regard, after a detailed search, it is possible to identify some express allusions to the "*rights of the rest of creation*",[548] which would imply a robust ecocentric conception. Furthermore, Muir himself dispelled any doubts, arguing that "[…] *all of the individual 'things' or 'beings' into which the world is wrought are sparks of the Divine Soul variously clothed upon with flesh* [animals] *leaves* [plants]*, or that harder tissue called rock, water,*

[545] Muir (1916) 139-41
[546] ibid 139-40.
[547] Muir (1996) 347 (emphasis added); Muir (1965) 89; Nash (1989) 39; Mighetto (1985) 110-1; Boone and Crockett Club (2017) para. 3rd.
[548] Muir (1916) 98. The complete phrase is "*How narrow we selfish, conceited creatures are in our sympathies! How blind to the rights of all the rest of creation!*" Notice the Darwinist sense.

etc." Roderick Nash knows quite well this argument so that he quotes it and, additionally, comments that Muir respected Nature as part of the created community to which humans also belonged. To Muir, morality did not stop with animals, Nash states.[549]

George Santayana was a prolific writer of literature and philosophy. Both in intellectual circles and popular wisdom, one can often listen to his famous aphorism, "*Those who cannot remember the past are condemned to repeat it*", published in his also celebrated, "*The Life of Reason*". Concerning the subject at hand, he asserted: "*I was thus fully settled in my naturalistic convictions* […]", while was admitting *naturalism* had directly to do with "[…] *the origin and history of mankind* […]". Greeks and especially Spinoza were his primary sources of thought in matters of environmental morality, as Santayana himself has recognised. Indeed, he considered Spinoza as his "*master and model*", being his lessons the foundation of Santayana's philosophy. To Coleman, one of Santayana's commentators, the combination between these two quite different traditions were not "thoroughgoing", but "[…] *complementary influences on Santayana's thought, compensating for each other's deficiencies*".[550]

Although there is not any reference about Santayana in the most spread compilations of environmental ethics, not even in the Encyclopaedia by Callicott and Frodeman, his inclusion in a review of holistic tendencies makes sense mainly as a straight antecedent of deep ecology. Indeed, Sessions has confessed his admiration for Santayana as "[…] *one of the most striking instances of early twentieth-century ecocentrism*". He has looked into Santayana's work from a critical perspective of American philosophy to the point of considering him–especially along with Thoreau and Muir–as the third opportunity to leave the "*anthropocentric detour*". Saint Francis and Spinoza, in chronological order, had been the two first ones.[551]

To outline Santayana's principal contributions to ecocentric thought, Sessions and other ethicists had utilised a well-known excerpt taken from a 1911-lecture, delivered before the Philosophical Union of the University of California. During that event, Santayana briefly articulated his discrepancies with how American philosophers had conceived the *egotistical* and *anthropocentric* manner, in which human reason was constituting "[…] *the centre and pivot of the universe* […]". Moreover, to his mind, American intellectuals had not been able to influence for the imposition of any restriction to or, at least, elaborate a consistent

[549] Muir (1938) 137-8; Nash (1989) 39.
[550] Santayana (2011) 172; Santayana (1987) 233-5; Coleman (2009) xxxvii.
[551] Sessions (1995b) 162, 166-7.

discourse against the uncontrolled *American will* to develop the society industrially and urbanely. In a metaphorical sense, Santayana frequently compared the conflict between wishes and reasons with the differences between classical and modern architecture. In other words, while "[t]*he American Will inhabits the sky-scraper; the American Intellect inhabits the colonial mansion* [he asserted] [t]*he one is all aggressive enterprise; the other is all genteel tradition*".[552]

Nevertheless, according to Santayana, there was solely one exception to that *gentle tradition of American intellectuals,* Walt Whitman, who had been capable of abandoning this human-centred perception by means of an extension of democracy "[…] *to the animals, to inanimate nature,* ***to the cosmos as a whole***". In a clear-cut reference to ecocentrism, it dealt with a democracy somehow exercised within the ambit of psychology and morality. The quotation is also present in Sessions and Garrido.[553]

To the aim of this research, it is particularly significant Santayana's reproach to Emerson's transcendentalist notion about Nature as a commodity. This diatribe constitutes one of the sources supporting the critical stance about the anthropocentric relationship between Nature and property.

Effectively, Emerson stated that Nature "[…] *is not only the material, but is also the process and the result* [where] [a]*ll the parts incessantly work into each other's hands for the profit of* [hu]*man*". Moreover, to him, the "[…] *influence of the forms and actions in nature, is so needful to man, that, in its lowest functions, it seems to lie on the* ***confines of commodity and beauty***".[554]

In response, Santayana held this transcendentalist assertion represented an instrumental view of Nature, where the evocation of human work and the aesthetic conception of the wild determined somehow its value or, in other words, "*his* [Emerson's] *love and respect for Nature*".[555] On his part, Sessions believes it is ironic that John Muir, one of the emblematic figures of early ecocentrism, have been alive at the time of Santayana's criticisms. He presumes that Santayana was looking at Thoreau and Muir as a mere extension of Emerson's thought.[556]

In Latin America, the concept of *Pachamama* is precisely the epitome of an ancient aboriginal conception of the wholeness. The terminology ontologically comes from the

[552] Santayana (2009) 527, 539; Sessions ibid 166-7; Garrido (2002) 162-3.
[553] Santayana ibid 534 (emphasis added); Sessions ibid 167; Garrido ibid 163.
[554] Emerson (2015) 38-9
[555] Santayana (2009) 532-3.
[556] Sessions (1995b) 167.

Andean traditional cosmology and other native cultural worldviews, depending on the region where people employ the word. Indeed, one can translate the expression into Aymara, Kichwa or Quechua, which are languages mainly spoken in Bolivia, Ecuador, and Peru. Currently, notwithstanding ***Eduardo Gudynas***' caveat about the imprecise scope of the interpretation, *Pachamama* has been construed as "*mother earth*" in legal jargon. Something similar has occurred in the environmental vocabulary, according to Mamani-Bernabé.[557]

Philosophically speaking, one of the most remote references about *Pachamama* belongs to ***Rodolfo Kusch***. He discovered that ancient natives used to associate the term with a visible or day-to-day perception of "*land*", i.e., "*what there is here*", "*what one sees growing*", separately from the idea of "*Pacha*" (meaning "*cosmos*" or "*habitat*"). In effect, Kusch highlights the suggestive verbatim translation: "*mother or wife of the Pacha*", which could get interpreted as segregation from higher divinities. Kusch is part–probably even the forerunner–of a group of philosophers (Mignolo, Escobar, Boff, among others) who conform "[…] *the ancient ethos and biocultural landscapes of Amerindian people*". In contrast to them, there is a group of thinkers who have attempted to incorporate the green philosophical thinking into the South American academic circles (i.e., Rozzi). In any event, some authors, such as Gudynas, are tending to articulate this approach with ecocentric worldviews, mainly deep ecology, and the land ethic.[558]

Although ***Walt Whitman*** and ***Gary Snyder*** are not precisely philosophers of environmental issues, some authors have analysed and interpreted parts of their poetry since the point of view of ecocriticism. Thus, in Whitman's work, one should emphasise mainly the differences between human-centred worldview and ecocentric one, within the ambit of the "*environmental literature*". Santayana assured that Whitman was a pantheist, but whose pantheism was different from Stoics' and Spinoza's, namely "*unintellectual, lazy, and self-indulgent*". Indeed, he claimed the possibility of expressing it in a kind of bond between psychology and morality within Whitman's concept of democracy.[559] Hitherto, the ***vast similitudes*** (Annexe # 3.10) that Whitman found are still resounding.

On his part, in 1969, the poet ***Gary Snyder*** evoked the representation of living Nature under the umbrella of what he called "*the wilderness*", prompting to formulate a "[…] *new definition of humanism and a new definition of democracy that would include the nonhuman, that would have representation from those spheres*". In addition, he narrated the experience

[557] Gudynas (2016) 137-8; Mamani-Bernabé (2015) 65-6.
[558] Kusch (2007) 400-1; Rozzi (2009) 264; Gudynas (2016) 102.
[559] Killingsworth (2006) 311ff; Santayana (2009) 534.

of Pueblo societies, which practiced a similar kind of democracy how he expected. "*Plants and animals are also people,* [Snyder avows] *and, through certain rituals and dances, are given a place and a voice in the political discussions of the humans*".[560]

Although the scholar value of the reference is not entirely ethical, it did play a strategic role at the moment of its publication, mostly aiding to make its moral proposition visible. Snyder's voice was not definitively little something, and it is not nowadays. "*Turtle Island*", the winner of the 1975 Pulitzer Prize for Poetry as a manifest in favour of Nature continues to influence contemporary writers, historians, ethicists, and even some scientists.[561]

To conclude, no review concerning the holistic tendencies of ethics can be complete without mentioning ***Roderick Nash***. As one can notice along several passages of this research, his scholar approach is historical, being his classical book, *The Rights of Nature,* quite probably the most comprehensive and remarkable compilation of theories ever written. Undoubtedly, his most significant contribution consists of the didactic explanation relative to the expansion of rights, whose chronological description is crucial to understand also the evolution of moral considerability. For the aims of the present dissertation, his opinion about the extension of morality toward Nature is invaluable. He argues: "*From the perspective of intellectual history, environmental ethics is revolutionary; it is arguably the most dramatic expansion of morality in the course of human thought*".[562]

5.2.3 Weak Holism

The theoretical stances of *weak holism,* also hierarchical biocentrism, rest on the idea of granting intrinsic value to all living beings, bringing into question the traditional belief that environment is secondary to human interests and therefore instrumental and auxiliary. In other words, Nature has no intrinsic value.

Thus, although it could sound somehow redundant, ***Holmes Rolston III*** emphasised the *richness* of the human uses of Nature to ratify the discursive character of the ethical value of living beings. To him, Nature does not have a value in itself, but rather it relies on human perception, by which "*humans are valuing the natural environment*", as one can read in the very title of the first chapter of his *Environmental Ethics*. That insight of value lies in

[560] Snyder (1974) 104, 106.
[561] See, for example, Nash (1989) 249; Wirth (2017) 113; Gilcrest (2002) 40; Takahashi (2002) 324; Oelschlaeger (1992) 303.
[562] Nash ibid 7.

different features, which Rolston III had elaborated by means of a lengthy description. It comprises of life-support, economics, recreation, science, aesthetics, genetic-diversity, history, cultural-symbolisation, character-building, diversity, unity, stability, spontaneity, didactics, life, and religion.[563]

One significant aspect for the aim of this dissertation is the role that ownership plays in the determination of moral values, according to Rolston III's thought. To him, moral value associates with ownership, insofar as the latter endows a worth in itself. The author employs "*life*" as an example, assuring that there is a "value ownership" when an "[…] *organism has something it is conserving, something for which it is standing: its life*", namely the organism owns its life, and that relationship of pertaining determines the value of living in ethical terms. Nevertheless, one should consider some other reasons in the determination of such moral significance. Thus, the organism deems not only the ownership but also the fact that life keeps it stood. To Rolston III, those additional considerations are "*projections*" of sentiments that solely exists in the human mind. In other words, this somewhat refined relationship of possession does not necessarily depict reality because it could involve imaginary scenes. For instance, aesthetic features depend on the viewer's mind and are usually the result of cumulative human experiences ("*experienced value*"). They pertain to the ambit of the subjectivity while they stay inside human intimacy.[564]

On the other hand, those human experiences are constructions arose out of excitements and desires, which becomes objective when their subjectivity turns "*inevitable*". In a certain sense, it means the "*subjective*" perceptions get materialised in "objective" realities; for example, "[…] *not reducing penguin value to people experience but extending value from subjective people experiences to objective penguin lives*". As an interpretation, it seems the author recognises that those owned sentiments or desires could be not exclusively humanistic so that they can transmute towards other external concerns. Therefore, mere empathy for penguins transforms in real worrying for their existence. Likewise, they could also be selfish and lead solely to the search for personal welfare. In any case, the valuer is the owner of its interests. The thread running through his reasoning gives the impression that Rolston III thinks of animals, plants, and ecosystems as "*value objects*", denying any potential moral agency.[565]

[563] Rolston III (1988) 1, 3-27.
[564] ibid 27-8, 100.
[565] ibid 31-2.

Nevertheless, the bestowal of intrinsic values on all living beings in the ambit of *weak holism* is not equitable, like Taylor's and Goodpaster's *egalitarian biocentrism*, but somewhat stratified. Hence its alternative label makes sense, ***hierarchical biocentrism***. Rolston III dedicates the entire chapter two of his *Environmental Ethics* to discuss the existence of higher and lower beings, emphasising the position of human beings at the top of the scale. He states that "[…] *humans are of the utmost value in the sense that they are the ecosystem's most sophisticated product*", which turns out a thoroughly anthropocentric view, at least from the axiological and existential perspectives.[566] Indeed, Rolston III assures that humans are the "*ablest form of life*", whose superiority bases on the Darwinian notion of "*evolutionary achievement*", materialised–for instance–through the development of culture, art, literature, philosophy, natural history, and science.[567]

In addition, although the biocentrism of Rolston III corresponds to a hierarchy discriminated in the function of sentience, at least among the higher animals, one should not confuse it with Singer's and Regan's *psychocentrism,* in which feelings also play a crucial part in the position that beings occupy along the value scale. Following Keller, unlike the sentientists, who proclaim that values are reserved for higher animals capable of suffering or being self-aware of themselves, both spatially and temporally, *weak holists* believe in the assignation of values to *all living beings*, although considering different degrees of intensity regarding sentiments. Effectively, Rolston III adduces that "[h]*igher animals* ***suffer the more*** *because they can form plans and carry them out; their sentience joins with their intentions and frustrations*". Hence, they can occupy an upper place than other organisms, such as insects or plants, in the pyramidal structure of values. They merit definitively higher worth.[568]

Interestingly, Professor Desjardins labels the explanation of Rolston III's value system as one of "[…] *the best philosophical account*[s] *of the values that support a comprehensive environmental ethics*". It works out like a ladder, in which every rung represents a value interconnected one another. Every level has an inherent value in itself because one can stand on it, but it is merely instrumental to the next step. "*Instrumental value uses something as a means to an end; intrinsic value is found worthwhile in itself without necessary contributory reference*". Furthermore, Rolston III states that one cannot speak about value without an evaluator, who *assesses* the importance of others *selectively*. Thus, for instance, although

[566] In the same line of reasoning, see Keller (2010) 11-2.
[567] Rolston III (1988) 73.
[568] Rolston III (1988) 62; Keller (2010) 149-50.

plants are *intrinsically* momentous in themselves, they attach *instrumental* significance to sunshine and water as sources of photosynthesis, their vital process. Likewise, insects probably put a value on the energy generated by plants, while in turn are essential for warblers, and warblers become crucial to falcons. The food chain will consequently unfold to reach higher animals and humans in the end.[569]

Although the structure of Rolston III's value system looks simple at first sight, the combination of elements taken from different philosophical sources turns it pretty complex to a certain extent. Keller, for example, appears to feel uncomfortable with the recurrent overlap between science and religion, stemmed from the author's Christian bias. At times, Rolston III sounds contradictory, such as when he arguably adduces neither biocentrism nor anthropocentrism defines his ethical system, given that it "[…] *does not center indiscriminately on life* [or] *functionally on humans*". Notwithstanding, as mentioned, living beings are bound one another as the supply of food for other's life sake–in Rolston's values scheme–while humans are on the top of that system.[570]

In addition, Rolston III advocates the theory of "*autonomous intrinsic value*", in which "[b]*iotic communities leave individuals 'on their own' as autonomous centers, spontaneous somatic selves defending their life programs*'. This autonomy implies a subjective conception of moral standing, where only humans are responsible for protecting what they "[…] *have been given on the Earth*". And solely *homo sapiens* are moral agents because they are the only beings who have the "*inherent moral capacity*" to take care of the natural world. The author affirms emphatically that "[p]*lants and animals do not have such responsibilities, much less do rivers and mountains*". They are not agents but patients and, therefore, the *object* of moral concern.[571]

Consequently, the Earth is valuable in a humanistic sense, meaning that it can produce an instrumental value, endowing to humans a right to an environment with integrity. Under Rolston III's vision, a conception of rights of Nature is "[…] ***comical,*** *because the concept of rights is an inappropriate category for nature*". It is alright for rhetorical, poetic, or even lamentation purposes, but not for taking them seriously. His reproaches are particularly stringent with Muir and Leopold.[572]

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[569] Rolston III ibid 150, 175, 186; DesJardins (2013) 146.
[570] Rolston III ibid 73, 175; Keller (2010) 12.
[571] Rolston III ibid 107-8, 114 and 183; Rolston III (1993) 262-3.
[572] Rolston III (1993) 256 [emphasis added], 278.

On his part, ***Frederick Ferré*** proposes an alternative track to the dilemma between Leopold's and Callicott's "*land ethic*" and Rolston III's "*painful good ethic*". Inspired in Alfred North Whitehead, the author fosters the so-called "*Personalistic Organicism*". It deals with a moral mechanism to supplement the inadequacy of land ethic to address specific human concerns and to overcome the absence of interconnections between environmental and social principles that he notices in Rolston III's ethical position.[573]

Effectively, albeit Ferré accepts the enormous constructive influence of Leopold in the realm of environmental ethics, and the subsequent validity of Callicott's interpretation, he challenges *land ethic,* grounded on three basic arguments. Firstly, he is not thoroughly sure of the existence of enough information about the actions to take for enhancing the "*integrity, stability, and beauty of the biotic community*", according to the currently available biological and ecological breakthroughs. Therefore, it would lead to the risk of implementing erratic public policies, even harmful to the environment. Secondly, Ferré considers that *Land Ethic* ignores precise transcendent dimensions of moral life, focusing exclusively on the aim of meeting the "*integrity, stability, and beauty of the biotic community*". For instance, he believes that land ethicists would be omitting the moral assessment regarding how right or wrong some specific human conducts are, either factual ones such as telling lies or more abstract dilemmas, such as the slavery or torture. Thirdly, Ferré holds a severe opinion concerning the theoretical option of considering morally right the deliberate extermination of humans, as a mechanism to achieve the aims of "*integrity, stability, and beauty of the biotic community*".[574]

Nevertheless, his last inference arises out of an interpretation that seems to overweight the biological variables with regard to the problem of overpopulation. One can notice certain parallelism with Regan's opinion about *ecofascism.* In the aftermath, Ferré completely discards the *land ethic* as guidance in crucial ethical situations, even feeling afraid that despite being a "[…] *refreshing change from anthropocentrism, Leopold's vision could easily swing to the opposite extreme and become an excuse for radical misanthropy*".[575]

As to Rolston III's ethical doctrine, Ferré brings into question the "*sharp separation*" between social and environmental ethics, alleging it leads to a moral incoherence. Rolston III had argued thereon that both ethics are not the same scope, supporting his ideas in the case of predation. To him, predation is ecologically right, a *painful good*, because it

[573] Ferré (1996) 15.
[574] ibid 17-8.
[575] ibid 18; Regan (1983) 361-2.

guarantees life within the trophic pyramid. Still, society condemns it to the point that humans have been isolated from it, grounded on their right to be rescued. Moreover, Rolston III claims that sentiments (pleasure and pain) are not the sole or the most important measures of value. He believes in living beings, playing their roles, and blossoming within their niches, "[…] *with increasingly distinctive organic individuality as one goes up the system*".[576]

In that regard, however, Ferré sees the dualism between the two kinds of ethics as incongruent because it leads to an unsolved disjunctive when it deals with a conflict between humans and nonhumans. By means of the case of deforestation in the global South, he wonders what ethical approach should be employed, social or environmental. He deems that while the first line of action favours the alleviation of poverty (social ethics), in turn, it depletes biodiversity, contributes to global warming, and fosters destructive anthropogenic encroachments (environmental ethics). According to Ferré, "*Rolston's answer is not much help* [because he] *acknowledges that there is nothing unusual in 'higher trophic levels' (including human, cultures) 'eating up' lower ones.*"[577]

As Rolston III's stance, Ferré's "*Personalistic Organicism*" also focuses on the idea of "[…] *different degrees of value on a common scale* [but] *discriminating moral choices* […] *not always or automatically in favor of human interests*". It will constitute a mechanism to solve the alleged lack of interconnection between human and nonhuman worlds. Furthermore, at this stage, it turns out convenient to recall that Ferré has practically dismissed *land ethic*. Instead, he is proposing a kind of bridge between the social and environmental ethics of Rolston III, which ends in a completely new system of values, based on the intensity of experiences.[578]

Firstly, Ferré seizes a semantic interpretation of the words "*artificial*" and "*natural*", granting them different degrees of intensity. He states, for instance, that "[a]*n apple orchard is more artificial than a forest, but a plastic apple is more artificial yet*". His objective consists of handling all ethical elements within a unique structure of values, the "*naturalness*". Secondly, such as Rolston III's system, *personalistic organicism* requires the participation of "*valuers*", who possess *intrinsic values* for their own sake, and *instrumental values*, which are going to be the object of valuation. In parenthesis, the author himself clarifies that a valuer can merit intrinsic and instrumental values at the same time. In that regard, valuers deserve intrinsic value as far as they can be the centre of experiences, "*of a*

[576] Ferré ibid 20; Rolston III (1988) 57-9
[577] Ferré ibid 20.
[578] ibid 21.

wide range of sharpness and complexity", which denotes an interconnectedness with the capacity of being considered as a "*subject*".[579] For example, a pond is valuable only in an instrumental manner because it is not able to gain experiences to the same extent as "[…] *the many varieties of valuers who flourish in and around it, who depend on it as a necessary condition for their continued valuing*".[580] In essence, it sounds like a disjunctive between subjects and objects organised in function of different degrees of value. So, the more subjective characteristics are, the more possibility of being endowed with intrinsic values and vice versa.

Another author of importance is ***Hans Jonas***, who posed the question concerning if Nature has rights in his 1979-famous work, *The Imperative of Responsibility*. He principally muses on the idea of deeming natural interests as a factor of moral considerability, which would imply some rethinking about foundational principles of ethics. Some authors, such as Dániel Déak, have seen Jonas' *ecological imperative* as a sort of guide for people to "[…] *act so that the effects of one's action are not destructive of the continuation of humanity on earth*".[581]

Nevertheless, although his holistic posture is often explicit, one can sometimes notice a tendency to encompass some anthropocentric connotations, such as the people's roles concerning the stewardship or care of Nature. Given his discourse seems to leap from Nature's intrinsic value to human dignity every once in a while, Ott, Frodeman, and Callicott have pigeonholed him among the group of the European biocentrists.[582] For example, one could read between the lines that he accepts the possibility of a human trust in the biosphere with the subsequent legal implications concerning the administration of natural resources, in practice. In his words,

> *It is at least not senseless anymore to ask whether the condition of extrahuman nature, the biosphere as a whole and its parts, now subject to our power, has become a human trust and has something of a moral claim on us not only for our ulterior sake but for its own and in its own right.*[583]

[579] In the same line of reasoning, Keller links the different degrees of values with the intensity of subjectivity. See Keller (2010) 12.
[580] Ferré (1996) 21-3
[581] Jonas (1984) 8; Deák (2019) 283.
[582] Ott, Frodeman and Callicott (2009) 406.
[583] Jonas (1984) 8.

Presumably, the most rigorous disapproval one can identify against the hierarchical biocentrism, particularly from the holistic perspective, consists of its profound anthropocentric roots in the structure of values, where humans appear once again in a dominant position over other beings. Sessions, for instance, alleges that this Whiteheadian position of applying different degrees of intrinsic value to Nature merely strengthens the traditional anthropocentrism. He even observes parallelism between hierarchical biocentrism and the humanistic pose of extending legal rights to natural objects, proposed by Christopher Stone, which has been sternly chastised by John Rodman stating that: "[…] *there is a pecking order in this moral barnyard*". Sessions himself uses the same phrase to support his point.[584]

5.2.4 Deep Ecology

Arne Næss coined the expression "*deep ecology*", also "*ecosophy*", to characterise initially a movement aimed at the "[r]*ejection of the man-in-environment image in favor of the relational, total-field image*". A platform of eight purposive principles, agreed by Arne Næss and George Sessions, guides this activism, determining who is a supporter and who is not (Annexe # 3.11). It is all or nothing so that half-measures do not work out in here. Despite its radicalism, or maybe because of it, its reputation has transcended the mere activist discourse, pushing its postulates through respectable academic circles. As Keller argues, deep ecology could be pigeonholed within "[…] *an egalitarian and holistic environmental philosophy founded on phenomenological methodology*", i.e., focused on an egalitarian value system (axiology) and an ensemble of interconnected individuals within a whole (ontology).[585]

Incidentally, it is worth mentioning that David Woodruff Smith defines phenomenology, in philosophical terms, as the study of the "[…] *structures of conscious experience as experienced from the first-person point of view, along with relevant conditions of experience*". In this sense, when Næss refers to the "*intrinsic value*" of nonhumans, he often mentions his intuition (first-person point of view) and the feelings for places or creatures (conditions of experience) as the sources of his conclusion (intrinsic value). Indeed, the methodological correlation becomes quite clear when, for example, Næss asserts the equal right to live is an "*intuitively*" clear and obvious value axiom of the "*egalitarian biocentrism*", the core precept of deep ecology. One can find another reference in "*Life's*

[584] Sessions (1985) 236. Stone (1972) 456; Rodman (1977) 93. The quotation also appears in Keller (2010) 12.
[585] Næss (1973) 95, 99; Næss (2003) 404-5; Keller (2009) 206-7.

philosophy", jointly with Per Haukeland, in which the authors dedicate an entire chapter to the feelings for all living beings. By the way, Diehm presents a more detailed analysis of deep ecology and phenomenological methodology. In either event, as Keller assures, the scholar scheme of deep ecology comprises of two vital tenets, the axiology of *biocentric egalitarianism* and the ontology of *metaphysical holism*.[586]

Regarding the first principle, one should recall that the philosophical category of *biocentric egalitarianism*, or also *egalitarian biocentrism*, has been encompassed mainly by Paul Taylor and Kenneth Goodpaster, according to myriad authors.[587] Taylor himself has even assigned it the personal label of "*biotic egalitarianism*".[588] This ethical stance, though, is not necessarily comparable to *deep ecology*, at least in terms of theoretical scope. The difference lies in the manner how Næss has tackled his "*biospherical egalitarianism–in principle*", particularly as part of his widely known essay, "*The Shallow and the Deep, Long-Range Ecology Movement*". Effectively, the core difference regards the insertion of the semantic clause, "*in principle*". Næss does not speak about a mere "*ecological or biospherical egalitarianism*", where every single being possesses an equal value. He refers to an "*ecological or biospherical egalitarianism–**in principle***", in which he admits that "[…] *any realistic praxis necessitates some killing, exploitation, and suppression*".[589]

Næss' astute proposal undoubtedly presupposes the existence of a type of beings who–under specific circumstances–are going to bring their values to bear upon others', such as it occurs in the food chain, for example. In other words, the function of this "*in principle*" clause is quite powerful, above all considering it strikes at the essence of the theory, adding "*an exception to the rule*". One should remember that Richard Watson, for example, brought into question the biocentric egalitarianism, arguing it treated the human actions like anti-natural ones. If humans, Watson affirms, "[…] *destroy many other species and themselves in the process*, *they do no more than has been done by many another species*". In this line of reasoning, Keller is in the right when he upholds that Næss was pretty shrewd due to the use of the *qualifier* "*in principle*" because it allowed to deep ecologists endowed their theory with higher philosophical consistency. Notwithstanding, ecosophy defenders should recognise that clause has not avoided the criticisms.[590]

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[586] Næss (1973) 95-6; Næss and Haukeland (2002) 92-116. Diehm (2004) 20ff; Keller (2009) 206-7; Smith (2013) sub-s 2.
[587] See, for instance, Attfield (1991) xvi; Carter (2005) 63; Engel (2009b) 398; Keller (2010) 14.
[588] Taylor (2011) 306.
[589] Næss (1973) 95-6.
[590] Watson (1983) 253; Keller (2009) 207.

On his part, ***George Sessions*** fully corroborates his partisan's avowal, assuring that none of the eight principles contains references about neither egalitarian biocentrism/ecology nor the equality of values. He argues that, in the ambit of deep ecology, humans and nonhumans have values in themselves, but they are not equal. It does not mean, though, that he believes in a hierarchy of values. Quite the contrary, in his *Deep Ecology,* written jointly with Bill Devall, he states that *ecological consciousness* is "[…] *in sharp contrast with the dominant worldview of technocratic-industrial societies* […]". It implies a rejection of the view of humans as a superior category, isolated from the rest of the natural world.[591]

In this point, one wonders if there is any contradiction around the deep-ecologists' arguments, principally considering they promote the differentiation of moral values while denying their hierarchy. The crux of the matter lies definitively in the semantic qualifier "*in principle*", by circumventing that the circumstantial application of priorities among beings should get deemed as an anthropocentric recognition of any supremacy, especially in favour of humans. Killing, exploitation, and suppression–to put it in Næss' words–are crucial relations for the subsistence of the biospherical net, not only for the human sake. Accordingly, Næss upholds that his "[…] *intuition is that the right to live is one and the same for all individuals, whatever the species, but the vital interests of our nearest, nevertheless, have priority*". This idea that fits quite coherently with his argument that "[…] *the equal right to live and blossom is an intuitively clear and obvious value axiom*". In sum, without this "*in principle*" clause, deep ecology would transmute into a mere "*hierarchical biocentrism*" that would reinforce the Western anthropocentrism and would lead to a failure of the norm concerning the "*ecological egalitarianism in principle*", Sessions concludes.[592]

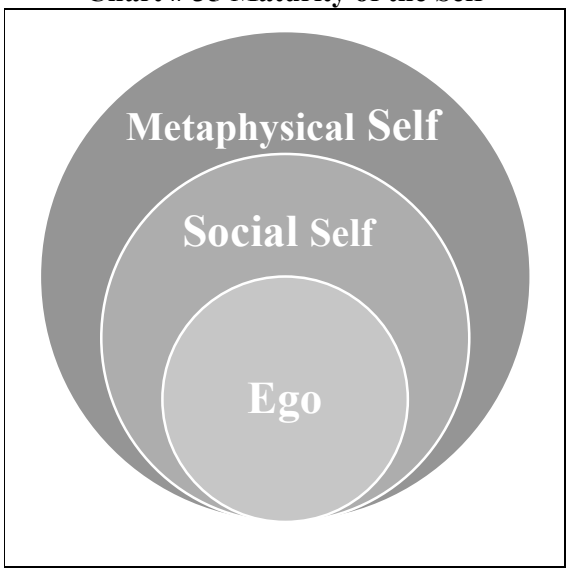
The second fundamental tenet of Deep Ecology concerns to the "*metaphysical holistic worldview*", unfolded by means of the so-called "*self-realisation*". DesJardins explains it pretty clearly, "[s]*elf-realization is a process through which people come to understand themselves as existing in a thorough interconnectedness with the rest of nature* [so that] *all organisms and beings are equally members of an interrelated whole* […]". However, Næss clarifies this process does not carry out in isolation. One's self-realisation hinders, he argues, if the self-realisation of others, with whom one identifies, also hampers. In a certain way, the individual self-realisation contributes to the self-realisation of the whole, as Devall and Sessions contend: "[a]*ll things in the biosphere have an equal right to live and blossom and*

[591] Sessions (1995a) 191; Devall and Sessions (1985) 65.
[592] Næss (1995a) 222, Næss (1973) 96; Sessions (1985) 236.

*to **reach their own individual forms** of unfolding and self-realization within the **larger Self-realization**'*.[593]

In addition, self-realisation and biocentric equality are not only bound up among them through a metaphysical relationship of interdependence, so to speak, but also in methodological terms, where the "*identification*" of the intrinsic worth of other living beings constitutes the mechanism to recognise "[…] *the solidarity of all life forms*". In a certain sense, one could identify in this argument the essence of the wholeness in Næss' stance, by means of what he calls "*ecological self*". Effectively, Næss explains that the "*maturity of the self*" traditionally experiences three interrelated phases, ego, social self, and metaphysical self, where the bigger ambits include the smaller ones.[594] See Chart # 35 thereon.

Chart # 35 Maturity of the Self



Based on Næss (1995b) 226.

In this framework, the maturity of the self gradually unfolds through the "*inescapable*" process of the identification of other community fellows, i.e., initially the self passes from the ego to a social stage and subsequently to a metaphysical one. Nonetheless, this scheme wholly excludes Nature so that the identification with nonhuman living beings gets disregarded. To Næss, the definition of the ecological self is essential because it concerns what the terms "I", "ego" or "self" represents for people. He argues that "[t]*he ecological self of a person is that with which this person identifies*".[595]

[593] Næss (1995b) 226; Devall and Sessions (1985) 67 (emphasis added); DesJardins (2013) 216..
[594] Næss ibid; Keller (2009) 207.
[595] Næss ibid 227.

To prevent confusions, it is worth reiterating, however, that Næss' assertion about the exclusion of Nature does not have to do with a strict description of reality, but rather with a question of philosophical method. Therefore, the absence of Nature within the process of identification toward other living fellows refers exclusively to a philosophical description that anthropocentrists circumvent and deep ecologists promote. One could easily elaborate this inference from the Næss' anecdote about how he once saw a flea dying burned by acid, without any possibility to help it. He describes the painful feelings of compassion and empathy, which are useful to characterise the process of identification, "*I saw myself in the flea*" Næss recalls. In this line of reasoning, identification acts as a precondition of *compassion* toward other living beings, similarly to *solidarity* among humans.[596]

On the other hand, the radicalism of the academic postures, coming from deep ecologists, could transfigure in practice through the platform of principles designed by Næss, accompanied by Sessions. Beyond the nature of its contents, which are quite understandable, as DesJardins observes, the crux of the matter resides in the specific weight that ecology adds to the theory.[597]

To conclude, the elaboration of critical opinions against deep ecology copes mainly with the mixture of its fundamentals, which drifts around academy and activism at the same time. This duality gives the impression that the defence of the theory tends too much to simplicity. DesJardins recalls, for example, that Sessions merely discredits to the questionings affirming it deals with a misunderstood or misinterpreted view of the doctrine. Furthermore, it allows defending scholar objections by means of activism, and vice versa, such as it occurs when some commenters accuse deep ecologism of being too abstract or vague. In response, some deep ecologists justify their arguments as rooted in the political activism of the movement. Indeed, political assertions often tend to blur the academic discourses.[598]

In any case, there is more than one observation against the theoretical postulates of deep ecology one can make. Firstly, misanthropy relating to the assertion of egalitarian biocentrism seems to be the higher charge that deep ecologists have to combat. Indeed, the alluded function of the "*in principle*" clause does not appear to be enough to eschew the accusations of being a fascist stance against humanity, incapable of discerning between human and nonhuman interests.

[596] ibid 227. The reference about the flea's story also appears in Keller (2009) 207.
[597] DesJardins (2013) 208.
[598] ibid 218-9, 229; Sessions (1995a) xii-xiii.

In this sense, as DesJardins notices, extreme arguments have strengthened this kind of criticisms. For example, it has happened with the affirmation of Abbey, the "*humanist*", who affirms his preference to kill humans instead of snakes. In a similar vein, Foreman, the "*eco-warrior*", has admitted that human suffering from drought and famine in Ethiopia is tragic. Still, he continues, the destruction of other beings and ecosystems is much more. Likewise, Sessions himself mentions a couple of additional allegations of misanthropy, coming from Murray Bookchin and the former U.S. Vice President, Al Gore Jr., against some pronouncements formulated by members of the activist movement Earth First! In particular, they deal with its co-founder, [once again] Dave Foreman. Bookchin brings into question, for example, the argument about AIDS as a valid mechanism of population control.[599]

On his part, Gore casts doubt on the logic of the metaphorical suggestion of eliminating people "*from the face of the earth*", due to their inherent and contagious destructive nature. Nonetheless, Sessions' response does not go beyond affirming that it deals with a misrepresentation of the doctrine, or that its critics' arguments are "*strange and unsubstantiated*". He even puts some distance between academic stances and the activists, admitting that Earth First! movement had "[…] *unfortunately made apparently misanthropic remarks which are antithetical to Deep Ecology philosophy*", although one should say Sessions does not really propound a robust reply against this objection.[600]

Among other responses, for example, McLaughlin assures that one should not interpret the call for a gradual reduction of the population (lasting approximately thousand years, as inferred from Næss' remarks) as a way of cruelty against humanity. He prefers to speak about a mechanism to moderate the population growth to furnish a decent life for all beings. In Ehrenfeld's view instead, albeit an anti-humanism perspective is questionable, without precluding the possibility of being true or untrue, it is even more questionable its utilisation as an excuse to delay the rejection of humanism (Sessions also alludes to this opinion). From all philosophers who have attempted to deny this accusation of fascism, Fox's argument is probably the most streamed, and it stems from a debate about ecofeminism. Indeed, the author contends that both ecofeminists and humanists tend to overlook the fact that "[t]*he target of the deep ecologists' critique is not humans per se* […] *but rather human-*

[599] DesJardins ibid 219, 229; Sessions ibid xiii; Abbey (1971) 20; Foreman (1991) 26; Bookchin (1987) 16.
[600] Sessions ibid xiii; Gore (1992) 217.

centeredness", leading the issue to the realm of ideology, not philosophy. By the way, both Sessions and Desjardins mention it.[601]

Nevertheless, despite all efforts to counter the allegations mentioned above, it seems the deep ecologists have not been able to dispense with those questionings at all, or their arguments are not convincing enough yet. As DesJardins appropriately suggests, it is difficult to abandon the anthropocentric perspective in favour of the equality of values, without falling within misanthropic stances, and vice versa so that a substantial theoretical development still looks like a pendant task in this field.[602]

The second point of contention consists of the *normative* status of deep ecology. As part of an interpretive reading of Næss, in his work "*The World of Concrete Contents*", Keller defends the descriptive nature of the doctrine. He attributes to Næss the idea regarding deep ecology is "[…] *simply an enumeration of general principles that command the assent of persons open to the direct apprehension of nature*". Moreover, Keller points out that "*eco-phenomenology*", understood as "*unmitigated empiricism*", has been useful to reinforce Næss' belief concerning the promotion of direct experiences of Nature, i.e., what Næss has named its "*concrete contents*". By the way, the notion of eco-phenomenology has been taken from Brown and Toadvine.[603]

In this regard, Næss does not come to affirm that his doctrine is essentially "*descriptive*". Notwithstanding there are specific references to appearance and reality within his article, such as, for example, the assertion regarding how one can use the ecosystem concept to "*describe*" the abstract structures of science's world. To him, deep ecology has definitively to do with those abstract structures. Næss even adduces that apparent and intrinsic distinctions between subjects and objects cannot be generalised and described as concrete contents of the world. Conversely, in "*The shallow and the deep…*"–he instead emphasises that the principles of the Deep Ecology movement "[…] *are clearly and forcefully normative*", as well as the social, political, and ethical material of ecosophy. Furthermore, reviewing the reference to deep ecology within the preparatory work of Brown and Toadvine, one can notice a tendency to close the presumed gaps between phenomenology and ecology. Moreover, he looks "[…] *for understanding the complex logics and boundary*

[601] Næss (1989) 127; McLaughlin (1995) 88; Ehrenfeld (1981) 223; Sessions, ibid xxvii, 267; DesJardins (2013) 219; Fox (1995) 279.
[602] DesJardins ibid 219.
[603] Keller (2009) 208.

relations that have been a stumbling block for Deep Ecology and other environmental approaches", but not necessarily an empirical approach of Nature.[604]

To conclude, although the foundations of Deep Ecology constitutes the most comprehensive ethical stance so far, it is not sufficient to encompass the juridical theory of the rights of Nature. In essence, the conception of a biospherical egalitarianism in principle does not include inanimate objects so that the recognition of rivers, glaciers, and other similar ecosystems is still improbable under this philosophical posture. It is comprehensive enough with humans and other living beings, but it does not concern abiotic elements of Nature.

