Inter-American Congress on the

Environmental Rule of Law

Selected Essays

Organization of American States | More rights for more people

UNEP

World Commission on Environmental Law

Commission Mondiale de Droit de l'Environnement | Comisión Mundial de Derecho Ambiental

Sustainable Development
General Secretariat
Organization of American States

RIGHTS OF THE AUTHOR© (2015)

General Secretariat of the Organization of American States (OAS). Published by the Department of Sustainable Development. All rights reserved under International and Pan-American Conventions. No portion of the contents may be reproduced or transmitted in any form, or by any means, electronic or mechanical, including photocopying, recording or any information storage retrieval system, without prior permission in writing from the publisher and the General Secretariat of the OAS.

Design and illustrations: María Montas

OAS Cataloging-in-Publication Data

Inter-American Congress on the Environmental Rule of Law (1st : 2015 : Montego Bay, Jamaica).
Estado de derecho en materia ambiental: Tendencias en las Américas : Ensayos seleccionados /
[Publicado por el Departamento de Desarrollo Sostenible de la Secretaría General de la Organización de los Estados Americanos].
p. : ill. ; cm. (OAS. Documentos oficiales ; OEA/Ser.D/XXIII.31)
ISBN 978-0-8270-6460-7
1. Environmental law--Congresses. 2. Environmental policy--Congresses. 3. Sustainable Development--Law and legislation. 4. Rule of law. I. Title.
II. Organization of American States. Department of Sustainable Development.
III. Congreso Interamericano sobre el Estado de Derecho en Materia Ambiental (1st : 2015 : Montego Bay, Jamaica). IV. Series.
OEA/Ser.D/XXIII.31

ISBN 978-0-8270-6460-7

The views expressed herein are presented for informational purposes only and do not represent the opinions or official positions of the Organization of American States, its General Secretariat, its Member States or any of its partner institutions.

Luis Almagro
Secretary General
Organization of American States

Foreword

This publication embraces a unique opportunity by addressing an issue of significant and wide-ranging importance to human well-being, peace, democracy, access to justice, the protection of human rights and generally, to sustainable development.

The Rule of Law is the binding element within and between these respective domains. And in my humble view it represents the only effective way of achieving equity, and the necessary balance that can assure environmental sustainability and human well-being.

Ultimately, our efforts towards sustainable development, security, environmental sustainability and political stability will be meaningless if they do not significantly improve the quality of life of our people.

As we all know, there are many, sometimes differing perceptions, of the Rule of Law. However there are a few common elements we can all agree on, and included among these is respecting and implementing environmental laws and conventions to guarantee the right to a healthy environment that the citizens of the Americas and the world are entitled to.

Ensuring all these elements come together affording more rights for more people is a common responsibility of legislators and parliamentarians, judges, attorney generals, prosecutors and ultimately the people. A holistic society approach is required to address the challenges of our times, which means also involving civil society and the private sector.

Since the Rio + 20 Summit in Brazil we have witnessed an encouraging surge of interest among members of the Executive, the Legislature and the Judiciary branches of Government across the world on the environment.

Equally encouraging is the growth of jurisprudence in the subject from the Inter-American Human Rights system to national courts and tribunals. But there is a great deal more work to be done.

I believe we need a fresh conceptual sustainable development framework, one focused on the human and environmental potential, in our countries, to guide our future efforts in this critical endeavor. The elements of such a framework should be based on the notion of “government of the people, by the people, for the people” exposed by President Lincoln in his famous Gettysburg address in November 1863. To me this is a potent reminder that the “tree of government” consists of more than the three branches referenced earlier i.e. the Executive, Legislature and Judiciary. These branches of Government are not of their own making and do not exist for their own sake.

The people are the very embodiment of the tree of Government. And I regard the Rule of Law as the trunk which holds that tree together, under pinned by an inclusive governance approach, focused on consultation with all stakeholders, accountability and transparency.

The tree of Government will, in the words of President Lincoln, “perish from the earth” if the natural environment from which it derives its sustenance, is in any way compromised or polluted; if its executive, legislature and judiciary branches act in a manner that ignores the will of the people and does not protect and advance the people’s well-being.

The challenge before us is to how to devise a system of democratic and environmental governance that is the embodiment of the Tree of Government described above.

The selected essays in this publication carefully and respectfully consider the evidence, facts, and opinions that were shared over the two days of the Inter-American Congress on the Environmental Rule of Law and represent the hope to invest in designing and adopting necessary, appropriate and effective policies, laws and regulations to protect the well-being of the people and their environment, but also to strengthen participatory decision-making frameworks that give effect to the Tree of Government approach.