5.2.5 Land Ethic

The general conception of the ***land ethic*** is at first sight probably what best describes the ethical transmutation from objects to subjects; something that promoters of the rights of Nature claim at a juridical level. The best one among the ecocentric perspectives, it is worth saying. Indeed, Leopold's famous tract opens with a remembrance of Odysseus, coming back home after the Trojan War to hang a group of slave-girls for suspected misconduct. After all, "[t]*he girls were* [his] *property*", Leopold emphasises, and "[t]*he disposal of property was then, as now, a matter of expediency, not of right and wrong*". The simile appears evident, Nature is currently property, and its disposal is a matter of convenience, not of ethics. In Leopold's words, "[l]*and, like Odysseus' slave-girls, is still property. The land-relation is still strictly economic, entailing privileges but not obligations*". By the way, Leopold's conception of land is ecosystemic and corresponds to the current definition of Nature, i.e., one should understand both expressions as synonyms in this particular case.[605]

From this assumption, and as a result of following strictly the ethical sequence so skillfully proposed by Leopold, one cannot avoid deducing that transmutation of land/Nature from being an object toward being a subject is going to be the next step. In other words, Leopold encourages to change the status of Nature, from being property to being a fellow-member of the biotic community, grounded on the axiology of a "*value in the philosophical sense*", which is superior to the "*mere economic value*". This criticism about the banality of economic values in comparison to "[…] *love, respect, and admiration for land* […]", along with the tendency described above to preserve the *integrity, stability, and beauty of the biotic*

[604] Næss (2006) 51-2; Næss (1973) 99-100; Brown and Toadvine (2003) xviii.
[605] Leopold (1970) 237-8.

community, embodies precisely the core of the theory, that is, the existence of "[…] *many elements in the land community that lack commercial value, but that are* […] *essential to its healthy functioning*".[606]

On his part, J. Baird Callicott, the principal contemporaneous developer and advocate of the theory, published in 1980 a controversial interpretation of Leopold's work. He started from the influential "*categorical imperative*" or "*principal precept*", as he calls it, of the land ethic, i.e., "*A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise*", already and reiteratively quoted. Then, Callicott proposes that one should pay attention to "[…] *the idea that the good of the biotic community is the ultimate measure of the moral value, the rightness or wrongness, of actions.*" Consequently, it would be ethically feasible and even recommendable, for example, to hunt a white-tailed deer to keep the wholeness of the ecosystem safe and sound, evading the harmful effects of a cervid population explosion.[607]

As Salwén recalls, Callicott's reasoning had [and still has] a strong dissonance within certain philosophical circles, primarily among his detractors, and especially Tom Regan, who even branded it as "*environmental fascism*". To his academic adversaries, the Leopoldean principle has ethically unacceptable consequences. Freyfogle, for instance, inferred that it would be morally permissible "[…] *if not obligatory, to reduce species populations, humans included, when lower numbers are needed to uphold the healthy functioning of the community*". In response, Callicott emphatically denied the presumed *inhumane* or *anti-humanitarian* character of Leopold's stance, arguing that this kind of conclusion would contradict absurdly the theoretical foundations of the land ethic.[608]

In the main, Callicott advocates the extensionist character of the theory, pointing out that the moral value of the biotic community does not replace the individual moral values. Thus, there is no substitution but accretion to the several accumulated social ethics, just like it occurs, for instance, to people who do not lose their citizenship in a republic due to being also residents of a municipality or family members. To support his argument, Callicott employs the concept of Leopold's biotic community, joint with another postulate coming from ***Mary Midgley***, the conception of "mixed communities".[609]

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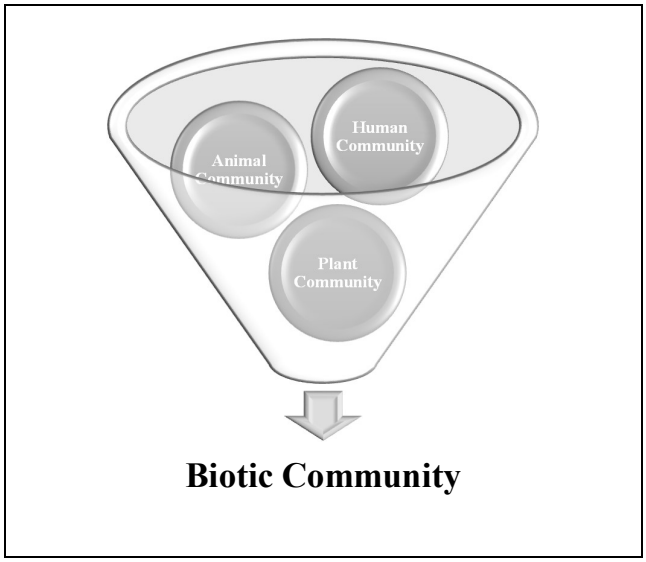
[606] Leopold (1970) 251 and 261.
[607] ibid 262; Callicott (1980) 320.
[608] Callicott (1987b) 206; Salwén (2014) 192ff; Regan (1983) 361-2; Freyfogle (2009) 24.
[609] Callicott (1999a) 13-4; Callicott (1999b) 70-1; Callicott ibid 207-8.

Thus, Callicott explains that there are different levels of communities, so-called "*nested communities*", which can have different structures and moral requirements but overlap among them, given that some are smaller than others. Then, a person forms part of both the human community and the biotic one, because the former is "*nested*" inside the latter.[610] By way of an interpretation, it turns out logic to suppose plants and animals also belong to their respective communities, which are also nested to the biotic one.

Chart # 36 Nested Communities



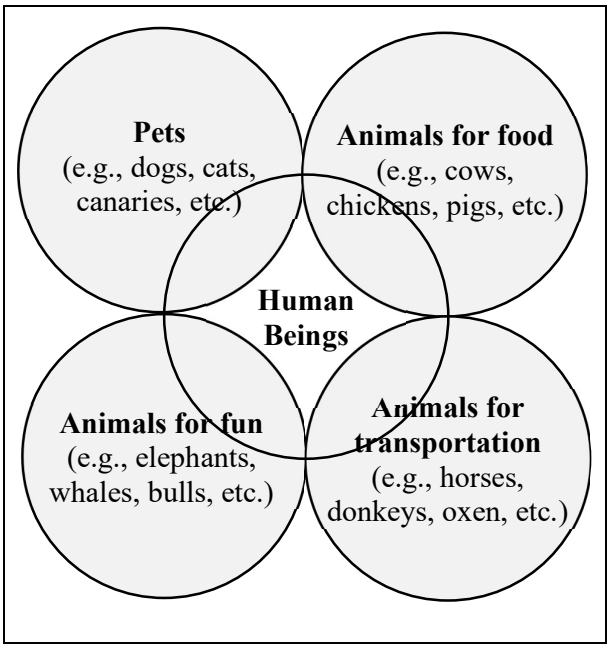
Source: Callicott (1988) 167-8

On her part, Mary Midgley describes her idea of "*mixed communities*" as from the interplay between people and domesticated animals. She holds that all communities of human beings involve animals. "*All creatures which have been successfully domesticated are ones which were originally social*", she argues. "*They have transferred to human beings the trust and docility which, in wild state, they would have developed towards their parents, and in adult life towards the leaders of their pack or herd*". In sum, she believes in a kind of pre-existing capacity of socialisation that other wild animals, "*equally intelligent*", do not possess, so they are impossible to tame. To her, domestication does not come from the "*fear of violence*" because tame animals can form individual connections with humans by understanding social signs. "*They learned to obey human beings personally* […] *not only*

[610] Callicott (1988) 167-8.

because the people taming them were social beings, but because they themselves were so as well", she states.[611]

Chart # 37 Mixed Communities



Source: Midgley (1983) 112-24

The reason why Midgley does not include what she calls the stigma of savagery within her idea of moral considerability of animals, based on her proposal of mixed communities, seems to respond to conceptual foundations. Effectively, the difference between wild and tame animals concerning the place they occupy within Nature is something that defenders of land ethic emphasise robustly. Indeed, when one scrutinises the criticisms against Singer's Animal Liberation, one can notice that Callicott holds that both kinds of animal form part of different communities. Indeed, he alleges that Singer missed that distinction. Tame animals are "[…] *products of human art and represent an extended presence of human beings in the natural world*", Callicott argues. Their place on the planet, therefore, is distinct from wild animals and native plants.[612] Hence,

> *Domestic animals are members of the mixed community and ought to enjoy, therefore, all the rights and privileges, whatever they may tum out to be, attendant upon that membership. Wild animals are, by definition, not members of the mixed*

[611] Midgley (1983) 112.
[612] ibid 122-4; Callicott (1980) 329-30, 332.

community and therefore should not lie on the same spectrum of graded moral standing as family members, neighbors, fellow citizens, fellow human beings, pets, and other domestic animals.[613]

Either domestic animals or wild ones, Callicott concludes that all their communities belong to the larger one, the biotic community, an ethical approach he calls the "*hyperholism of the land ethic*". Indeed, humans, plants (native and introduced ones) and any other living beings are members of the biotic community, despite they pertain to their specific communities. Callicott's hyperholism in itself constitutes the function of an ecological description of the biotic community, whose ethical version would be the "*biosocial moral theory*", attributed to Leopold and Midgley altogether. Within the interaction of participants, the author comments, the biosocial moral paradigm provides for several co-existing cooperating and competing ethics, where "[…] *each corresponding to our nested overlapping community entanglements* […]".[614] The previous charts are illustrative thereon.

Callicott's conclusion concerning the fact that all animals and other living beings pertain to the biotic community, without ceasing to be part of others, either nested or mixed ones, philosophically reinforces the principal postulates of the land ethic. Firstly, his argument does not only ratify but also pivots on Leopold's idea concerning the existence of members who are independent of their fellows and the community to which they belong. In Leopold's words, "[a]*ll ethics so far evolved rest upon a single premise that the individual is a member of a community of interdependent parts*". Secondly, Callicott emphasises the function of the biosocial moral theory as a provider of a dichotomic atmosphere of competition and cooperation among the members of the social community. In other words, when Callicott affirms that individuals contend among them but, at the same time, they help each other, he is backing up the ecological conception of Leopold regarding that ethics constitute "[…] *a limitation on freedom of action in the struggle for existence*".[615]

In essence, as one can notice, Callicott's line of reasoning does not only contribute to enhancing the understanding of moral purview of the land ethic concerning the roles of living beings and their positions in Nature. Behind the scenes, he also attempts to provide a scholar reaction against the Animal Liberation/Rights stances regarding the alleged "*ecofascism*" of Leopold's theory. Interpreting his conclusion, the assertion about the fact that all animals

[613] Callicott (1988) 167-8.
[614] Callicott (1988) 168.
[615] Leopold (1970) 238-9.

pertain to the biotic community, in the end, constitutes a provocative way to suggest that the *subjects-of-a-life* are members of it as well, in contradistinction to Regan's opinion. Thus, although Regan had said that both visions are like water and oil, so they do not mix, one cannot deny that both perspectives seem to share common environmental concerns.[616]

Within this line of thought, as Keller argues, there is no way to certainly know whether this suggestive defence of the land ethic throughout the overlapping communities is aimed only at undermining the criticisms or also mitigating the initial extreme holism of the theoretical posture. In either event, it turns out evident that Callicott is looking for a joint alignment against what he names as "*the destructive forces at work ravaging the nonhuman world*".[617] It would be preferable that environmental ethicists make common cause against the contemporary ecological crisis than keep contending among them, sometimes due to superficial conceptual details.

To recapitulate, as explained by DesJardins, the charges of "*environmental fascism*" or "*ethical totalitarian holism*" are pretty serious. Nonetheless, the model of "[…] *concentric circles in which our affections are extended first to self and family and later to broader communities*" seems to overrule the interpretation concerning the feasibility to reduce the population of species (including humans) if it is the better for the stability of the community.[618]

The reason lies in the fact that overlapped communities foster the cooperation of subsistence firstly within the smaller circles of morality; i.e., what Leopold calls the "*limitation on freedom of action in the struggle for existence*". In point of fact, there is also a connotation of competence in the word "struggle". Notwithstanding, it is not rare in Nature, above all considering the Darwinist conception of natural selection. In any case, Callicott also urges Darwin's allusion to social organisation, which is essentially an invocation of cooperation. He writes:

> *Darwin's solution is in principle both direct and simple. Many species of animals, Homo sapiens conspicuously among them, survive and flourish* ***better in social organizations than as solitaries****. Social existence, however, is not possible unless*

[616] Regan (1983) 362.
[617] Callicott (1988) 163; Keller (2010) 18.
[618] DesJardins (2013) 189, 199.

individuals relinquish certain liberties, unless individuals are to some degree mutually deferential, ***cooperative****, and considerate of one another's welfare.*[619]

Following DesJardins, the land ethic makes an attractive philosophical option. It is chiefly due to the theory represents a comprehensive outline capable of addressing ecosystems and global issues (e.g., pollution, conservation, climate change, and the like) from an all-inclusive perspective, which seems more suitable to that kind of themes.[620] The land ethic highlights the role of individuals as part of the community, rejecting the useless individualism in isolation coming from other theoretical postures, such as animalism or egalitarian biocentrism.

One could think about the Callicott's defence concerning the premises of land ethic does not seem to provide a persuasive enough answer for his opponents. However, this is what most frequently appears in the environmental literature as a reply[621] In that regard, Desjardins has compiled a brief series of alternative arguments to contradict the thesis of environmental fascism, formulated by him and a couple of different adherents to the theory of land ethic. The following table # 5 shows those alternative points of view.

Table # 5 Defence of Land Ethic against ecofascism

Bibliographic Reference	Theoretical Stance	Summary
Joseph DesJardins (2013) 189.	Practical Holism	*Either we act as though the community itself has standing and override the interests of the human, or we abandon the pretense and allow the human interest to take precedence. With the first option, we face the fascism charge, and with the second, we abandon holism.*
Don Marietta (1993) 409.	New source of right and wrong into ethics	*This abstraction is extremely reductionist* [ecofascism]. *The individual person is viewed only in terms of functions related to the whole: the significance and value of the individual is reduced to the significance that individual has a part in the whole. The only important ethical aspect of the individual is the ethical importance of membership of the whole. This sort of reductionism has the same faults as other reductionistic approaches. It ignores far too much that is morally relevant.*
Jon Moline (1986) 105.	Indirect Holism	*I argue that Leopold, by contrast, is an indirect holist, i.e., one who applies holistic criteria not directly to acts, but only indirectly to these through criticisms of practices, rules, predilections, and attitudes. He criticizes above all our manner of thinking and wishing, seeing that all our actions flow from this.*

Based on DesJardins (2013) 189-91

[619] Callicott (1989c) 236.
[620] DesJardins (2013) 183.
[621] See, for example, Callicott (1999b) 70-1; Freyfogle (2009) 24; Keller (2010) 17-8; Kaufman (2003) 255; Cochrane (2018) sub-s 1.d.

Beyond the convincing or not character of his arguments, Callicott's figure has not diminished regarding the preponderant position he occupies in the development of the land ethic theory. Indeed, more than a few philosophers agree upon Callicott has contributed substantially to increase the philosophical consistency of "the land ethic" through his interpretations.[622] Nash, for instance, argues that, before Callicott or at least before the 1960s, Leopold's work had been completely ignored. Indeed, Callicott himself has remarked the previous lack of attention to Leopold in his celebrated article "*The Conceptual Foundations of the Land Ethic*".[623]

To recapitulate, Callicott has emphasised more than once that the key issue of the land ethic, or [in his words] the *summum bonum*, "[…] *resides in the biotic community and moral value or moral standing devolves upon plants, animals, people, and even soils and waters by virtue of their membership in this (vastly) larger-than-human-society*". This assertion means that moral value corresponds to the whole, as explained by Keller, and "[i]*ndividuals have no value in and of themselves independent of the biotic community*".[624]

5.2.6 Gaia hypothesis

Although it is not a philosophical stance in practice, it turns out hard to escape the inevitable parallelism that some promoters of the holistic theories[625] or the rights of Nature[626] have perceived regarding the principles of *Gaia* hypothesis. In 1974, ***Lynn Margulis*** and ***James Lovelock***, its most renowned academic forerunners, defined Gaia as a "[…] *complex entity involving the earth's atmosphere, biosphere, oceans and soil* [whose] *totality constitutes a feedback or cybernetic system which seeks an optimal physical and chemical environment for the biota*". Later, in 1979, it came out probably the most popular Lovelock's works, "*Gaia: A new look at the life on Earth*', including only a tiny modification; i.e., instead of the phrase: "*for the biota*", one reads: "*for life on this planet*".[627]

In spite that certain scientific circles have severely brought into question the Gaian tenets, their discursive influence has been efficient enough to permeate through the environmental parlance and guide it towards the "*holistic views*". Some authors, such as

[622] For example, Lo (2009) 129; DesJardins (2013) 195, Kaufman (2003) 267.
[623] Callicott (1987b) 186; Nash (2012) 342.
[624] Callicott (1989a) 198; Keller (2010) 17.
[625] See Keller ibid 152.
[626] For example Harding (2012) 79; Donahue (2010) 51; Cullinan (2008) 26.
[627] Margulis and Lovelock (1974) 473; Lovelock (1979) 11.

Linda Leib, have even argued that "*Deep ecology, transpersonal ecology and the Gaia hypothesis represent the modern forms of ecocentrism*". In a similar sense, Alan Marshal, a sceptical critic of Lovelock, has labelled the Gaian postulates as a "*technocentric embodiment*". However, he has also recognised its enormous repercussion within the currents of thought that promote the modern tendencies toward the "*wholeness*"; or in his own words, "*the unity of nature*". Nevertheless, the idea is not necessarily fresh, since one of its antecedents easily tracks in the older concept of the "*indivisibility of Earth*", written [once again] by Aldo Leopold in a 1923 article, published in journals and compilations after his death.[628]

The best evidence of the influence of Gaia-hypothesis, at present, consists of having achieved the incorporation of some its core features into the *draft Universal Declaration of the Rights of Mother Earth*, promoted by the Bolivian government in 2010. It constitutes the only updated document that encompasses the rights of Nature at a global level. From the outset, it establishes the living condition of the planet, when effectively reads: "*Mother Earth is a living being*". Curiously, *Gaia* (also *Gaea*) means literally "*Mother Earth*", the mythological primordial Greek goddess, mother of the Titans. Sagan and Margulis recount the anecdote about how the celebrated novelist Willian Golding, Lovelock's neighbour, suggested the name "*Gaia*" to him.[629]

In context, the head objection relative to Gaia hypothesis perhaps resides in the lack of concurrence between the homeostatic autoregulation of the planet, which creates purposefully optimal conditions for life, and the evolution by natural selection. To Dawkins, one of its critics, homeostasis is a typical activity of living organisms during their development, i.e., after a competition among individuals wherein the survivors are those who have been more successful in transmitting their genes. Therefore, being Earth the only living planet without rivals in the solar system, the development of its homeostasis would sound unrealistic.[630]

Indeed, Margulis herself rejected the term "*organism*", as a personification of the Earth's surface. In both "*Simbiotic Planet*" and "*Acquiring Genomes*" (along with Sagan), she made it clear that no organism is able to survive, by consuming its own wastes and breathing its very gas excretions. She even was of the opinion that Lovelock had allowed

[628] Leib (2011) 29; Marshall (2002) 53-80; Leopold (1991) 95.
[629] Draft Universal Declaration of the Rights of Mother Earth (2010) Article 1 (1). Hereinafter Declaration of the Rights of Mother Earth; Margulis and Sagan (1997) 202.
[630] Dawkins (1999) 234-6.

people to believe that Earth was an organism, just as a mechanism to avoid its mistreatment. "*To me, this is a helpful cop-out, not science*", Margulis wrote in "*Gaia is a Tough Bitch*". Notwithstanding, at the same time, she recognised that despite her disagreement with Lovelock's opinion about Gaia as an organism, she realised that his stance had been more effective in communicating the Gaian approach than hers. Sagan and Whiteside complemented the objection, remembering how Ford Doolittle ridiculed the idea about searching for optimal conditions for life, as if it were a teleological system, suggesting a "*secret consensus*" among microorganisms to determine their common interests.[631]

In response, Lovelock accepted having designed a computer simulation, termed "*Dasiyworld*", especially to answer his detractors, Doolittle and Dawkins, and demonstrated that the world, weather, and environment are the result of an automatic, not teleological, goal-seeking system. In addition, he admitted as evident that "[…] *Earth was alive in the sense that it was a self-organizing and self-regulation system*".[632]

Beyond Lovelock's response, the Gaia hypothesis has experienced a conceptual transition from exclusive homeostasis towards autopoiesis, a definition created by biologists Varela and Maturana to describe self-production and maintenance of living beings. As Lyon asserts, autopoiesis consists of a "[…] *continual production by a network of the very components that comprise and sustain the network and its processes of production*". The interconnectedness between the living organism and its surroundings, anchored to autopoiesis, is fundamental for its very survival. If the interplay between living systems and their surroundings is inappropriately or comes to a halt, the latter would be in serious jeopardy of dying.[633]

In sum, it would not be fair to say that the Gaia hypothesis has only received criticisms. There has been a significant acceptation within other wings of scientific knowledge as well. In that regard, Schneider et al. have developed a quite exhaustive compilation of pro-and-against contemporary arguments concerning this theory. Thus, some law scholars, such as Burdon, have interpreted the concept of *Gaia* as "[…] *the notion that the Earth's surface is alive* [and] *characterised by communion, differentiation and autopoiesis*". These three primary conditions coincide with those corresponding to the "*Ecozoic Era*", a term coined

[631] Margulis (1998) 118-9; Margulis and Sagan (2002) 130; Margulis (1995) Chapter 7; Sagan and Whiteside (2004) 178-9.
[632] Lovelock (1988) 31, 39.
[633] Lyon (2004) 29-30.

by Thomas Berry to signify the emerging period succeeding the Cenozoic, i.e., the Ecozoic era, "[…] *when humans will begin to live on the Earth in a mutually enhancing manner*".[634]

In essence, Berry perceived that the only possibility to overcome the contemporary problems of "*macrophase biology*", characterised by an erratic interaction of its five spheres (land, water, air, life, and human mind), was the transition towards this new biological period, the *Ecozoic era*. In this context, communion represents the interconnectedness among beings ("*subjects*" in the words of Berry), in contrast to the notion of a simple "*collection of objects*". It evokes the symbolic link with the proposed legal transmutation of Nature, from being an object towards being a subject of law. Likewise, although differentiation refers to the uniqueness of organisms, which could not live fragmented, the sole manner to sustain life on Earth consists of its integral functioning. Thus, Berry asserts "[…] *earth is not a global sameness*".[635]

As mentioned, autopoiesis relates to systems capable of producing and sustaining by themselves. This idea is not rare above all if one thinks about plants as autotrophs or primary producers and the photosynthesis, as the mechanism to synthesise their food. Lovelock and Berry's coincidences turn around this ensemble of elements relative to the integral operation of Nature. Berry was thinking about Lovelock was one of the very few scientists concerned about the functioning of living systems.[636]

In that regard, the draft *Declaration of the Rights of Mother Earth* interestingly includes the essential tenets of the Gaia hypothesis, when it reads: "*Mother Earth is a unique, indivisible, self-regulating community of interrelated beings that sustains, contains and reproduces all beings*". It represents the idea about the wholeness of Nature, which one can address through the notions of uniqueness and indivisibility, and somehow means differentiation as well. The community of interrelated beings illustrates the communion. Lastly, autopoiesis appears in the insight of a self-regulating community that sustains and reproduces all beings.[637]

5.2.7 Earth Jurisprudence

[634] Schneider et al. (2004) 1ff; Burdon (2012) 89-92. Berry (1991) para. 56th.
[635] Berry ibid paras. 13th, 14th, 27th, and 32nd
[636] Ibid para. 13th.
[637] Declaration of the Rights of Mother Earth (2010) Article 1 (1)

Earth Jurisprudence is quite probably one of the few philosophical cutting-edge movements, in matters of the wholeness of Nature, whose roots trace in the new millennium. In effect, Mike Bell narrates its "*formal*" origin was a meeting organised by the London-based Gaia Foundation in Northern Virginia, occurred in April 2001. The philosopher ***Thomas Berry*** led the conference, counting on the participation of lawyers and educators coming from Canada, Colombia, South Africa, and the U.S.A., whose expertise focused primarily on environmental issues and aboriginal cultures.[638]

Before passing to address the central premises of the Earth Jurisprudence, however, is worth clarifying that some authors often review Thomas Berry's ethical thought as part of the Ecotheology, as well. This clarification turns out of importance since the reader could question the present dissertation for negligence, by avoiding earlier defenders of the Ecological Theology, such as Joseph Sittler, Lynn White Jr., Francis Schaeffer, Alfred North Whitehead, John Cobb, among others. One should also allude to the French Jesuit priest Pierre Teilhard de Chardin, whose works decisively influenced Berry's moral thought, according to Lisa Sideris, but who is barely quoted by Berry within his seminal work concerning Earth Jurisprudence.[639] Moreover, although one should recognise the significance of Ecotheology and its promoters within environmental ethics, this subheading emphasises those stances concerning holistic hypothesis exclusively.

In this line of reasoning, one cannot preclude mentioning Pope Francis and his *Laudato si*, above all considering it includes an explicit acknowledgement of Nature as valuable in itself before God's eyes, and several arguments against the consequences of a *tyrannical, misguided, excessive or distorted anthropocentrism*. Nevertheless, one does not elaborate more on the analysis of this encyclical letter because it does not aim at promoting a holistic perspective. Additionally, natural resources are still discursively deemed as earth's goods that humans should use responsibly, which is a human-centred outline yet.[640]

Undoubtedly, Berry is the founder of the Earth Jurisprudence and his celebrated "*The Great Work*" also represents its foundational book. By and large, he proposes some conditions of equality within his "*Earth community*" that one can only understand them by focusing on the role of each element of Nature as an intrinsic value. It, therefore, contradicts the traditional belief coming from classic Aristotelian philosophy, where one sees natural components as mere instrumental values subordinated to higher ends. Thus, the difference

[638] Bell (2003) 71.
[639] Sideris (2009) 291-4.; Berry (1999) 173, 230, 241.
[640] Francis (2015) paras. 68th, 69th, 116th, 118th, 119th, and 122nd.

between standard principles and those of Earth Jurisprudence becomes substantial, given that no benefit is any more important than another.[641]

A priori, if one reads the context of Earth Jurisprudence, it is not difficult to suppose its general approach tends to resemble the ecocentric perspectives, mainly the land ethic. For example, both doctrines coincide with seeing humans and nonhumans as members of the community. Indeed, Berry recognises that the "[…] *single integral community of the Earth* […] *includes all its component members whether human or other than human*". Likewise, the human being, "[…] *as every species, is bound by limits in relation to the other members of Earth community*", more or less as it occurs in Leopold's biotic community by means of the "[…] *ethical obligation on the part of the private owner* […]". ***Cormac Cullinan***, the other remarkable figure of the Earth Jurisprudence, attributes explicitly to Leopold and Berry the "*deep roots*" of the theory.[642]

Now, if one can identify such an ensemble of commonalities between both perspectives, it begs the question of why one should address them separately. Initially, there are three main reasons to do it, concerning predominantly to the methodology employed at the present research. Firstly, the scope of Earth Jurisprudence refers factually to the philosophy of law, properly speaking, rather than ethics or moral philosophy. Consequently, as Cullinan argues, Earth Jurisprudence is "[…] ***a philosophy of law and human governance*** *that is based on the idea that humans are only one part of a wider community of beings and that the welfare of each member of that community is dependent on the welfare of the Earth as a whole*".[643]

As one could imagine, the present conception definitively encompasses quite accurately the aims of the doctrines of Nature's rights. In practice, Cullinan himself and other specialists affiliated to different adherent institutions to Earth Jurisprudence, such as GAIA Foundation or the Community Environmental Legal Defense Fund (CELDF), among others, have advised various procedures relating to the application of legislative measures, mainly in Africa and Latin America. In that regard, Peter Burdon, in his valuable "*Exploring Wild* Law", has compiled numerous references thereon. Thus, it requires an examination in more detail from a legal standpoint.[644]

Secondly, albeit both Leopold and Berry draw almost the same holistic conclusions about the idealistic functioning of earth/biotic community, both paths are methodologically

[641] Keller (2010) 5-6.
[642] Berry (1999) 4, 89; Leopold (1970) 251; Cullinan (2012a) 22.
[643] Cullinan ibid 13 (emphasis added).
[644] Burdon (2012).

dissimilar. Consequently, their respective analyses should be distinct, as well. In this sense, while Leopold emphasises a scientific discourse, built on Darwinian principles, to outline the philosophical foundations and pedigree of the land ethics, Berry prefers a historical reconstruction of the current environmental crisis, "[…] *to understand where we are and how we got here*".[645]

To Berry, the realisation of where humans are and how they arrived here is crucial because the relationship between earth and humanity is experiencing a decisive [almost apocalyptic] moment, in which "[n]*atural selection can no longer function as it has functioned in the past*". The end of the Cenozoic Era is looming, and the planet will move towards the Ecozoic Era, by means of a "[…] *transition from a period of human devastation of the Earth to a period when humans would be present to the planet in a mutually beneficial manner*".[646]

Thirdly, although the scholar adherents of both philosophical stances have found in the indigenous worldviews some moral elements to support their respective premises, they do not influence Land Ethic and Earth Jurisprudence with the same theoretical or empirical intensity. Therefore, one should observe these references seem to be more explicit in Berry's work than in Leopold's.

Effectively, there is only one express reference to native Indians in Leopold's essay, *"The Land Ethic*", which has to do with the struggles for the control of the settlements of Mississippi against the French and English traders and the American settlers. Leopold briefly muses on the questions, coming from historians, concerning the effects upon cane-lands, derived from activities of cattle raising, ploughing, burning, and deforestation. He does not elaborate on any examination about the ethical perspectives of native peoples.[647] Instead, Callicott is who sees the shared points between American Indian cosmology and the land ethic. So, he argues:

> *The detailed representations of the personal-social order of nature among the Ojibwa, on the one hand, and among contemporary ecologists like Aldo Leopold, on the other, are, of course, vastly different. The one is mythic and anthropomorphic; the other is scientific and self-consciously analogical. Nevertheless, when the mythic and scientific detail is stripped away from either, an*

[645] Callicott (1999b) 66-7; Berry (1999) ix.
[646] Berry (1999) 3-4.
[647] Leopold (1970) 241.

identical abstract structure - an essentially social structure - emerges. The core conceptual pattern of the totemic natural community of the Ojibwa and the biologist's economy of nature are identical.[648]

For Thomas Berry, instead, the wisdom of the indigenous peoples possesses momentous importance. It constitutes one of the four pivots that will guide humanity into the future. The other pillars are the wisdom of women, classical traditions, and science. Following a historical method, as his principal tool of analysis, Berry highlights the role of these wisdom traditions as supporters of the forthcoming era, within the ambit of the interplay between humans and Nature. In context, one could read a moral connotation concerning human behaviour towards the natural world, which would orient to a mutual enhancement of their presence on Earth.[649]

Indigenous wisdom, Berry states, "[…] *is distinguished by its intimacy with and participation in the functioning of the natural world*", which to some extent reaches a metaethical scope, spiritual, as it were. For example, the cosmogony of native people regarding the sequence of sunrise and sunset reveals an unusual sensitivity, to the point of constituting a "*pattern of life*", a "*great liturgy*", or a "*celebration of existence*". Berry rejoices at the fluorescence and colour of flowers or the beauty of birds' songs as a reflection of the indigenous worldview. Likewise, he evokes the capacity of adaptation of early humans, discovering new sources of food and shelter, expressing new signs of culture, through rituals, chants, arts and other customs, developed mainly during the Palaeolithic, or continuously enhancing their systems of communication. In sum, he fosters the role of indigenous people in terms of previous experience to guide current and incoming generations. In his words: "*As the years pass it becomes ever more clear that dialogue with native peoples here and throughout the world is urgently needed to provide the human community with models of a more integral human presence to the Earth*".[650]

As a complement, Cullinan confirms the roots of Earth Jurisprudence lies at the cosmologies and customary practices of many native peoples coming from Africa, India, and other countries.[651] At present, native worldviews and ancient traditions have entailed a resurgence, influencing the modernity of law, and being particularly successful in the cases

[648] Callicott (1989b) 215
[649] Berry (1999) 176.
[650] ibid 177-80.
[651] Cullinan (2012a) 22.

mentioned earlier of Bolivia, Colombia, Ecuador, India, New Zealand, and the U.S.A. For Cullinan, one should emphasise the universality of environmental problems and its solutions, which arise out of different communities, but they are quite similar. He argues that:

> *One of the most significant aspects of the emergence of Earth Jurisprudence is that it has resonated with a wide range of diverse people and communities throughout the world, many of whom had already reached similar conclusions from their own, widely different, experiences. In many cases, the initial reaction of people who first read or hear of Earth Jurisprudence is one of recognition – as if they are hearing for the first time something that they already guessed. This means that despite the many different origins of these ideas, as soon as they make contact with one another, like water drops, they rapidly cohere and absorb one another.*[652]

To recapitulate, Berry believed the environmental problems were primarily of what he labelled as "*macrophase biology*". Macrophase biology comprises "[…] *the integral functioning of the entire complex of biosystems of the planet* […]", and concerns five essential spheres: land, water, air, life, and the human mind. To him, the interplay between the human mind and the other elements is crucial to understand the nature of the environmental crisis, because although all living beings possess consciousness, it is different in humans, animals, and plants. It does not mean the human consciousness is better or superior to the others' ones. It is just distinct. As an example, Berry states that, for fish's purposes, "[…] *human modes of consciousness would be more a defect than an advantage*".[653] In context, it seems he subtly holds the ecological problem comes historically from humans (mind), not from the rest of living beings, who seem to adapt to the milieu.

In this regard, the only manner to overcome the environmental crisis consists of a change of biological period, i.e., from the *Cenozoic* to the *Ecozoic era*. However, according to Berry, humans have to previously meet some conditions for the emergence of the new stage: (1) to understand that the universe is a communion of subjects, not a collection of objects, (2) to realise that the Earth exists, and can survive, only in its integral functioning, (3) to recognise that the Earth is a one-time endowment, (4) to realise that the Earth is primary and humans are derivative, (5) to realise that there is a single Earth community, (6) to understand fully and respond effectively to the very human role in this new era, and (7) to establish a

[652] Cullinan (2012a) 22.
[653] Berry (1991) paras. 13th and 14th.

multivalent language, one much richer in the symbolic meanings that language carried in its earlier forms. As one can notice, these conditions seem to brief the overall principles of ecocentrism.[654]

In particular, the communion of subjects evokes the symbolic link with the proposed legal transmutation of Nature, from being an object towards being a subject of law. For this reason, the adaptability of this theory to the postulates of Nature's rights facilitates the moral support that the recognition of the international legal personality of Nature would require in practice, and not only the endowment of specific rights. Moreover, there is a real possibility to personalise Nature through the idea concerning a single Earth community. This community does not prevent the individualisation of its members due to its integral function. Indeed, although differentiation refers to the uniqueness of organisms, which could not live fragmented, the sole manner to sustain life on Earth precisely consists of its integral functioning. That is why Berry asserts "[…] *earth is not a global sameness*".[655] In sum, as Leopold thought, Earth is a community formed by its parts, and all of them possess their individuality.

Lastly, ***Vandana Shiva*** is an Indian philosopher to whom several authors, such as Gruen or Koons, attributes the notion of *Earth Democracy*, understood as a set of social practices, movements, and actions towards living politics, cultures, and economies. Nevertheless, the fact that one can pigeonhole her ethical stances into the Earth Jurisprudence is undoubtedly due to the explicit allusions coming from Cullinan and Berry himself. From her first book, "*Staying Alive*" of 1988, she already addressed the theme of rights of specific ecosystems. Thus, although the work refers to issues concerning ecofeminism, she dedicated one section to analyse the need for respecting the rights of the soil.[656] Some years later, she unfolded the scope of Earth Democracy. In short,

> *Earth Democracy is both an ancient worldview and an emergent political movement for peace, justice, and sustainability. Earth Democracy connects the particular to the universal, the diverse to the common, and the local to the global. It incorporates what in India we refer to as vasudhaiva kutumbkam (the earth family)–the community of all beings supported by the earth.* […] *The principles of Earth Democracy evolved through the convergence of groundwork with*

[654] ibid paras. 1st, 27th, 32nd, 33rd, 35th, 37th, 51st, and 52nd.
[655] Berry ibid paras. 32nd.
[656] Shiva (1988) 151-3; Gruen (2009) 241; Koons (2012) 53; Cullinan (2012a) 18; Berry (2012) 227.

communities and the debates over the dominant paradigm. Earth Democracy is about ecological democracies–the democracy of life […] *Earth Democracy is based on diversity. It is based on multidimensional and multifunctional expressions of creativity and productivity in humans and nature.*[657]

5.3 Conclusions

There were four hypotheses posed at the beginning of this chapter. The first one consisted of ***finding out if the traditional human-centred principles were enough to provide the ethical foundations for the recognition of international legal personhood to Nature***. In this regard, after a review of the core premises of traditional ethics, one could corroborate that the process of expansion of the borders of morality exclusively occurs among human beings, from the anthropocentric standpoint.

Consequently, traditional ethics rejects any living being or entity positioned outside the ambit of the human sphere. Within a hierarchical understanding of life, were people occupy a preeminent place over any natural element or Nature itself, it would be unthinkable to consider non-human moral agents as equals to persons.

Moreover, one of the principal reasons to reject the possibility of acknowledging Nature as a legal person in general (international one in particular) refers to its juridical status. Effectively, from an anthropocentric perspective, natural resources make up a set of goods, even commodities, able to deliver food, clothes, shelter, and other services for human welfare. In other words, anthropocentric ethics appear so unquestionable because they precisely correspond to and fit well with an early, modern, and contemporary production of commodities and provision of services, coming from the different stages of capitalism.

Accordingly, from this outlook, the right to a healthy environment perhaps emerges as the perfect legal mechanism to warranty ecological protection. It does not imply a defence of the rights of Nature in itself but rather a way to guard the rights of people, their rights to have a sound, general satisfactory, safe, clean, or a healthy environment. So, Nature constitutes a thing, not a person.

The second hypothesis involved the query concerning ***what the moral considerability of Nature is, according to the principles of environmental ethics***. In this regard, as an initial

[657] Shiva (2005) 1, 5, 62, 83

step, one should divide the response into two approaches: an individualistic and another holistic.

As mentioned, the individualistic ethicists depict a different range of stances, which goes from the restricted recognition of specific species of animals, such as the higher mammals, to the broadest acknowledgement of all life, such as it happens in the egalitarian biocentrism. In effect, the psychocentrism of Singer and Regan, barely differentiated by specificities of ethical scope, restricts the moral considerability of natural elements exclusively to those mammals capable of feeling pain and pleasure or being mentally aware of their surroundings, respectively. On his part, through his teleological centres of life, Taylor has opened the purview of moral status to the totality of living beings on the planet. In parenthesis, it is worth clarifying the mentioned ethical doctrines are not the only ones promoting biocentric perspectives to address the environmental issues. They are merely examples of two doctrinal positions of the extremes, useful to illustrate the variety of scholar proposals.

Concerning the possibility to support the international legal personality of Nature throughout any of these theoretical postures, one should warn there are, at least, three main hindrances. On the one hand, the biocentric perspectives avoid extending the limits of the moral circle towards inanimate elements of Nature, such as air, water, and soil. This lack of recognition sets aside the possibility of granting moral considerability to ecosystems, which would mean a distortion for the application of rights of Nature in practice.

On the other hand, the general premises of psychocentrism impose a too-rigid restriction on the moral considerability of the natural world. The doctrines of animal liberation and rights, in particular, exclude a significant group of species, reducing, even more, the spectrum of moral and legal recognition of Nature.

Instead, the egalitarian biocentrism seems to be too flexible, by acknowledging the moral considerability of all living beings. If the sole condition to deserve moral standing is life, it would bring about an ontological struggle for morality between complete organisms (e.g., humans, plants or animals) and other microorganisms, which are often parts of them (e.g., virus, bacteria or archaea).

Another unwanted implication evokes the past judgements of animals, which has been entirely inconvenient for the development of law, as mentioned. An uncontrolled unfold of these theories could bring about a mere aesthetic transfiguration of animals from being historically defendants to being plaintiffs before contemporary courts.

The holistic approach concerning the moral considerability of Nature also contributes to answering the third ethical research question of this chapter, i.e., ***how feasible the enlargement of moral limits toward Nature would be***. Initially, one has to discard those positions associated with the so-called weak holism. The main reason to reject the doctrine lies in the hierarchical structure of values, which places once again to humans in a supervisory position over the natural world. Although the authors bestow moral importance on Nature and its components, it would be hard to claim equity of conditions with respect to humans in the international arena or before the system of justice.

On its part, the principles of deep ecology are neither enough to support the potential granting of rights to Nature ethically. Indeed, although one should admit this moral stance is the most comprehensive one among the biocentric trends, it lacks the recognition of abiotic elements of Nature. This deficiency of scope derives in an irremediable hindrance to consider the legal personhood of ecosystems.

In this line of analysis, although Gaia-hypothesis adapts better to the granting of moral personality to Nature, above all considering the personification of the planet, it has been said it deals with a scientific approach more than an ethical posture. Consequently, it is useful as a reference but not as a moral foundation of the legal system.

To conclude, both the land ethic and the earth jurisprudence describe the interplay between humans and Nature symmetrically, so to speak, that is, there is a biotic/earth community formed by members who play a specific role and possess particular entitlements. Their actions respond to moral restrictions that allow others the exercise of their very rights. The welfare of the community is the principal aim, while the wellbeing of its members turns out ancillary and functional to the benefit of the whole.

In sum, it proves hard to avoid a simile with the international community, where every single country possesses legal personality, which is different from their citizens'. The moral depictions designed by both Leopold and Berry are definitively the best allegories to promote the bestowment of legal personality on Nature, from an ethical standpoint. In addition, this affirmation constitutes the response to the fourth hypothesis as well. Thus, ***the central foundations of ethics with which the holistic perspective would contribute to enhancing the interplay between humans and Nature*** are the land ethic and the earth jurisprudence.

Chapter Six

Legal rights and representation of Nature and other ecosystems

The present chapter mainly aims at the description of the essential juridical requirements to verify the transmutation of the legal status of Nature from being an object of the law, understood as a set of goods, or even commodities, towards being a subject of the law, understood as a legal entity who holds specific rights. Likewise, it encompasses the scrutiny of the main implications derived from the change of lawful condition.

As reiteratively mentioned, the ambit of study corresponds to the international arena, considering that Nature or any other ecosystem does not constitute an individualistic entity, but rather a holistic one, whose extension could involve more than one national territory. Furthermore, even when the ecosystem does not possess transboundary limits, there is a latent possibility to be part of disputes before international courts of justice, as explained in the chapter four. In any case, the representation of Nature has arisen as a need of momentous importance, in order to defend the natural interests at continuous stake.

In that regard, the primary sources of those legal requirements will be the national experiences coming from Bolivia, Colombia, Ecuador, India, New Zealand, and the United States of America, in matters of legislation and justice. The reason lies in the fact that those national legal frameworks are currently in operation and whose results can be already subject of analysis because of their advanced implementations.

Additionally, one cannot discard the secondary sources of information, comprised of the existing scholar developments. Those academic outputs are significant since they have massively supported the implementation of the rights of Nature in the quoted countries, both at a legislative level and a judicial one. Therefore, the incidence of the theories and hypothesis coming from the promoters and defenders of rights of Nature turns out undeniable, at least, over those nations.

Likewise, the scrutiny of the flaws concerning the international legal framework and the system of justice, elaborated in the previous chapters, will be of importance to describe the legal implications derived from the potential recognition of Nature as a legal person and a holder of rights.

Now, to ease its discursive contents, this chapter will be guided by a series of research questions, as follows:

1) *What aspects of the national laws in current force, by which Nature has been recognised as a holder of rights, would be useful for its international acknowledgement?*

2) *To what extent would the bestowal of international legal personality on Nature modify the legal conditions of the property rights?*

3) *What would be the key rights and duties of Nature as an international subject of law?*

4) *Who would represent Nature as a subject of law in the international ambit?*

To close the chapter, one will present a personal proposal of legal conditions concerning the acknowledgement of international legal personhood to Nature. It will aim at responding to the central research question of the dissertation, which reads:

How feasible is it to confer international legal personality on Nature, as an alternative instrument to cope with the environmental crisis?

6.1 Legal doctrines of recognition of rights of Nature

Beyond the specific hypothesis concerning the rights of Nature, this subsection aims at the review of those authors who have analysed this issue, especially during the twentieth and twenty-first centuries. It will endow the theoretical postulates that the research requires. By way of a guide, the following chart shows a schematic summary.

Chart # 38 Timeline of Authors who have studied the Rights of Nature

Animal Judgements		Thomas Colwell Jr. Earl Murphy Joan McIntyre Harold Gilliam		Godofredo Stutzin (1976) Thomas Linzey (1995) **Thomas Berry (1999)**		Raúl Zaffaroni (2011) Ramiro Ávila (2011) Julio Prieto (2013) Javier Molina (2014)	
1501-1600	1900-1970	1971	1972	1973-2000	2001-2010	2011-2014	2015-2020
John Salmond (1902) Clarence Morris (1964)		**Christopher Stone** William O. Douglas		**Cormac Cullinan (2002)** Mari Margil (2008) Alberto Acosta (2009)		Tāmati Kruger (2015) David Boyd (2017) Ever. Lamprea (2019)	

6.1.1 Early antecedents

To contextualise, if one makes do with a peripheral vision about the idea of the recognition of rights of Nature, one takes the risk to think it deals merely with "[…] *imaginative legal innovations and prescriptions for radical social transformation beyond present institutional or legal scope*".[658] In other words, it would consist of a "*useless juridical endeavour*", so to speak. Nevertheless, a revision in detail of erstwhile records will permit to discover these proposals are not only contemporary novelties to face the environmental crisis, but rather lawful concerns, whose historical roots could be found even in the Renaissance.

For example, one of the ancient antecedents is "[…] *the right of the insects to adequate means of subsistence suited to their nature*", a right recognised as a result of a sixteenth-century court proceeding, instituted against a swarm of weevils under the accusation of having plundered the vineyards of the city of Saint-Jean-de-Maurienne, in France. Interestingly, beyond the appropriateness of legal reasoning, the nature of beetles demanded to think about the community instead of individuals, namely the judges had to prioritise the swarms instead of each insect, which somehow represents the essence of the ecocentric doctrine. Nonetheless, swarms were not the only case. Evans remembers that, at the time, practitioners were perfectly aware that natural laws governed the protection of general welfare among animals living in communities, i.e., herds, flocks or swarms, which punished corporally or capitally any potential attack coming from their members.[659]

6.1.2 Modern forerunners

Around four hundred years later, in 1902, ***John Salmond*** spoke again about the existence of a community, more or less under the same line of reasoning that ancient practitioners did, focusing on its welfare. Nevertheless, this time the author referred to the existence of a "*community at large*", wherein humans and animals inhabit together, an aspect that certainly draws near to the ecocentric doctrines in theoretical terms. In principle, the idea does not seem complicated because the animals are not individually entitled to anything. They are just things. However, the argument turns increasingly obscure when Salmond asserts that animals could be holders of specific rights as fellows of the community, referring specifically to "*particular classes of animals*". In this regard, it is difficult to avoid thinking

[658] Elder (1984) 293.
[659] Evans (1906) 34-5, 37, 50.

about the parallelism between this Salmond's conjecture and the case of the beetles in the vineyards.[660]

Being goods, animals cannot possess rights by themselves so that Salmond utilises the public and charitable trust, which constitutes a valid mechanism to represent Nature in form of goods. This Salmond's work is quite probably one of the most remote antecedents of Sax's idea to apply the public trust doctrine to natural resources. Therefore, animals have the right to be part of that trust. To Salmond, both duties and rights do not really correspond to animals, but to the society in itself. If one reads between the lines, however, Salmond looks like a fervent believer of animal rights, to the point that he comes to enquire himself if animals could really be holders of rights and have legal personality. He immediately dismisses the possibility, mainly because he considers from the outset they are "[…] *merely things–often the objects of legal rights and duties, but never the subjects of them*", according to the Western traditional principles that guide all his parlance.[661]

Curiously, his will to recognise animal rights is so strong that he ends up including them into the society to attain this goal. In his words: "*These duties towards animals are conceived by the law as duties towards society itself. They correspond not to private rights vested in the immediate beneficiaries, but to public rights vested in the community at large – for the community has a rightful interest, legally recognized to this extent, in the well-being even of the dumb animals which belong to it*". Moreover, his arguments are transcendent to the doctrines of Nature's rights because they became one of the juridical sources, utilised by the Indian High Court of Uttarakhand at Nainital, in the conferment of legal personality to the rivers Ganga and Yamuna, and the glaciers Gangotri and Yamunotri.[662]

Another important author to mention is ***Clarence Morris***. He is responsible for the first modern explicit allusion to Nature as a subject of law, which appeared in a curious 1964-essay, prepared apropos of a landscape architecture lesson. At first glance, a couple of interesting facts should be emphasised. On the one hand, Morris was quite probably the first author who gave a name to that human-centred approach seen as a threat to Nature; but he employed the expression "***homocentric***", which never came to popularise to the same extent that the term "*anthropocentric*" did. Nelson and Ryan attribute the first academic use of the expression "anthropocentric" to Lynn White Jr. in 1967. On the other hand, one of the key

[660] Salmond and Williams (1957) 352.
[661] ibid 351.
[662] ibid 351-2; Writ Petition (PIL) No.126 of 2014, *Mohammed Salim v. State of Uttarakhand & others* (2017) Direction No. 19; Writ Petition (PIL) No.140 of 2015, *Lalit Miglani v State of Uttarakhand & others* (2017) Direction No. 2.

arguments to support the recognition of rights of Nature was peculiarly anthropocentric as well, and focusing on the economic need to satisfy the losses experienced by both people and Nature affected by others' harmful actions. Morris upholds that "[s]*ome of the costs fall on brutes and things, worth protecting for themselves as well as for their use to men*".[663]

During the early seventies, some inspiring releases sprang from different sources than legal ones, i.e., from activism, journalism, and education. Roderick Nash counts on a quite complete compilation. Thus, the activist ***Joan McIntyre*** wrote in 1971 a book chapter propounding a bill of rights for wildlife, whose importance lies mainly in the fact that it pragmatically supports the global insight, addressed previously by Morris. McIntyre suggested that "[…] *any meaningful legislative program must be constructed on a new morality, must be directed at achieving a Bill of Rights for* ***all*** *wild creatures,* ***everywhere****".* The use of the adjective "all" and the adverb "everywhere" represents the cohesive character of his proposal, what is doubtlessly confirmed when the author quotes Leopold, to whom he seems to know beforehand.[664]

A second source came from a 1971 chronicle about the "*First Constitutional Convention to recognize the existence and rights of the Great Family*", prepared by ***Harold Gilliam***, a newspaperman from the San Francisco Examiner and Chronicle. Nash quoted the event and its contents as "*An Equinoctial Ceremony in a Nob Hill Cathedral*". According to Gilliam, the meeting aimed at asking "[…] *how the Bill of Rights might be rewritten by the national bicentennial in 1976 to affirm not only the rights of man but the rights of all living things–members of the Great Family*". Beyond this assertion, there is no more specific information about the contents of such a convention, so that it would not be adequate to comment it in deep.[665]

Although his views concerning the interplay between rights and environment could turn out indecipherable due to the lack of information, one could infer Gilliam somehow believed in the rights of Nature. The context of the three questions the author posed immediately after the quoted statement about the gathering's aim seems to confirm this assertion, that is, he wonders: "*What are the rights of a pelican? A redwood? A stream?*"[666] To elucidate his opinion would be necessary to segregate his twofold facet, discarding the scathing journalist

[663] Morris (1964) 185, 189-91; Nelson and Ryan (2015) *Section Anthropocentrism.*
[664] Nash (1989) 127-8, 249; McIntyre (1970) 74, 76 (emphasis added), and 84.
[665] Nash ibid 127-8; Gilliam, "An Equinoctial Ceremony in a Nob Hill Cathedral" *San Francisco Examiner and Chronicle* (San Francisco, 17 October 1971) 31.
[666] Nash ibid 128.

he sometimes used to show up within his chronicles, and keeping the environmental activist who published a few impressive works about ecological and other personal concerns.[667]

Thus, Joel Hedgpeth remembers how Gilliam, overwhelmed by the excess of unnecessary technical data, reported a section from one of the conferences of the U.S. National Commission for UNESCO in his column. "*Clobbered with bushels of horror statistics and predictions of barely conceivable calamities*, [Gilliam wrote] *we could sit there in the meeting rooms of the St. Francis in a kind of stupor and occasionally check our watches to see how long it was until the next meal*". Thus, from a broad overview, one can observe that Gilliam continuously oriented his discourse towards the maintenance of a balanced relationship between humans and Nature, public and private interests, and even current and future generations. These ideas, recurrent within his texts, are precisely the starting point to infer he champions somehow the position about rights of Nature, above all when he asserts that "*Every species, including Homo sapiens,* ***must live in balance*** *with its natural environment*".[668]

For Gilliam, "[…] *the fate of wildlife reflects the inconsistencies of man*", who firstly destroys the species and later, feeling regretful, strives to save the survivors. It provokes an impasse, he states, a "[…] *conflict concerned a deadly serious matter: the relation of man to his environment, particularly to* ***the community of plants and animals to which he belongs***". Summing up, although one can perceive an anthropocentric root in his statements, Gilliam sees a natural community integrated by humans as well. Thus, he becomes as one of the genuine pragmatic forerunners. For example, the author upholds that "*There is a point at which the conquest of nature becomes overkill. At that point man jeopardizes his own life-support system*".[669]

Finally, the last no legal allusion refers to an educational researcher, ***Thomas Colwell Jr.***, whose academic interests have been robustly relating to ecological education since the end of the sixties, emphasising precisely the recurrent idea about [hu]man as part of Nature.[670] To him, humans belong to a "*natural community*", understood as a wholeness of diverse elements, where both a struggle for resources to live and a law of ecology that

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[667] For example: *The Fallacy of Single-Purpose Planning* (1967), *Between the devil & the deep blue bay: the struggle to save San Francisco Bay* (1969); *For Better or for Worse: the Ecology of an Urban Area* (1972); among others.
[668] Gilliam (1969) 52, 92, 99; Gilliam (1972) 47, 120 (emphasis added), 127, 132, 151, 169; Hedgpeth (1970) 366
[669] Gilliam (1972) ibid 120, 125 (emphasis added).
[670] See, for example, *The Ecological Basis of Human Community* (1971) 425; *The Laying on of Environmental Education* (1975) 399; *A Critique of Behavior Objectives Methodology in Environmental Education* (1976) 66.

intricately checks the system, in order to maintain a relative balance coexist together. Nevertheless, Colwell's contribution does not stay solely in the ambit of the ecological implications, supporting his ideas on works of distinguished ecologists, such as Paul Sears. As Nash points out, it has gone further. Effectively, as an educator, Colwell believes firmly "[w]*hat a genuine environmental education needs to do above all is to foster a recognition of the full implications of the simple and oft-repeated truth that man is part of Nature*".[671]

Moreover, his primary ethical source is John Dewey himself, the celebrated philosopher to whom several authors (e.g., Legg and Hookway) attribute to be one of the founders of *pragmatism,* along with Charles Sanders Peirce and William James. Considering certain aspects concerning holism, Colwell devoted a book review about some commentators of Dewey's works, focusing mainly on how Dewey addresses the relationship between humans and Nature, but also highlighting the notion about humans as part of the environment, assumed as a biological organism. McDonald has developed a quite thorough analysis of Dewey's holism.[672]

In 1971, ***Earl Murphy*** wrote a somehow obscure essay [by the way considering this research focus], "*Has Nature Any Right to Life?*", mainly aimed at contrasting the different dimensions between the urban areas and the countryside. Within the text, one can find a somehow holistic idea. The assertion reads: "*If ends are influenced by intermediate procedures, there seems to be forming out of nature a kind of entelechy implying a term to all things*". One should concur with Nash, however, about the fact that "[…] *the title is more provocative than the text*".[673]

Reviewing Roderick Nash's compilation, one can notice the inclusion of two additional sources within the context of what he calls the "*anticipation of Stone's inquiry*". At first sight, given that both are quoted immediately after the reference about Murphy, one would tend to think they are also useful to support the ideas about rights of Nature. Nonetheless, after a brief examination, one can conclude that none constitutes a valid reference. It transpires that Nash included them because these works denoted reflections about "*environmental rights*", but the author himself seems to dismiss them.[674]

Thus, Atkinson's doctoral dissertation, Nash comments, "[…] *examines human rights **to**, rather than the rights **of**, nature*", what entails that it is not an accurate source to support

[671] Colwell (1971) 424-5, 428; Colwell (1975) 399; Colwell (1979) 347; Nash (1989) 249; Sears (1965) 474.
[672] Colwell (1970) 117; Legg and Hookway (2019) § 1 and 2; McDonald (2004) 109-22.
[673] Murphy (1971) 482; Nash (1989) 248.
[674] Nash ibid.

the proposition about rights of Nature. Likewise, Yannacone, Cohen, and Davidson, in their 1972-book, affirmed in essence that "[e]*nvironmental rights are simply a further recognition of basic human rights* [or] *an extension of already recognized civil rights and a step toward judicial protection of fundamental human rights*". It implies their work is neither useful to underpin the present dissertation's aim.[675]

6.1.3 Christopher Stone and the unthinkable

Professor Christopher Stone quite probably constitutes the most connoted philosopher of law in the ambit of Nature's rights and his celebrated "*Should trees have standing?*" represents the cornerstone. His most remarkable contribution maybe consists of proposing that unthinkable in terms of rights becomes thinkable in practice.

In 1972, Christopher Stone explicitly wrote that he was quite seriously proposing *"*[…] *to give legal rights to forest, oceans, rivers and other so-called 'natural objects' in the environment-indeed, to the natural environment as a whole".* His reasoning was intensely supported on the extension of rights towards "*natural life*", as it had historically happened with new bearers before the law, such as children, women, blacks, Indians, foetuses, among others. As Stone himself recognised it, the bestowal of legal standing on the "*natural environment*" occurred to him on the merits of the famous case *Sierra Club v. Morton*, while the appeal was pending before the U.S. Supreme Court. His argument aimed at backing up the claimant's allegation against the lack of right to sue, adduced by the defendant.[676]

Although one can trace the case's roots in 1965, the controversy actually started in 1969, when the U.S. Forest Service granted a 30-year permit to Walt Disney Productions, Inc. to construct a complex and a ski-resort on eighty acres of Mineral King Valley. The area was located in the Sierra Nevada Mountains, adjacent to Sequoia National Park. The whole project comprised of installations for lodging, food, swimming, parking, and transportation, among other facilities. In addition, investors expected to build a 20-mile high-speed road and a 66-kilovolt power line, counting already on the approvals issued by the Department of the Interior.[677]

Initially, Sierra Club–a non-profit organisation founded by the conservationist John Muir in 1892–filed a suit, arguing "[…] *a special interest in the conservation and the sound*

[675] ibid; Atkinson (1972) bibliographic record; Yannacone, Cohen, and Davidson (1972) 344.
[676] Stone (1972) 456; Stone (1985) 2; Case 70-34, *Sierra Club v. Morton* (1972) § III, 741.
[677] Case 70-34, *Sierra Club v. Morton* ibid § I, 729-30.

maintenance of the national parks, game refuges and forests of the country […]". The immediate result was successful, given that the Federal District Court awarded a preliminary injunction, grounded on possible "[…] *excess of statutory authority, sufficiently substantial and serious to justify* […]" it, and rejected the respondents' allegation with regard to the club's right to sue.[678]

Nevertheless, the Ninth Circuit Court of Appeals reversed the previous judgement, reasoning that Sierra Club was not the proper plaintiff because their members did not allege any affectation, which somehow could financially harm or jeopardise them. Besides, the tribunal argued that the general interest in conservation was not enough "[…] *to challenge the exercise of responsibilities on behalf of all the citizens by two cabinet level officials of the government acting under Congressional and Constitutional authority*". Finally, the U.S. Supreme Court upheld the Ninth Circuit's judgement in April 1972, affirming that nobody can invoke a mere "*interest in a problem*" by itself as the starting point of litigation. If it would occur, the Court would not be able to refuse future lawsuits, brought purely predicated on good faith and "*special interest*".[679]

Despite this adverse decision, the whole process has always been seen as positive by Sierra Club members, maybe not only due to the fact that Disney World Productions never built the project, but essentially because U.S. authorities annexed Mineral King Valley into Sequoia National Park in 1978.[680]

Within the Court's reasoning, there are two key issues to address in *Sierra Club v. Morton*, as requirements to legal standing. They are the judicial representation and the economic sense of Nature's rights. Thus, on the one hand, Professor Stone profoundly analysed the legal obstacles to represent natural objects, and especially wilderness areas, before courts, being aware of the importance of juridical actions to promote their conservation. The author suggested handling a guardianship in the same way one can use it to represent incompetent people or corporations in their lawful businesses or even real estates. In other words, the proposal deals with the appointment of a guardian (could be "*ad litem*"), a conservator or setting up a committee, as appropriate.[681]

Thirteen years later, Stone continued to wonder, "[…] *if standing were the barrier, why not designate Mineral King, the wilderness area itself, as the plaintiff 'suffering legal*

[678] ibid § I, 730-1; Sierra Club (2016) Section: *Our roots*.
[679] Case 70-34, *Sierra Club v. Morton* (1972) § I and III, 730-1, 739.
[680] Hartog (2009) para. 3rd. Public Law No. 95-625 (1978) Appendix B, § 314
[681] Stone (1972) 459, 464-5.

wrong,' let the Sierra Club be characterized as the area's attorney or guardian ad litem, and get on with the merits?" Nowadays, he perhaps would ask the same, considering this reasoning seems to be still the standard of various U.S. courts.[682]

On the other hand, one of the most common measures of legal status to bring a suit within the American system of justice comprises the injury caused on who is concerned. In this regard, when the U.S. courts define what one should understand as injury, it is unavoidable to identify an economic connotation. As one will notice, whatever the label the judges use in environmental judgements, either concrete and particularised injury, special interest, personal rights, and so forth, the approach of the proceedings does not usually focus on the environment. The courts often zero in on the litigants, especially the claimants, and the idea of a "*concrete injury*" does not leave room for anything than something measurable in monetary terms. In a similar vein, when the courts refer to "*redressable*" injuries, the economic connotation becomes even stronger. Otherwise, money is not abstract.

Therefore, beyond the final result of the adjudications, the American courts' criteria have focused on considering the concrete and particularised injury of the petitioners instead of the environment's, as one of the requirements of legal standing.[683] In a celebrated 2000-case, between Friends of Earth and Laidlaw Environmental Services, the U.S. Supreme Court stated that "*The relevant showing for Article III standing is not injury to the environment but injury to the plaintiff*". Moreover, the court asserted that the insistence on ecological damages solely implies a higher hindrance than necessary on the merits of the environmental permit enforcement. The Supreme Court referred to a National Pollutant Discharge Elimination System (NPDES) permit granted to Laidlaw by the South Carolina Department of Health and Environmental Control.[684]

Likewise, in a recent case of 2020, the U.S. Court of Appeals for the Ninth Circuit reversed the certified orders coming from the district court due to lack of standing. In brief, a group of sixteen minor claimants, represented by their respective legal guardians, five adult ones, a non-profit organisation (*Earth Guardians*), and the future generations, represented by the criminologist James Hansen, brought a suit against the American federal government and some other public officials for the injuries caused by permitting, authorising and subsidising fossil fuels. Their claim included psychological harm, impairment of recreational

[682] Stone (1985) 2.
[683] One can find similar reasoning, for example, in Case 16-cv-339-JL, *Conservation Law Foundation, Inc. v. Continental Paving Inc. D/B/A Concord Sand & Gravel DNH* (2016) § III
[684] Case 98-822, *Friends of Earth, INC. v. Laidlaw Environmental Services (TOC), INC.* (2000) § II (A);

interests, exacerbated medical conditions, and other damages to property. They even allude to a violation of the public trust doctrine in matters of environmental protection, although they do not really elaborate on this particular point as part of their allegations. In that regard, the claimants sought "[…] *declaratory relief and an injunction ordering the government to implement a plan to 'phase out fossil fuel emissions and draw down excess atmospheric (carbon dioxide)'*."[685]

As reiteratively argued by the U.S. courts, to have standing according to their legislation, plaintiffs should possess (a) concrete and particularised injury (b) brought about by the questioned behaviour, and which (c) is probably redressable by a favourable decision.[686] So, the case between Juliana and others v. the U.S.A. depicts an example of how the economic connotations influence the criteria of American tribunals concerning the interconnections between damage and legal standing. Indeed, the Court of Appeals of the Ninth Circuit dismissed the lawsuit, arguing the lack of standing because they were "[…] ***skeptical that the first redressability prong is satisfied****. But even assuming that it is, the plaintiffs do not surmount the remaining hurdle-establishing that the specific relief they seek is within the power of an Article III court.*", among other reasons. According to the Court of Appeals, the remedial plan [i.e., a non-economic response to the injury, by the way] that petitioners requested is out of its ambit of action. It also requires the intervention of the executive and legislative branches. Thus, the court could not order, design, supervise, or implement it.[687]

In conclusion, American courts have employed the concept of "*injury in fact*" to determine both the legal representation of Nature before courts and the economic connotation of the compensation for injuries. If the litigant does not attain to demonstrate the concrete and particularised injury, there will be a lack of legal standing to bring a lawsuit. But, additionally, if the injury is not measurable in monetary terms, the claim will not either be successful. In Sierra Club v. Morton, the Court explicitly argued:

> *We do not question that this type of harm may amount to an "injury in fact" sufficient to lay the basis for standing under 10 of the* [Administrative Procedure Act, APA]. *Aesthetic and environmental well-being,* ***like economic well-being****, are*

[685] Case 18-36082, *Kelsey Cascadia Rose Juliana and others v. United States of America* (2020) § I, II (B) and III.
[686] ibid § II (B) and III. In a similar environmental sense, see Case 98-822, *Friends of Earth v. Laidlaw* (2000) § II (A); Case 90-1424, *Manuel Lujan, Jr. and Secretary of the Interior v. Defenders of Wildlife and others* (1992) § II (7).
[687] Case 18-36082, *Juliana and others v. the U.S.A.* ibid § II (B.3) emphasis added.

> *important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than* ***the few does not make them less deserving of legal protection through the judicial process***. ***But the "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.***[688]

In contradistinction to the anthropocentric view of the courts, Professor Stone proposes a quite different but understandable reasoning from the point of view of ecocentrism. Lawyers have performed their professional activities among inanimate right-holders, he stated, such as trusts, corporations, joint ventures, municipalities, nation-states, and so on. To a certain extent, although he does not do it explicitly, Stone seems to wonder how it is possible than humans have recognised the [even constitutional] rights of ships and banks, which constitute inanimate objects, and they cannot acknowledge the rights of Nature and its components, as it were, which are living beings. The questioning seems pretty simple but it possesses a consistent philosophical and legal profundity in practice.[689]

Effectively, if one scrutinises the logic of Stone's proposition, one should wonder what the legal difference between a corporation and an ecosystem would be in practice. Why do legislations worldwide recognise only rights for the former but no for the latter? Corporations are even the archetype of what laws define as "*fictitious or artificial persons*";[690] i.e., these entities do not even exist in reality. Instead, although an ecosystem could include inanimate objects (e.g., rocks, soils, or minerals), it certainly constitutes the habitat of living beings, who are part of it, that is, while a corporation is a mere entelechy, without material substance and intangible, which one could only visualise through a set of legal documents, an ecosystem is quite the opposite, its existence is real, material, tangible.

Then, the only difference between corporations and ecosystems concerning their legal status is what the law establishes. The conferral of legal personhood to corporations was a need for human sake in a particular moment of the history and lawmakers just did it. At present, the recognition of legal personality in favour of ecosystems could imply a valid alternative for their protection, and humanity's survival by the way, so the bestowal of juridical considerations does not seem to be a bad idea.

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[688] Case 70-34, *Sierra Club v. Morton* (1972) § III, 734-5 emphasis added.
[689] Stone (1972) 459-3.
[690] Gifis (2003) 313; Garner (2004) 3619.

From the outset, human beings have created corporations for their benefit. As John Dewey argued, the fiction doctrine concerning the personality of corporate bodies, or *universitates*, whose origin can be traced to Pope Innocent IV, "[…] *was stated as the reason why an ecclesiastic collegium or universitas, or capitulum could not be excommunicated, or be guilty of a delict*". Thus, ecclesiastic authorities created corporate bodies to carry out a specific function for accomplishing their objectives. Nowadays, although they possess other ends, corporations fulfil their respective goals, but continue to be useful to humans. In plain language, it does not matter the category of the corporation, i.e., non-profit, public or municipal, professional, and business ones, following the classification proposed by Mayer and others, they will often tend to ease the legal relationships and look for the human sake.[691]

Therefore, it turns out extremely difficult to justify the bestowal of legal personality on corporations and other similar entities, while at the same time legislations deny this possibility to ecosystems. Furthermore, this idea becomes incomprehensible when one thinks about the importance of ecosystems for the survival of people on Earth.

In this framework, to Professor Stone, legal rights have traced a path of evolution parallel to morality, i.e., by extending its borders towards an increasing number of subjects, to whom Stone labels as "*holder of legal rights*". Indeed, he begins his distinguished article, "*Should trees have standing?*" through this comparison. At this point, it proves inevitable to find a characteristic in common with Leopold, Callicott, and their Land Ethic, the direct reference to the Darwinian explanation of "*social instincts and sympathies*" as a sort of catalyser of this extension of rights and the human advances in civilisation.[692]

To be a right-holder, according to Stone, it is necessary to accomplish four requirements, i.e., (1) recognition of legal standing by an authority, (2) capacity to bring lawsuits before the system of justice by itself, (3) acknowledgement of legal remedies derived from legal relief of natural objects, and (4) benefits of legal relief applied directly on Nature.[693]

Firstly, the recognition as a holder of rights coming from a legal authority seems to comprise of the conferment of legal personhood. Still, this possibility did not appear explicitly in his 1972-essay. It is rather in his following work thereon in which he refers expressly to what he calls "*legal considerateness*" or "*legal personification*" of certain "*Unorthodox Entities (UEs)*" to whom he labels as "*Disinteresteds* (Ds)". One should state

[691] Dewey (1926) 665; Mayer, Warner, and Siedel (2012) 1526.
[692] Stone (1972) 450-1, 458; Darwin (1981) 100.
[693] Stone ibid 458.

that, although his particular legal-moral terminology has not transcended in the academic circles, it helps to explain the overall context in which Stone's theory unfolds.[694]

If one tries to pigeonhole the category of *unorthodox entities*, one could hold they are everything or everybody that is nonhuman or, being human, does not fulfil the mainstream criteria of the "*Contemporary Normal Proximate Persons (CNPPs)*", who are typical adult humans, especially those of sound mind and not suffering from any disability. Consequently, it is not rare that Stone includes into this group a range "[…] *from natural persons of 'special' sorts, infants, lunatics, the unborn, slaves, and so on, to such nonhumans as animals, species, the dead, and various sorts of corporations: nations, municipalities, business organizations, and universities*".[695]

As DesJardins observes, Stone's conception of moral considerability [and legal considerateness[696]] grounds on the "*principle of interest*", a theoretical structure constructed in the function of the rights, and attributed to one of the most reputable philosophers, Joel Feinberg, and developed later also by Peter Singer. In an overall sense, Feinberg claims that "[...] *the sorts of beings who can have rights are precisely those who have (or can have) interests*". To him, a being who does not have any interest in being profited, avoiding injuries, or having behalf to act in and no sake to act for cannot have rights.[697]

Notwithstanding, contrary to what one could believe, taking for granted the association of Feinberg and Singer with sentientism, Christopher Stone does not promote animal rights or liberation, or any other premise related to psychocentrism. His notion of "interest" interestingly lies rather in the letter of the law, i.e., the legal framework defines what one should understand of "*interest*". "*Legal interests and legal harms are what the law says they are*", he argues. If one carefully ponders on the possibility that an interest springs from the law instead of conscience, sentiment, or feeling, however, the idea could even sound absurd. Stone was entirely conscious of the potential criticisms, to the point of admitting that the legal status bestowed on any river, for example, does not necessarily imply a better or worse condition to the ecosystem. "*The implication, our critic will claim, is that any apparent conflict involving rivers is illusory*", he affirmed.[698] Over time, nevertheless, one has been

[694] Stone (1985) 22-38, 40.
[695] ibid 9-10.
[696] Professor Stone seems to purposely use the expression "*considerateness*" within a juridical connotation precisely to differentiate the widely employed ethical allusion to "*considerability*".
[697] DesJardins (2013) 111; Feinberg (1980) 167, 178.
[698] Stone (1985) 41.

able to see the growing social unrest around the rivers and other bodies of water, primarily due to their implications for human survival.

In any case, it turns out undeniable that Stone was utterly aware of Feinberg's and Singer's stances (to whom he even quotes within his text) concerning the role of "*interest*" in the determination of moral standing. Therefore, he proposes the notion of the "*Disinteresteds* (Ds)", i.e., entities without interests, whose epitome or example par excellence is the "*river*". Throughout the essay, one can find other ecosystems, such as soils, lakes, mountains, forests, marshes, brooks, and beaches, among others. Indeed, there is an explicit reference to Leopold and Land Ethic concerning the functional context of the conception of soils for life. Yet, the legal analysis is not solely circumscribed by the ecosystemic field. Professor Stone also reviews the cases of robots, embryos, tribes, species, future generations, and artefacts.[699] Consequently, it does not appear difficult to deduce the legal proposal. If there are some entities without interests, whose welfare constitutes an interest for the *Contemporary Normal Proximate Persons*, as it were, then the law will determine their interest.

Secondly, as far as the capacity to sue, as already mentioned, Professor Stone solves the question through the legal guardianship, which would be useful to represent Nature under similar terms it currently occurs with children, incompetent people, fictitious persons, and even real state.

Finally, the third and fourth requirements to be a bearer of rights are somehow interconnected because both refer to the legal remedies derived from an injury. In contradistinction to what American tribunals have often argued, the redress for injuries should orient to Nature, instead of human beings. To illustrate his point, Professor Stone uses the example of a car accident. He suggests that Nature entitles to repair its "*environmental health*" under the same conditions as a person who has suffered a car accident concerning its medical expenses. He states that: "*Comparable expenses to a polluted river would be the costs of dredging, restocking with fish, arid so forth*".[700]

One last thought-provoking reference consists of Stone's view concerning the rights of Nature from an international point of view. To him, the interactions among nations and the environment comprise an issue of distributive justice. For example, Stone is concerned about the effects of climate change on developing countries, derived from the commercial activities coming from developed nations. Likewise, he worries about the stock and overexploitation

[699] ibid 4, 8, 20-2, 28, 56
[700] Stone (1972) 476, 489.

of natural resources. Thus, he wonders, for instance, if one can "[…] *even meaningfully discuss what distribution of whales is 'just' or 'fair'*". Curiously, however, his analysis unfolds within the ambit of ethics.[701] Consequently, although it would be worth elaborating a review in more detail, it could be a matter of new research, given it is not the main aim of this chapter.

In sum, the proposal of Christopher Stone concerning the bestowal of legal rights on different kinds of ecosystems undoubtedly constitutes the more adequate legal thesis for supporting the international legal personhood of Nature. His reasoning has been so consistent in matters of recognition of legal rights, that it can readily be considered an anticipation of the contemporary national recognitions of legal personhood and the conferment of rights to various rivers in Colombia, India, and New Zealand.

6.1.4 Legal developments after Professor Stone

Justice ***William O. Douglas*** was one of the Supreme Court members who took part in Sierra Club v. Morton of 1972. His dissenting opinion became a historic milestone among the promoters of Nature's rights because he compared the environmental issues with the role played by "*inanimate objects*", such as ships or corporations, whose legal personality was wide enough not only to be considered as legitimate adversaries before courts, but also to accomplish maritime or other business ends. In a certain way, legal standing would allow "*environmental objects*" to sue for their preservation and look after their interests, through legal representation. In the name of his defence of rights of Nature he even suggested the shift of the case label to "***Mineral King*** *v. Morton".*[702]

Douglas thought in a federal rule to allow litigating in the name of natural things "[…] *about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage*". This assertion was parallel to Stone's, who had affirmed that "[t]*he rights of the environment could be enlarged by borrowing yet another page from the* [law] *and mandating comparable provisions for 'private governments'.*" One should clarify that Stone refers to the U.S. *Environmental Protection Act* in particular and not to the law in a general sense.[703] In one way or another, it meant a future vision of at least thirty-five years

[701] Stone (2006) 12-3.
[702] Case 70-34, *Sierra Club v. Morton* (1972) Justice Douglas, dissenting opinion, 742-3 emphasis added.
[703] ibid 741; Stone (1972) 484.

concerning the course of certain legislation about this acknowledgement, as it ensued with the 2008 Ecuadorian Constitution or the 2010 Bolivian Rights of Mother Earth Act.

In his dissent opinion, Justice Douglas also posited that it was not necessary to count on only economically valuable damages in order to protect environmental rights before courts. He argued that other aspects also emphasise the importance of Nature, such as spiritual, aesthetic, recreational, or ecological values, inter alia. For instance, he quoted the case of the river, as "[…] *the living symbol of all the life it sustains or nourishes - fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life*".[704]

Douglas' concern for Nature, however, was not new during the period of Sierra Club v. Morton. In fact, one of his earlier references about environment dates from 1950, through a kind of field diary about his "*discoveries*" in the mountains of the Pacific Northwest in the U.S.A. According to O'Fallon, that work was the first foray into autobiography, in which Douglas described his love for the wilderness.[705]

Moreover, in 1965, he published a proposal to preserve the wilderness through a bill of rights, understood from the perspective of people's rights instead of Nature's ones in itself.[706] Notwithstanding, it calls attention to his previous knowledge about Leopold, dedicating even one chapter of his work to a conservation land ethic. "*If we are to acquire a new land ethic,* [Douglas asserts] *we must make education a tool for understanding our link with nature*".[707]

Other authors have tackled the question of legal standing from diverse outlooks. One of those voices corresponded to Professor ***Godofredo Stutzin***, who suggested to stop thinking about the environment as a human right, such as the Stockholm Declaration conceived it. He rather asked if one had not "[…] *discovered the rights of a new legal entity called Nature (or the Environment) by admitting that the natural environment has to be protected against human activity*".[708]

Shortly after, during the 1977 First National Congress of Environmental Law at the Catholic University of Valparaiso (Chile), Stutzin stated the recognition of Nature as a juristic person was not only lawfully possible but imperative. It depicted "[…] *a genuine «sine qua non» condition to structure authentic Ecological Law, able to cease the accelerated process of Biosphere's destruction*". Like Justice Douglas, Stutzin focused his

[704] ibid 743.
[705] Douglas (1950) ix-x; O'Fallon (2000) 21.
[706] Nash also remarks this point. See Nash (1989) 130.
[707] Douglas (1965) 150-68
[708] Stutzin (1976) 129.

reasoning on the feasibility of using the category of legal person in Nature, as though it would be a corporation, like a means to accomplish the ends of justice and public welfare. Indeed, he supported the idea that Nature is not a fictitious entity since it counts on worthier and higher interests to protect. To Stutzin, Nature constitutes a real [natural] being, an unmatched setting of organisation, stability, vitality, autonomy, and a performance of vital functions that enables human existence.[709]

Barely from the late 2000s on, mainly because of the enactment of the Ecuadorian Constitution and the Bolivian Rights of Mother Earth Act, a series of South American writers retook the topic of rights of Nature. In parenthesis, during this period of thirty years approximately, the theory of Earth Jurisprudence emerged but it is part of the next subheading. Thus, one of the most connotated authors has been ***Eugenio Zaffaroni***, current judge of the Inter-American Court of Human Rights. His main contribution has been the association between the concepts of Nature's rights and Pachamama, the indigenous expression of how Latin American natives often refer to the environment. To Zaffaroni, Pachamama has come as a resurgence of the ancestral culture of harmonious coexistence within Nature, incorporating itself to universal Constitutional Law. The promulgation of these new legal frameworks has unquestionably implied, according to the author, a breakpoint of the traditional constitutional paradigm, in which individuals have been the only archetype of subjects of law. Anyway, the rights of Pachamama constitute a kind of collective prerogative that contains others (human beings' entitlements included). The recognition of rights of Nature has allowed the emergence of a millenarian worldview, based on harmony and balance of life. Indigenous call it *sumak kawsay* (good living), and it is currently part of the Ecuadorian Constitution.[710]

One should clarify that professor Zaffaroni has not been the only one who has addressed the theme of rights of Nature in Latin America. Nevertheless, it would not be accurate to review the immense range of authors, given that virtually all of them wrote their analysis after the issuing of normative thereon. Therefore, it would be enough to mention the most remarkable cases. In Ecuador, for example, ***Ramiro Ávila*** was one of the most enthusiastic promoters or the recognition of rights of Nature at a constitutional level, through various publications. One should emphasise his "*The Utopia of the Downtrodden one*", although it

[709] Stutzin (1984) 97, 104.
[710] Zaffaroni (2011a) 155-6; Zaffaroni (2011b) 21; Translation of the Constitution of Ecuador (2011) Articles 14 and 71.

came out more than ten years later. Likewise, one cannot avoid mentioning the compilation of scholarly articles by Carlos Espinosa and Camilo Pérez or the book by Julio Prieto.[711]

Alberto Acosta depicts an exceptional case because he led the inclusion of the rights of Nature into the 2008 Ecuadorian Constitution. His contribution did not come from the ambit of law but rather from activism and politics. Even though he is not a lawyer but an economist, he supported and favoured the recognition of Nature as a subject of law in the constitution. His position as president of the National Constituent Assembly was crucial to achieving the goal. From the first meeting on, carried out in November 2007, Acosta has profusely published several works concerning this subject matter.[712]

Likewise, in Colombia, ***Javier Molina*** published in 2014 a quite thorough analysis of the Latin American experiences concerning the rights of Nature and the expectations about the future regulation for his country in this matter. His contribution also encompasses a broad historical review from the animal judgements to the most recent applications of rights of Nature in the Latin American legal frameworks. On his part, Everaldo Lamprea presented an interdisciplinary work, which goes beyond law, extending the scholar examination toward social and natural sciences from a comparative perspective.[713]

In addition, there are a couple of remarkable compilations that one cannot set aside. The first one consists of a joint effort by universities in Colombia and Ecuador, elaborated by Liliana Estupiñán et al., focusing on democratic constitutionalism. The second one is a Mexican contribution, by José Garza and Roberto Rodríguez that embraces several articles concerning a variety of legal and social topics. They comprise several issues about criminal and public law, and questions related to indigenous studies and sustainable development as well.[714]

Despite that ***Tāmati Kruger*** is not really an attorney but an anthropologist and political scientist, specialised in Māori studies, his contribution should be part of any legal compilation concerning the rights of Nature. As David Boyd remembers, Kruger was the lead negotiator for the Ngāi Tūhoe, a *Māori iwi* (tribe) from New Zealand, concerning the Treaty of Waitangi settlement. This treaty constitutes the legal foundation of the subsequent agreement *Tūtohu Whakatupua,* which bestowed legal personhood on the *Whanganui* River.[715]

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[711] Ávila (2011) 35ff; Ávila (2019); Espinosa and Pérez (2011); Prieto (2013).
[712] For example, Acosta (2012) 17-8; Acosta (2011) 317ff; Acosta (2010) 11; Acosta (2009) 21-7.
[713] Molina (2014); Lamprea (2019).
[714] Estupiñán and others (2019); Garza and Rodríguez (2012).
[715] Boyd (2017) 144; Victoria University of Wellington (2015) para. 1st; *Tūtohu Whakatupua* (2012).