At the heart of this approach must be sustained education and communication especially among the users of natural resources, about the laws and procedures that are needed and that are set in place to facilitate effective enforcement and compliance.

As we identify and focus on the emerging trends regarding the environmental rule of law, and on ways of curbing irresponsible use of the environment and natural resources, we must seek to develop a more balanced and Integrated paradigm for sustainable development, one that will balance the needs of the market with the social challenges and the opportunities the environment offers.

The OAS has had a deep and abiding interest on the topics addressed in these essays. As integral development, human rights, multi-dimensional security and democracy are the four main pillars of the OAS and have received considerable attention ever since the formation of our organization. As a consequence, I believe the OAS has a great deal to offer the global community both in terms of the availability of clear and thoughtfully-negotiated instruments like the Inter-American Democratic Charter, the Charter on Social Protection, and the Inter-American Strategy on Public Participation in Decision-Making for Sustainable Development, but also in terms of significant lessons learned over more than 50 years of ground-breaking work in environment and sustainable development.

The Americas is currently at a critical juncture in its history characterized by profound changes driven by a motivation to adjust to the current and future challenges.

As we join in this global journey of fashioning a global framework for the environmental Rule of Law, we at the OAS with UNEP , WCEL and CCJ our key partners will be alert for insights that will help us build on the achievements of the Inter-American Democratic Charter and on the agreed principles and policy framework for the promotion of public participation in sustainable development decision making; to ensure that laws are representative of the people and are crafted in a manner that assures effective enforcement and compliance; that the role of citizens, women, indigenous people, youth and children is enhanced and supported in the legal frameworks; and that justice is neither blind nor unwilling to tilt the scales to achieve fairness for those that are most vulnerable.

Luis Almagro
Secretary General
Organization of American States

Elizabeth Mrema
Director, Environmental Law and Conventions, UNEP

Prologue

In facing ever increasing complexities regarding our planet, people everywhere view environmental rights, environmental law and jurisprudence and environmental governance as becoming increasingly central to resolving problems of environmental justice.

The American region has equally been facing these complexities. Latin America and the Caribbean region for instance is home to approximately 23 per cent of the world's forests, 31 per cent of its freshwater resources and six of the world's 17 mega-diverse countries. And although these resources are not evenly distributed, the overall richness and economic importance of the region's ecosystems and its natural capital are undeniable.

Thus despite this vast natural wealth, the Region countries face many challenges which have hampered the efficient management of the rich natural resources. With 79 per cent of the population living in towns and cities, the region remains one of the most urbanized in the world thereby impeding the region's ability to provide its burgeoning towns and cities with safe water and sanitation, and in addressing air pollution and the contamination of its freshwater, oceans and seas. This has led to enhanced competition for resources and an increased demand for and extraction of raw materials and other natural capital. The associated competition for scarce resources and the inequitable distribution of benefits have led to emerging socio-environmental conflicts and risks to the traditional lifestyles and livelihoods of local and indigenous communities.

The existing scenario has been occasioned by the historical development model in Latin America and the Caribbean which has been based to a large extent on the provision of food, raw materials and natural resources. While this may have generated economic growth, it has in many ways and in many places, undermined the social and environmental dimensions of sustainable development.

Hence bringing together the outputs of the first Inter-American Congress on the Environmental Rule of Law could not have come at a better time. The papers included in this publication afford us the opportunity to reflect on key concrete measures that may provide relevant guidance towards reversing and eventually halting negative environmental trends in the Americas.

The legal tools identified in these articles represent views on a fundamental tool to restore, protect and conserve the environment: the Environmental Rule of Law.

The Rule of Law lies at the core of a just administration of justice and is a prerequisite of peaceful societies, in which environmental obligations, equality before the law and the adherence to the principles of fairness and accountability are respected by all. Law coupled with strong institutions is essential for societies to respond to environmental pressures and crucial for the international community to address the environmental challenges of our time.

At the regional level significant progress has been made. A key example of this is the strong partnership between UNEP and OAS to support the advancement of the Environmental Rule of Law in the Americas. However a lot of the progress has really been at the national level, in the development of environmental strategies, the creation of specialized agencies, the establishment of institutional and legal frameworks, and the ratification of international conventions. Moreover judicial decisions in this field have been drivers of environmental change in the region.

The Rule of Law in the field of the environment serves the purpose of environmental equity through a fair access to justice and consequently advances Sustainable Development by guaranteeing a rights-based approach and the respect of essential rights such as the right to food, the right to water and the right to a healthy environment. The success of the 2030 sustainable development agenda is reliant on this intrinsic nexus between sustainable development and human rights as both mutually benefit from each other.