According to Pennie Opal Plant and Shannon Biggs, when they interviewed to Kruger to learn about the process of bargaining, he told them expressly that "[l]*and is not property*" and the challenge consisted of convincing the government of it. This was a direct reference to the proposal of transferring the ownership of Te Urewera National Park from the New Zealand Crown to the Tūhoe people, which Prime Minister John Key had eventually rejected.[716] As Kennedy Warne recalls, when the exhausting and long process of negotiation was going about to fail, it occurred to Kruger a very persuasive argument for the Prime Minister. He told to Warne:

> *I realised John Key was misunderstanding what we were on about. Ownership was his obsession, not ours. So, we stopped using that word.* ***My feeling is that the land was here first, so nobody owns it****. If anything, it owns you. The water owns the water, the land owns the land. So, our proposition to the government has been, 'Let us agree that Te Urewera owns itself.'*[717]

In sum, through this phrase–that one can also find within the proceedings of the discussions of the Parliament concerning the *Te Urewera Bill*[718]–Kruger sketched out the basic principle of legal personality, the inexistence of property rights over the subject of law. The subject of law can possess, own, or have belongings, but it can never be the property of anybody else. It experienced a transmutation from object to subject of law, acquiring rights and duties, but it is no longer object of those rights and duties. In this way, Kruger obtained the enactment of the Te Urewera Act, by which the forested area was recognised as a legal person in 2014, and an anticipation of what later occurred with the Whanganui River.[719]

Several years later, in 2017, ***David Boyd*** –who is currently the U.N. Special Rapporteur on human rights and the environment– published a legal review of the state-of-the-art advances in matters of rights of Nature. Although it was not his first academic output, it is quite probably his most important work in this subject matter. His main objective, as Boyd himself declares, consisted of determining to what extent laws recognise those rights. As a result, he cannot conceal his concern about the inefficacy of legislation in helping to face the ecological crisis. "[E]*nvironmental laws have put the brakes on some types of harm,* [he

[716] Boyd ibid 145; Opal Plant and Biggs (2016) para. 11th.
[717] Warne (2019) 3 emphasis added.
[718] Tūhoe Claims Settlement Bill, Te Urewera Bill - Third Readings (2014) Intervention of the Hon Dr Pita Sharples, para. 7th.
[719] Te Urewera Act (2014) para. 11th (1)

argues] *but the train is still headed for a cliff*". For this reason, a fundamental reorientation of law seems to be a must, and that turn of the page would be the recognition of the rights of Nature.[720]

In summary, there is a certain confrontation between legal universalism [or natural law] and legal positivism. As Dániel Deák has argued, the global ecological crisis of the Anthropocene age has triggered irreversible processes in Nature, making necessary a radical renewal of environmental law and perhaps the entire legal order. This shift would require a supplement of the mere anthropomorphic foundations with biotic ethics, in a way that allows the coexisting of humans and non-humans, instead of the subjugation of Nature. Furthermore, professor Deák states that:

> *This requires a renewal of the legal formal language, which is mainly to be hoped for by resolving the fragmentation and rigidity currently experienced in law and allowing for a broader, more liberal interpretation of traditional legal institutions. One of the reasons for rigidity is that coercion is still considered the basic function of law to this day, and it can be argued accordingly that coercion is essential to the creation of a civilized order of coexistence. This, in turn, means that the law cannot be truly impartial and will not be free from the unpredictable and opaque influence of political forces.*[721]

6.1.5 Wild Law and the legal implications of Earth Jurisprudence

Although the contributions of ***Thomas Berry*** were already part of the ethical chapter, the legal implications turn out of such importance that it would also be pertinent a specific examination of his arguments in matters of the theory of law. Thus, in 1999, Berry wrote that the leading cause of the planet's destruction grounded on a "*mode of consciousness*" that had bestowed all rights only on humans to the detriment of nonhumans, especially from the standpoint of the industrial-commercial world. This vision emphasises that the very existence of Nature aims at human possession and use. Taking into account that American jurisprudence directly orients to personal human rights, Berry believed that "[…] *there can be no sustainable future, even for the modern industrial world, unless these inherent rights*

[720] Boyd (2017) 219.
[721] Deák (2020) 53.

of the natural world are recognized as having legal status".[722] Consequently, as one can see, he openly supports the granting of legal personality to Nature.

Berry's argument about the traditional view of Nature as an object of human possession and use reaffirms what got already argued in the previous chapters concerning the property rights and the representation of Nature. On the one hand, the fact that nonhuman living beings are mere goods or things and not subjects of law brings about a profound judicial and administrative significance in terms of environmental protection. Nature does not possess any right to claim, depending exclusively on the human actions to obtain protection. On the other hand, Nature is currently property of individuals and legal persons, and laws, as mentioned earlier, tend to protect property rights instead of the environment. For this reason, as Susana Borràs has pointed out, "*The consequence has been that environmental laws and regulations, despite their preventive approach, have developed so as to legalize and legitimate environmental harm*."[723]

The focal point of Berry's approach, nevertheless, consists of encouraging a proportional distribution of the planet's great commons (i.e., land, water, air and life systems) among all the members of the Earth community, depending on their particular needs. Human beings are not the centre but only one more element within the processes of life. For that purpose, it is desirable to count on a "*new jurisprudence*", Berry states, as an alternative mechanism to enhance the human-earth relationship, through the articulation of adequate conditions for the integral functioning of those life processes.[724]

As one can imagine, this proposal would bring about the overthrow of property rights. "*The naive assumption that the natural world is there to be possessed and used by humans for their advantage and in an unlimited manner* [Berry states] *cannot be accepted.* ***The Earth belongs to itself and to all the component members of the Earth community***". That is why the author recommends that all the members of the community share what he labels as the "*Great Commons*".[725]

This legal effect concerning a sudden disappearance of property rights, derived from the transmutation of Nature from object to subject of law, seems to be pretty evident in practice. If one rethinks about the case of slavery, the direct and immediate upshot coming from the manumission consisted of the abolition of any kind of ownership over those human beings

[722] Berry (1999) 4, 60, 61.
[723] Borràs (2016) 113-4.
[724] Berry (1999) 61.
[725] ibid.

who have been until then the property of someone else. Consequently, it would not have to be different in the case of the granting of legal personhood to Nature. It draws attention, however, that none of the authors before Berry have encompassed and explained in more detail the question regarding the potential vanishing of property rights. From a conventional civil law perspective, there are owners and belongings, as it were. If something is not a belonging, s/he is probably the owner.

In other words, to guarantee the accurate condition of Earth's existence, the discard of property rights or, at least their flexibility, should be necessary, given that they would not have more value than any other prerogative. In case of conflict, it would be quite probable that existence rights prevail over the property. Berry is pretty precise in affirming that human rights do not eliminate other modes of being to exist in their natural state. To him, "[h]*uman property rights are not absolute. Property rights are simply a special relationship between a particular human 'owner' and a particular piece of 'property,' so that both might fulfil their roles in the great community of existence*".[726]

In any case, Berry's call for a "*new jurisprudence*" became crucial to lay the groundwork of "*Earth Jurisprudence*", conceived by Judith Koons as an

> […] *emerging legal theory based on the premise that rethinking law and governance is necessary for the well-being of Earth and all of its inhabitants. Earth Jurisprudence is an inclusive and systems-based theoretical perspective that supports robust environmental regulation and recognises a kinship with the field of environmental ethics. In addition, Earth Jurisprudence embraces the connection between Earth justice and social justice.*[727]

Additionally, in terms of rights, Thomas Berry matched the whole elements of Earth at the same level, by proposing a group of three fundamental entitlements: to be, to habitat, and to fulfil its role in the ever-renewing processes of the Earth community. However, they are specific to every species, according to the corresponding part they play. Thus, humans have human rights; birds have bird rights; rivers have river rights, and so on. At this point, there is a parallelism between Berry's ideas with Paul Taylor's arguments about the rights of animals and plants, and particularly concerning the respect for the existence of Nature.[728]

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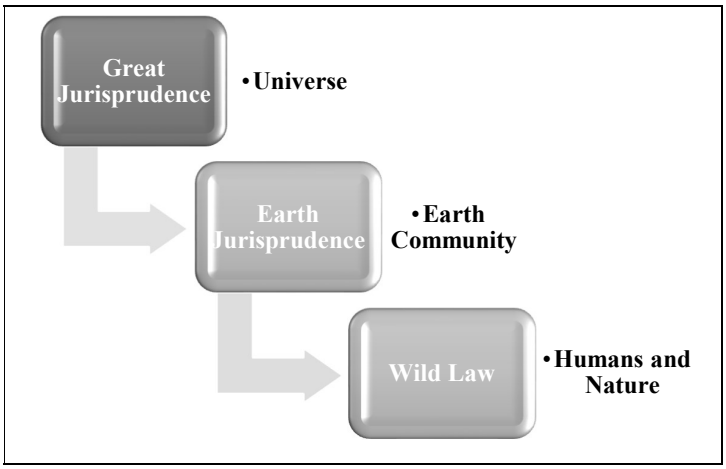
[726] Berry (2006) 150.
[727] Koons (2012) 45.
[728] Berry (2006) 149; Taylor (2011) 222-6.

Another proponent of importance concerning "Earth Jurisprudence" is ***Cormac Cullinan***. He drew international attention through the publication of his celebrated book "*Wild Law*", in 2002, which consisted of a *Manifesto for Earth Justice*, just like its very subtitle. His most significant contribution to the doctrine of Earth Jurisprudence has probably involved endowing it with a scholar consistency from the legal angle, given his broad expertise as a practising environmental lawyer.

For Cullinan, Earth Jurisprudence intricately connects to the conception of "*Wild Law*". Nevertheless, when one scrutinises his theoretical approach, this interplay between both aspects does not appear at first sight and is not self-evident. To understand their association, one would have to identify three levels of regulation, interrelated among them. By way of explanation, every single stage endows the standards of functioning to the next and narrower range, as one can notice in chart # 39.

Chart # 39 Sources of Wild Law



Based on Cullinan (2011) 29, 78; and (2012a) 12-3.

Firstly, the author labels "*Great Jurisprudence*" to the set of fundamental laws and principles of the universe, so-called also natural world, which not only guides how it [universe] functions, but it establishes the parameters to develop the next levels. Thus, it determines how the earth community and the human legal framework should operate. Curiously, despite that Cullinan describes the Great Jurisprudence in terms of laws and principles, he clarifies this level does not constitute specifically rules to govern, but rather quality to guide the following stages. It deals with an abstract approximation. "*It is what it is*" the author affirms.[729]

[729] Cullinan (2011) 29, 78.

Secondly, the next level is "*Earth Jurisprudence*", comprising philosophy of law and governance, as mentioned above, guided by the idea of people as only another component of a wider community. In consequence, people are not the centre of the Earth community, but rather they share a place in common with other members. Within the community, individual welfare is dependent on the welfare of Earth as a whole.[730]

In this subject matter, his contribution could get summarised in a series of five succinct principles of Earth Jurisprudence that he formulated in 2010, also based on Thomas Berry's stance. The table below shows them.

Table # 6 Principles of Earth Jurisprudence

(1) The Universe is the primary law-giver, not human legal systems.

(2) The Earth Community and all the beings that constitute it have fundamental "rights", including the right to exist, to have a habitat or a place to be, and to participate in the evolution of the community.

(3) The rights of each being are limited by the rights of other beings to the extent necessary to maintain the other beings to the extent necessary to maintain the integrity, balance, and health of the communities within which it exists.

(4) Human acts or laws that infringe these fundamental rights violate the fundamental relationships and principles that constitute the Earth community and are consequently illegitimate and "unlawful."

(5) Humans must adapt their legal, political, economic, and social systems to be consistent with the fundamental laws or principles that govern how the universe functions and guide humans to live in accordance with these, which means that human governance systems at all times must take account of the interests of the whole Earth community and must:

- *determine the lawfulness of human conduct by whether or not it strengthens or weakens the relationships that constitute the Earth community;*
- *maintain a dynamic balance between the rights of humans and those of other members of the Earth community on the basis of what is best for Earth as a whole;*
- *promote restorative justice (which focuses on restoring damaged relationships) rather than punishment (retribution); and*
- *recognise all members of the Earth community as subjects before the law, with the right to the protection of the law and to an effective remedy for human acts that violate their fundamental rights.*

Source: Cullinan (2010) 144.

In the core of Cullinan's proposal, one can distinguish a call for changing the governance policies and philosophies as appropriate. This shift will permit to correct the

[730] Cullinan (2012a) 13.

troubled relationship between Earth and humanity, which the old traditional systems have not been able to avoid. Moreover, a new scheme of governance will help to prevent or reduce the loss of biodiversity, pollution, deforestation, climate change, and combat other contemporary environmental problems. In Cullinan's words, "*Earth Jurisprudence is needed to guide the realignment of human governance systems with the fundamental principles of how the universe functions* [i.e., Great Jurisprudence]".[731]

According to Warren, Filgueira, and Mason, an accurate interpretation of Cullinan's opinion about why the traditional legal systems do not work out efficiently to protect the planet has to do with the regulation of Earth as a thing. "*The reality* [the authors argue] *is that legal systems treat the Earth as a 'resource' and value it only as such when in fact it is the organism that sustains all forms of life*".[732]

In response, as other authors previously analysed, Cullinan believes in a change in the concept of Nature, from an object to a subject of law, i.e., as a holder of rights. Nevertheless, he seems to differ in terms of scope because the last of his proposed principles of Earth Jurisprudence individualises all members of the Earth community, without mentioning any exigency concerning ecosystems. Furthermore, he promotes the members of the Earth community are entitled to receive protection and effective remedy against any human action that violates their fundamental rights.[733]

Although his stance keeps the general line of the legal holism, one should argue this opinion would step out from it, turning out even a little bit inadequate for the structure of ecocentrism. If one recalls the parallelism between Berry and Taylor, one should take into account it referred to individualisation of rights (e.g., human rights for humans, river rights for rivers, insect rights for insects, and so on) but within the community as a whole. Cullinan's suggestion seems to be different in that sense, given it regards to legal recognition of individuals, setting aside the comprehensive approach of community. Nevertheless, one would have to consider that, in 2008, the author wrote in support of the recognition of natural communities and ecosystems as legal persons in the Tamaqua Borough, Pennsylvania. This reference leads to thinking about the fact that he is not opposed to the granting of legal personhood to ecosystems and other similar natural entities.[734]

[731] Cullinan (2011) 29.
[732] Warren, Filgueira, and Mason (2009) 3.
[733] Cullinan (2012a) 13.
[734] Cullinan (2008) para. 17th.

Finally, the third stage corresponds to "*Wild Law*", which constitutes a regulation of roles within the Earth community. Those roles get oriented to the evolution of the planet, and their limit is the right of the others. In this way, the integrity, balance, and health of the community can get maintained.[735]

For Cullinan, the idea of a "Wild Law" is not contradictory as one could think given the opposite connotation between both terms in common parlance. In effect, the word "*Law*" is an explicit reference to "*bind*", "*constrain*", "*regularise*", or "*civilise*", the author argues. Instead, the expression "*wild*" is usually close in meaning to "*unkempt*", "*barbarous*", "*unrefined*", "*uncivilised*", "*unrestrained*", "*wayward*", "*disorderly*", "*irregular*", "*out of control*", "*unconventional*", "*undisciplined*", "*passionate*", "*violent*", "*uncultivated*", or "*riotous*".[736]

Cullinan recognises the complexity to pigeonhole the concept of Wild Law within the conventional structures of the legal framework. He does not even see it as a branch of law. He associates this notion with human governance instead. Summing up, Cullinan believes in Wild Law as a set of "[…] *laws that regulate humans in a manner that creates the freedom for all the members of the Earth Community to play a role in the continuing co-evolution of the planet*".[737]

Another remarkable aspect to mention consists of property rights. Cullinan seems to be very conscious about the implications of a potential shift of world law and governance of ownership, especially concerning the land. "*The challenge that now faces us is how to begin the process of undoing the property systems that impede a proper relationship with land,* [the author affirms] *and to build a workable alternative in its place*".[738]

Cullinan assumes beforehand an evident impact over the interplay between humanity and Nature, in terms of property rights. Furthermore, he accepts the position of Berry arguing the current legislation and governance are obstructive instead of helpful to the flourishment of the planet. He also recognises that several voices have shown concern in front of a potential abolition of existing law and political system. In that regard, his stance regarding ownership sounds more flexible than Berry's one, stating explicitly that: "*I am not proposing that property laws be abolished overnight. I am under no illusions about the short-term chaos that would ensue if this happened*". Thus, he admits any implementation of Earth

[735] Cullinan (2012a) 13.
[736] Cullinan (2011) 29-30.
[737] ibid 31.
[738] ibid 145.

Jurisprudence, through the development of Wild Law, will take time and will not apply to all locations under the same conditions all over the world.[739]

Another transcendent exponent of Earth Jurisprudence is ***Thomas Linzey***, the successful attorney and co-founder, joint with Stacey Schmader and Brenda Sue Thornton, of the *Community Environmental Legal Defense Fund (CELDF)* in 1995, in Pennsylvania. From the outset, the Fund aimed at helping "[…] *people in various communities research and prepare permit appeals*". So, around 1997, most of its clients were community groups.[740]

Conscious of conventional Western laws treat Nature as a collection of commodities and as the property of someone, Linzey and the CELDF started to advise some local communities in the U.S.A. about the mechanisms to pass ordinances recognising the rights of Nature. In his words, "*Today, it is our communities and natural systems that are treated as property under the law–just as slaves once were–because what's in our communities is routinely bought, sold, and traded without a whisker of local control*". The first community that enacted an ordinance against the sewage sludge, but recognising Nature's rights, was Tamaqua Borough, in 2006. It is a small town located in Schuylkill County, Pennsylvania.[741]

Nevertheless, Linzey did not do it alone. ***Mari Margil***, the closest colleague of Linzey at the CELDF, and current Executive Director of the Center for Democratic and Environmental Rights (CDER) also did his part. Thus, she participated as a consultant for the 2008 Ecuadorian Constitution, joint with Linzey, which was the first one all over the world, in acknowledging the rights of Nature. Likewise, she worked in India for the recognition of the legal personality of the Ganga river basin in 2017.[742]

Her view about the CELDF's defence of local communities was not entirely optimistic. She thought about corporations re-wrote the laws or exhausted communities presenting permit applications several times until they obtained the corresponding authorisations to construct or undertake their projects. She affirmed: "*We helped hundreds of communities appeal these corporate permits – but even when we won, we lost*". For this reason, she has concluded that traditional laws do not protect the environment, and somehow legalise environmental harm. "*At best, they merely slow the rate of its destruction*", she argues. As a response, Margil advocates the recognition of rights of ecosystems and natural communities

[739] ibid 158.
[740] Campbell and Linzey (2016) 2.
[741] ibid 5; Ordinance Tamaqua Borough No. 612 (2006) § 7.6.
[742] Center for Democratic and Environmental Rights (2019) para. 1st; Margil (2017) para. 4th.

to exist and flourish as a new form of environmental jurisprudence, which grants a legal authority to people and local governments to enforce and defend those rights.[743]

To conclude, when one scrutinises the different perspectives of Earth Jurisprudence, it is difficult to avoid thinking about a continuation of the premises posed by Professor Stone, in legal terms. For moments, it even seems an updated version and adaptable to the current reality. Likewise, one could elaborate a similar reflection concerning the postulates of the Land Ethic, in matters of moral philosophy. For these reasons, nowadays Earth Jurisprudence appears to be the most accurate theoretical stance to support the idea of rights of Nature, not only at a national level but also at the international one.

6.2 Current legal framework concerning the representation of Nature

Just like it occurred in the ethical approach, one can address the recognition of Nature as a legal person from different points of view. Indeed, one could affirm that there is virtually a legal proposal for each ethical way of addressing the moral considerability of Nature. From anthropocentrism to ecocentrism, one could find multiple ranges of lawful regulations (including soft law) that could fit almost precisely with the respective ethical scope.

Since this perspective, an outstanding arrangement has been developed by Dinah Shelton, who has gathered some different ways to address the legal personality of Nature in four categories. They are the public trust, animals, ecosystems, and the whole. Consequently, being an extremely useful taxonomy of approaches, this subsection follows Shelton's organisation.[744] Thus, table # 7 shows an exemplificative illustration.

From the outset, it would be useful to clarify a couple of aspects. On the one hand, the question of animal rights has been emphasised and unfolded in more detail within this section lest the confusion of the proposed theoretical scope. In a colloquial sense, there is an equivocal idea that rights of Nature are synonym of the rights of animals. So, it is necessary to clarify concepts. On the other hand, both approaches derived from the holistic insight, i.e., Nature and ecosystems, will get analysed altogether due to the legal foundations for the new normative grounds on similar scholar sources.

[743] Margil (2011) 249; Margil (2014) 151
[744] Shelton (2015) 1.

Table # 7 Legal Representation of Nature (Exemplificative)

Individualistic insight	
Anthropocentrism ***(Nature as a set of goods)***	***Hierarchical Biocentrism / Psychocentrism*** ***(Rights of Animals)***
National Level: - Regulations based on Public Trust Doctrine (specific, USA) - Private Property	***National Level:*** - Rights of Birds (specific, India) - Normative of protection against cruel treatment
International Level: - Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) - European Conventions for the protection of animals for slaughter, farming, experimentation, transport, among others	***International Level:*** - Convention on the Conservation of Migratory Species of Wild Animals (inferred text)
Holistic insight - Ecocentrism	
Ecosystems	***Nature***
National Level: - Ordinances for protection of diverse ecosystems, mainly water resources (specific, USA) - Te Awa Tupua Act (river and water resources, New Zealand) - Court decisions for protection of rivers, glaciers and similar ecosystems (Colombia, India)	***National Level:*** - Constitution of the Republic of Ecuador - Rights of Mother Earth Act and Framework Mother Earth Act for comprehensive development to live well (Bolivia)
	International Level: - Convention on Wetlands of International Importance especially as Waterfowl Habitat - World Charter for Nature (*Soft Law*) - Earth Charter (*Soft Law*) - Draft Universal Declaration of the Rights of Mother Earth (*Soft Law*)

Based on Shelton (2015) 1.

6.2.1 Public trust doctrine

In general, as Ryan asserts, public trust doctrine corresponds to "[…] *the notion that certain resources are of so common a nature that they defy private ownership in the classical liberal sense* [and herald] *conservationist principles*". Initially, this doctrine referred to commercial purposes, i.e., to the "[…] *principle that navigable waters* [were] *preserved for the public*

use, and that state [was] *responsible for protecting the public's right to the use*", according to Garner.[745]

According to Sax, the employment of this principle, an aspect that used to draw much attention in Roman and English law, brought into question the nature of private property in rivers, the sea, and the seashore, i.e., "*highways and running waters*", mainly concerning navigation and fishing.[746] From this argument, and by means of a detailed analysis of abundant case law, Sax applied the doctrine theoretically to the aim of protecting natural resources, coming to design what a large panel of authors[747] has termed "*the new public trust*" or, at least the very beginning.

Likewise, the public trust doctrine has even influenced the judgements seriously. For example, Alexandra Klass recalls that the Supreme Court of Wisconsin decided, in 1972, that the prohibition against the filling of wetlands abutting or lying close to navigable waters was constitutional. Therefore, the taking was not subject to compensation. In plain language, as one can read in the Wex Legal Dictionary of Cornell University, when the government takes private property for public use, it must pay "*just compensations*" to proprietors. Nevertheless, the Court did not order the redress. It rather interestingly characterised the case under the following terms: "[…] *it is a conflict between the public interest in stopping the despoliation of natural resources, which our citizens until recently have taken as inevitable and for granted, and an owner's asserted right to use his property as he wishes*".[748]

Consequently, the overall idea seems to be quite simple, just like it was written in the 1971 amendment of the Pennsylvanian state constitution and others later. That provision, in force until these days and largely quoted in the environmental literature, reads: "*Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people*", meaning, in the end, that State is a kind of steward of natural resources for the public benefit.[749]

Taking Pennsylvania's provision as the starting point, the first conclusion one can draw with regard to the initial posed hypotheses, then, consists of natural resources are still the

[745] Ryan (2001) 479; Garner (2004) 3889.
[746] Sax (1970) 475.
[747] See principally Ryan (2001) 482-3. Some other updated references in Huffman (2016) 249-56; Ma (2016) 42-3; Babcock (2015) 15-24; Feris (2012) 7-8, among others.
[748] Klass (2013) 708-9; Case 106 *Just v. Marinette County* (1972) 14-5, 20, 26 and Note 1; Wex Legal Dictionary and Encyclopedia (2008) takings para. 3rd.
[749] Shelton (2015) para. 7th and 9th; Constitution of the Commonwealth of Pennsylvania (1971) Article I, § 27. Hereinafter Constitution of Pennsylvania

property of people, or even public property if it refers to takings. Under these circumstances, although one can speak about restrictions of property rights in the name of public benefit, one cannot deny the existence of sovereign entitlements on natural resources. In plain language, States are able to maintain control over Nature through the implementation of the public trust doctrine, reproducing the anthropocentric handle of the ecosystems over time.

Secondly, as Klass holds, the public trust doctrine emphasises the acknowledgement of environmental and substantive rights. As mentioned, however, both approaches correspond to a human prerogative, instead of any entitlement in favour of Nature. Consequently, under these premises, Nature is not the bearer of rights, while humans continue to be legitimate holders. In this regard, Pennsylvania constitution is explicit, for example, when it establishes that: "*The **people have a right** to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment*". In the same sense, Klass mentions the case of 1972 Montana's constitution, which defines the clean and healthful environment as an inalienable right. In consequence, although one should deem this doctrine could be useful to handle environmental issues, it does not fit the propositions of rights of Nature in practice. It tends to perpetuate the anthropocentric sight of a right to an adequate environment for human sake.[750]

Summing up, it turns out irrefutable the successful expansion of the public trust doctrine as a mechanism of environmental protection in virtually all the United States, as Klass argues. Indeed, several state constitutions have already included those provisions. In addition, Blumm and Guthrie have been theorising around the internationalisation of the doctrine. Some of their examples of countries in which there are regulations thereon are India, Pakistan, Philippines, Uganda, Kenya, Nigeria, South Africa, Brazil, Ecuador, and Canada.[751] Nevertheless, one cannot lose sight of the fact that they are still domestic experiences, not necessarily applicable to international law. Moreover, it continues to perpetuate the anthropocentric idea of humans managing an ensemble of goods to their benefit, an argument that the postulates concerning the recognition of rights of Nature deny from the outset.

6.2.2 Legal personhood of animals in ancient times

[750] Klass (2013) 701; Constitution of Pennsylvania ibid (emphasis added); The Constitution of the State of Montana (1972) Article II, § 3.
[751] Klass (2015) 439; Blumm and Guthrie (2012) 760-807.

Although one can find a diversity of analyses concerning the legal personhood of animals in the works of Keeton, Pastoureau, Duméril, among others, one should necessarily highlight the scholar scrutinises by Edward Evans, whose outstanding and careful results guide the present subheading. It is even worth mentioning an essay by the Harvard Law Review Association concerning modern examples of animals as plaintiffs before tribunals.[752]

The "*personification*" of animals in law is not a novelty. Indeed, Osenbrüggen dedicated an entire chapter of his book, "*Studies on German and Swiss legal history*" to explain how the idea of the "*personification of animals*" has supported the prosecution and other interventions of animals before courts during ancient and medieval times. His reasoning, following the interpretation of Evans, consisted of equating rights and duties of animals, namely "[…] *only by an act of personification* […] *the brute can be placed in the same category as man and become subject to the same penalties*".[753]

Furthermore, Osenbrüggen accounts that several animal behaviours were criminalised, even with capital punishment, especially when they brought about human's death. Concomitantly, as members of the household, animals and servants had the same rights, which sometimes were also parallel to women's, such as the right to the wergild (also wergeld, or weregild). In the ancient Germanic law, the wergild comprised of "[…] *the amount of compensation paid by a person committing an offense to the injured party or, in case of death, to his family*". The original quotation corresponds to Grimm: "[…] *in the ancient times, servants were treated like pets, and pets like servants, thus being conferred with certain rights of people, especially in the manner of repentance and wergild*".[754]

Nevertheless, to avoid any misunderstanding, one should bear in mind that although women, servants, and animals were–under certain circumstances–equally treated, they were not at the same status of man. There is no opposite evidence in Evans' treatise or any other scholar work thereon. According to those archaic regulations, although the laws vested kind of "*human rights and responsibilities*" to those "*beasts*" under the protection of man, that man was the master, i.e., the head of the family and the landlord.[755]

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[752] Evans (1906) 10ff; Keeton (1930) 117-8; Pastoureau (2004) 45-56; Duméril (1880); Phillips (2013); Dinzelbacher (2002) 405; Harvard Law Review Association (2009) 1205-6.
[753] Evans ibid 10; Osenbrüggen (1881) 136-49.
[754] Osenbrüggen ibid 139. One can find the concept of *wergild* in Encyclopædia Britannica (2011) para. 1st. Grimm's text originally in German reads: "*es lag ganz in der anficht des alterthums, nicht nur knechte wie hausthiere, fondern auch hausthiere wie knechte zu behandeln, dem thier alfo gewiffe me nfchliche rechte, namentlich in art und weife der buße und des wergeldes einzuräumen*". See Grimm (1854) 670. The quotation also appears Osenbrüggen at 140.
[755] Evans (1906) 10-1.

Furthermore, one can trace some evidence concerning the bestowal of legal personhood on animals. In effect, Osenbrüggen accounts that "[…] *personality was also conferred to animals when, in the absence of real human witnesses, they used to appear as evidence before courts*".[756] In Evan's opinion, this practice was not sufficient in itself to explain the origin and purpose of those legal procedures accurately. In ancient times, the personification of animals got oriented to justify their punishment but not their rights.[757]

6.2.3 Animals as commodities within the international legal framework

Unlike the past, contemporary legislation rather tends to regulate and foster animal protection, to the point that one can effectively identify some academic works aimed at encompassing these alternatives even before the seventies.[758] Thus, there is a wealth of proposals to change the status of animals from things to legal persons,[759] including others who more radically suggest extending property rights to them.[760] Still, animals are currently being deemed ownership yet, both in international law and the bulk of domestic legislation, save for specific provisions mainly in civil law.

In this line of reasoning, although many authors know and defend the status of animals as things, particularly in the field of civil law, one can find explicit references about their "*special*" character before the law, which sometimes is more ancient than one could expect. That is the case of Duméril, for example, a writer from the late nineteenth century, who was thoroughly aware of this disjunctive. He addressed the status of animals from both points of view, namely as objects susceptible of appropriation and–at the same time–as beings "*endowed with sensibility, capable of feeling pleasure and pain, with affections and hatreds, and appetites to satisfy*". It interestingly implies suggestive anticipation to sentientism. More explicitly, Dinzelbacher accepts that dogs, cats, and some roosters "[…] *could be invested with a juridical personality*".[761]

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[756] Originally in German: "*Eine Persönlichkeit ist den Thieren auch beigelegt, wenn sie in Ermanglung wirklicher Zeugen als Scheinzeugen vor Gericht aufgeführt warden*". Osenbrüggen, (1881) 142.
[757] Evans (1906) 11, 35.
[758] Holstein (1969) 771.
[759] Regan (1987) 172-3; Shyam (2015) 266; Shooster (2017) Conclusion; Kurki and Pietrzykowski (2017); Wise (2010) 1.
[760] Bradshaw (2018) 809.
[761] Duméril's text originally in French reads: "[animal] *est, de plus, doué de sensibilité; il ressent le plaisir et la douleur; il a des affections et des haines; il a des appétits qu'il cherche à satisfaire*". Duméril (1880) 5; Dinzelbacher (2002) 421.

In any case, animals continue to be goods, even commodities, before the law. As already seen, the express recognition of property upon them, existing in the CITES Convention, constitute an example, particularly relating to exemptions to trade. In fact, one can find a provision to "*specimens that are personal or household effects*", and the consequent allusions to their owners. Curiously, the CITES is entirely quoted within the decision about the legal personality of the glaciers Gangotri and Yamunotri, by the Indian High Court of Uttarakhand at Nainital.[762]

Likewise, one can find other references to animals as goods, (including means of production) and the existence of "*owners*", in several regional European instruments. In this regard, it proves obvious to infer that those legal instruments, aimed at regulating the production of food or any other outcomes for human benefit, entail the notion of animals like goods or commodities implicitly. That is the case, for instance, of the European Convention for the Protection of Animals for Slaughter, focused on minimising the adverse effects on "*the quality of the meat*".[763]

Similarly, in the European Convention for the Protection of Animals kept for Farming Purposes, for example, animals are those "[…] *bred or kept for the production of food, wool, skin or fur or for other farming purposes* […]". This provision coincides with the explicit admission that certain animals are used "[…] *for food, clothing and as beasts of burden* […]", recited in the European Convention for the Protection of Vertebrate Animals used for Experimental and Other Scientific Purposes.[764]

On their part, the European Convention for the Protection of Animals during International Transport, its reviewed version, and the European Convention for the Protection of Pet Animals set forth explicitly the ownership of domestic animals (i.e., mainly those aimed at private enjoyment and companionship) and the possibility of their trade.[765]

The Convention on the Conservation of Migratory Species of Wild Animals comprises an exceptional case. It is probably one of the very few instruments [maybe even the only one], in which animals constitute "*population*" or "*members*" of a species. Thus, this provision establishes: "*Migratory species means the entire* ***population*** *or any geographically separate part of the* ***population*** *of any species or lower taxon of wild*

[762] CITES (1973) Article VII, para. 3rd; *Lalit Miglani v State of Uttarakhand & others* (2017) 26-35.
[763] Convention for the Protection of Animals for Slaughter (1979) Recital 3rd.
[764] Convention for the Protection of Animals kept for Farming Purposes (1976) Article 1; Convention for the Protection of Vertebrate Animals used for Experimental and Other Scientific Purposes (1986) Recital 3rd.
[765] Convention for the Protection of Animals during International Transport (1968) Article 40 (1); Convention for the Protection of Animals during International Transport [Revised] (2003) Article 2 (2-b); Convention for the Protection of Pet Animals (1987) Articles 1 (2 and 5) and 12 (b-i).

animals, a significant proportion of whose ***members*** *cyclically and predictably cross one or more national jurisdictional boundaries*".[766]

Although both words denote a mere symbolic connotation, it is worth mentioning them due to their semantic sense invoke the concept of subjects instead of objects of law. In that regard, the general trend of the instrument is biocentric because it gets oriented to assign an intrinsic value to animals for their conservation benefit. Curiously, it does not impede the coexistence of contradictions, as it occurs in the first recital where one can perceive a slight anthropocentric tinge within the biocentric recognition of the irreplaceable character of the natural system. It declares: "*RECOGNIZING that wild animals in their innumerable forms are an irreplaceable part of the Earth's natural system which must be conserved for the good of mankind*".[767]

6.2.4 Status of animals according to national law

As far as domestic law concerns, animals are goods in most countries, apart from exceptional instances, such as civil legislation in Austria, Germany, and Switzerland, where they are not things or objects before the law. In this regard, the Austrian General Civil Code, for example, sets forth: "***Animals are not things****; they are protected by special laws. The provisions in force for the things apply to animals only if no contrary regulation exists*". Likewise, the German Civil Code declares: "***Animals are not things.*** *They are protected by special statutes. They are governed by the provisions that apply to things, with the necessary modifications, except insofar as otherwise provided*". On its part, the Swiss Civil Code establishes: "*A. Nature of ownership / II. Animals / 1* ***Animals are not objects****. 2 Where no special provisions exist for animals, they are subject to the provisions governing objects*".[768]

Nevertheless, all those provisions are merely symbolic owing to the same rules for things apply to animals in practice, especially if in any doubt. Shyam considers these regulations are "[…] *an important step away from the erroneous premise upon which ancient Roman laws were built*", despite the fact that they are barely declarative and do not change the legal status of animals in reality.[769] In addition, these legislative structures leave fauna

[766] Convention on the Conservation of Migratory Species of Wild Animals (1979) Article I (1a) emphasis added.
[767] ibid Recital 1st.
[768] Austrian General Civil Code, *Allgemeines bürgerliches Gesetzbuch* (1988); Unofficial translation available in Global Animal Law Project (2018) Article 285a; German Civil Code (2002) Section 90a; Swiss Civil Code (2018) Article 641a.
[769] Shyam (2015) para. 25th.

in a kind of juridical limbo, refusing its condition of a bundle of goods but, in turn, without conferring its legal personality.

By and large, beyond the particularities of each law, the current world tendency consists of regulating the possession of wildlife, avoiding the trafficking of species or their parts (e.g., elephant ivory, rhino horn, animal fur, and so forth) just like illegal fishery and shark finning, criminal conducts of importance even for Interpol. Indeed, a significant number of lawmakers around the world have fostered the incorporation of provisions [even criminal ones] against unlawful commercial activities and others, such as abuse, cruelty, harmful research, participation in any kinds of shows, among others. At the statutory level, those rules have reached relative success and met those goals in most cases. One can find a concise and accurate review in Greg Miller.[770]

Moreover, from the late twentieth century, some activists and academic sectors have been promoting a change in the judicial status of animals, particularly concerning great apes. The most common employed mechanism has been the conferment of specific rights, which has relatively brought about successful results in terms of fauna's protection, chiefly diminishing the mistreatment. Nevertheless, the enshrinement of entitlements does not necessarily mean the acknowledgement of legal personality, i.e., that animals continue to be objects instead of subjects of law. Consequently, one should be aware of the impossibility of evaluating the efficacy of the bestowal of legal personhood entirely. In some measure, it is often difficult to notice if normative advancements in this field are realistic or just rhetorical.

The paradigmatic case has been the Spanish one, whose 2008 parliament passed a resolution banning experimentation and research that hurt simians, just like their possession with commercial ends, or aimed at their exhibition in shows. Spanish legislators even came to establish that illegal trade, unlawful possession, and abuse of animals are aggravated felonies. In addition, the resolution encompassed the undertaking of actions aimed at protecting nonhuman hominids against abuse, slavery, torture, death, and extinction, by means of the adherence to the "*Great Ape Project*". This project comprises an international movement, inspired by Paola Cavalieri and Peter Singer, which was created in 1994 to promote the fundamental rights to life, freedom, and non-torture of great nonhuman primates, such as chimpanzees, gorillas, orangutans, and bonobos.[771]

[770] Interpol (2014) 56; Miller (2011) 28.
[771] Proposición no de ley sobre el proyecto Gran Simio (2008) 26ff; Great Ape Project, Official Translation (2008) paras. 1st and 4th; Proteção aos Grandes Primatas (2018) paras. 1st and 2nd.

The semantic closeness of these harmful behaviours to the field of human rights motivated a vigorous reaction from activists and press, who interpreted this legislative step as a granting of rights to simians.[772] Someone even dared to speak about the concession of human rights.[773] From an academic perspective, instead, the feedback was much less intense, given the comments and analyses revolved around generalities more than any specificity.[774] Nonetheless, some authors assured erroneously the resolution dealt with the recognition of legal personality,[775] while others even thought about it as a constitutional amendment.[776]

Notwithstanding, there have been critical positions as well. As a brief digression, for example, it is curious how the protection of apes and support of bullfights could concur in the same legislative framework. Likewise, it is worth getting questioned how in a country where there are no wild hominids, the parliament can prioritise the issue of a normative to protect them, among other questioning approaches.[777]

With hindsight, if one scrutinises the resolution text, it turns out hard to conclude to what extent its provisions depicted a real milestone for the acceptance of animals as holders of rights, and consequently as legal persons, at that moment. Indeed, the word "*right*" did not even appear within the document, an aspect that could constitute a mere formality but illustrates quite well the activist rhetoric. In plain language, the real inconsistency concerned to the fact that the instrument was not really mandatory in practice. It was not a full-blown law, but solely a parliamentary compromise to adapt Spanish legislation to the principles of the Great Ape Project within a year,[778] but it never happened.[779]

There is another example in New Zealand, where one can infer a similar academic sensation of stark contrast about these legislative achievements, despite the fact that the legal reform was actually a given on this occasion. In effect, albeit gorillas, chimpanzees, bonobos, and orangutans could be still the property of someone in New Zealand, the use of these "*non-human hominids*" in research, testing or teaching is currently restricted.[780] Nevertheless, as mentioned, the opinions of experts were not concurrent in this case too. While some authors saw the norm like a valid improvement of the living conditions of great

[772] Glendinning (2008) para. 1st; Roberts (2008) paras. 1st and 2nd; Abend (2008) para. 1st; Nature News (2008) para. 1st.
[773] O'Carroll (2008) paras. 1st and 2nd.
[774] Eisen (2010) 69-70; Suran and Wolinsky (2009) 1080.
[775] Duck (2009) 168.
[776] Cornell (2015) 2.
[777] Eisen (2010) 69-70.
[778] Proposición no de ley sobre el proyecto Gran Simio (2008) para. 2nd.
[779] Casal (2018) para. 5th.
[780] Animal Welfare Act (1999) Part 6, para. 85th 1.

apes,[781] others believed the argument about the conferment of rights to fauna, and particularly to great apes, often seems an "*exaggeration*" more than real progress in practice.[782]

In this framework, there is currently an array of references about recognition of legal personality and granting of rights to animals in the environmental parlance, even at the constitutional level, whose appraisal requires to get carefully carried out. Those recognitions are not always consistent with the actual contents of the law, or any other normative instrument. For example, Emily Fitzgerald argues that Swiss, German and Indian Constitutions had granted rights to nonhuman animals (dolphins in the case of India) and had declared their legal personality, an affirmation widely reproduced by news media.[783] Nevertheless, once one examines those regulations, one should conclude that this assertion is not correct.

Firstly, the Swiss constitution appears in several documents as one of the landmarks in the field of animal law and its progress. Moreover, it is one of the older legal instruments existing in this subject matter, considering it came into effect in 1992. Evans explains that this successful 1992 reform allowed the regulation of transgenic research, but later lawmakers rejected a total prohibition of animal research in 1999. Nowadays, albeit the Swiss constitution is quite probably one of the most comprehensive instruments aimed at their protection, animals are still goods to use, or even commodities one can import, trade, and transport. They are not definitively the subjects of law within the Swiss legislation, but rather things, even though it contradicts the Civil Code's provisions directly.[784]

Secondly, the 2002 amendment of the German constitution (so-called Basic Law for the Federal Republic of Germany) meant the incorporation of the phrase "*and animals*" (official translation) or "*and the animals*" (according to some researchers such as Nattrass, Eisen, and Evans) into the Article 20a. In general terms, it implied "[…] *the state* [would] *protect the natural foundations of life* ***and animals*** *by legislation and, in accordance with law and justice* […]". Its transcendence is also indisputable in the framework of animal defence, above all considering the period of issuing. Nonetheless, it does not virtually mean recognition of rights, let alone of legal personality. If one thoroughly reflects about the theme in the constitutional context, one can notice an overall tendency to deem animals as things,

[781] Kolber (2001) 165-6.
[782] Brosnahan (2000) 192.
[783] Fitzgerald (2015) 350; For example, USA Today (2002) para. 1st and 2nd; Hooper (2002) para. 1st.
[784] Evans (2010) 239; Federal Constitution of the Swiss Confederation (1999) Article 80; Swiss Civil Code (2018) Article 641a.

sometimes implicitly and sometimes expressly, such as it occurs in the Article 74 (1.20) that establishes that: "*Concurrent legislative power shall extend to* […] *20. the law on food products, including animals used in their production* […]". It entails the allusion to animals as the means of nourishment production.[785]

Finally, the case of dolphins in India was a misunderstanding, originated in a circular issued by the Central Zoo Authority, by which it banned the establishment of dolphinariums in the whole country.[786] Effectively, some journalists confused a reference about the intelligence of dolphins, as one of the reasons to think about them as non-human people and the possibility of conferring rights to them, with their factual recognition.[787]

Nevertheless, one year later, the Indian Supreme Court paradoxically declared that animals have the right to live with dignity and be treated fairly, coming even to ***expand*** explicitly the human rights to life and liberty, guaranteed by the Indian Constitution, to them.[788] The judgement aimed initially at banning *jallikattu*, "[…] *a popular bull-taming sport celebrated mainly in Tamil Nadu every year, during the Pongal festival, on Mattu Pongal day*", Southern India.[789] It brought about serious outrage in a significant number of people, who have been demanding the lift of the ban since then, and the intervention of other public instances, such as the Ministry of Environment or the Tamil Nadu Assembly.[790]

Afterwards, the Ministry repealed the prohibition by means of a notification in 2016, while the Assembly approved an amendment to the Prevention of Cruelty to Animals Act unanimously, in 2017, favouring *jallikattu*'s practice.[791] Certainly, although the attempts of restricting the activity of *jallikattu* have been empirically unfruitful, having experienced a significant increase in terms of events' number during the last years instead,[792] the Supreme Court decision triggered a series of adjudications dealing with animal welfare. Therefore, some Indian high courts have issued, for instance, express recognition of the right of birds and other animals "[…] *to co-exist along with the human beings*", or their "[…] *right to live with dignity* [and] *fly in the sky*". Moreover, they have ordered the avoidance of the cruelty

[785] Official Translation of the Basic Law for the Federal Republic of Germany (1949) Articles 20 (a) emphasis added, 74 (1.20); Nattrass (2004) 297; Eisen (2017) 914-5; Evans (2010) 236.
[786] Central Zoo Authority of India (2013) para. 9th; Dvorsky (2013) para. 2nd.
[787] For example, Hackman (2013) paras. 3rd and 8th; Hogan (2015) para. 1st.
[788] Civil Appeal No. 5387, *Animal Welfare Board of India v. A. Nagaraja and others* (2014) para. 68th; Constitution of India (1950) Article 21.
[789] Pranav (2017) paras. 1st and 3rd.
[790] The Hindu (2017) para 2nd; The News Minute (2017) paras. 8th and 9th; BBC News (2016) paras 1st and 8th.
[791] Ministry of Environment and Forest and Climate (2016) paras. (i) to (iv); Act to amend the Prevention of Cruelty to Animals of 1960 (2017) para. 3rd.
[792] Annamalai (2019) para. 3rd.

of keeping them in cages, among other similar entitlements, whose references get adequately compiled in a governmental report of 2017.[793]

Nowadays, if one compares the legal conditions of animal well-being among countries, it is quite probable to find out more similarities than differences regarding what has occurred in Spain, New Zealand, Germany, Switzerland, among others. The reason would be that there is somehow a kind of trend towards the *standardisation* of the most problematic animal issues (i.e., abuse, cruelty, trafficking, and so on). These harmful human conducts have brought about an increase in regulations that is restricting them all over the world. Nevertheless, one should have it in mind that speaking about rights while animals are still things before the law does not constitute a coherent discourse in legal terms.

In this sense, a cutting-edge and useful tool to measure and compare the welfare of animals among countries is the "*Animal Protection Index (API)*". The API is an instrument that unfolds online geo-referenced data about various parameters of policy and legislation, constructed from information by fifty different nations in the whole continents. For example, if one reviews the indicator concerning "*laws that prohibit causing animal suffering either by a deliberate act of cruelty or by a failure to act*" (notice the express allusion to sentientism), one can find several examples similar to those mentioned in this section. However, one cannot argue if they deal with or not the assignment of specific rights to animals, let alone legal personality.[794]

To recapitulate, in the same line as the previously addressed ethical approach, the core target of this dissertation does not have to do with the prospective international personhood of animals. In either event, a proposal in this sense would lead unfailingly to the individualisation of beings, contaminating somehow the scope of legality and jurisprudence. It already occurred in medieval Europe. Thus, it would not be adequate to experience the prosecution of some rats for "[…] *having feloniously eaten up and wantonly destroyed the barley-crop of* […] the French fields of Autun. Likewise, it would not be correct these days to have a rooster condemned to death under the strange suspicion of having laid a cockatrice egg.[795]

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[793] Case 8040, *S. Kannan v. Commissioner of Police and others* (2014) para. 3rd; Case 2051, *People for Animals v. MD Mohazzim and Anr* (2015) para. 5th; Law Commission of India (2017) 12-3.
[794] Animal Protection Index (2018) Indicator 2.
[795] Evans (1906) 11-2, 18; Phillips (2013) 9-14, 19-20. By the way, according to the Encyclopædia Britannica, a cockatrice, also known as *basilisk*, was a mythological small serpent in the legends of Hellenistic and Roman times, "[…] *credited with powers of destroying all animal and vegetable life by its mere look or breath*". Encyclopædia Britannica (1998) para. 1st.

6.3 Nature as a subject of law from the international legal perspective

The next stage of legal representation of Nature corresponds to the ecocentric view. Unlike Shelton, who divides the approaches of ecosystems and Nature, understood as a whole, into separate categories, both dimensions will appear together in this subsection.[796] The reason lies in the fact that both instances grounds on the same theoretical and legal sources. Instead, it turns out more useful to separate the examination of the holistic legal perspectives in two scopes, international and national, according to what exists nowadays in this subject matter. In practice, that is what exactly has occurred in the cases of the global treaties and drafts, and particularly in the national legislations of Bolivia, Colombia, Ecuador, India, New Zealand and the United States, whose theoretical examination unfolds around the same ecocentric fundamentals.

6.3.1 Ramsar Convention

The *Convention on Wetlands of International Importance especially as Waterfowl Habitat,* also known as the *Ramsar Convention*, is the earliest international binding instrument attaching significance in the matters of environmental conservation. Its evolution through technical meetings, conferences, intergovernmental negotiations and so forth, occurred during the 1960s. Nonetheless, it was effectively and officially adopted during the International Conference on the Wetlands and Waterfowl, carried out between 30 January and 3 February 1971, in the Iranian city of Ramsar.[797]

The convention ultimately entered into force in 1975, although it experienced two subsequent amendments; the first one by the Paris Protocol, adopted at the Extraordinary Conference of the Contracting Parties, held from 2 to 3 December 1982 and the second one by the Regina Amendments on 28 May 1987. By and large, the Ramsar Convention is a very concise document, containing only a total of twelve articles and referring to one specific kind of ecosystem, wetlands. Despite its limited scope, its worldwide influence is undeniable, by allowing the declaration of 2,410 ecological-protected sites, covering more than 254 million hectares, all over the world to date.[798]

[796] Shelton (2015) paras. 24th – 34th.
[797] Matthews (2013) 2-5, 65, 77; Carp (1972) 1-5.
[798] The Ramsar Convention Secretariat (2014) paras. 1st, 3rd, and 4th; Ramsar Sites Information Service (2018) Excel Report.

Although the International Covenants of Human Rights and Ramsar Convention came into force virtually together, their approaches are downright different. While the former (in effect since 1976) constitutes the starting point of the anthropocentric perspective in international law, the later (in force since 1975) consists in one of the first and few international legal instruments whose contents are strongly biased in favour of ecocentric and biocentric postures. Indeed, one can even perceive a straightforward tendency to emphasise the importance of a specific kind of ecosystem, *wetlands* (ecocentrism), including its core inhabitants, *waterfowl* (biocentrism) over people's benefits and property rights.

To an extent, even though some writers like Borràs are a little bit sceptical about the completely non-anthropocentric character of the instrument, they end up agreeing the convention acknowledges, at least in part, the inherent worth of Nature, emphasising environmental injury rather than impacts on humans. "*The ultimate goal of these treaties is certainly to serve human purposes* […]", she argues, albeit there is not strictly any reference of people's benefits or the like in the whole text.[799]

From the outset, one can notice the very title excludes any remark on people or their welfare. Afterwards, the document interestingly incorporates one of the central tenets of Paul Taylor's biocentrism, the so-called "*interdependence of man and his environment*", which denotes an idea of equality between people and Nature, instead of the anthropocentric notion of human supremacy. Moreover, the only remark of dependence alluded within the convention consists of the ecological interplay between wetlands and aquatic birds. There is a kind of constant emphasis on the importance of wetlands and waterfowl, while there is not any reference to human significance in contrast. Thus, the only mention of "*human interference*" has a negative connotation in context, given its subtle association with undesirable technological developments and pollution. To put on metaphoric words, the obligation to count on any information concerning the shifts of the ecological character of ecosystems, derived from the technology, somehow resembles the action to clean the bubble-visor of technology-oriented culture that distorts the human vision, described by Cullinan.[800]

Another substantial difference regarding the International Bill of Human Rights consists of the way how the Ramsar Convention addresses the question of *sovereignty*. Unlike the covenants, sovereignty constitutes a restricted conception in this case, in which there is no manner to "*freely dispose of natural wealth and resources*", invoking self-determination.

[799] Borràs (2016) 131.
[800] Convention on Wetlands of International Importance especially as Waterfowl Habitat (1971) Recital 1st, Articles 2 (1 and 2) and 3 (2). Hereinafter Ramsar Convention; Taylor (2011) 116ff; Cullinan (2011) 51.

Instead, the core idea consists of every country designates "*suitable wetlands*" to promote their conservation and wise use as far as possible. Consequently, as one can infer, "*conservation*" and "*wise use*" are concepts utterly opposed to the "*freely dispose of*". Thus, the estates included in the *List of Wetlands of International Importance* are precisely subject to specific constraints of conservation.[801]

On the contrary, one could affirm that the Ramsar Convention does account on sovereignty as a limit to the conservation and wise use of wetlands. It principally occurs when it lays down that: "*The inclusion of a wetland in the List does not prejudice the exclusive sovereign rights of the Contracting Party in whose territory the wetland is situated*".[802] It means that States could include areas of their territories in the list or exclude them, invoking a fully-fledged exercise of sovereignty in both cases.

Nevertheless, albeit the country's willingness to incorporate an area to the list, or even dismiss it, based on "*urgent national interests*", effectively constitutes a sovereign decision in its own right, the State should ratify the existence of a severe restriction of activities during the period of inclusion. The allowed activities chiefly circumscribe to conservation, wise use, research, and exchange of data regarding wetlands. Moreover, if a state party resolves to delete or restraint the boundaries of those lands, it "[…] *should as far as possible* ***compensate*** *for any loss of wetland resources, and in particular it should create additional nature reserves for waterfowl and for the protection* […] *of the original habitat*". Additionally, member states must immediately inform any change of the wetlands' condition to the IUCN, which is the institution in charge.[803]

Finally, any connotation concerning property rights or economic interests shows up generally weak all through the Ramsar Convention. It includes some also feeble allusions to wetlands and waterfowl as natural resources of an international character, which could equate to deem them as material goods. Indeed, save a cursory reference to the countless economic value of the wetlands–joint with cultural, scientific, and recreational ones–within the recitals, there is not truly a vigorous scheme in matters of ownership. Furthermore, the core reasons a state party can plead for the declaration of a suitable wetland do not either embrace economic ones. Instead, they predicate on their international significance, in terms

[801] Ramsar Convention ibid Articles 2 (1) and 3 (1).
[802] ibid Article 2 (3).
[803] ibid Articles 2 (5), 3 (2), 4 (2 and 3) emphasis added, and 8 (1).

of ecology, botany, zoology, limnology or hydrology, i.e., a set of purely nonhuman motives.[804]

Summing up, beyond the fact that it is the only international instrument currently in force, the most significant contribution coming from the Ramsar Convention is probably that the convention solely focuses on one single type of ecosystem and a species that dwelling on that habitat. This aspect should not necessarily imply the rest of environments and living beings are less crucial. This sort of individualisation maybe constitutes an advantage instead, allowing better monitoring of ecological conditions of wetlands and quicker identification of the problems. The instrument turns out quite comprehensive, as far as it does not avert from the theoretical principles of ecocentrism, such as the interdependence between humans and Nature, while shows a valid pragmatism towards conservation through the employment of a concrete list of protected locations.

6.3.2 The World Charter for Nature

The U.N. General Assembly adopted and proclaimed the World Charter for Nature, during its 48th plenary session, on 28 October 1982. Until then, this instrument was probably the most consistent declaration in ecological terms, given that it included explicitly some of the principles that constitute the ecocentric perspective of the interplay between humans and Nature. Thus, for example, one can read within the preamble: "*Every form of life is unique, warranting respect regardless of its worth to man, and, to accord other organisms such recognition, man must be guided, by a moral code of action*".[805]

The charter comprises three sections, i.e., general principles, functions, and implementation, emphasising those mentions concerning the respect of natural processes, the safeguards of habitats, conservation of ecosystems and protection of rare and endangered species, the ensuring of the functioning of natural systems, the avoidance of exceeding the capacity of natural resources regeneration, and the control of environmental impacts, among other ecocentric allusions. Indeed, Thomas Berry himself believes this charter constitutes the most impressive and the finest official statement of human-Earth relationship that has been approved by the international community until now.[806]

[804] ibid Recital 3rd and 5th and Articles 2 (2) and 4 (2).
[805] World Charter for Nature (1982) Recital-Conviction a).
[806] ibid Principle I (1, 2, and 3), Function II (3, 10a, and 11); Berry (1999) 75, 133.

On the other hand, despite that one can also find some references, which could seem anthropocentric to a certain extent, it is necessary to consider them in context. Effectively, the charter alludes to the management and maintenance of [sustainable] productivity of ecosystems, organisms, lands, soils, and marine and atmospheric resources. Likewise, it provides the state obligation to establish standards for products and manufacturing processes that could bring about adverse effects on Nature. Additionally, the charter determines that every State must deem its sovereign power to give effect to the instrument's provisions. Nevertheless, all these references correspond to a framework of environmental restrictions, such as avoiding the endangerment of the ecosystemic integrity, safeguarding the long-term fertility of soils, and evaluating the deleterious impacts.[807]

Moreover, the instrument clearly attributes the deterioration of natural systems and the breakdown of economic, social, and political conditions of society to excessive consumption, misuse of natural resources, and failures in establishing an accurate economic order.[808] In sum, it deals with an instrument profoundly embodied on an ecocentric view with the legitimacy of being a U.N. output.

6.3.3 The Earth Charter

Although the Earth Charter constitutes *soft law* in practice, some authors, such as Robin Attfield, see the instrument as "[…] *a wholesome embodiment of a commendable and globally applicable ecological ethic*". Indeed, its own promoter, the organisation Earth Charter International (ECI) conceptualises it as an "[…] *ethical foundation for actions to build a more just, sustainable, and peaceful global society in the 21st century*", which powers a global movement as well.[809]

In context, the Earth Charter is probably more biased toward ecocentrism that the World Charter for Nature itself, despite that the latter could be even the immediate antecedent of the former. Nevertheless, it does not count yet on approval coming from the international community, which is possibly the most noticeable difference among both instruments. In any case, it has been gradually gaining global acceptance, to the point that Thomas Berry considers it as a basis for a juridical recognition of the comprehensive Earth community.[810]

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[807] ibid Principle I (4), Function II (10b), and Implementation III (21b and 22).
[808] ibid Persuasion b).
[809] Attfield (2007) 359; Earth Charter International (2018) para. 2nd.
[810] Berry (1999) 76.

Another distinction probably lies in the scope of sovereignty. In fact, while the World Charter for Nature establishes that every State must deem its sovereign power to give effect its provisions, the Earth Charter does not even include that expression or its derivative words within the text. It refers to "*peoples of Earth*" instead, which would denote a series of interpretations, such as the reference to reduced groups of individuals, for example, indigenous ones.[811]

Curiously, one can trace the origins of the Earth Charter in a debate that took place in the self-same 1992-Rio Conference. Nevertheless, as their supporters recognise, that was not the best moment for its discussion and launching. Some years later, during the Forum Rio+5, a draft document was still in progress. From then on, an independent commission, formed in 1997 to oversee the elaboration of the charter, announced the development of various drafts. Notwithstanding, in June 2000 the Earth Charter Commission agreed on the text and officially released the instrument in The Hague, Netherlands.[812]

Akin to the Ramsar Convention, the Earth Charter is also a succinct instrument, comprised of sixteen principles. From the preamble, one can feel an ecocentric atmosphere, where protrudes the "*Earth community*" that shares a common destiny with the human family. By and large, the Earth constitutes a living being and the home for humans, although the text does not obviate the existence of animals, plants, soil, water, and air, namely the elements of the Land Ethic. Another interesting allusion corresponds to the notion of "*respect for Nature*", a wink for the biocentrism of Paul Taylor.[813]

In this regard, the principle of respect and care for the community of life embraces the ecocentric recognition of interdependence among all beings,[814] no matter the worth those individuals represent for people. The use of the expression "*worth*" overrules any potential hierarchy between humans and non-humans. Moreover, given its strong connotation biased towards an economic context, it also removes any level of importance among animals, plants, or one another. One should recall that the Western world tends to grant more value to those species useful for food, attire, and other similar products and services. Therefore, this tenet contradicts the mainstream.[815]

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[811] ibid Principle 22nd; The Earth Charter (2000) Preamble para. 1st and Principle III (12).
[812] Earth Charter International (2018) para. 2nd, 4th, and 8th.
[813] The Earth Charter (2000) Preamble, paras. 1st and 2nd.
[814] By way of clarification, one should bear in mind that both Taylor and Berry considers interdependence as a principle within their respective theoretical stances. Notwithstanding, as mentioned, while Taylor detaches humans from other living beings, Berry associates all members of the Earth community. In other words, Taylor believes in the interdependence between people and nonhumans and the other way around. Berry sees an interdependent behaviour among all instead.
[815] The Earth Charter (2000) Principle I (1).

On the other hand, two out of three elements of Land Ethic explicitly appear within the text, i.e., integrity and beauty. Effectively, there is a specific section addressing the ecological integrity, which highlights the protection and restoration of ecosystems, with particular concern on biodiversity and processes of life. The charter prioritises the holistic profile of Nature, instead of natural resources seen separately, promoting a comprehensive handle of environmental issues in this way. Likewise, the beauty of Earth constitutes an element to secure for the present and future generations, an aspect that one could visualise through the flourishing of human and ecological communities.[816]

Furthermore, although the third characteristic of Land Ethic, i.e., stability, does not appear in the charter's text explicitly, one can notice several references. Thus, if one assumes the notion of stability in terms of diversity, as Callicott proposed, it is going to be relatively easy to find various allusions to the protection of diversity of life. They mostly concern the safeguard of the Earth's regenerative capacity and the protection of life support systems. Lastly, the charter also promotes the security of Earth's bounty for future generations. All of them imply somehow the maintenance of the stock over time.[817]

Additionally, the charter includes an explicit recognition of the impacts derived from the economic activities over the environment. Thus, the patterns of production and consumption constitute the direct sources of ecological devastation, depletion of resources, and loss of species. This correlation between environmental impacts and economic activities turns out concomitant of anthropocentric criteria, which ecocentrists frequently criticise. Moreover, the charter identifies too an association between development and poverty, coinciding with the theoretical interplay addressed previously. To cope with this so-called "*global situation*", the instrument appeals to the notion of "*economic justice*", primarily aimed at the eradication of poverty, the promotion of a human, equitable, and environmental development, the affirmation of gender equality and equity as prerequisites to sustainable development, and the defence of rights without discrimination.[818]

As one can notice, the suggested measures to combat the ecological crisis include not only strong green connotations. By way of critical opinion, if one comprehensively reads the instrument, it is hard to overlook several human-centred actions, derived from the endeavour to face the problems. They are, for example, the promotion of human development and the management, use, and exploitation of natural resources as sources of water, clean air, food,

[816] ibid Principles I (4) and II (5).
[817] ibid Principles I (4) and II (5b and 7); Callicott (1980) 325.
[818] The Earth Charter ibid Preamble, para. 3rd and Principle III.

uncontaminated soils, shelter, and the provision of other goods and services. In practice, their application does not mean necessarily a wrong decision. It is simply they set apart from the ecocentric essence of the instrument. Indeed, one can find measures much more oriented to the rhetoric of the charter, such as the reduction, reuse and recycle of materials, or the change of patters of production and consumption.[819]

In a similar vein, Robin Attfield brings into question the lack of clarity to determine the obligations from present to future regenerations. Beyond the inclusion of this subject matter demands an anthropocentric understanding [in itself] of the whole picture, the author argues that both of the groups are not comparable, mainly owing to the existence of forthcoming people directly depends on current actions, which one cannot identify or define. [820]

An additional and recurrent aspect throughout this research has to do with property rights. The charter expressly recognises the existence of ownership of natural resources, although limited by environmental restrictions. One can read: "*Accept that with **the right to own**, manage, and use natural resources comes the duty to prevent environmental harm and to protect the rights of people*".[821] Nevertheless, although the shift of the paradigm of property rights cannot occur overnight, as Cullinan has observed, their explicit acknowledgement contradicts the spirit of ecocentrism in one way or another.[822]

6.3.4 Draft Universal Declaration of the Rights of Mother Earth

Before the launch of the proposed Declaration of the Rights of Mother Earth, there were a couple of antecedents of importance that occurred. Firstly, in 2009, the U.N. General Assembly designated 22 April as International Mother Earth Day, an event that triggered the negotiations to form the platform so-called "*Harmony with Nature*" with the leadership of the Bolivian government. Secondly, the U.N. General Assembly effectively adopted the principles of "*Harmony with Nature*", as a sub-item under the item "*Sustainable Development*" and requested the Secretary-General to submit a report thereon, publishing it in August 2010. Today, one can find full information in the U.N.'s online platform.[823]

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[819] ibid Principles II (5e, 5f, and 7), and III (9a, 9b, and 10).
[820] Attfield (2007) 359.
[821] ibid Principle I (2) emphasis added.
[822] Cullinan (2011) 158.
[823] U.N.G.A. Resolution No. A/RES/63/278 (2009) para. 1st; U.N.G.A. Resolution No. A/RES/64/196 (2010) para. 3rd; U.N.G.A Document No. A/65/314 (2010) 1; Harmony with Nature (2020) Programme.

The draft Declaration of the Rights of Mother Earth sprang into being during the First Peoples' World Conference on Climate Change and the Rights of Mother Earth, held from 20 to 22 April 2010, in Cochabamba, Bolivia. According to Pablo Sólon, former Permanent Representative of Bolivia to the United Nations, the conference counted on more than 35,000 attendants and more than 100 delegations coming from different countries. David Boyd argues that Cormac Cullinan led the group who drafted the document, which makes sense considering the contents of the text.[824]

On 7 May 2010, Pablo Sólon submitted the conclusions of the conference and the draft declaration to the U.N. General Assembly, emphasising primarily a set of seven tenets to cope with the climate change and a list of proposed rights of mother earth, which the draft instrument includes. Nevertheless, given that the original language of the document was Spanish, the translation elaborated by the United Nations differs from what one can find in the official website of the declaration, i.e., the *Global Alliance for the Rights of Nature* (GARN). As a result, although most of the translated texts are quite similar, there are specific points in which both diverge significantly. For example, one can read "*Mother Earth is a living* ***being***" within the GARN's document. While the U.N.'s translation declares "*Mother Earth is a living* ***thing***", bringing about a confusing connotation, above all considering that the advocates of the rights of Nature are trying to emphasise a transmutation of the legal condition from object to subject of law. Therefore, the version employed in this dissertation corresponds to GARN's one.[825]

In either event, it is worth clarifying that both versions of the declaration define the expression "*beings*" in terms of "[…] *ecosystems, natural communities, species and all other natural entities that exist as part of Mother Earth*". Consequently, this provision allows taking it for granted the holistic approach of the whole document.[826]

From then on, as one can notice in the website of the U.N.'s platform, a series of interactive dialogues has occurred, the Secretary-General of the Harmony with Nature has published several reports, and the U.N. General Assembly has adopted various resolutions. Nevertheless, no real progress seems to have happened until now.[827]

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[824] Sólon (2018) 122; Boyd (2017) 207.
[825] Letter from Bolivia (2010) 1; Declaration of the Rights of Mother Earth [version U.N.G.A.] (2010) Article 1 (1).
[826] Declaration of the Rights of Mother Earth [version U.N.G.A.] ibid Article 4 (1); Declaration of the Rights of Mother Earth [original version] (2010) Article 4 (1).
[827] Harmony with Nature (2020) 2009-2020.

By and large, even though it deals with a concise statement of only four articles in total, the draft declaration comprises probably the most ecocentric document debated at the international level. Its structure encompasses the concept of Nature, its inherent rights, people's obligations, and a couple of definitions. However, by way of a curious remark, it turns out weird that a legal instrument only provides duties for one single kind of participants (humans). At the same time, however, the document includes rights for all the rest of participants, i.e., Mother Earth, ecosystems, species, and human beings. Consequently, it does not deal with correlative entitlements and responsibilities.

From the outset, within the preamble, it highlights the idea that Mother Earth constitutes a living community, where human beings are only another part. Indeed, there is more than one explicit elucidation concerning the fact that human rights are not the only existing entitlements and the necessity to recognise the rights of the Mother Earth and those of other living beings that form part of her. It openly evokes Berry's argument regarding the existence of different rights for different species (i.e., human rights, bird rights, river rights, insect rights, and so on).[828]

Although the proposal's declaration does not include verbatim all the principles that guide the ecocentrism, especially the stances of Land Ethic and Earth Jurisprudence, one can find some elements explicitly and other references in context. Thus, for example, the [either Earth or biotic] community of beings is expressly present both in the preamble and the body of the document.[829]

With regard to Land Ethic's tenets, save for the notion of "*beauty*", the other principles do appear within the text of the draft. For instance, the expression "*integrity*" forms part of several provisions, mainly as the expected result coming from the exercise of rights, namely any human action taken in the ambit of the rights of Mother Earth should maintain her integrity, even though they deal with her own rights or restoration. On its part, the proposal mentions "*stability*" in terms of balance. Despite that the idea of balance possesses a similar scope than integrity, i.e., as a kind of limitation for human actions, it also makes out how human rights and the rights of others are at the same level. By the way, this last statement coincides with the maintenance of a dynamic balance between both kinds of rights, required by Earth Jurisprudence.[830]

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[828] Declaration of the Rights of Mother Earth (2010) Recitals 1st, 4th, and 5th, Articles 1 (5 and 7), 2 (2 and 3), 3 (8), and 4 (1); Berry (2006) 149.
[829] Declaration of the Rights of Mother Earth ibid Recitals 1st and 4th, Articles 1 (2 and 6).
[830] ibid Recital 4th, Articles 1 (7), 2 (1d and 1i), and 3 (2f and 2g); Leopold (1970) 262; Cullinan (2010) 144.

The principles of Earth Jurisprudence instead, included in the draft declaration, expressly comprise the rights of Nature and its members to exist and to a place. Other entitlements, such as the right to participate in the evolution of the community could correspond to the right of beings to play a role in Mother Earth for her harmonious functioning.[831] It is worth quoting the third principle of Earth Jurisprudence in parallel with the seventh paragraph of the first article of the draft declaration, whose texts are virtually equal. Moreover, notice the allusions to the principles of Land Ethic concerning integrity and stability, in terms of balance. So,

> ***Earth Jurisprudence:*** *(3) The rights of each being are limited by the rights of other beings to the extent necessary to maintain the other beings to the extent necessary to maintain the* ***integrity, balance****, and health of the communities within which it exists.*[832]

> ***Draft Declaration of the Rights of Mother Earth:*** *Art. 1 [7] The rights of each being are limited by the rights of other beings and any conflict between their rights must be resolved in a way that maintains the* ***integrity****,* ***balance*** *and health of Mother Earth.*[833]

Moreover, if one peruses every provision, there is apt to be many coincidences between the contents of the declaration and Berry's conditions for the emergence of the so-called Ecozoic era, which implies a new biological period characterised by an enhancement in the relationship between humans and the planet. The table below shows a brief comparison.[834]

Lastly, following the same critical orientation of ecocentrism, the draft declaration brings harshly into question the capitalist system, by associating it with all forms of depredation, exploitation, abuse, and contamination against Mother Earth. Thus, it mentions those effects of the environmental crisis that most detractors of anthropocentrism attributed to human-centred management of Nature. Consequently, it is understandable that the proposed answer consists of promoting "[…] *economic systems that are in harmony with Mother Earth and in accordance with the rights recognized in* [the] *Declaration*", although

[831] Declaration of the Rights of Mother Earth ibid Article 2 (1a and 2)
[832] Cullinan (2010) 144.
[833] Declaration of the Rights of Mother Earth (2010) Article 1 (7).
[834] Berry (1991) 23rd.

it does not really mention or exemplify what kind of economic systems should work out instead of what operates nowadays.[835]

Table # 8 Conditions for the emergence of the Ecozoic era in the Soft Law

	Berry's Earth Jurisprudence	Declaration of the Rights of Mother Earth	
No.	**Condition**	**Art.**	**Text**
1)	the universe is a communion of subjects, not a collection of objects	1 (2)	Mother Earth is a […] community of interrelated **beings**
2)	the Earth exists, and can survive, only in its integral functioning	2 (1d)	Mother Earth [has] the following rights: […] the right to maintain its […] **integrity**
3)	the Earth is a one-time endowment	1 (2)	Mother Earth is a **unique** […] community of interrelated beings
4)	the Earth is primary, and humans are derivative	Recital 2nd	Mother Earth is the **source** of life, nourishment, and learning
5)	there is a single Earth community	1 (2)	Mother Earth is a **unique** […] community of interrelated beings
6)	to understand fully and respond effectively to the human role in this new era	2 (2)	Each being has the right to [...] play its **role** in Mother Earth for her harmonious functioning.
7)	humans need to establish a multivalent language	3 (2c)	Human beings […] must: […] promote and participate in […] **communication** about how to live in harmony with Mother Earth

Based on Berry (1991) 27th, 32nd, 33rd, 35th, 37th, 51st, and 52nd

From beginning to end, there are no allusions to property rights or trade within the text, aspects whose lack undoubtedly constitutes a weakness of the draft, since both are core components of capitalism, so severely condemned in the preamble. There is neither any mention of sovereignty over natural resources. However, its absence would be more explainable if one thinks about the conception of Mother Earth as a living being, and the existence of "*obligations*" explicitly attributed to all States in favour of Nature.[836]

At first sight, the idea of counting on a universal instrument to represent the interests of Nature would seem to be probably the best option to bind the principles of ecocentrism with international law. Nevertheless, this alternative does not appear to work out efficiently in practice, above all, when one starts thinking of who is going to depict those interests. At a national–and even regional–level, for example, one has seen how hard it is to maintain an adequate range of autonomy and independence between the interests of States and Nature. Naming an international entity to represent Nature would only transfer the problem from local to global scenario. It would merely turn out an idealistic decision.

Another alternative would consist of creating a new international entity. Nevertheless, this possibility would duplicate those functions that the United Nations, the European Commission, and the Inter-American Commission on Human Rights, for instance, already

[835] Declaration of the Rights of Mother Earth (2010) Recital 3rd; Article 3 (2l).
[836] ibid Article 3 (2).

carry out within their respective ambits. Moreover, one should think about the enormous endeavours necessary to reach global commitments among nations nowadays, within the political frameworks of those entities, let alone achieve an agreement to give rise to a new international institution. It is perhaps one of the clue reasons why one cannot identify any real progress thereon.

Cormac Cullinan is of the opinion that the implementation of Earth governance at the international level is not possible immediately because there is an issue of scale. "*At the level of the 'international community',* [he admits] *which is populated with yet more artificial legal persons (states and international organisations), the sense of intimacy and common purpose may have disappeared altogether*". He believes that a potential shift should begin at a local level, where the connectedness between people and Nature is closer, scaling up later to greater ambits, i.e., from communities to cities, to provinces, to countries, and lastly the planetary scale. Nevertheless, the change does not respond to a breakpoint but a slow-moving but continuous process. It does not occur overnight; it takes time.[837]

In any case, the most relevant contribution coming from this proposal relates to the compilation of a set of rights, which are useful to promote its application more efficiently within smaller geographical areas. The rights of Earth and all beings are life, existence, respect, regeneration of bio-capacity, the continuation of vital cycles and processes, maintenance of identity and integrity, self-regulation, interrelation, water, clean air, integral health, freedom of contamination, pollution, and toxic or radioactive waste, no-modification of genetic structure, restoration, having a place, playing a role, well-being, freedom from torture or cruel treatment.[838] As mentioned, however, one should also highlight that the obligations curiously correspond only to human beings, States, and institutions. Mother Earth does not possess duties.

6.4 Nature as a bearer or rights before the domestic law (experiences)

As one can corroborate within this section, whether an entity can be subject to rights (right-holder) depends on the [political] legislative will and the fulfilment of formal conditions. The right-holder depends on the global consensus in the field of human rights. In contrast, in the realm of fundamental rights, it depends on the constitutional power and local

[837] Ibid Article 2.
[838] Cullinan (2011) 149-54.

legislation, which changes much more flexibly. Therefore, at the national level, Nature and its elements can become much more frequently legal entities and right-holders than in the international law – regardless of the value system, the philosophical concept, or rational needs. Thus, a peculiar contradiction is apparent: developments leading to lawful personalisation of Nature and its elements have appeared in domestic laws, while the universality of the environment requires juridical progress in international law.

6.4.1 The Constitution of the Republic of Ecuador

The 2008 Ecuadorian Constitution is the first and the only one in recognising the rights of Nature all over the world. The acknowledgement of *Pachamama*, the indigenous name attributed by native peoples to Mother Earth, was mainly possible due to the intervention and political weight of Alberto Acosta, former president of the National Constituent Assembly that debated the contents of the Constitution in the city of Montecristi. Effectively, it is true that several sectors from the society, such as indigenous peoples, social movements, and activists, supported the process, and it counted on the counselling by Thomas Linzey and Mari Margil from CELDF, and Cormac Cullinan, among others. Nevertheless, one should admit it would not have been possible without the influence of Acosta. Consequently, it is more a political than legal achievement in practice. In 2010, the Pachamama Foundation published a report concerning the process experienced by the whole actors involved.[839]

Generally, the chapter seven concerning the rights of Nature comprises four articles, which (1) determinate its entitlements, (2) recognise its vital cycles, structure, functions, and processes, (3) mention how and who can enforce its rights (virtually all people or communities), (4) provide the need to establish incentives to protect it, (5) promote the application of preventive and restrictive measures against harmful activities, (6) grant the right to benefit from the natural wealth on people and communities, and (7) expressly prohibit the property on environmental services.[840]

The Constitution essentially confers on Nature the rights to integral respect and restoration. The most celebrated provision is article 71, which reads: "*Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence*

[839] See Fundación Pachamama (2010) 6-9.
[840] Translation of the Constitution of Ecuador (2011) Articles 71-4.

and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes".[841]

Nevertheless, one can identify a severe constitutional contradiction that affects the concepts of both property rights and sovereignty. On the one hand, the Constitution expressly provides that natural resources are the inalienable property of the State, being even able to participate in profits earned. On the other hand, Ecuadorian State has sovereign power over biodiversity. Moreover, it can exercise the right to administer, regulate, monitor, and manage, besides biological diversity, energy in all its forms, nonrenewable natural resources, genetic heritage, radio spectrum, water, among others.[842] Consequently, one can affirm that the Ecuadorian Constitution drifts between ecocentric and anthropocentric perspectives.

With the end of counting on thorough legislation in this matter, the National Assembly issued the General Organic Code of Proceedings in 2015. It aimed at regulating the processual activities concerning all the legal matters, except for the constitutional, electoral, and criminal one. Likewise, the Ecuadorian government enacted the Environmental Organic Code in 2017 to protect the rights of Nature. Both laws experienced amendments in 2018, providing a new set of measures to represent more effectively Nature's interests.[843]

In terms of judicial representation, the General Organic Code of Proceedings has been decisive. It explicitly establishes that Nature can be a claimant, and any person, legal person, collective organisation, or the ombudsperson can represent it. Curiously, nevertheless, the code prohibits any lawsuit against Nature. In addition, the code of proceedings specifies that environmental and human (including belongings) damages are separate and independent, which allows implementing the constitutional right of restoration in practice. Therefore, through this provision, one can present two detached lawsuits, one in the name of people and another in the name of Nature. Consequently, it is possible to speak about the right of Nature's restoration specifically. Promoters of Earth Jurisprudence surely see this provision positively, above all, considering that Cullinan already opinionated of this separation favourably in 2011.[844]

On its part, the Environmental Organic Code also includes provisions concerning the representation of Nature but outside the realm of the judiciary. Thus, it provides that National

[841] ibid Article 71.
[842] ibid Article 313, 400, and 408
[843] Código Orgánico General de Procesos (2015) 1; Código Orgánico del Ambiente (2017) 1;
[844] Código Orgánico General de Procesos ibid Article 30 (4), 38; Cullinan (2011) 185. Additionally, one can find an explanation in detail about the differentiation of the right of restoration, from the Ecuadorian perspective, in Bedón (2016) 137ff.

Decentralised System of Environmental Management oversees the tutelage of Nature. Likewise, the National Environmental Authority exerts the "*juridical and administrative tutelage*".[845]

Moreover, this environmental code includes provisions aimed at the protection of the rights of Nature as well. For instance, the law regulates those activities susceptible of generating environmental impacts on Nature, establishes the comprehensive redress in case of damages against Nature, and declares that the respect of rights of Nature constitutes public interest, among others. One of the most thought-provoking aspects mentioned in the Code consists of defining the principle so-called "*In dubio pro natura*". It reads: "*When there is lack of information, legal void, the contradiction of provisions, or doubts concerning the scope of the legal regulations in environmental matters, it will be applied what favours Nature and the environment. In the case of conflict of these laws, one should similarly do*".[846] It would be of importance to elaborate a study in detail regarding this tenet. However, it would comprise new research.

Summing up, although the Ecuadorian Constitution and legislation reproduce the idea of Nature as a whole, one should admit the specification of who can represent it both in the legal arena and before courts constitutes a positive contribution. Effectively, the lack of definition of ecosystems, species, and biotic communities as the concrete bearers of rights creates an abstraction much more challenging to protect in practice. The rights of an undefined entelechy will tend to fade easier. However, it is a valid contribution that any person or institution, including the ombudsperson, be able to depict natural interests. Especially in the judicial field, it makes more feasible the defence of Nature, by avoiding the exigence of conditions, such as ownership or possession of any benefit, that rather hurdles the environmental protection.

6.4.2 The legal personhood of the Whanganui River

One of the most thought-provoking experiences of how a native worldview can influence environmental management has been the bestowal of legal personality on the Whanganui river in New Zealand. Paradoxically, however, the origins of the decisive role played by indigenous people were the defence of "*their natural resources*", which constitutes an anthropocentric perspective, even anchored in property rights. In any case, it proved to be

[845] Código Orgánico del Ambiente (2017) Article 12.
[846] ibid Articles 1, 3 (5), and 9 (5).

efficient in propitiating the signing of an agreement, and the subsequent enactment of legislation, by which the Parliament of New Zealand assigned legal personhood to the river at the domestic level.

Effectively, despite the fact that indigenous communities have preserved a deep-rooted belief of natural resources as things or places – it is worth saying "*sacred ones*"– they have, in one way or another, underpinned the legal transmutation of Nature from being an object toward being a subject. According to Rodgers, it deals with the longest-running dispute over indigenous Maori territories in the history of New Zealand. The claim was officially brought and registered in December 1990 by the Maori Trust Board, initially conducting litigation to obtain the restitution for natural resources, customary lands and governance of the river system; which means, in other words, goods deemed Maori property and their management.[847]

Nevertheless, if one reviews the 1999 report by the Waitangi Tribunal, one will notice the conflict dates from the nineteenth century, having its origin in alleged breaches of principles of the 1840 Treaty of Waitangi. Therefore, it is the result of a long-standing and tedious popular struggle to defence not only property and its administration, but also ancient, traditional, and cultural values, relative to memories of ancestors and history, sources of physical and spiritual nourishment, sacred places, and so forth.[848]

In 2012, as a previous step towards the enactment of the law, the *Whanganui Iwi* [people] and the Crown signed the agreement so-called *Tūtohu Whakatupua*, whose meaning represents the commitment between the parties to progress the development of *Te Awa Tupua* arrangements. In a certain way, it comprises a kind of reaffirmation of the historical Treaty of Waitangi.[849]

By and large, the document establishes the fundamental characteristics of the so-called *Te Awa Tupua* (textually "the whole of the river"), which "[…] *comprises the Whanganui River as an indivisible and living whole, from the mountains to the sea, incorporating its tributaries and all its physical and metaphysical elements*". Furthermore, both parties reached a compromise on enacting legislation to give effect to the deed of settlement they consented.[850]

[847] Rodgers (2017) 266-7.
[848] Waitangi Tribunal (1999) xviii, 55-104.
[849] *Tūtohu Whakatupua* (2012) 2.
[850] Ibid paras. 1.17, 2.1, and 2.4.

Nevertheless, the most remarkable accords were probably the recognition of *Te Awa Tupua* as a legal entity and the subsequent creation of a legal personality for the river, overriding any trace of ownership. From then on, *Te Awa Tupua* was going to be the holder of the funds and property, although without derogating existing private property or hurdling public access and use.[851] By way of comment, *Te Awa Tupua* constitutes another archetype of the uniqueness comprised of the diversity, claimed from the perspectives of the Earth Jurisprudence and even the Respect for Nature, and alluded to in the Declaration of the Rights of Mother Earth. Interestingly, its origin in the traditional native worldview of the Maori people demonstrates that philosophy or law are not the only sources to support the recognition of Nature as a bearer of rights, which concedes more consistency to the proposal.

The process of legislative approbation began in May 2016, the last reading of the Parliament of New Zealand carried out in February, and the Crown gave formal assent to *Te Awa Tupua (Whanganui River Claims Settlement) Act* on 20 March 2017. To date, there have been three minor amendments, coming from the Trust Act (2019), the Public Service Act (2020), and the Education and Training Act (2020). However, none of them changed the essence of the law; they merely shifted some legal references.[852]

At first glance, the language of the legal text draws attention. Effectively, unlike other cases, the Parliament decided to incorporate the spirit of aboriginal believes in the letter of the law. Interestingly, they did it in the very Maori language, in addition to English. As one can imagine, there is no place to semantic interpretations of the terminology in here, not even in common parlance. Albeit one could see this idiomatic combination as a mere declarative aspect, it seems to break down into two remarkable purposes: it boosts the social visibility of the indigenous cosmology about the *Whanganui* River ecosystem, and minimises the misunderstanding about the contents of the law, especially among the Maori communities.[853] Unlike the previous case, there is no place to semantic interpretations of the terminology here, not even in common parlance, mainly because the spirit of aboriginal believes has been incorporated to the letter of the law in the proper Maori language, in addition to English.

On the other hand, as Hutchison notices, the holistic conception of *Te Awa Tupua*, coming from the Waitangi Tribunal and the agreement with the Crown, seems quite close to the ecocentric philosophies, chiefly regarding Earth Jurisprudence.[854] This characteristic is

[851] Ibid paras. 2.1.2, 2.6, 2.7, 2.8.4, 2.9, 2.13, and 2.21.5.
[852] *Te Awa Tupua* Act (2017) § 1; Versions and Amendments of *Te Awa Tupua* Act 2017 (2020) § 135 and 668.
[853] Magallanes (2015) 311.
[854] Waitangi Tribunal (1999) 36; Hutchison (2014) 180.

continuously present throughout the whole document, which finally did not restrict to the limits of the agreement to define what one should understand for *Te Awa Tupua.* Thus, when one analyses the legal instrument in detail, one can immediately note additional dimensions of the concept, which repeatedly appear in different sections of the Law. Therefore, if one could gather those definitions, one could conceptualise it as:

> Te Awa Tupua is an indivisible, living, spiritual, physical, singular whole or entity that supports and sustains life, natural resources, health and well-being of the iwi, hapū, and other communities, from the mountains to the sea, incorporating the Whanganui River, its physical and metaphysical elements. Moreover, Te Awa Tupua is a legal person and has all the rights, powers, duties, and liabilities as appropriate.[855]

By and large, the representation of *Te Awa Tupua* corresponds to the so-called *Te Pou Tupua*, a body of two members, appointed by the iwi and the Crown. The office of *Te Pou Tupua* constitutes "*the human face of Te Awa Tupua*" and acts in its name. Given that *Te Pou Tupua* has full capacity and all the necessary powers to exercise its functions and duties, it performs as a kind of administrator in the strictest sense of the word. Among the main tasks, *Te Pou Tupua* must represent *Te Awa Tupua*, manage registers, properties, and funds, and promote the health and wellbeing of the community, among others. In chart # 40, one can observe a diagram of activities.[856]

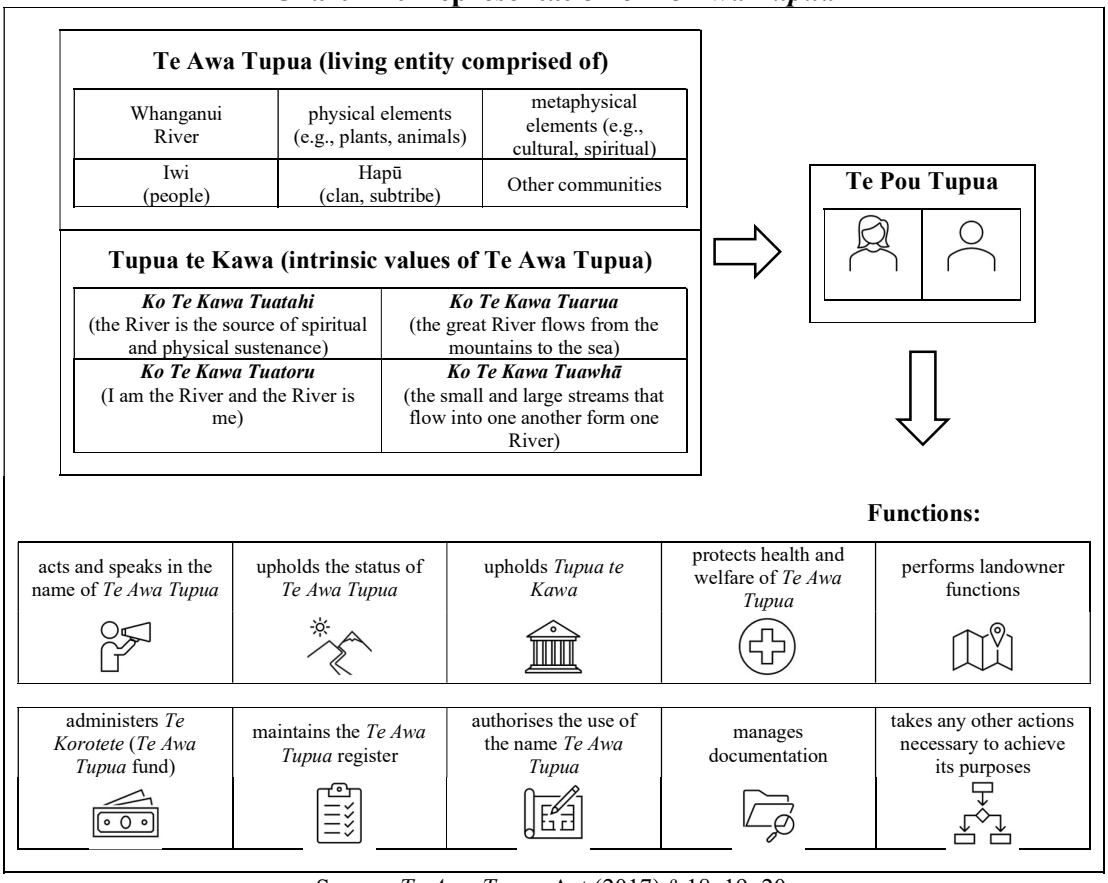
In practice, *Te Pou Tupua* replaced the former Maori Trust Board, whose dissolution, and the expiration of the term of office of its members became a part of the *Te Awa Tupua* Act as well. The board activities comprised administrative and financial tasks, including the handle of assets and liabilities. In that regard, the functions of *Te Pou Tupua* are quite similar, emphasising the management of *Te Korotete*, a fund comprised of a Crown's economic contribution joint with grants coming from other sources.[857]

When one ponders about the representation of the river and its associated ecosystems by means of a work team coming from the Crown and people simultaneously, it is hard to consider the existence of any sovereign power over natural resources, coming exclusively from the side of the State. There is a latent idea of shared responsibility around the tasks for

[855] *Te Awa Tupua* Act (2017) § 12, 13 (a, b, and c), and 14 (1).
[856] ibid § 18, 19, and 20 (1 and 2).
[857] ibid § 57, 58, 93, 94.

the administration of *Te Awa Tupua*, which is positive because it helps to maintain a healthy balance between State and indigenous peoples. Interpretatively, Argyrou and Hummels even believe that *Māori iwi* is able to exercise its *self-determination*, which it can put in practice through its power of prior consent concerning those issues outside the law and the agreement. Subsequently, the grouped management also allows perceiving a favourable balance in the interrelationship between humans and Nature due to absence of conflicts concerning the destiny of the natural components.[858]

Chart # 40 Representation of *Te Awa Tupua*



Source: *Te Awa Tupua* Act (2017) § 18, 19, 20.

With respect to the exercise of property rights, the Act is not as emphatic as the agreement was when it referred to the river's incapability of being "*owned*" in an ***absolute sense***. To some extent, the law is certainly ambiguous, by assigning to *Te Pou Tupua* the condition of the landowner in a couple of passages, and at the same time warranting pre-existing private property rights concerning the river, mostly those derived from customary

[858] Argyrou and Hummels (2019) 3, 6.

law or earlier titles. Moreover, the prohibition concerning alienation especially limits to those former Crown-owned lands vested to *Te Awa Tupua*. Despite this vagueness, some authors, such as Collins and Esterling, have questioned the lack of definition of property rights in favour of Māori people. For the authors, native ownership has constituted a historical claim under the Treaty of Waitangi. In any case, the field of action of *Te Pou Tupua* allows thinking about a generalised restriction of ownership around the Whanganui River.[859]

On the contrary, the ideas concerning the river understood as a living entity that has legal standing in its own right, following the exigencies of the agreement, are recurrent and entirely consistent with the ecocentric context. As mentioned, indivisibility, spirituality, uniqueness, singularity, among others, are characteristics related to the conceptualisation of *Te Awa Tupua*. It means the river is not an isolated individual, but rather, it deals with a being that forms part of a whole, of a greater ecosystem, *Te Awa Tupua*. Furthermore, unlike the previous examples, the individualisation of the ecosystem around the river avoids the alluded abstractions, tougher to protect environmentally in practice.

To conclude, the explicit determination of duties constitutes a remarkable contribution. Effectively, for example, there is a complete section dedicated to the rules of taxation. Thus, the first provision reads: "*Te Awa Tupua and Te Pou Tupua are deemed to be the same person for the purposes of the Inland Revenue Acts and the liabilities and obligations placed on a person under those Acts*". This aspect is diverse from any other proposal to recognise the legal personality of Nature and fit adequately with the idea of a subject of rights and obligations, according to the normative mainstream. Furthermore, the possibility of conceiving the ecosystem by exercising rights and accomplishing duties suggests the idea of people working on their own benefit, welfare, enhancement of their living conditions, among other aspects. Indeed, Argyrou and Hummels also see this feature as a call for "*community entrepreneurship*" for the benefit, health, and wellbeing of the river.[860]

In that regard, although one has questioned the anthropocentric character of the conventional legislation worldwide, the fact that the new paradigms can adapt to the law, currently in force, implies a step forward in the challenge of recognising the rights of Nature. It seems better to undergo a process of adaptation than attempting to impose new ways of thinking overnight. One should be aware that our legal systems need a change in the terms

[859] *Te Awa Tupua* Act (2017) § 16 (a), 19 (d), 41(1), 43 (1), 46 (2b), 47 (3a), 53 (3), and 55 (3a); *Tūtohu Whakatupua* (2012) para. 2.7.1; Collins and Esterling (2019) 24.
[860] *Te Awa Tupua* Act ibid § 25 (1); Argyrou and Hummels (2019) 12-4.

how Nature and humans interact, and their relationships evolve. Nevertheless, a traumatic shift could be self-defeating and block the fulfilment of the objectives. This consideration is significant, particularly in the case of property rights, which is probably the most sensitive aspect to treat.

6.4.3 Ecosystems and natural communities in the United States of America

The first experience of recognition of Nature's rights occurred in 2006, in the United States, when the small town of Tamaqua Borough, Pennsylvania, issued an ordinance against sewage sludge. The instrument constitutes a milestone in matters of rights of Nature because it acknowledged natural communities and ecosystems as persons for the purposes of enforcement of civil rights. As already mentioned, the community counted on the assistance of Thomas Linzey from CELDF to elaborate the regulation. The provision reads: "*Borough residents, natural communities, and ecosystems shall be considered to be 'persons' for purposes of the enforcement of the civil rights of those residents, natural communities, and ecosystems*".[861]

Curiously, the ordinance also denies the quality of "*persons*" within the jurisdiction of Tamaqua Borough to those corporations "[…] *engaged in the land application of sludge, dredged material, or any other type of waste*". Likewise, it prohibits the protection of "[…] *the Contracts Clause or Commerce Clause of the United States Constitution, or similar provisions from the Pennsylvania Constitution*" to these entities. Furthermore, any resident has the authority to enforce the ordinance through an action in equity brought in the Court of Common Pleas of Schuylkill County.[862]

David Boyd recalls how the solicitor warned that the ordinance was going to trigger lawsuits against the district. Still, Mayor Morrison employed his deciding vote to look for its approbation. From there on, twenty-five communities more in the United States have taken its cue from the borough of Tamaqua (See Annexe No. 4). Maybe it is one of the reasons why Cullinan considers this instrument is not only extraordinary but revolutionary.[863]

Although the bulk of U.S. local instruments are quite similar, there are some peculiarities that one should mention. For example, the resolutions coming from the native

[861] Campbell and Linzey (2016) 2; Ordinance Tamaqua Borough No. 612 (2006) § 7.6.
[862] Ordinance Tamaqua Borough No. 612 ibid § 7.5 and 11.7.
[863] Boyd (2017) 113-4; Cullinan (2012b) 234; Harmony with Nature (2020) § 23.

tribes of Yurok, Nez Perce, and Menominee correspond to the recognition of the rights of the rivers Klamath, Snake, and Menominee, located within their respective jurisdictions. Likewise, the ordinance coming from the City of Toledo relates to the recognition of the rights of the ecosystem comprised of Lake Erie and its watershed. The rest of the ordinances recognises the rights of ecosystems and natural communities by means of two formats of texts, whose contents get relatively repeated with a few variations. It is probably the result of CELDF's advisory. The only different provision, already quoted, corresponds to Tamaqua Borough. Just as an exemplification, both recurrent provisions are as follows:

> *Natural communities and ecosystems, including, but not limited to, wetlands, streams, rivers, aquifers, and other water systems, possess inalienable and fundamental rights to exist and flourish.*
>
> *Ecosystems and the natural flora and fauna communities which compose them possess inalienable and fundamental rights to exist in the state of nature, flourish, and naturally evolve.*

6.4.4 The rights of Mother Earth in Bolivia

The recognition of rights of Nature in Bolivia occurred in 2010 when the Legislative Assembly passed the Rights of Mother Earth Act. Indeed, there was already a mention of the concept of *Pachamama* in the preamble of the Constitution one year before. In that regard, the acknowledgement that Nature is a holder of rights does not turn out rare, above all, considering the huge impulse to the Declaration of the Rights of Mother Earth coming from the Bolivian government during those years.[864]

In essence, the Rights of Mother Earth Act is quite like the Declaration, mostly in terms of scope, that is, it comprises of four chapters concerning the principles, the definitions, the rights of Nature, and the obligations of the State and society. It fundamentally establishes that "*Mother Earth is the living and dynamic system, comprised of the indivisible community of all systems of life and living beings, interrelated, interdepending, and complementary, that share a common destiny*". Nevertheless, from the legal standpoint, it deals with a "*collective subject of public interest*", which constitutes an ambiguous terminology, given

[864] Translation of the Constitution of Bolivia (2009) Recital 6th.

the law does not bestow legal personality on Nature, under the conditions of the national legislation.[865]

On their part, the tenets that govern the relationship between humans and Nature are harmony, collective welfare, warranty of generation of Mother Earth, respect and defence of its rights, no commodification, and interculturality. Likewise, the law recognises the following rights: life, diversity of life, water, clean air, balance, restoration, and freedom from contamination. As a peculiarity, the law has created an ombudsperson to protect, promote, spread, and enforce the rights of Mother Earth.[866]

Two years later, the Legislative Assembly enacted the Framework Mother Earth Act for Comprehensive Development to Live Well, aimed at establishing the vision and fundamentals of holistic development, in harmony and balance with the Mother Earth for living well. It attempted warrantying the continuity of the capacity of regeneration of the components and systems of life, recovering, and strengthening local wisdom and ancestral knowledge, within the framework of the complementarity of rights and duties.[867]

Nonetheless, when one scrutinises the contents of the law, it is noticeable a remarkable shift of orientation. For example, one can find references concerning the actions to promote the use of goods and service to meet the basic needs of people, minimising the excessive exploitation of the components of Mother Earth. Likewise, the law tends to establish processes of production without pollutants, to facilitate the equate access to her components, or to democratise the access to the means or factors of production.[868]

In brief, this longer instrument includes some terminologies more associated with anthropocentric parlance than ecocentric one. For instance, one can find expressions like market, commerce, trade, sustainable exploitation, investments, sovereignty on food safety, and even property rights. In practice, the law provides the right of exploitation or use of the "*products*" coming from the components of the Mother Earth with commercial ends or public interest. Moreover, it even promotes the industrialisation of her components and the activities of mining and oil extraction. As Boyd appropriately points out, "[…] *this second Mother Earth law is fraught with contradictions*"[869]

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[865] Ley de Derechos de la Madre Tierra (2010) Articles 2. 3, and 5. One can find the concept of legal personality in both the Bestowal of Legal Personality Act and the Civil Code. See Ley de Otorgación de Personalidades Jurídicas (2013) Article 4 (1); Código Civil (1975) Article 52.
[866] Ley de Derechos de la Madre Tierra ibid Articles 2, 7, and 10.
[867] Ley Marco de la Madre Tierra y Desarrollo Integral para Vivir Bien (2012) Article 1.
[868] Ibid Articles 14 (2), 15, and 19.
[869] Ibid Article 5 (6), 10 (6), 11 (4), and 26 (1); Boyd (2017) 196.

6.5 The rights of Nature in the judicial adjudications

Finally, there are two cases that it is worth mentioning. They are the judicial decisions coming from India and Colombia, where the judiciary recognised certain rivers and other ecosystems as legal persons, without counting on previous legislation thereon.

6.5.1 The legal personhood of Ganga and Yamuna Rivers in India

As Kelly Alley explains, watercourses are sacred in Indian traditions, especially Ganga (also the Ganges) and Yamuna Rivers, which people see as goddesses. Moreover, during the last years, Ganga River has experienced the ravages derived from overpopulation and pollution. In a certain way, these aspects help to elucidate why was necessary a turning point in the manner how Hindus have historically handled the rivers.[870]

Aware of the fact that Ganga River supports around 500 million people, the National Ganga Rights Movement, join with other partners (such as Ganga Action Parivar, CELDF, and Action Aid India) began a campaign to promote the enactment of a National Ganga Rights Act some years ago. Their main objective consists of reaching the recognition of the right to exist, thrive, regenerate, and evolve in favour of Ganga River, as well as the right of people, plants, fish, and animals to a healthy river. Moreover, they also search for empowering individuals, groups, and governments to protect and defend those entitlements.[871]

In 2017, in the middle of this struggle for the recognition of the rights of the river, its defenders received a momentous thrust when the High Court of Uttarakhand at Nainital decided that, "[…] *to protect the recognition and the faith of society, Rivers Ganga and Yamuna are required to be declared as the legal persons/living persons*". Furthermore, the court invoked the doctrine of "*Parens Patriae*", a Latin locution for "parent of his or her country", which comprehends the State in its [sovereign] capacity as provider of protection to those unable to care for themselves.[872] Thus, it reads:

[870] Alley (2011) 33-4.
[871] Ganga Action (2012) paras. 1st, 7th, and 8th.
[872] Writ Petition (PIL) No.126 of 2014, *Mohammed Salim v. State of Uttarakhand & others* (2017) Direction No. 16; Garner (2004) 3520.

> *Accordingly, while exercising the* ***parens patrie jurisdiction*** [sic]*, the Rivers Ganga and Yamuna, all their tributaries, streams, every natural water flowing with flow continuously or intermittently of these rivers, are declared as juristic/legal persons/living entities having the status of a legal person with all* ***corresponding rights, duties and liabilities*** *of a living person in order to preserve and conserve river Ganga and Yamuna. The Director NAMAMI Gange, the Chief Secretary of the State of Uttarakhand and the Advocate General of the State of Uttarakhand are hereby declared* ***persons in loco parentis*** *as the human face to protect, conserve and preserve Rivers Ganga and Yamuna and their tributaries. These Officers are bound to uphold the status of Rivers Ganges and Yamuna and also to promote the health and wellbeing of these rivers.*[873]

From the previous declaration, one should emphasise at least a couple of remarkable aspects. Firstly, the bestowal of legal personality on the rivers does not only imply the granting of rights but also the establishment of obligations, which coherently fit with the characterisation of a legal person. This issue is not new for the Hindu juridical tradition. Indeed, the court quotes a 1969 Supreme Court decision, in which it held that "[…] *a Hindu idol is a juristic entity capable of holding property and of being taxed through its Shebaits who are entrusted with the possession and management of its property*".[874] Under similar circumstances to what happened with the Whanganui River of New Zealand, one should argue this peculiarity assuredly endows more consistency to the recognition of rights.

Secondly, the court settled the question of legal representation invoking the condition of the rivers as "*persons in loco parentis*", another Latin expression literally meaning "*in the place of a parent*", usually employed or related to temporary guardians or caretakers of children, who take on all or some of the responsibilities of a parent. In this manner, the court entrusted the representation of the river to the three alluded public authorities, in order to protect, conserve, and preserve the fluvial system, i.e., being their human face.[875] By way of comment, as already mentioned, the designation of someone who represents Nature (the rivers in this case) constitutes an adequate contribution in itself. However, one should consider that if the representatives respond to State concerns, there is going to be a potential

[873] Writ Petition (PIL) No.126 of 2014 ibid Direction No. 19, emphasis added.
[874] ibid Direction No. 12.
[875] Garner (2004) 2305.

conflict of interests, whose consequences associate with lack of independence and autonomy in both the medium and long terms.

As a corollary, during the same year 2017, the court declared the Indian Glaciers including Gangotri and Yamunotri, rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests wetlands, grasslands, springs and waterfalls, as a legal person. Curiously, as a manner to leave no doubt of their lawful status, the court also employed additional terminology, i.e., legal entity, juristic person, juridical person, moral person, and artificial person, with all corresponding rights, duties and liabilities of a living person, in order to preserve and conserve them. The mechanism of recognition was identical to what the court used with the rivers.[876]

6.5.2 The legal personhood of Atrato River and other ecosystems in Colombia

As Lidia Cano recounts, and one can read within the decision of the Colombian Constitutional Court, the recognition of the Atrato River as a subject of law arose as a mean to prevent the progress of illegal mining, logging, and other extractive activities. Nevertheless, beyond the environmental reasons supporting the adjudication, the Court curiously points out that legal provisions have lost their "*binding effect*" in practice, becoming in what Mauricio García calls the "*symbolic efficacy of law*", which does not take into account the environmental and social realities of the nation. This argument somehow justifies the Court's decision, above all, considering there is no direct legislative or judicial antecedent thereon in the country.[877] Thus, the Constitutional court ruled:

> *FOURTH.- TO RECOGNISE Atrato River, its watershed and tributaries as an entity/holder of rights to protection, conservation, maintenance, and restoration in charge of the Estate and the ethnic communities, according to the fundamentals 9.27 to 9.32 of this ruling.*[878]

In this framework, the Court also ordered to Colombian government exerts the guardianship and the representation of the river through an institution appointed by the

[876] Writ Petition (PIL) No.140 of 2015, *Lalit Miglani v. State of Uttarakhand & others* (2017) Directions No. 2 and 3.
[877] Cano (2018) 30; Case T-622, *"Tierra Digna" y otros v. Colombia* (2016) Antecedent No. I (2), para. III (9.45); García (1991) 5ff.
[878] Case T-622, ibid Resolution 4th.

President of the Republic, joint with a delegate coming from the native communities. Eventually, eight months later, the government designated the Ministry of Environment and Sustainable Development as the representative (Decree No. 1148). Subsequently, both delegates had an obligation to form part of the "*Commission of Atrato River's Guardians*", accompanied by an advisory team coming from the Humboldt Institute and the World Wide Fund for Nature (WWF Colombia). The commission, created by resolution in 2018, aims at assuring the protection, recovering, and due conservation of the river. The team can count on the support of public and private entities, universities, research centres, and environmental organisations.[879]

Like the previous cases, although the recognition of the rights Nature constitutes an enhancement of the relationships between humans and the ecosystems, the logic under the state representation of Nature's interests does not fit very well with the independence and autonomy, required for their defence. That is perhaps one of the reasons why the conditions of the Atrato River have not improved four years after the acknowledgement of its rights. There are still activities of illegal mining and pollution. Thus, within its last report, the Comptroller General concluded that:

> *As a result of the audit, the Comptroller General of the Republic considers that the fulfilment of the 2016 decision T-622 concerning the environmental aspects of the mining activity in the watershed of Atrato River is not satisfactory, in all the significative aspects of the applicable criteria. Consequently, one issues a concept of ADVERSE UNFULFILLMENT.*[880]

Additionally, the adjudication reiteratively mentions the assuring of collective property in favour of native communities, even as a part of the maintenance of their distinctive cultural heritage and not only as a mere question of ownership. Nevertheless, they do refer to the property, possession, and use of lands as a fundamental aspect to their permanence and survival, or even as a spiritual location.[881] Although there are also communities of mestizos and Afro-Americans settled on the river banks, they do not depict a hindrance to organising the management of the river because their property rights also associate with the life of the community.

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[879] ibid; Decreto No. 1148 (2017) Article 1; Resolution No. 907 (2018) Article 1.
[880] Contraloría General de la República (2019) Conclusion 2.6.1.
[881] Case T-622, *"Tierra Digna" y otros v. Colombia* (2016) Antecedents 1, 5.14, 5.57, 6.3, and 6.6.

Under a similar logic, two years later, the Supreme Court declared the Colombian Amazon as a bearer of rights of protection, conservation, maintenance, and restoration, in charge of State and the territorial entities that form part of it. The lawsuit initially consisted of a legal guardianship, required by a group of children and youth (between 7 and 25 years old), as an endeavour to prevent the Amazon deforestation and to claim the respect of their right to a healthy environment. Unlike the Atrato River's case, the claimants are now the guardians of the Amazon. Nevertheless, they must count on the government to elaborate and Action Plan to stop deforestation and consolidate the *Intergenerational Pact for the Life of the Colombian Amazon* (PIVAC, in Spanish) in practice.[882]

Although one should admit the granting of guardianship in favour of a group of individuals, particularly children and youth, depicts the cutting edge in matters of rights, one cannot obviate the fact that both the action plan and the intergenerational pact impose a certain dependence on the Colombian government, which constitutes a subtle way to obtruding the independence and autonomy of the defence of Nature. It turns out particularly curious that the Ministry of Agriculture, the other member of the Pact, oversee an action plan to halt deforestation when it has been traditionally an institution dedicated to foster it.

Likewise, the Administrative Tribunal of Boyacá declared Pisba Highlands (*páramo*) as a holder of rights, implying the Ministry of Environment and Sustainable Development is responsible for the legal representation. Nevertheless, property rights responded to a quite different situation in comparison to what happened with the Atrato River's case, because mining workers and other private landowners were claiming for their respective entitlements. Indeed, this ruling began with a lawsuit coming from a group of mining workers, who required be part of the process of delimitation of Pisba Highlands. And, although they eventually lost the proceedings, the judgement proves there is a high level of social conflict into that area.[883]

The Pisba Highlands case entirely shows the crucial problem derived from any potential recognition of rights of Nature, the strains between the transmutation of the legal character of natural resources and the maintenance of traditional property rights, including the expectancies for economic profits coming as a result of productive activities (e.g., mining). In other words, if Nature is not going to be a set of things anymore, but a subject of law,

[882] Case STC4360-2018, *Andrea Lozano Barragán y otros v. Presidencia de la República de Colombia y otros* (2018) Antecedent 2, Consideration 14; Ministerio de Agricultura y Desarrollo Rural (2018) paras. 3rd and 4th.
[883] Case 15238 3333 002 2018 00016 01, *Juan Carlos Alvarado Rodríguez y otros v. Ministerio de Medio Ambiente y otros* (2018) Decision No. 3.

there is not going to be natural resources (including lands) to own or possess, which implies an enormous shift of the legal status quo, the human mentality, and even social organisation.

Therefore, one should take into account the recognition of rights of Nature cannot occur overnight. It is a process that should carry out gradually over time and depend on a diversity of perspectives, mainly ecological, legal, economic, and ethical ones.

6.6 Conclusions

The first research question of the present chapter somehow gathers the whole elements of analysis addressed within these last pages, which implies that the responses to the other queries also contribute to answering this one. As a reference, the question was: ***What aspects of the national laws in current force, by which Nature has been recognised as a holder of rights, would be useful for its international acknowledgement***?

The response turns around four fundamental ideas: property rights, entitlements, duties, and legal representation. All these components comprise the final proposal of regulation posed through this research. One should take into account, however, that all these themes have already been a matter of analysis, with different intensity, throughout the whole research. Thus, the aim of this last subsection does not imply a large recapitulation of previous definitions and conclusions. It deals only with a final summary of arguments ratified by national experiences.

In this regard, the second question research referred to ***what happens with the legal conditions of property rights in the case of the bestowal of international legal personality on Nature***. The response should be emphatic. If Nature becomes an international legal person, property rights on natural resources (including land) cannot maintain their *status quo*. The logic of transmutation from object to subject of law gets imposed over current legality. Subjects possess objects, things, commodities, and so on. Subjects do not own other subjects.

The granting of legal personality and the subsequent recognition of rights of Nature brings about a tendency to vanish property rights. It will not occur overnight, as Professor Cullinan has foretold, but it will gradually happen sooner or later. In a certain sense, all the great scholars knew it. Leopold, Berry, Stone, and Cullinan quickly understood it so that they have addressed this issue either directly or indirectly.

Nevertheless, one should take into account that property rights would only fade if the conferral of legal personality automatically places legal persons on a level playing field. In

effect, the law recognises that an entity is a holder of rights only in a specific legal relationship (for example, the editorial office of a newspaper is a juristic entity in press lawsuits but it is not on the stock exchange or in the court of registration). Consequently, in accordance with the interests of Nature, one can preserve some forms of ownership. Thus, a paradigm shift would also take place in the universality of property rights. Another solution is that the forms of ownership are not equal, i.e., a distinction would be made between the public and private property (also based on the objects that one can own), as it exists in several countries (e.g., land, forest, or water).

In either event, one should comprehend the shifts on the regulations of property rights would probably "*tend*" to its disappearance, which does not mean they are going to fade unfailingly. There are societies better prepared to cope with a change of paradigms, such as indigenous peoples, for example. Indeed, their modality of property-in-community appears as an effective alternative of adaptation to a potential new pattern of social organisation. For instance, the fact that everybody owns the soils and water subtly implies that nobody is the owner in practice. The concept entirely aligns to the ecocentric perspective: "*The water owns the water; the land owns the land*". As seen, this idea facilitates the management of the fluvial ecosystems in New Zealand, India, and Colombia, given the existence of native peoples as actors of the process.

On their part, Ecuador and Bolivia would count on the same advantage because both countries possess an important indigenous population. However, their legal experiences seem to be quite more ambiguous. Their legislative systems opted to recognise the rights of Nature in general instead of focussing on specific ecosystems, such as rivers, glaciers, highlands, and so on. Indeed, one could criticise the idea of recognising the rights of the Amazon region in Colombia under similar reasons, i.e., the ambiguity that leads to uncertainty. If one cannot identify what the real scope of the recognition is, it is going to be awfully hard to determine the scope of protection.

Within this analysis, one should also consider the question of state sovereignty over natural resources. As mentioned, sovereign management of the environment constitutes a kind of variable of property rights in favour of State. In this sense, countries cannot continue to handle the environment as their private property, prioritising the economic and developmental benefits. Unlike property rights, sovereignty cannot tend to disappear because it could be a powerful ally to promote the administration of resources from an ecocentric perspective, based on the state capacity of enforcement.

To conclude, if the tendency of recognition of the rights of Nature continues to spread worldwide, it would be a great idea to think about the possible changes concerning the regulation of property rights, above all, because if there is no any modification in the manner how humans administrate their ownership, the recognition of rights of Nature will only be a utopic whim or simply dead letter.

The third research question corresponds to the essence of a juridical person, i.e., ***what the key rights and duties of Nature as an international subject of law would be.*** One could divide the answer to this query in two parts. Hence, it would be adequate to firstly address the entitlements and later the obligations. In this regard, the Declaration of the Rights of Mother Earth, the Ecuadorian Constitution, and the Bolivian law constitute outstanding sources because they somehow imply a systematisation of the rights of Nature. In consequence, according to the mentioned instruments, one could argue the main rights of Nature are life, diversity of life, existence, integral respect, regeneration of its bio-capacity, continuation, maintenance, and regeneration of its vital cycles and processes, maintenance of its identity, integrity, water, clean air, integral health, freedom from contamination, pollution, and toxic or radioactive waste, no modification of its genetic structure, restoration, and balance.

On the other hand, both the Whanganui River Act and the adjudication concerning the Ganga River constitute accurate sources to determine what would be the duties of Nature, as a subject of law. According to both experiences, the archetype of obligation derived from an ecosystem is the payment of taxes, based on the productive and economic activities that people can carry out within those environments.

Both instruments are coherent in this matter. If those people whose subsistence depends on a specific ecosystem seize the benefits, derived from the utilisation of natural resources, it turns out consistent be claimed a correlative obligation. In the end, people are not the legal owners of Nature. In principle, the ecosystem possesses itself. However, if humans, who are also part of the ecosystem, obtain economic benefits, it would not be weird that they have to contribute to society through the payment of taxes. Under these circumstances, the redistributive character of taxes correctly fit with the theoretical stances of a juridical person and its capacity to acquire legal duties.

In consequence, considering the existence of an administrative body, co-represented by State and people from the river banks, the model described within the Whanganui River Act would seem to be the more realistic and adequate standard to warranty a healthy and correlative balance between rights and duties of Nature.

The fourth research question refers to one of the most remarkable characteristics of the acknowledgement of the rights of Nature, which consists of the "*legitimacy of representation*". It reads: ***Who would represent Nature as a subject of law in the international ambit?*** The best manner to answer this question is perhaps by means of the discard of options.

Thus, the representation of Nature's interest should respond to a balance among the political, economic, and social powers exercised within the international arena. Starting from the biggest organisations, it does not seem to be a good idea to count on new global or regional institutions to defend the rights of Nature because it would imply the redundant creation of more bureaucracy through immense political and economic efforts. If the international entities, such as the United Nations, the European Union, the Organization of American States, and so on, have not been able to cease the environmental disaster through their enormous political legitimacy, acceptance, and power, it seems little probable that another new organisation of similar peculiarities can do it.

Nevertheless, the inconvenience of creating new international or regional entities does not mean what exists is useless. All the contrary, the role of the global entities is crucial as the political platform where international instruments can be issued and implemented. For example, the programme "*Harmony with Nature*" has been a good beginning to visualise the question of rights of Nature worldwide. One should be conscious that bargaining processes are slow, and one can only obtain results gradually, but the fact that the theme can be included in the U.N. agenda is already an advance.

On the other hand, although the States would appear to be the ideal political organisations to defend and represent the rights of Nature, the absence of total autonomy and independence to implement eco-friendly measures of public policy could be a hindrance. As seen, most of the time, States have an obligation to foster economic development as a response to poverty and other associated social inequalities. Nevertheless, that kind of economic development often contradicts any endeavour to protect, conserve, and preserve Nature. This duality circumvents that States can orient their policies exclusively toward one side or another. If the society claims for public services of electricity, secure water, communications, and so on, or the countries have to promote the industries of oil or mining, it is going to be very difficult that public policies establish strong environmental restrictions to these activities in practice. States will have to defend those vested interests instead of green ones.

In that regard, however, States cannot be definitively isolated from the process. The defence of the rights of Nature does require their effective and permanent presence, playing their traditional role, i.e., making new laws, enforcing existing laws, and executing them through the implementation of public policies. Granted that governments often are not able to represent the rights of Nature fully, but their intervention is unavoidable to regulate behaviours and control harmful activities. Under specific circumstances, it is not maybe a good idea they oversee the rights of Nature due to vested interests over environmental-high-impact activities. Still, State is probably the only institution that counts on the resources and capacity to combat against the environmental disaster for the time being.

One additional aspect to consider is the geographical range of representation. In plain language, the experiences of recognition of Nature as a bearer of rights have a twofold scope. On the one hand, the Declaration of the Rights of Mother Earth, the Ecuadorian Constitution, the Bolivian law, and the Colombian adjudication concerning the Amazon region turn out vague because they do not refer to a particular ecosystem but the whole. It generates difficulties, for example, to identify actors, determine the ambit of real protection, implement public policy measures, and so forth.

The determination of a specific ecosystem would seem the most effective way to address the recognition of the rights of Nature, as it happens in the Atrato, Whanganui and Ganges Rivers, or Pisba highlands, Gangotri and Yamunotri glaciers, or the U.S. ecosystems. The singularisation of every situation allows a major closeness between people and Nature, making feasible the communion alluded to by Thomas Berry.

In the middle of the state insufficiency to exercise the representation of Nature, the legal structure of the ombudsperson arises as an interesting alternative. However, one should deem it cannot deal with an institutionalised form, coming from the global perspective because it would imply to commit the same mistake alluded with regard to the international and regional entities, by duplicating the bureaucracy. The direct reference would be the structure designed within the Ecuadorian legislation, even the Bolivian one, which pertains to the orbit of the local regulations. Thus, if that ombudsperson, created at a local level, could participate within the international arena, and defend judicially to the different existing ecosystems. Nature before international tribunals and courts, one could argue this option should, at least, be thought.

To conclude, the best manner to assure the defence and protection of Nature probably comprises the entrustment of the representation to any individual or organisation with enough capacity to carry out its defence before the international system of justice or depict

its interests over the table of international negotiations. It could endow legitimacy to the different processes, given those people or entities would enjoy autonomy and independence for struggling in favour of Nature.

Finally, to close the present chapter and the dissertation, a general research question was posed under the following terms: ***How feasible is it to confer international legal personality on Nature, as an alternative instrument to cope with the environmental crisis?*** As a response, one should theoretically admit that it is possible to grant international legal personhood to Nature. There is a scenery comprised of the international or regional entities, there is the legal instrument (e.g., conventions, treaties, covenants, and so on), and there are the conditions of crisis necessary to think about a shift of paradigm. There is probably a lack of political and economic will, which will be surely overcome if this legal alternative spreads worldwide. In any case, the recognition of the rights of Nature would respond preferably to the following conditions:

- A modification and rethinking of the regulations of property rights and state sovereignty.
- The maintenance and fulfilment of the current eco-friendly roles played by the international and regional entities, as well as States at a local level.
- The establishment of a correlative set of rights and duties of Nature, and
- The conferment of legal representation of Nature, based on legitimacy, independence, and autonomy from other public and private actors.

Chapter Seven
Summary of conclusions and future research

7.1 Summary of Conclusions

Given that each chapter includes a specific subheading concerning the conclusions in detail, this final sub-section only corresponds to a schematic summary. It will be useful for the reader because it allows gathering in one single place the whole main findings coming from the research. It is organised in the function of each chapter.

7.1.1. Chapter Two - Nature in the international legal framework

- There is abundant evidence that international treaties continuously emphasise the importance of people's welfare over Nature.
- No environmental instrument is exclusively eco-friendly in itself, given that they often aim at benefitting human wellbeing.
- The restrictive exercise of property rights could make up a manner to promote the protection of Nature, as an inseparable component from the right to life.
- The individual human rights approach has failed to preserve the environment for decades, as a result of the exploitative and hegemonic operation of global capitalism.
- The ecological measures based on the right to a healthy environment do not operate if there is no demonstrable welfare for people, according to international law.
- There are profuse references concerning principles of sustainability guarantee anthropocentric conditions instead of environmental ones.
- Various instruments show decisive support of international trade within the framework of sustainability (e.g., Convention on Climate Change).
- The achievement of sustainable development does not necessarily enhance ecological conditions *per se*, in practice.
- The protection of Nature on behalf of future generations does not represent an ecological end in itself because it also promotes human wellbeing.
- The application of eco-friendly policies, programmes, action plans, and so forth, will not be significantly efficient to avoid ecological devastation if legislation neither supports them.

- Although historical regulations have recognised the legal personhood of other participants, States have been customarily the institutions responsible for environmental protection.
- States have managed Nature as things under their control and Nature has been historically a set of goods, or even commodities, intended to meet human needs.
- The instruments of human rights will emphasise detrimental impacts on people rather than on the wild itself because it is their original essence.
- States have an obligation to protect both human beings and Nature, but it turns out quite difficult that States will enforce international treaties only in favour of Nature.
- There is a need to count on an independent and legitimate actor (different from State), who can be legally capable of representing Nature in front of harmful human activities.

7.1.2. Chapter Three - The ubiquity of property rights

- Everything that exists on Earth, especially lands and species, belongs to human beings, either by private means or public ones.
- The fact that some conventions contain allusions to "*natural resources*" evokes the ideas of commodification and objectification of the wild.
- The exercise of state sovereignty grants to countries a legal right easily comparable with property rights, meaning they are a kind of owners in practice.
- The commerce of wild species represents perhaps the archetype of Nature as merchandise, where its purchase and sale pursue the logic of traditional property rights.
- There is seemingly an incontrovertible association between poverty and environmental degradation, in which property rights are the link.
- The continuous breakdown of environmental policies, grounded on economic growth, shows how the application of anthropocentric measures upon ecological problems does not always succeed.
- One cannot entirely assure the international environmental instruments bias toward the prevalence of property rights, above all, concerning specific topics, such as overexploitation or pollution.

- The exercise of state sovereignty consists of the disjunction between the application of environmental or developmental policies to use and exploit natural resources.
- The decision to exploit ecosystems entirely depends on States. It entails repercussions on the prevalence of property rights, given that development gets often associated with economic growth and commerce.
- The international legal framework does not play any role to determine pecking orders, in which property rights occupy a higher position than Nature.
- It seems to be evident that the fact of accomplishing all the requirements to be recognised as a sovereign State (statehood, self-determination, independence, and so forth) is not enough to exercise the right to protect the national ecosystems.
- The tenet of cooperation or the no-harm rule in environmental matters only seems to work out when the country that alleges its enforcement counts on enough political or economic influence to attain it.
- The legality of statehood, the strength of self-determination, and the warranty of state independence do not confer legitimacy to represent Nature's interests, in practice.

7.1.3. Chapter Four - The Court of Justice of the European Union

- In the totality of the proceedings in which there was any strain between ownership and environmental protection, the Court auspiciously ruled on the latter, arguing the social function of property and reasons of general interests.
- The theoretical and legal predominance of property rights over natural resources, alleged by defenders and promoters of rights of Nature, appears to be more rhetorical than empirically verifiable in the international field.
- Being a proprietary does not warranty a successful result before the Court. Quite the opposite, the data have proved that the vast majority of petitioners-owners obtained unfavourable decisions.
- It is not a requirement to be the owner for obtaining a favourable eco-friendly ruling, mainly predicated on the marginal character of data.
- The redundant lack of environmental impact assessments at the national level and failures to accomplish green obligations constitute two clear indicators of the need to count on someone who can represent the environmental rights in the international arena.

- A representative of green interests could be useful to promote a more organic defence of natural resources at a global level.
- The European Commission could be an attractive option to represent Nature, given its impressive judicial favourable results but it is still a speculation.
- The ambit of action coming from the Court is restricted to its part as the organism to administrate justice. Therefore, the CJEU could not be a kind of guardian of Nature at all or constitute even the protection warranty.
- The Court certainly provides a balance to the strains between property rights and environmental protection through its adjudications.
- The increasing trend of the environmental cases before the Court between 1979 and 2019 is consistent with the results of the Pearson's correlation coefficient and the growth rates.
- The cumulative dynamics of records could also be explained through the effects of the adaptation to climate change.

7.1.4. Chapter Five - The moral considerability of Nature

- Traditional ethics rejects any living being or entity positioned outside the ambit of the human sphere.
- From an anthropocentric perspective, natural resources make up a set of goods, even commodities, able to deliver food, clothes, shelter, and other services for human welfare.
- From the human-centred outlook, the right to a healthy environment perhaps emerges as the perfect legal mechanism to warranty ecological protection.
- The individualistic view depicts a different range of stances, which goes from the restricted recognition of specific species of animals, such as the higher mammals, to the broadest acknowledgement of all life, such as it happens in the egalitarian biocentrism.
- The possibility to support the international legal personality of Nature throughout any of the individualistic theoretical postures implies some hindrances.
- The biocentric perspectives avoid extending the limits of the moral circle towards inanimate elements of Nature, such as air, water, and soil.

- The general premises of psychocentrism impose a too-rigid restriction on the moral considerability of the natural world.
- The doctrines of animal liberation and rights exclude a significant group of species, reducing, even more, the spectrum of moral and legal recognition of Nature.
- The egalitarian biocentrism seems to be too flexible by acknowledging the moral considerability of all living beings.
- The holistic approach concerning the moral considerability of Nature shows more adaptability to the recognition of its international legal personality and rights.
- The principles of deep ecology are neither enough to support the potential granting of rights to Nature ethically, although its moral stance is the most comprehensive one among the biocentric trends.
- Gaia-hypothesis adapts better to the granting of moral personality to Nature, but it deals with a scientific approach more than an ethical posture.
- Both the land ethic and the earth jurisprudence describe the interplay between humans and Nature symmetrically, so to speak, that is, there is a biotic/earth community formed by members who play a specific role and possess particular entitlements.
- The moral depictions designed by both Leopold and Berry are definitively the best allegories to promote the bestowment of legal personality on Nature, from an ethical standpoint.

7.1.5. Chapter Six - Legal rights and representation of Nature

- If Nature becomes an international legal person, property rights on natural resources (including land) cannot maintain their *status quo*.
- The granting of legal personality and the subsequent recognition of rights of Nature brings about a tendency to vanish property rights.
- Property rights would only fade if the conferral of legal personality automatically places legal persons on a level playing field.
- Native modality of property-in-community appears as an effective alternative of adaptation to a potential new pattern of social organisation of property rights.

- The conferral of rights on ambiguous ecosystems (such as it happened in Ecuador, Bolivia, and Colombia) leads to uncertainty because one cannot identify what the real scope of the environmental protection is.
- The determination of a specific ecosystem would seem the most effective way to address the recognition of the rights of Nature, as it happens in the Atrato, Whanganui and Ganges Rivers, or Pisba highlands, Gangotri and Yamunotri glaciers, or the U.S. ecosystems.
- Sovereign management of the environment constitutes a kind of variable of property rights in favour of State, but it cannot tend to disappear because it could be a powerful ally to promote the administration of resources from an ecocentric perspective.
- The main rights of Nature are life, diversity of life, existence, integral respect, regeneration of its bio-capacity, continuation, maintenance, and regeneration of its vital cycles and processes, maintenance of its identity, integrity, water, clean air, integral health, freedom from contamination, pollution, and toxic or radioactive waste, no modification of its genetic structure, restoration, and balance.
- The archetype of obligation derived from an ecosystem is the payment of taxes, based on the productive and economic activities that people can carry out within those environments.
- The redistributive character of taxes correctly fit with the theoretical stances of a juridical person and its capacity to acquire legal duties.
- The Whanganui River Act would seem to be the more realistic and adequate standard to warranty a healthy and correlative balance between rights and duties of Nature.
- The representation of Nature's interest should respond to a balance among the political, economic, and social powers exercised within the international arena.
- It would not be a good idea to count on new global or regional institutions to defend the rights of Nature because it would imply the redundant creation of more bureaucracy through immense political and economic efforts.
- The role of the global entities is crucial as the political platform where international instruments can be issued and implemented.
- Although the States would appear to be the ideal political organisations to defend and represent the rights of Nature, the absence of total autonomy and independence to implement eco-friendly measures of public policy could be a hindrance.

- The defence of the rights of Nature does require the effective and permanent presence of State, playing their traditional role, i.e., making new laws, enforcing existing laws, and executing them through the implementation of public policies.
- The ombudsperson, created at a local level, could participate within the international arena, and defend judicially to the different existing ecosystems.
- The best manner to assure the defence and protection of Nature probably is comprised of the entrustment of the representation to any individual or organisation with enough capacity to carry out its defence before the international system of justice or depict its interests over the table of international negotiations.

7.2 Future research

During the process of research, it was possible to identify some topics that would merit further study. They are:

- Under similar terms of CJEU's examination, it would be interesting to count on a review of jurisprudence coming from the international courts of human rights of Africa, America, and Europe.
- The analysis of the trends of law-cases concerning the effects of the adaptation to climate change, given it would be quite probable the number of adjudications rises during the next years.
- A review of the concept of ecofascism in detail, as an intermittence of the recognition of the rights of Nature, from an ethical standpoint.
- A more profound development of the ethical implications of the concept of Pachamama in the Andean region.
- An analysis of the theoretical stance of the ecocentrism as a resurgence of the traditional ideas of *iusnaturalism*.

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Annexe

Annexe No. 1 List of Cases – Court of Justice of the European Union

No.	Number	Date	Tittle	Action
1	C-185/78	3-Jul-1979	van Dam	Preliminary Ruling
2	C-141/78	4-Oct-1979	France v United Kingdom	Failure to fulfil obligations
3	C-32/79	10-Jul-1980	Commission v United Kingdom	Failure to fulfil obligations
4	C-804/79	5-May-1981	Commission v United Kingdom	Failure to fulfil obligations
5	C-124/80	2-Jun-1981	Van Dam	Preliminary Ruling
6	C-269/80	16-Dec-1981	Tymen	Preliminary Ruling
7	C-21/81	10-Feb-1982	Bout	Preliminary Ruling
8	C-13/82	28-Oct-1982	Arantzamendi-Osa	Preliminary Ruling
9	C-137/81	28-Oct-1982	Campandeguy Sagarzazu	Preliminary Ruling
10	C-138/81	28-Oct-1982	Marticorena-Otazo	Preliminary Ruling
11	C-50/82	28-Oct-1982	Dorca Marina	Preliminary Ruling
12	C-287/81	30-Nov-1982	Noble Kerr	Preliminary Ruling
13	C-372/85	12-May-1987	Traen	Preliminary Ruling
14	C-247/85	8-Jul-1987	Commission v Belgium	Failure to fulfil obligations
15	C-291/84	17-Sep-1987	Commission v Netherlands	Failure to fulfil obligations
16	C-236/85	13-Oct-1987	Commission v Netherlands	Failure to fulfil obligations
17	C-322/86	12-Jul-1988	Commission v Italy	Failure to fulfil obligations
18	C-339/87	15-Mar-1990	Commission v Netherlands	Failure to fulfil obligations
19	C-42/89	5-Jul-1990	Commission v Belgium	Failure to fulfil obligations
20	C-131/88	28-Feb-1991	Commission v Germany	Failure to fulfil obligations
21	C-361/88	30-May-1991	Commission v Germany	Failure to fulfil obligations
22	C-59/89	30-May-1991	Commission v Germany	Failure to fulfil obligations
23	C-337/89	25-Nov-1992	Commission v United Kingdom	Failure to fulfil obligations
24	C-355/90	2-Aug-1993	Commission v Spain	Failure to fulfil obligations
25	C-366/89	2-Aug-1993	Commission v Italy	Failure to fulfil obligations
26	C-313/93	13-Apr-1994	Commission v Luxembourg	Failure to fulfil obligations
27	C-131/93	13-Jul-1994	Commission v Germany	Failure to fulfil obligations
28	C-379/92	14-Jul-1994	Peralta	Preliminary Ruling
29	C-396/92	9-Aug-1994	Bund Naturschutz	Preliminary Ruling
30	C-255/93	5-Oct-1994	Commission v France	Failure to fulfil obligations
31	C-431/92	11-Aug-1995	Commission v Germany	Failure to fulfil obligations
32	C-149/94	8-Feb-1996	Vergy	Preliminary Ruling
33	C-202/94	8-Feb-1996	van der Feesten	Preliminary Ruling
34	C-133/94	2-May-1996	Commission v Belgium	Failure to fulfil obligations
35	C-168/95	26-Sep-1996	Arcaro	Preliminary Ruling
36	C-72/95	24-Oct-1996	Kraaijeveld and Others	Preliminary Ruling
37	C-142/95 P	12-Dec-1996	Associazione agricoltori della provincia di Rovigo and Others v Commission and Others	Appeal
38	C-298/95	12-Dec-1996	Commission v Germany	Failure to fulfil obligations

No.	Number	Date	Tittle	Action
39	C-302/95	12-Dec-1996	Commission v Italy	Failure to fulfil obligations
40	T-105/95	5-Mar-1997	WWF UK v Commission	Actions for annulment
41	C-304/94	25-Jun-1997	Tombesi	Preliminary Ruling
42	C-129/96	18-Dec-1997	Inter-Environnement Wallonie	Preliminary Ruling
43	C-321/95 P	2-Apr-1998	Greenpeace Council and Others v Commission	Appeal
44	C-321/96	17-Jun-1998	Mecklenburg	Preliminary Ruling
45	C-183/97	18-Jun-1998	Commission v Portugal	Failure to fulfil obligations
46	C-81/96	18-Jun-1998	Gedeputeerde Staten van Noord-Holland	Preliminary Ruling
47	C-192/96	25-Jun-1998	Beside and Besselsen	Preliminary Ruling
48	C-203/96	25-Jun-1998	Dusseldorp and Others	Preliminary Ruling
49	C-341/95	14-Jul-1998	Bettati	Preliminary Ruling
50	C-389/96	14-Jul-1998	Aher-Waggon	Preliminary Ruling
51	C-301/95	22-Oct-1998	Commission v Germany	Failure to fulfil obligations
52	C-214/96	25-Nov-1998	Commission v Spain	Failure to fulfil obligations
53	C-150/97	21-Jan-1999	Commission v Portugal	Failure to fulfil obligations
54	C-207/97	21-Jan-1999	Commission v Belgium	Failure to fulfil obligations
55	C-166/97	18-Mar-1999	Commission v France	Failure to fulfil obligations
56	C-293/97	29-Apr-1999	Standley and Others	Preliminary Ruling
57	C-198/97	8-Jun-1999	Commission v Germany	Failure to fulfil obligations
58	C-178/98	8-Jul-1999	Commission v France	Failure to fulfil obligations
59	C-215/98	8-Jul-1999	Commission v Greece	Failure to fulfil obligations
60	C-217/97	9-Sep-1999	Commission v Germany	Failure to fulfil obligations
61	C-435/97	16-Sep-1999	WWF and Others	Preliminary Ruling
62	C-392/96	21-Sep-1999	Commission v Ireland	Failure to fulfil obligations
63	C-231/97	29-Sep-1999	Van Rooij	Preliminary Ruling
64	C-232/97	29-Sep-1999	Nederhoff	Preliminary Ruling
65	C-175/98	5-Oct-1999	Lirussi	Preliminary Ruling
66	C-365/97	9-Nov-1999	Commission v Italy	Failure to fulfil obligations
67	C-184/97	11-Nov-1999	Commission v Germany	Failure to fulfil obligations
68	C-96/98	25-Nov-1999	Commission v France	Failure to fulfil obligations
69	C-6/99	21-Mar-2000	Greenpeace France and Others	Preliminary Ruling
70	C-209/98	23-May-2000	Sydhavnens Sten & Grus	Preliminary Ruling
71	C-307/98	25-May-2000	Commission v Belgium	Failure to fulfil obligations
72	C-384/97	25-May-2000	Commission v Greece	Failure to fulfil obligations
73	C-418/97	15-Jun-2000	ARCO Chemie Nederland	Preliminary Ruling
74	C-318/98	22-Jun-2000	Fornasar and Others	Preliminary Ruling
75	C-387/97	4-Jul-2000	Commission v Greece	Failure to fulfil obligations
76	C-261/98	13-Jul-2000	Commission v Portugal	Failure to fulfil obligations
77	C-287/98	19-Sep-2000	Linster	Preliminary Ruling
78	C-152/98	10-May-2001	Commission v Netherlands	Failure to fulfil obligations
79	C-230/00	14-Jun-2001	Commission v Belgium	Failure to fulfil obligations
80	C-510/99	23-Oct-2001	Tridon	Preliminary Ruling
81	C-324/99	13-Dec-2001	DaimlerChrysler	Preliminary Ruling
82	C-196/01	15-Jan-2002	Commission v Luxembourg	Failure to fulfil obligations

No.	Number	Date	Tittle	Action
83	C-366/00	19-Feb-2002	Commission v Luxembourg	Failure to fulfil obligations
84	C-6/00	27-Feb-2002	ASA	Preliminary Ruling
85	C-9/00	18-Apr-2002	Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus	Preliminary Ruling
86	C-159/00	6-Jun-2002	Sapod Audic	Preliminary Ruling
87	C-177/01	6-Jun-2002	Commission v France	Failure to fulfil obligations
88	C-117/00	13-Jun-2002	Commission v Ireland	Failure to fulfil obligations
89	C-474/99	13-Jun-2002	Commission v Spain	Failure to fulfil obligations
90	C-314/99	18-Jun-2002	Netherlands v Commission	Actions for annulment
91	C-336/00	19-Sep-2002	Huber	Preliminary Ruling
92	C-348/01	7-Nov-2002	Commission v France	Failure to fulfil obligations
93	C-316/00	14-Nov-2002	Commission v Ireland	Failure to fulfil obligations
94	C-319/01	19-Nov-2002	Commission v Belgium	Failure to fulfil obligations
95	C-202/01	26-Nov-2002	Commission v France	Failure to fulfil obligations
96	C-63/02	16-Jan-2003	Commission v United Kingdom	Failure to fulfil obligations
97	C-75/01	13-Feb-2003	Commission v Luxembourg	Failure to fulfil obligations
98	C-392/99	10-Apr-2003	Commission v Portugal	Failure to fulfil obligations
99	C-419/01	15-May-2003	Commission v Spain	Failure to fulfil obligations
100	C-130/01	12-Jun-2003	Commission v France	Failure to fulfil obligations
101	C-444/00	19-Jun-2003	Mayer Parry Recycling	Preliminary Ruling
102	C-233/00	26-Jun-2003	Commission v France	Failure to fulfil obligations
103	C-114/01	11-Sep-2003	AvestaPolarit Chrome	Preliminary Ruling
104	C-30/01	23-Sep-2003	Commission v United Kingdom	Failure to fulfil obligations
105	C-322/00	2-Oct-2003	Commission v Netherlands	Failure to fulfil obligations
106	C-154/02	23-Oct-2003	Nilsson	Preliminary Ruling
107	C-434/01	6-Nov-2003	Commission v United Kingdom	Failure to fulfil obligations
108	C-296/01	20-Nov-2003	Commission v France	Failure to fulfil obligations
109	C-332/02	27-Nov-2003	Commission v United Kingdom	Failure to fulfil obligations
110	C-429/01	27-Nov-2003	Commission v France	Failure to fulfil obligations
111	C-201/02	7-Jan-2004	Wells	Preliminary Ruling
112	C-209/02	29-Jan-2004	Commission v Austria	Failure to fulfil obligations
113	C-53/02	1-Apr-2004	Commune de Braine-le-Château	Preliminary Ruling
114	C-117/02	29-Apr-2004	Commission v Portugal	Failure to fulfil obligations
115	C-194/01	29-Apr-2004	Commission v Austria	Failure to fulfil obligations
116	C-341/01	29-Apr-2004	Plato Plastik Robert Frank	Preliminary Ruling
117	C-87/02	10-Jun-2004	Commission v Italy	Failure to fulfil obligations
118	C-421/02	24-Jun-2004	Commission v United Kingdom	Failure to fulfil obligations
119	C-1/03	7-Sep-2004	Van de Walle and Others	Preliminary Ruling
120	C-127/02	7-Sep-2004	Waddenvereniging and Vogelbeschermingsvereniging	Preliminary Ruling
121	C-227/01	16-Sep-2004	Commission v Spain	Failure to fulfil obligations
122	C-280/02	23-Sep-2004	Commission v France	Failure to fulfil obligations
123	C-457/02	11-Nov-2004	Niselli	Preliminary Ruling
124	T-168/02	30-Nov-2004	IFAW Internationaler Tierschutz-Fonds v Commission	Actions for annulment
125	C-79/03	9-Dec-2004	Commission v Spain	Failure to fulfil obligations
126	C-309/02	14-Dec-2004	Radlberger Getränkegesellschaft and S. Spitz	Preliminary Ruling

No.	Number	Date	Tittle	Action
127	C-463/01	14-Dec-2004	Commission v Germany	Failure to fulfil obligations
128	C-62/03	16-Dec-2004	Commission v United Kingdom	Failure to fulfil obligations
129	C-6/03	14-Apr-2005	Deponiezweckverband Eiterköpfe	Preliminary Ruling
130	C-186/04	21-Apr-2005	Housieaux	Preliminary Ruling
131	C-494/01	26-Apr-2005	Commission v Ireland	Failure to fulfil obligations
132	C-83/03	2-Jun-2005	Commission v Italy	Failure to fulfil obligations
133	C-270/03	9-Jun-2005	Commission v Italy	Failure to fulfil obligations
134	C-364/03	7-Jul-2005	Commission v Greece	Failure to fulfil obligations
135	C-121/03	8-Sep-2005	Commission v Spain	Failure to fulfil obligations
136	C-416/02	8-Sep-2005	Commission v Spain	Failure to fulfil obligations
137	C-176/03	13-Sep-2005	Commission v Council	Actions for annulment
138	C-6/04	20-Oct-2005	Commission v United Kingdom	Failure to fulfil obligations
139	C-320/03	15-Nov-2005	Commission v Austria	Failure to fulfil obligations
140	C-94/03	10-Jan-2006	Commission v Council	Actions for annulment
141	C-98/03	10-Jan-2006	Commission v Germany	Failure to fulfil obligations
142	C-37/05	12-Jan-2006	Commission v United Kingdom	Failure to fulfil obligations
143	C-122/04	23-Feb-2006	Commission v Parliament and Council	Actions for annulment
144	C-209/04	23-Mar-2006	Commission v Austria	Failure to fulfil obligations
145	C-290/03	4-May-2006	Barker	Preliminary Ruling
146	C-508/03	4-May-2006	Commission v United Kingdom	Failure to fulfil obligations
147	C-98/04	4-May-2006	Commission v United Kingdom	Failure to fulfil obligations
148	C-221/04	18-May-2006	Commission v Spain	Failure to fulfil obligations
149	C-459/03	30-May-2006	Commission v Ireland	Failure to fulfil obligations
150	C-60/05	8-Jun-2006	WWF Italia and Others	Preliminary Ruling
151	C-244/05	14-Sep-2006	Bund Naturschutz in Bayern and Others	Preliminary Ruling
152	C-216/05	9-Nov-2006	Commission v Ireland	Failure to fulfil obligations
153	C-486/04	23-Nov-2006	Commission v Italy	Failure to fulfil obligations
154	C-32/05	30-Nov-2006	Commission v Luxembourg	Failure to fulfil obligations
155	C-183/05	11-Jan-2007	Commission v Ireland	Failure to fulfil obligations
156	C-199/04	1-Feb-2007	Commission v United Kingdom	Failure to fulfil obligations
157	C-176/05	1-Mar-2007	KVZ retec	Preliminary Ruling
158	C-135/05	26-Apr-2007	Commission v Italy	Failure to fulfil obligations
159	C-391/06	3-May-2007	Commission v Ireland	Failure to fulfil obligations
160	C-252/05	10-May-2007	Thames Water Utilities	Preliminary Ruling
161	C-508/04	10-May-2007	Commission v Austria	Failure to fulfil obligations
162	T-216/05	22-May-2007	Mebrom v Commission	Appeal
163	C-342/05	14-Jun-2007	Commission v Finland	Failure to fulfil obligations
164	T-182/06	27-Jun-2007	Netherlands v Commission	Appeal
165	C-255/05	5-Jul-2007	Commission v Italy	Failure to fulfil obligations
166	C-507/04	12-Jul-2007	Commission v Austria	Failure to fulfil obligations
167	C-388/05	20-Sep-2007	Commission v Italy	Failure to fulfil obligations
168	C-179/06	4-Oct-2007	Commission v Italy	Failure to fulfil obligations
169	C-248/05	25-Oct-2007	Commission v Ireland	Failure to fulfil obligations
170	T-374/04	7-Nov-2007	Germany v Commission	Actions for annulment

No.	Number	Date	Tittle	Action
171	C-418/04	13-Dec-2007	Commission v Ireland	Failure to fulfil obligations
172	C-194/05	18-Dec-2007	Commission v Italy	Failure to fulfil obligations
173	C-195/05	18-Dec-2007	Commission v Italy	Failure to fulfil obligations
174	C-263/05	18-Dec-2007	Commission v Italy	Failure to fulfil obligations
175	C-64/05 P	18-Dec-2007	Sweden v Commission	Appeal
176	C-2/07	28-Feb-2008	Abraham and Others	Preliminary Ruling
177	C-14/06	1-Apr-2008	Parliament v Commission	Actions for annulment
178	C-308/06	3-Jun-2008	Intertanko and Others	Preliminary Ruling
179	C-219/07	19-Jun-2008	Nationale Raad van Dierenkwekers en Liefhebbers and Andibel	Preliminary Ruling
180	C-188/07	24-Jun-2008	Commune de Mesquer	Preliminary Ruling
181	C-215/06	3-Jul-2008	Commission v Ireland	Failure to fulfil obligations
182	C-142/07	25-Jul-2008	Ecologistas en Acción-CODA	Preliminary Ruling
183	C-237/07	25-Jul-2008	Janecek	Preliminary Ruling
184	T-75/06	9-Sep-2008	Bayer CropScience and Others v Commission	Appeal
185	C-251/07	11-Sep-2008	Gävle Kraftvärme	Preliminary Ruling
186	C-381/07	6-Nov-2008	Association nationale pour la protection des eaux and rivières	Preliminary Ruling
187	C-66/06	20-Nov-2008	Commission v Ireland	Failure to fulfil obligations
188	C-317/07	4-Dec-2008	Lahti Energia	Preliminary Ruling
189	C-387/07	11-Dec-2008	MI.VER and Antonelli	Preliminary Ruling
190	C-127/07	16-Dec-2008	Arcelor Atlantique and Lorraine and Others	Preliminary Ruling
191	C-473/07	22-Jan-2009	Association nationale pour la protection des eaux and rivières and Association OABA	Preliminary Ruling
192	C-552/07	17-Feb-2009	Azelvandre	Preliminary Ruling
193	C-373/07 P	2-Apr-2009	Mebrom v Commission	Appeal
194	C-362/06 P	23-Apr-2009	Sahlstedt and Others v Commission	Appeal
195	C-75/08	30-Apr-2009	Mellor	Preliminary Ruling
196	C-165/08	16-Jul-2009	Commission v Poland	Failure to fulfil obligations
197	C-344/08	16-Jul-2009	Rubach	Preliminary Ruling
198	C-427/07	16-Jul-2009	Commission v Ireland	Failure to fulfil obligations
199	T-380/06	7-Oct-2009	Vischim v Commission	Actions for annulment
200	T-420/05	7-Oct-2009	Vischim v Commission	Actions for annulment
201	C-263/08	15-Oct-2009	Djurgården-Lilla Värtans Miljöskyddsförening	Preliminary Ruling
202	C-188/08	29-Oct-2009	Commission v Ireland	Failure to fulfil obligations
203	C-495/08	12-Nov-2009	Commission v United Kingdom	Failure to fulfil obligations
204	C-205/08	10-Dec-2009	Umweltanwalt von Kärnten	Preliminary Ruling
205	C-226/08	14-Jan-2010	Stadt Papenburg	Preliminary Ruling
206	C-209/09	25-Feb-2010	Lahti Energia	Preliminary Ruling
207	T-16/04	2-Mar-2010	Arcelor v Parliament and Council	Actions for annulment
208	T-429/05	3-Mar-2010	Artegodan v Commission	Appeal
209	C-241/08	4-Mar-2010	Commission v France	Failure to fulfil obligations
210	C-297/08	4-Mar-2010	Commission v Italy	Failure to fulfil obligations
211	C-378/08	9-Mar-2010	ERG and Others	Preliminary Ruling
212	C-379/08	9-Mar-2010	ERG and Others	Preliminary Ruling
213	C-392/08	25-Mar-2010	Commission v Spain	Failure to fulfil obligations

No.	Number	Date	Tittle	Action
214	C-64/09	15-Apr-2010	Commission v France	Failure to fulfil obligations
215	C-346/08	22-Apr-2010	Commission v United Kingdom	Failure to fulfil obligations
216	C-82/09	22-Apr-2010	Dimos Agiou Nikolaou	Preliminary Ruling
217	C-308/08	20-May-2010	Commission v Spain	Failure to fulfil obligations
218	C-105/09	17-Jun-2010	Terre wallonne	Preliminary Ruling
219	C-526/08	29-Jun-2010	Commission v Luxembourg	Failure to fulfil obligations
220	C-343/09	8-Jul-2010	Afton Chemical	Preliminary Ruling
221	T-69/08	9-Dec-2010	Poland v Commission	Actions for annulment
222	C-266/09	16-Dec-2010	Stichting Natuur en Milieu and Others	Preliminary Ruling
223	C-524/09	22-Dec-2010	Ville de Lyon	Preliminary Ruling
224	C-50/09	3-Mar-2011	Commission v Ireland	Failure to fulfil obligations
225	C-240/09	8-Mar-2011	Lesoochranárske zoskupenie	Preliminary Ruling
226	C-275/09	17-Mar-2011	Brussels Hoofdstedelijk Gewest and Others	Preliminary Ruling
227	C-115/09	12-May-2011	Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen	Preliminary Ruling
228	C-376/09	19-May-2011	Commission v Malta	Failure to fulfil obligations
229	C-165/09	26-May-2011	Stichting Natuur en Milieu and Others	Preliminary Ruling
230	C-538/09	26-May-2011	Commission v Belgium	Failure to fulfil obligations
231	C-15/10	21-Jul-2011	Etimine	Preliminary Ruling
232	C-2/10	21-Jul-2011	Azienda Agro-Zootecnica Franchini and Eolica di Altamura	Preliminary Ruling
233	C-71/10	28-Jul-2011	Office of Communications	Preliminary Ruling
234	C-53/10	15-Sep-2011	Franz Mücksch	Preliminary Ruling
235	C-295/10	22-Sep-2011	Valčiukienė and Others	Preliminary Ruling
236	C-128/09	18-Oct-2011	Boxus and Roua	Preliminary Ruling
237	C-404/09	24-Nov-2011	Commission v Spain	Failure to fulfil obligations
238	C-585/10	15-Dec-2011	Møller	Preliminary Ruling
239	C-28/09	21-Dec-2011	Commission v Austria	Failure to fulfil obligations
240	C-366/10	21-Dec-2011	Air Transport Association of America and Others	Preliminary Ruling
241	C-204/09	14-Feb-2012	Flachglas Torgau	Preliminary Ruling
242	C-182/10	16-Feb-2012	Solvay and Others	Preliminary Ruling
243	C-41/11	28-Feb-2012	Inter-Environnement Wallonie and Terre wallonne	Preliminary Ruling
244	C-340/10	15-Mar-2012	Commission v Cyprus	Failure to fulfil obligations
245	C-504/09 P	29-Mar-2012	Commission v Poland	Failure to fulfil obligations
246	C-121/11	19-Apr-2012	Pro-Braine and Others	Preliminary Ruling
247	T-338/08	14-Jun-2012	Stichting Natuur en Milieu and Pesticide Action Network Europe v Commission	Appeal
248	T-396/09	14-Jun-2012	Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht v Commission	Appeal
249	C-177/11	21-Jun-2012	Syllogos Ellinon Poleodomon kai Chorotakton	Preliminary Ruling
250	C-43/10	11-Sep-2012	Nomarchiaki Aftodioikisi Aitoloakarnanias and Others	Preliminary Ruling
251	C-416/11 P	29-Nov-2012	United Kingdom v Commission	Appeal
252	C-279/11	19-Dec-2012	Commission v Ireland	Failure to fulfil obligations
253	C-374/11	19-Dec-2012	Commission v Ireland	Failure to fulfil obligations
254	C-68/11	19-Dec-2012	Commission v Italy	Failure to fulfil obligations
255	C-416/10	15-Jan-2013	Križan and Others	Preliminary Ruling
256	C-358/11	7-Mar-2013	Lapin luonnonsuojelupiiri	Preliminary Ruling

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257	C-420/11	14-Mar-2013	Leth	Preliminary Ruling
258	C-244/12	21-Mar-2013	Salzburger Flughafen	Preliminary Ruling
259	C-258/11	11-Apr-2013	Sweetman and Others	Preliminary Ruling
260	C-463/11	18-Apr-2013	L	Preliminary Ruling
261	T-526/10	25-Apr-2013	Inuit Tapiriit Kanatami and Others v Commission	Appeal
262	C-113/12	3-Oct-2013	Brady	Preliminary Ruling
263	C-533/11	17-Oct-2013	Commission v Belgium	Failure to fulfil obligations
264	C-566/11	17-Oct-2013	Iberdrola and Gas Natural	Preliminary Ruling
265	C-72/12	7-Nov-2013	Gemeinde Altrip and Others	Preliminary Ruling
266	T-456/11	14-Nov-2013	ICdA and Others v Commission	Actions for annulment
267	C-576/11	28-Nov-2013	Commission v Luxembourg	Failure to fulfil obligations
268	C-241/12	12-Dec-2013	Shell Nederland	Preliminary Ruling
269	C-292/12	12-Dec-2013	Ragn-Sells	Preliminary Ruling
270	C-279/12	19-Dec-2013	Fish Legal and Shirley	Preliminary Ruling
271	C-281/11	19-Dec-2013	Commission v Poland	Failure to fulfil obligations
272	C-67/12	16-Jan-2014	Commission v Spain	Failure to fulfil obligations
273	C-537/11	23-Jan-2014	Manzi and Compagnia Naviera Orchestra	Preliminary Ruling
274	C-530/11	13-Feb-2014	Commission v United Kingdom	Failure to fulfil obligations
275	C-301/12	3-Apr-2014	Cascina Tre Pini	Preliminary Ruling
276	C-532/13	4-Sep-2014	Sofia Zoo	Preliminary Ruling
277	C-525/12	11-Sep-2014	Commission v Germany	Failure to fulfil obligations
278	T-614/13	26-Sep-2014	Romonta v Commission	Appeal
279	C-196/13	2-Dec-2014	Commission v Italy	Failure to fulfil obligations
280	C-551/13	18-Dec-2014	SETAR	Preliminary Ruling
281	C-401/12 P	13-Jan-2015	Council v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht	Appeal
282	C-404/12 P	13-Jan-2015	Council v Stichting Natuur en Milieu and Pesticide Action Network Europe	Appeal
283	C-498/13	5-Feb-2015	Agrooikosystimata	Preliminary Ruling
284	C-531/13	11-Feb-2015	Marktgemeinde Straßwalchen and Others	Preliminary Ruling
285	C-534/13	4-Mar-2015	Fipa Group and Others	Preliminary Ruling
286	C-570/13	16-Apr-2015	Gruber	Preliminary Ruling
287	C-461/13	1-Jul-2015	Bund für Umwelt und Naturschutz Deutschland	Preliminary Ruling
288	C-398/13 P	3-Sep-2015	Inuit Tapiriit Kanatami and Others v Commission	Appeal
289	C-473/14	10-Sep-2015	Dimos Kropias Attikis	Preliminary Ruling
290	T-268/10 RENV	25-Sep-2015	PPG and SNF v ECHA	Appeal
291	T-360/13	25-Sep-2015	VECCO and Others v Commission	Appeal
292	C-71/14	6-Oct-2015	East Sussex County Council	Preliminary Ruling
293	C-137/14	15-Oct-2015	Commission v Germany	Failure to fulfil obligations
294	C-141/14	14-Jan-2016	Commission v Bulgaria	Failure to fulfil obligations
295	C-556/14 P	7-Apr-2016	Holcim (Romania) v Commission	Appeal
296	C-191/14	28-Apr-2016	Borealis Polyolefine	Preliminary Ruling
297	C-158/15	9-Jun-2016	Elektriciteits Produktiemaatschappij Zuid-Nederland	Preliminary Ruling
298	C-69/15	9-Jun-2016	Nutrivet	Preliminary Ruling
299	C-147/15	28-Jul-2016	Edilizia Mastrodonato	Preliminary Ruling

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300	C-457/15	28-Jul-2016	Vattenfall Europe Generation	Preliminary Ruling
301	C-584/14	7-Sep-2016	Commission v Greece	Failure to fulfil obligations
302	C-506/14	26-Oct-2016	Yara Suomi and Others	Preliminary Ruling
303	C-290/15	27-Oct-2016	D'Oultremont and Others	Preliminary Ruling
304	C-243/15	8-Nov-2016	Lesoochranárske zoskupenie VLK	Preliminary Ruling
305	C-504/14	10-Nov-2016	Commission v Greece	Failure to fulfil obligations
306	C-348/15	17-Nov-2016	Stadt Wiener Neustadt	Preliminary Ruling
307	C-408/15 P	24-Nov-2016	Ackermann Saatzucht and Others v Parliament and Council	Appeal
308	C-461/14	24-Nov-2016	Commission v Spain	Failure to fulfil obligations
309	C-645/15	24-Nov-2016	Bund Naturschutz in Bayern and Wilde	Preliminary Ruling
310	T-177/13	15-Dec-2016	TestBioTech and Others v Commission	Appeal
311	C-444/15	21-Dec-2016	Associazione Italia Nostra Onlus	Preliminary Ruling
312	T-189/14	13-Jan-2017	Deza v ECHA	Actions for annulment
313	C-460/15	19-Jan-2017	Schaefer Kalk	Preliminary Ruling
314	C-321/15	8-Mar-2017	ArcelorMittal Rodange and Schifflange	Preliminary Ruling
315	C-315/16	30-Mar-2017	Lingurár	Preliminary Ruling
316	C-335/16	30-Mar-2017	VG Čistoća	Preliminary Ruling
317	C-488/15	5-Apr-2017	Commission v Bulgaria	Failure to fulfil obligations
318	C-142/16	26-Apr-2017	Commission v Germany	Failure to fulfil obligations
319	T-115/15	11-May-2017	Deza v ECHA	Appeal
320	C-549/15	22-Jun-2017	E.ON Biofor Sverige	Preliminary Ruling
321	C-129/16	13-Jul-2017	Túrkevei Tejtermelő Kft.	Preliminary Ruling
322	C-60/15 P	13-Jul-2017	Saint-Gobain Glass Deutschland v Commission	Appeal
323	C-651/15 P	13-Jul-2017	VECCO and Others v Commission	Appeal
324	C-196/16	26-Jul-2017	Comune di Corridonia	Preliminary Ruling
325	C-664/15	20-Dec-2017	Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation	Preliminary Ruling
326	C-328/16	22-Feb-2018	Commission v Greece	Failure to fulfil obligations
327	C-336/16	22-Feb-2018	Commission v Poland	Failure to fulfil obligations
328	C-572/16	22-Feb-2018	INEOS Köln	Preliminary Ruling
329	C-117/17	28-Feb-2018	Comune di Castelbellino	Preliminary Ruling
330	C-577/16	28-Feb-2018	Trinseo Deutschland	Preliminary Ruling
331	T-33/16	14-Mar-2018	TestBioTech v Commission	Actions for annulment
332	C-470/16	15-Mar-2018	North East Pylon Pressure Campaign and Sheehy	Preliminary Ruling
333	C-323/17	12-Apr-2018	People Over Wind and Sweetman	Preliminary Ruling
334	C-97/17	26-Apr-2018	Commission v Bulgaria	Failure to fulfil obligations
335	C-160/17	7-Jun-2018	Thybaut and Others	Preliminary Ruling
336	C-671/16	7-Jun-2018	Inter-Environnement Bruxelles and Others	Preliminary Ruling
337	C-557/15	21-Jun-2018	Commission v Malta	Failure to fulfil obligations
338	C-626/16	4-Jul-2018	Commission v Slovakia	Failure to fulfil obligations
339	C-15/17	11-Jul-2018	Bosphorus Queen Shipping	Preliminary Ruling
340	C-329/17	7-Aug-2018	Prenninger and Others	Preliminary Ruling
341	C-293/17	7-Nov-2018	Coöperatie Mobilisation for the Environment and Vereniging Leefmilieu	Preliminary Ruling
342	C-461/17	7-Nov-2018	Holohan and Others	Preliminary Ruling

No.	Number	Date	Tittle	Action
343	C-60/18	2-Mar-19	Tallinna Vesi	Preliminary Ruling
344	C-487/17	28-Mar-19	Verlezza and Others	Preliminary Ruling
345	C-305/18	8-May-19	"Verdi Ambiente e Società - Aps Onulu" and Others	Preliminary Ruling
346	C-689/17	16-May-19	Conti 11. Container Schiffahrt	Preliminary Ruling
347	C-321/18	12-Jun-19	Terre wallonne	Preliminary Ruling
348	C-43/18	12-Jun-19	CFE	Preliminary Ruling
349	C-624/17	4-Jul-19	Tronex	Preliminary Ruling
350	C-411/17	29-Jul-19	Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen	Preliminary Ruling
351	C-82/17 P	12-Sep-19	TestBioTech and Others v Commission	Appeal
352	C-197/18	3-Oct-19	Wasserleitungsverband Nördliches Burgenland and Others	Preliminary Ruling
353	C-105/18	7-Nov-19	UNESA	Preliminary Ruling
354	C-280/18	7-Nov-19	Flausch and Others	Preliminary Ruling
355	C-261/18	12-Nov-19	Commission v Ireland (Parc éolien de Derrybrien)	Failure to fulfil obligations

Annexe No. 2 Complementary legal reviews

Annexe # 2.1 Binding Environmental Instruments of International Law

The International Bill of Human Rights

The International Bill of Human Rights is a set of instruments, adopted within the framework of the United Nations, which is constituted by "[…] *the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols*".[884]

Among them, although the 1948-Universal Declaration does not actually have a compulsory legal character but either only a formalistic declarative value, it has reached an enormous ethical–and even juridical–influence worldwide to the point that both 1966-covenants are predicated on it. Indeed, it has also reportedly "[…] *acquired a status juridically more important than originally intended,* [having] *been widely used, even by national courts, as a means of judging compliance with human rights obligations under the U.N. Charter*".[885]

In any event, the three of them are considered the foundational legal documents of human rights. As such, their sturdy orientation towards people's benefit marks undoubtedly their anthropocentric character *par excellence.* The most evident sample of this human-centred bias could be probably illustrated through the conception of "*inherent dignity*", which is often associated with different dimensions of human welfare, such as liberty, work, or education, for example. Indeed, the entire system of human rights derives expressly from the idea of *inherent dignity* as its cradle of origin. Likewise, freedom, justice, and peace rely on it, along with equal and inalienable rights of humanity.[886]

More specifically, although there is not any reference to the right to a healthy environment within the International Bill of Human Rights, the question of the *inherent dignity* appears recurrently as one of the ethical roots of other numerous international agreements. Moreover, it is usually mentioned in different academic ambits and analysed as

[884] Office of the High Commissioner for Human Rights, OHCHR (1996) 1.
[885] Weston (1984) 273.
[886] Universal Declaration (1948) Preamble, recitals 1st and 5th, Articles 1, 22 and 23 (3); Political Covenant (1966) Preamble, recitals 1st and 2nd, Article 10 (1); Economic Covenant (1966) Preamble, recitals 1st and 2nd, Article 13 (1).

the starting point of the global legal system in this matter.[887] Maybe that is why Holmes Rolston III affirmed that "[…] *the concept of rights that has worked so well to protect human dignity is a hallmark of recent cultural progress*".[888]

Consequently, the International Bill of Human Rights constitutes indisputably a compendium of anthropocentric principles and statements, thoroughly slanted towards human sake. This aspect is understandable, above all in the case of the Universal Declaration, if one bears in mind the post-war period in which it got adopted.[889]

Convention on International Trade in Endangered Species of Wild Fauna and Flora

The historical roots of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) can be located in a 1963-resolution adopted by the members of the International Union for Conservation of Nature (IUCN). Later, representatives coming from eighty countries concurred with the final version during a meeting, carried out in Washington D.C., U.S.A., on 3 March 1973. Lastly, CITES came into force on 1 July 1975. Then, reforms were introduced twice to the instrument, via the Bonn Amendment of 1979 and the Gaborone Amendment of 1983. By and large, the instrument's core purpose consists of regulating the commerce of species, relying on diverse levels of threatening to which they are exposed. Three appendixes encompass different categories of extinction's risk.[890]

United Nations Framework Convention on Climate Change

The origin of the convention dates from 1988 when the World Meteorological Organization (WMO) and the UNEP decided to establish the Intergovernmental Panel on Climate Change (IPCC). It is one of the resulting agreements negotiated during the U.N. Conference on Environment and Development, also known as Earth Summit, carried out in Rio de Janeiro, Brazil, between 3 and 14 June 1992. It finally entered into force on 21 March 1994.[891]

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[887] In deep, see Leib (2011) 46ff. See also Taylor (1998a) 315; Borràs (2016) 116; Marks (1981) 440; Cullet (1995) 31; Chapman (1993) 223-4; Alfredsson and Ovsiouk (1991) 22-3; Schram (1992-1993) 144-6; Fung (Fung, 2006) 112.
[888] Rolston III (1993) 256. See also Marks (1981) 440; Cullet (1995) 26.
[889] United Nations (2018) History of the Document, para. 1st.
[890] CITES (1973) Articles II-V; Bonn Amendment (1979); Gaborone Amendment (1983); What is CITES? (2015) paras. 1st and 4th.
[891] United Nations Conference on Environment and Development (1992) para. 1st; UNFCCC Enters into Force (1994) para 1st and IPCC Established (1988) para. 1st.

It is quite probable the Convention on Climate Change can be the core treaty in environmental matters of the current times. It seems to be so, above all, if one ponders about its primary aim, which consists of facing the problem of climate change, an aspect of planetary range and importance, whose impacts have been deemed inevitable for a long time ago. The chief measure employed to cope with the effects of global warming has been usually the control of the global average temperature, establishing constraints to avoid its significant increase.[892]

By and large, a thought-provoking peculiarity of the Convention on Climate Change bears on the manner how the treaty tackles the notion of rights. If one takes pains to review the usage of the term thoroughly, it is not as frequent as one could assume it is. Consequently, there are only eight explicit references about different kinds of entitlements, including the right to a healthy environment. The others are comprised of rights to exploit natural resources, to promote sustainable development, to vote, and the concurrent exercise of those rights and the economic justification of actions against climate change.[893] In sum, the overall outline of the instrument does not lean towards a rights-based approach.

According to the information taken from the United Nations Treaty Collection, the instrument has experienced four essential milestones in terms of amendments.[894] The early one–so-called *Kyoto Protocol*–corresponds to 1997, and it is considered the first world treaty to reduce greenhouse gas emissions–this is the principal objective.[895] The leading involved greenhouse gases were Carbon dioxide (CO_2), Methane (CH_4), Nitrous oxide (N_2O), Hydrofluorocarbons (HFCs), Perfluorocarbons (PFCs), and Sulphur hexafluoride (SF_6). Another noteworthy aim consisted of promoting sustainable development, through the implementation of policies and measures, such as the enhancement of energy efficiency, the protection and improvement of sinks and reservoirs of greenhouse gases, the promotion of sustainable agriculture, and so on. It finally came into effect on 16 February 2015.[896]

Another legal reform was proposed by Belarus concerning the inclusion of its quantified emission limitation or reduction commitment in 92%, applicable to itself, as an Amendment to Annex B of the Kyoto Protocol. It formed part of the second session of the Conference of

[892] History of the Convention (2015) Essential background, para. 5th.
[893] Convention on Climate Change (1992) Recitals 8th and 17th, Articles 1, 3 (4), 4 (1f), 18, 22 (2).
[894] United Nations Treaty Collection (2019) Chapter XXVII: Environment.
[895] Kyoto Protocol Adopted (1997) para. 1st.
[896] Kyoto Protocol (1997) Article 2 and Annex A; Kyoto Protocol Enters into Force (2005) para. 1st.

the Parties to the Kyoto Protocol, carried out in Nairobi, Kenya, from 6 to 17 November 2006. However, it is not yet in force.[897]

Thirdly, a new proposal to modify the Kyoto Protocol occurred in 2012, in Doha, Qatar. The text of the amendment involves two foremost changes. The first one comprised a new period of commitment, i.e., 2013-2020, and the second one consisted of the addition of Nitrogen trifluoride (NF_3) to the list of Greenhouse gases, but only applicable for the second commitment period. The rest of the changes revolve around calculations, adjustments, and so on. The Doha Amendment also includes an annexe regarding political declarations. Nevertheless, it is neither yet in force.[898]

Finally, the so-called Paris Agreement of 2015, in force since 2016, probably depicts the most archetypal effort to cope with climate change, not only in terms of national commitments to diminish the temperature but also in terms of participation. Thus, on the one hand, it turns out crucial the compromises to hold the increase in the global average temperature to well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 degrees Celsius above pre-industrial levels. Besides, it is interesting that both measures have been considered as mechanisms to promote sustainable development and alleviate poverty.[899]

On the other hand, speaking about participation, the signature of the Paris Agreement was a real success. It was the first time that all nations, i.e., the 195 countries recognised by the United Nations, made a "*common cause*" to combat climate change, adapt to its effects, and implement actions and investments to accomplish these ends.[900] Maybe that is the reason for its enormous media coverage and its vast political influence,[901] as well as the world shock brought about for the USA withdrawal in 2017.[902] Perhaps, all these episodes succinctly epitomise the transcendence of this instrument. Moreover, one should argue it also emphasises the global debate about the environmental crisis, where prevails the discursive exchange of beliefs and disbeliefs over the scientific dimension or the social sphere.

In any case, despite a convention, four amendments (two in force), twenty-five conferences of the parties, countless meetings, and other procedures, one could hardly affirm

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[897] Proposal from Belarus to amend Annex B to the Kyoto Protocol (2006) Annex.
[898] Amendment to the Kyoto Protocol pursuant to its Article 3, paragraph 9, the Doha Amendment (2012) Annexes I and II.
[899] Paris Agreement (2015) Article 2 (a).
[900] The Paris Agreement Website (2015) para. 1st; Historic Paris Agreement on Climate Change (2015) paras. 1st and 2nd.
[901] See § 1.1.5.
[902] Communication of the United States of America (2017) 1

the planet's climate have decisively improved. The hypothesis to explain these unfavourable results consists of the anthropocentric degree of its contents.

Convention on Biological Diversity

The first meetings of the *Ad Hoc* Working Group of Experts on Biodiversity took place in November 1988. This team got formally established in May 1989, being its central objective the preparation of "[…] *an international legal instrument for the conservation and sustainable use of biological diversity*". The convention was initially opened for signature on 5 June 1992, during the Rio Conference, and it finally entered into force one and a half years later, on 29 December 1993.[903]

Despite its green discourse at times, the convention's overall intent does not only frame within the conservation of biodiversity. It also promotes, quite similarly to the Convention on Climate Change, a human-centred bias, materialised in the "*sustainable use*" of biodiversity and genetic resources, and the "*fair and equitable sharing*" of their benefits.[904]

The instrument counts on three protocols. The first one is the Cartagena Protocol on Biosafety, signed in 2000, which came into force in 2003, with the overall objective of adequately protecting biodiversity and human health, in case of transfer, handling, and utilisation of biotechnologically modified organisms, emphasising trans-boundary movements. The second one is the Nagoya Protocol on Access to Genetic Resources, opened to signatures in 2010. It finally entered into effect in 2014. Its aim was the fair and equitable sharing of the benefits brought about the sustainable use, access, transfer of technology, rights over the resources, and adequate funding of genetic resources, as mechanisms to conserve biodiversity. And the last one is the Nagoya - Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol, whose primary purpose consisted of providing international rules and procedures of liability and redress regarding living modified organisms. The document also takes into account the risks to human health. It was signed in 2010 and came into force in 2018.[905]

[903] History of the Convention (2019) para. 2nd.
[904] Convention on Biological Diversity (1992) Article 1.
[905] Cartagena Protocol on Biosafety to the Convention on Biological Diversity (2000) Article 1; Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (2010) Article 1; Nagoya - Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol (2010) Article 1.

Convention to Combat Desertification in those countries experiencing serious Drought and/or Desertification, particularly in Africa

The responsible entity for the elaboration of the document was the Intergovernmental Negotiating Committee, established in Paris, in 1992. The instrument was opened for signature in 1994 and finally entered into force on 26 December 1996. In general, the instrument's title describes quite precisely its central aim, which could be nuanced in context through a framework of additional elements; such as, for one, international cooperation, sustainable development, enhancement of soil's productivity, and improvement of living conditions, among others. Moreover, the convention counts on specific annexes dedicated to Africa, Asia, Latin America, the Caribbean region, and the Northern Mediterranean region.[906] The agreement has neither amendments nor protocols.

Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

The adoption of this instrument was carried out on 25 June 1998, during the Fourth "*Environment for Europe*" Ministerial Conference, which was held in Aarhus, Denmark (thenceforth, and due to the mentioned reason, it is known as *Aarhus Convention* as well). Its core aim is to guarantee "[…] *the rights of access to information, public participation in decision-making, and access to justice in environmental matters* […]" so that signatories can protect the human right to live in a suitable environment for health and welfare. It came into force on 30 October 2001.[907]

The convention banks on one protocol and one amendment, although only the former is currently in effect. The 2003-Protocol on Pollutant Release and Transfer Registers entered into force in 2009. Its primary objective is to enhance "[…] *public access to information through the establishment of coherent, integrated, nationwide pollutant release and transfer registers (PRTRs)*". The final idea coincides with the scope of the principal instrument, i.e., facilitate public participation in environmental decision-making processes. The amendment to the convention instead was formulated during a meeting, held in Almaty, Kazakhstan,

[906] Convention to Combat Desertification (1994) Article 2; U.N.G.A. Resolution No. A/RES/47/188 (1993) paras. 2nd and 23rd; United Nations Treaty Collection (1994) Status of the Convention to Combat Desertification, Chapter XXVII, No. 10
[907] Ebbesson, et al. (2014) 15; Aarhus Convention (1998) Article 1.

between 25 and 27 May 2005. However, it is not yet in force. Mostly, the proposed modification comprises the inclusion of an annexe to regulate public participation in decisions on the deliberate release into the environment and placing on the market of genetically modified organisms (GMO). Interestingly, the amendment pretends to put GMO on the commerce, a possibility that the original convention does not lay down.[908]

Regional instruments of human rights

In the international arena, beyond the Universal Declaration, there is not any in-force instrument of human rights with an overall character on a world scale. Instead, there are conventions regarding specific topics of rights, intended to the protection of priority groups, such as slaves, workers, racial minorities, women, children, and so on. Conventionally, the question of human rights, from a general perspective, has been addressed through regional instruments, whose jurisdiction corresponds to a continental scope. In this line, the analysed documents within this section are:

- Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (1952).[909]
- American Convention on Human Rights, also known as the Pact of San José (1969).[910]
- African Charter on Human and People's Rights (1981).[911]
- Asian Human Rights Charter (1998), also known as A People's Charter.[912] It deals only with a soft law and consequently, it is not in force.
- Arab Charter on Human Rights (2004).[913]
- Charter of Fundamental Rights of the European Union (2007).[914]

Environmental Soft Law

[908] Protocol on Pollutant Release and Transfer Registers to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (2003) Article 1; Amendment to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (2005) Article 6 bis.
[909] Additional Protocol to the European Convention on Human Rights (1952).
[910] American Convention on Human Rights (1969).
[911] African Charter on Human Rights (1981).
[912] Asian Human Rights Charter (1998).
[913] Arab Charter on Human Rights (2004).
[914] EU Charter of Fundamental Rights (2012).

Soft Law is a paradoxical expression, used to describe a process of normative creation, which is not mandatory in the international arena, at least in a conventional manner or beyond its authoritative–often authoritarian–language. Sociologists address it as a phenomenon, structural in its development, diversified in its components, and rapid in its evolution, especially in regard to the increase of the world economy, the state interdependence, and the progress of science and technology.[915] Starting from Stockholm, the U.N. declarations and resolutions are examples.

From the United Nations perspective, the backgrounds of the connexion among human rights and environment are located mostly in two of the most prominent declarations of principles everybody knows. They are the Stockholm Declaration of the United Nations Conference on the Human Environment (1972) and the Rio Declaration on Environment and Development (1992).[916]

The Stockholm Declaration was the outcome of multiple attempts to promote the diminution of the gap between environmental protection and economic growth.[917] Indeed, this dichotomy was being already debated through several works and events worldwide, coming even to give rise to the very concept of "*sustainable development*", popularised later by the Brundtland Report.[918] Some experts consider the 1972-Conference on the Human Environment–the scenario where countries agreed the declaration's contents–as the most successful international event of those times. It is due to the adoption of institutional and financial arrangements, the commitment of an ambitious action plan, and an accord about shared principles to guide people towards the preservation and strengthening of the human environment.[919]

On its part, the 1992-Rio Declaration is much more than mere ratification of what nations agreed in Stockholm, even though there is an express reaffirmation of principles in the first recital. The fact of having "[…] *been endorsed by virtually every nation in the world*", as David Boyd highlights, and quoted in practically all existing works about the topic[920] illustrates its global significance. Likewise, as mentioned by some authors, the chronicle concerning the negotiation of its title's wording denotes its original envisions of

[915] Dupuy (1991) 420-1.
[916] Stockholm Declaration (1972) Principle 1; Rio Declaration (1992) Principle 1.
[917] Taylor (1998a) 37.
[918] Brundtland Report (1987) 24-5.
[919] Sohn (1973) 423.
[920] For example, see Borràs (2016) 117; Cullet (1995) 29; Déjeant-Pons and Pallemaerts (2002) 57; Giorgetta (2002) 173; Leib (2011) 5; Sands (2003) 54-7, Shelton (2008) 42; Taylor (1998a) 335.

being an "*ideological umbrella for Agenda 21*", or a real "*Earth Charter*".[921] Both aspects, however, did not weaken its unquestionable influence on worldwide debate about development, economic growth, and sustainability.[922]

Although there is availability of numerous similar documents concerning the disjunctive between environment and development, a more detailed analysis of additional instruments would be useless for this study. For this reason, it will be enough to just quote the most noticeable.

Thus, for example, it is undeniable the influence exerted in the international green discourse by works, such as "*Silent Spring*" (1962) or "*The Limits to Growth*" (1972).[923] Likewise, certain international events have also influenced the environmental field. In this regard, the *Intergovernmental Conference of Experts on the scientific basis for the rational use and conservation of the resources of the biosphere* (1968), also known as "*The Biosphere Conference*", was the first international forum to discuss the notion of sustainable development, despite the fact that it was not the original aim. The conference was quite relevant to the global debate of sustainable development, to the point of having laid the foundations for the creation of the Program "*Man and Biosphere*", just like UNESCO has recognised.[924]

Additionally, prestigious agencies and researchers addressed topics regarding development programs and their consequences on health, nutrition, productivity, irrigation, environmental degradation, among others, in the *Conference on the Ecological Aspects of International Development* (1968). Lectures came out in the well-known work "*The Careless Technology*".[925] Indubitably, one should not set aside the documentation relating to the U.N. Secretary-General's report: "*Problems of the Human Environment*" (E/4667), requested by the U.N. General Assembly through the Resolution No. 2398 (XXIII). That was the same instrument employed to summon what would be the *Stockholm Conference*.

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[921] It appears Europe had this expectation. See: Towards Sustainability (1993) Executive Summary, para. 9th. It is also known as the "*Fifth EC Environmental Action Programme*".
[922] Nanda and Pring (2013) 110-1; Kovar (1993) 122-3; Boyd (2012) 41.
[923] Carson (1962); Meadows and others (1972).
[924] UNESCO (1969) 1-5; UNESCO (1993) 4-5.
[925] Farvar and Milton (1972); Sears (1973) 520-1.

Annexe # 2.2 Brief review of the Gabčíkovo-Nagymaros case

In the main, the history of this conflict traces back to 16 September 1977, when Hungary and Czechoslovakia signed at Budapest the treaty and the agreement concerning mutual assistance in the construction and operation of the Gabčíkovo-Nagymaros System of Locks. The project also included the building of head-water installations, flood-control works, dams, a bypass canal, a hydroelectric plant, and works on the bed of the Danube River, as a joint investment. According to the treaty, the initial idea consisted of attaining the "[…] *broad utilization of the natural resources of the Bratislava-Budapest section of the Danube river for the development of water resources, energy, transport, agriculture and other sectors of the national economy of the Contracting Parties*".[926]

The works started in 1978. Hungary undertook the construction in the sector of Nagymaros, located in a narrow valley at a bent of the Danube River. On its part, Czechoslovakia, whose territory got finally split into two independent countries in 1993– Slovakia and the Czech Republic–began to build in Gabčíkovo, a location in the left bank of the river, in Slovak territory. Eventually, Slovakia took over both the treaty and the construction.[927]

Despite a couple of changes regarding the comprehensive schedule, one in 1983 and another in 1989[928], the construction continued as usual. During 1989, however, the Hungarian government decided to suspend the works at Nagymaros and Dunakiliti, arguing a "*state of ecological necessity*". According to Hungary, the foremost environmental risk derived from the project consisted of the potential impacts on the quality of water. The residual discharges into the bed of the Danube River could affect the ecosystem, bringing about mainly eutrophication and placing flora and fauna in jeopardy.[929]

Furthermore, Hungary claimed the breach of the Treaty in regard to water quality and environmental protection. One of the alluded provisions thereon lays down that the

[926] Agreement between the Government of the Czechoslovak Socialist Republic and the Government of the Hungarian People's Republic concerning mutual assistance in the construction of the Gabčíkovo-Nagymaros System of Locks (1977) Article 1. Hereinafter the Czechoslovakia-Hungary Agreement; Treaty between the Hungarian People's Republic and the Czechoslovak Socialist Republic concerning the construction and operation of the Gabčíkovo-Nagymaros System of Locks (1977) Recital 1st and Article 1. Hereinafter the Czechoslovakia-Hungary Treaty.
[927] International Court of Justice (1997) Summary of Gabčíkovo-Nagymaros Project, 2.
[928] Protocol amending the Czechoslovakia-Hungary Agreement (1983) 125; Protocol amending the Czechoslovakia-Hungary Agreement (1989) 128-9.
[929] Case 92, *Hungary/Slovakia* (1997) para. 40th; Lammers (1998) 12-3.

contracting parties "[…] *shall ensure, by the means specified in the joint contractual plan, that* ***the quality of the water*** *in the Danube is not impaired as a result of the construction and operation of the System of Locks*". Likewise, the Treaty established that both countries should "[…] *ensure compliance with the obligations for the* ***protection of nature*** *arising in connection with the construction and operation of the System of Locks*".[930]

As mentioned by Fred Pearce, Hungarian biologists mainly "[…] *worried that the dams would damage both the treasured scenery of the Danube Bend and the underground water reserves on which more than a million Hungarians depend*". The ICJ somehow shared this argument or, at least, was conscious of it, pointing out the severe disapproval generated in Hungary concerning the construction.[931]

On its part, Slovakia began the construction of an alternative solution for the Gabčíkovo project, so-called "*Variant C*", in 1991. It entailed a unilateral diversion of the Danube– located around ten kilometres upstream of Dunakiliti–, the construction of an overflow dam at Cunovo, and a levee linking that dam to the south bank of the bypass canal. The country put the installation into operation in 1992.[932]

During this period, some negotiations took place between the parties, although unsuccessfully. Indeed, the fruitless bargaining, as Marcel Szabo observes, continued until the first decade of the twenty-first-century, chiefly due to the different strategies employed by the parties. Thus, while Hungary considered that "*the facilities not constructed were not required to be built*", Slovakia "[…] *underlined that the main goal of the negotiations was that every necessary measure had to be adopted with the view to achieving all the goals of the 1977 Treaty*".[933]

On 19 May 1992, Hungary notified the termination of the 1977-Czechoslovakia-Hungary Treaty, arguing "[…] *the existence of a state of necessity; the impossibility of performance of the Treaty; the occurrence of a fundamental change of circumstances; the material breach of the Treaty by Czechoslovakia; and, finally, the development of new norms of international environmental law*".[934]

Eventually, on 2 July 1993, both nations agreed to submit a letter to the ICJ, which contained three questions undergone to the decision of the Court. Firstly, both parties asked if Hungary was entitled to suspend and abandon the project in 1989. Secondly, they also

[930] ibid para. 41st; Czechoslovakia-Hungary Treaty (1977) Articles 15 and 19 (emphasis added).
[931] Pearce (1994) 28; International Court of Justice (1997) Summary of Gabčíkovo-Nagymaros Project, 3.
[932] International Court of Justice (1997) Summary of Gabčíkovo-Nagymaros Project, 3-4.
[933] International Court of Justice ibid 3; Szabo (2009) 18-9.
[934] Case 92, *Hungary/Slovakia* (1997) para. 92nd.

enquired whether Czechoslovakia, and Slovakia subsequently, was entitled to proceed to the "*provisional solution*" in 1991 and put it into operation in 1992. And, thirdly, they desired to know what the legal effects of the 1992-notification regarding the termination of the Treaty by Hungary were[935].

The Court issued the judgement on 25 September 1997, deciding that Hungary was not entailed to suspend and abandon the project, while Czechoslovakia held right to proceed the "*provisional solution*" but not to put it into operation. The ICJ also concluded that both parties had to negotiate in good faith the achievement of the Treaty's aims. Furthermore, the adjudication mentioned the obligation of the parties to compensate each other for the damages as well[936].

Finally, on 3 September 1998, Slovakia required the Court a new decision, arguing the reluctance of Hungary to implement the 1997-judgement. Thenceforth, there has not been an accord between the nations, perhaps due to the distinct legal strategies, as mentioned. In any case, it still deals with a pending case before the ICJ[937].

[935] ibid para. 2nd.
[936] ibid para. 155th.
[937] International Court of Justice (2017) Overview of the Case Gabčíkovo-Nagymaros Project (Hungary / Slovakia) para. 4th.

Annexe No. 3 Complementary tables

Annexe # 3.1 Right to a Healthy Environment in the International Law

International Instrument	Article / Recital	Text of the provision
Aarhus Convention	Recital 3rd	*Recalling further General Assembly resolutions 37/7 of 28 October 1982 on the World Charter for Nature and 45/94 of 14 December 1990 on the need to ensure **a healthy environment** for the well-being of individuals.*
Aarhus Convention	Recital 7th	*Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations.*
Aarhus Convention	Article 1	*In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.*
Aarhus Convention	Article 2 (3c)	*Environmental information means any information in written, visual, aural, electronic or any other material form on:* […] *The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above;*
Aarhus Convention	Article 5 (1c)	*Each Party shall ensure that:* […] *In the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected.*
Convention on Climate Change	Article 1 (1)	*"Adverse effects of climate change" means changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare.*
Convention on Biological Diversity	Article 8 (e)	*Each Contracting Party shall, as far as possible and as appropriate:* […] *Promote **environmentally sound** and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas:*
Convention on Biological Diversity	Article 15 (2)	*Each Contracting Party shall endeavour to create renditions to facilitate access to genetic resources for **environmentally sound** uses by other Contracting Parties and not to impose restrictions that run counter to the objectives of this Convention.*

Annexe # 3.2 Right to a Healthy Environment in the Instruments on Human Rights

International Instrument	Article / Recital	Text
African Charter on Human Rights	Article 24	*All peoples shall have the right to a **general satisfactory environment** favorable to their development*.
Arab Charter on Human Rights	Article 38	*Everyone shall have the right to an adequate standard of living for himself and his family, ensuring well-being and a decent life, including adequate food, clothing, housing, services and **a right to a safe environment**. The State Parties shall take appropriate measures within their available resources to ensure the realization of this right.*
Asian Human Rights Charter (soft law, not in force)	Paragraph 3.2	*Foremost among rights is the right to life, from which flow other rights and freedoms. The right to life is not confined to mere physical or animal existence but includes the right to every limb or faculty through which life is enjoyed. It signifies the right to live with basic human dignity, the right to livelihood, the right to a habitat or home, the right to education and **the right to a clean and healthy environment** for without these there can be no real and effective exercise or enjoyment of the right to life. The state must also take all possible measures to prevent infant mortality, eliminate malnutrition and epidemics, and increase life expectancy through a clean and healthy environment and adequate preventative as well as curative medical facilities. It must make primary education free and compulsory.*
Additional Protocol to the American Convention on Human Rights - Protocol of San Salvador	Article 11	***Right to a Healthy Environment*** *1. Everyone shall have the right to live in **a healthy environment** and to have access to basic public services.* *2. The States Parties shall promote the protection, preservation, and improvement of the environment.*

Annexe # 3.3 Sustainable Development in the International Law in force

International Instrument	Article / Recital	Text of the provision
Convention on Climate Change	Article 3 (4)	*The Parties have a right to, and should, promote **sustainable development**. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change.*
Convention on Biological Diversity	Article 2, para. 16th	*"**Sustainable use**" means the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.*
Convention on Biological Diversity	Article 8 (e)	*Promote environmentally sound and **sustainable development** in areas adjacent to protected areas with a view to furthering protection of these areas:*
Convention to Combat Desertification	Recital 11th	*Realizing that, despite efforts in the past, progress in combating desertification and mitigating the effects of drought has not met expectations and that a new and more effective approach is needed at all levels within the framework of **sustainable development**,*
Convention to Combat Desertification	Article 2 (1)	*The objective of this Convention is to combat desertification and mitigate the effects of drought in countries experiencing serious drought and/or desertification, particularly in Africa, through effective action at all levels, supported by international cooperation and partnership arrangements, in the framework of an integrated approach which is consistent with Agenda 21, with a view to contributing to the achievement of **sustainable development** in affected areas.*
Aarhus Convention	Recital 5th	*Affirming the need to protect, preserve and improve the state of the environment and to ensure **sustainable** and environmentally sound **development**,*
EU Charter of Fundamental Rights	Article 37	*A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of **sustainable development**.*
Treaty on European Union	Recital 9th	*Determined to promote economic and social progress for their peoples, taking into account the principle of **sustainable development** and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields,*

Annexe # 3.4 Sustainable Development Goals

Goal 1.	End poverty in all its forms everywhere
Goal 2.	End hunger, achieve food security and improved nutrition and promote sustainable agriculture
Goal 3.	Ensure healthy lives and promote well-being for all at all ages
Goal 4.	Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all
Goal 5.	Achieve gender equality and empower all women and girls
Goal 6.	Ensure availability and sustainable management of water and sanitation for all
Goal 7.	Ensure access to affordable, reliable, sustainable and modern energy for all
Goal 8.	Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all
Goal 9.	Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation
Goal 10.	Reduce inequality within and among countries
Goal 11.	Make cities and human settlements inclusive, safe, resilient and sustainable
Goal 12.	Ensure sustainable consumption and production patterns
Goal 13.	Take urgent action to combat climate change and its impacts*
Goal 14.	Conserve and sustainably use the oceans, seas and marine resources for sustainable development
Goal 15.	Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss
Goal 16.	Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels
Goal 17.	Strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development

* Acknowledging that the United Nations Framework Convention on Climate Change is the primary international, intergovernmental forum for negotiating the global response to climate change.

Source: Transforming our world: the 2030 Agenda for Sustainable Development (2015) para. 59th.

Annexe # 3.5 Future Generations in the International Law in force

International Instrument	Article / Recital	Text of the provision
CITES	Recital 1st	*Recognizing that wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which* ***must be protected for this and the generations to come***
Convention on Climate Change	Recital 23rd	*Determined to* ***protect the climate system for present and future generations****.*
Convention on Climate Change	Article 3 (1)	***The Parties should protect the climate system for the benefit of present and future generations*** *of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.*
Convention on Biological Diversity	Recital 23rd	*Determined to conserve and sustainably use biological diversity* ***for the benefit of present and future generations****.*
Convention on Biological Diversity	Article 2	"*Sustainable use*" *means the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to* ***meet the needs and aspirations of present and future generations****.*
Convention to Combat Desertification	Recital 26th	*Determined to take appropriate action in* ***combating desertification and mitigating the effects of drought for the benefit of present and future generations***
Aarhus Convention	Recital 7th	*Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to* ***protect and improve the environment for the benefit of present and future generations***
Aarhus Convention	Article 1	***In order to contribute to the protection of the right of every person of present and future generations*** *to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.*
Arab Charter on Human Rights	Article 1	*The present Charter shall undertake, in the context of the national identity of the Arab States, their sense of belonging to a common civilisation, to achieve the following goals:* […] ***To prepare future generations in the Arab States to live free and responsible lives*** *in a civil society united by a balance between consciousness of rights and respect for obligations, and governed by principles of equality, tolerance and moderation.*
EU Charter of Fundamental Rights	Recital 6th	*Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community, and to* ***future generations****.*

Annexe # 3.6 Property Rights in the Instruments on Human Rights

International Instrument	Article / Recital	Text
African Charter on Human Rights	Article 14	*The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.*
Arab Charter on Human Rights	Article 31	*Everyone has a guaranteed right to own private property. No person shall under any circumstances be divested of all or any part of his property in an arbitrary or unlawful manner.*
EU Charter of Fundamental Rights	Article 17	*Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.*
Protocol to the European Convention on Human Rights	Article 1	*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.* *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*
American Convention on Human Rights - Pact of San José	Article 21	*1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.* *2. No one shall be deprived of his property except upon payment of just compensation, for reasons of utility or social interest, and in the cases and according to the forms established by law.* *3. Usury and any other form of exploitation of man by man shall be prohibited by law.*

Annexe # 3.7 Validity of Resolutions - Compensation in Texaco et al. v. Libya

Instrument	In favour	Against	Abstentions	Arbitrator's remarks
Resolution No. 1803 (XVII)	87	2	16	[…] *the majority voted for this text, including many States of the Third World, but also several Western developed countries with market economies, including the most important one, the United States*.
Resolution 3281 (XXIX) [Charter]	118	6	10	[…] *there was no general consensus of the States with respect to the most important provisions and in particular those concerning nationalization*.
Resolution 3171 (XXVII)	108	1	16	*This specific paragraph concerning nationalizations, disregarding the role of international law, not only was not consented to by the most important Western countries, but caused a number of the developing countries to abstain*.

Source: Texaco and California Asiatic v. Libya (1977) paras. 84th and 85th.

Annexe # 3.8 Cooperation in the International Law

International Instrument	Article / Principle	Text of the provision
Convention on Climate Change	Article 3 (3)	*Efforts to address climate change may be carried out **cooperatively** by interested Parties.*
Convention on Biological Diversity	Article 14 (d)	*Each Contracting Party, as far as possible and as appropriate, shal1:* […] *(d) In the case of imminent or grave danger or damage, originating under its jurisdiction or control, to biological diversity within the area under **jurisdiction of other States** or in areas beyond the limits of national jurisdiction, notify immediately the potentially affected States of such danger or damage, as well as initiate action to prevent or minimize such danger or damage*
Convention to Combat Desertification	Article 11	*Such **cooperation** may include agreed joint programmes for the sustainable management of **transboundary natural resources**, scientific and technical cooperation, and strengthening of relevant institutions.*
Stockholm Declaration	Principle 22	*States shall **co-operate** to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas **beyond their jurisdiction**.*
Rio Declaration	Principle 18	*States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the **environment of those States**. Every effort shall be made by the international community to help States so afflicted.*
Rio Declaration	Principle 19	*States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a **significant adverse transboundary environmental effect** and shall consult with those States at an early stage and in good faith.*

Annexe # 3.9 Environmental policies to exploit natural resources

Instrument	Year	Reference
Including developmental policies		
Rio Declaration	1992	Principle 2.
United Nations Framework Convention on Climate Change	1992	Recital 8th.
Convention to Combat Desertification in those countries experiencing serious Drought and/or Desertification, particularly in Africa	1994	Recital 15th.
Stockholm Convention on Persistent Organic Pollutants	2001	Recital 10th.
Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Heavy Metals	1998	Recital 9th.
Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants	1998	Recital 8th.
Protocol to the 1979 Convention on Long-range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-level Ozone	1999	Recital 12th.
Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes	1999	Article 5 (c).
UN non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests	1992	Principles 1 (a) and 2 (a)
Excluding developmental policies:		
Stockholm Declaration	1972	Principle 21.
Convention on Long-range Transboundary Air Pollution	1979	Recital 5th.
Vienna Convention for the Protection of the Ozone Layer	1985	Recital 2nd.
Convention on Biological Diversity	1992	Article 3rd.
Convention on the Transboundary Effects of Industrial Accidents	1992	Recital 8th.

Annexe # 3.10 On the beach at night alone (extract) by Walt Whitman

A VAST SIMILITUDE interlocks all,
All spheres, grown, ungrown, small, large, suns, moons, planets, comets, asteroids,
All the substances of the same, and all that is spiritual, upon the same,
All distances of place, however wide,
All distances of time - all inanimate forms,
All Souls - all living bodies, though they be ever so different, or in different worlds,
All gaseous, watery, vegetable, mineral processes the fishes, the brutes,
All men and women - me also,
All nations, colors, barbarisms, civilizations, languages,
All identities that have existed, or may exist, on this globe or any globe,
All lives and deaths - all of past, present, future,
This vast similitude spans them, and always has spanned, and shall forever span them, and compactly hold them

Whitman, 12 (2009) 230-1.

Annexe # 3.11 Basic Principles of Deep Ecology

(1) The flourishing of human and non-human life on Earth has intrinsic value. The value of non-human life forms is independent of the usefulness these may have for narrow human purposes.

(2) Richness and diversity of life forms are values in themselves and contribute to the flourishing of human and non-human life on Earth.

(3) Humans have no right to reduce this richness and diversity except to satisfy vital needs.

(4) Present human interference with the non-human world is excessive, and the situation is rapidly worsening.

(5) The flourishing of human life and cultures is compatible with a substantial decrease of the human population. The flourishing of nonhuman life requires such a decrease.

(6) Significant change of life conditions for the better requires change in policies. These affect basic economic, technological, and ideological structures.

(7) The ideological change is mainly that of appreciating life quality (dwelling in situations of intrinsic value) rather than adhering to a high standard of living. There will be a profound awareness of the difference between big and great.

(8) Those who subscribe to the foregoing points have an obligation directly or indirectly to participate in the attempt to implement the necessary changes

Source: Næss (2003) 404

Annexe No. 4 U.S. Ordinances and Resolutions concerning the Rights of Nature

Ordinance	Reference	Year	Article / Section	Community	State
Tamaqua Borough Sewage Sludge Ordinance	No. 612	2006	Section 7.6	Tamaqua Borough	Pennsylvania
Ordinance to amend the Town Code of Halifax		2008	Section 30-156.7	Halifax	Virginia
Mahanoy Township Sewage Sludge Ordinance	No. 2008-2	2008	Section 7.14	Mahanoy	Pennsylvania
Nottingham Water Rights & Self Government Ordinance		2008	Section 5.1	Nottingham	New Hampshire
Local Control, Sewage Sludge and Chemical Trespass Ordinance	No. 08-003	2008	Section 7.2	Packer	Pennsylvania
Town of Newfield Water Ordinance	30-A M.R.S.A. § 3002(2)	2009	Section 5.1	Newfield	New Jersey
Community Water Rights and Self-Government Ordinance	No. 031101	2010	Section 3.5	Licking	Pennsylvania
Ordinance supplementing the Pittsburgh Code	File #: 2010-0909	2010	618.03 (b)	Pittsburgh	Pennsylvania
Ordinance banning the commercial extraction of natural gas	No. 838	2011	Section 3 (b)	Baldwin	Pennsylvania
Ordinance banning the extraction of and/or exploration for natural gas	No. 1017	2011	Section 3 (b)	Forest Hills	Pennsylvania
Natural Gas Extraction Ordinance	No. 2011-01	2011	Section 2	Mountain Lake	Maryland
Community Bill of Rights and Natural Gas Drilling Ban	Section 41.2-205	2011	Section 41.2-205 (d)	State College	Pennsylvania
Community Protection of Natural Resources	No. 3-2011	2011	Section 4 (b)	Wales	New York
Ordinance banning the commercial extraction of natural gas	No. 659	2011	Section 3 (b)	West Homestead	Pennsylvania
Community Bill of Rights	No. 115-12	2012	Section 1 (d)	Broadview Heights	Ohio
Community Protection from Gas and Oil Extraction Ordinance	No. 2012-17	2012	Section 4 (b)	Yellow Springs	Ohio
Community Water Rights and Local Self-Government Ordinance	No. 2013-01	2013	Section 4.3	Mora County	New Mexico
Ordinance establishing sustainability rights	No. 2421 CCS	2013	Chapter 4.75.040 (b)	Santa Monica	California
Community Bill of Rights Ordinance		2014	Section 2 (d)	Grant Township	Pennsylvania
Ordinance of 11-4-2014(1) Mendocino County Code	No. 11-4-2014(1)	2014	Section 8.05.020 (c)	Mendocino County	California
Waterville Community Bill of Rights		2016	Article II § 2.03 (h)	Waterville	Ohio
Lake Erie Bill of Rights	No. O-497-18	2018	Section 1 (a)	Toledo	Ohio
Resolution establishing the Rights of the Klamath River	No. 19-40	2019	para. 14th.	Yurok Tribe	California
Santa Monica Municipal Code	Charter 12.02.030	2019	Charter 12.02.030	Santa Monica	California
Resolution to recognize that the Snake River is a living entity	No. SPGC20-02	2020	para. 10th.	Nez Perce Tribe	Idaho
Recognition of the Rights of the Menominee River	No. 19-52	2020	para. 17th (1)	Menominee Tribe	Wisconsin

Declaration of PhD dissertation

Szeged, 6 November 2020

To whom it may concern:

I hereby declare that the present dissertation has been composed solely by myself and that it has not been submitted, in whole or in part, in any previous application for a degree. Except where states otherwise by reference or acknowledgement, the work presented is entirely my own.

Best regards,