Integrating human rights and environmental protection into adequate legislation is of crucial importance for the achievement of a sustainable future, and the fact that today more than more than 100 constitutions explicitly contain a right to the environment pays tribute this importance.

But efforts towards an effective realization of these rights are still required considering the ongoing deterioration of the natural basis. To this end, procedural rights have been regarded as being of major significance as they have the potential to boost societal cohesion and reinforce trust of the civil society in public institutions. The inclusion of the public in the decision-making process and access to information, for instance, can ensure better environmental adjudication and achieve a higher level of environmental protection.

This is more true in light of the environmental crimes of our times which undermine sustainable development and compromise the maintenance of peaceful societies. Therefore, enhancing the capacity of courts, enforcement agencies, auditing institutions and other stakeholders to effectively implement and promote the environmental rule of law at the national, sub-regional and regional levels is necessary in order to address emerging and growing issues such as environmental crime and the illegal exploitation of natural resources. It is estimated that at least 40 percent of internal conflicts over the last 60 years have a link to natural resources, and the risks of violent conflict are elevated when the exploitation of natural resources causes environmental damage and loss of livelihoods or when their benefits are unequally distributed.

Strengthening the Rule of Law in the field of the environment can be a great ally in reducing the risks of conflict and preventing further tensions related to environmental matters. From the powerful recognition of the role of law and strong institutions in the strategies adopted under the auspices of the OAS related to sustainable development to the progressive developments in terms of participatory rights in environmental matters and some of the most modern judiciaries in the application of environmental law – the Americas is and will continue to be a key player for the promotion of the rule of law in the field of the environment.

From a UNEP perspective I would hope that, the Governments of the region will jealously safeguard and build upon the achievements they have made in their own countries – particularly to ensure more just and sustainable development outcomes in the context of transforming our future.

This book is the initial stepping stone; it is now up to each reader to move the Environmental Rule of Law in the Americas to the next level.

Elizabeth Mrema

Acknowledgements and List of Contributors

The Organization of American States (OAS), the United Nations Environment Program (UNEP), the International Union for the Conservation of Nature World Commission on Environmental Law (IUCN- WCEL) and the Caribbean Court of Justice express their gratitude to the following contributors to this publication: Winston Anderson, Justice of the Caribbean Court of Justice; Elizabeth Mrema, UNEP-DELC Director; Arnold Kreilhuber, Legal Officer UNEP-DELC; Andrea Brusco, UNEP-ROLAC; Cletus Springer, Director, Department of Sustainable Development of the OAS; Claudia S. de Windt, Senior Legal Specialist, Department of Sustainable Development of the OAS; Oscar Ceville, Isis Márquez and Nicolle Brolo, Department of Sustainable Development of the OAS. The coordinating institutions would also like to express their gratitude to the following authors for their effort and invaluable support to the advancement of the Environmental Rule of Law in the Americas through this publication:

Danielle Andrade-Goffe

Jamaican Attorney-at-Law with nine years' experience in environmental law. She obtained her Bachelor of Laws from the University of the West Indies and is a graduate of the Norman Manley Law School in Jamaica. She received a British Chevening scholarship and completed a Masters degree in Environmental Law from Queen Mary, University of London. She is the Legal Director of the Jamaica Environment Trust, a non-governmental organization. Areas of expertise include environmental policy, litigation, and advocacy.

Eduardo Abbott

Former Executive Secretary of the WB Inspection Panel (1994-2006) and previously Principal Counsel at the World Bank and Labor Lawyer in Chile.

María Amparo Albán

Lawyer with a master in economic, Sustainable development and international law. She is the founder, former President and Executive Director of the Ecuadorian Center on Environmental Law. Maria Amparo Alban has worked for more than 15 years in Environmental law and in the Development of public policies for Sustainable Development with governments, multilateral organizations, civil society and the private sector. She is a lecturer in environmental law at the national and international level and is currently in private practice.

Martha Aldana

Lawyer with an LLM in Environmental Law (American University, Washington DC). She has been an advisor on environmental legislation to the Congress, the Ministry of Agriculture, the Ministry of Health; and also served as Legal Supervisor for the Agency of Investment in Energy and Mining. She has been an advisor to the Deputy Minister of Environmental Management and Control, Director of Compliance and Coordinator of Legal Projects of the Peruvian Agency on Assessment and Environmental Control, she also served as Director of Strategic Management of the National Environmental Certification Service for Sustainable Investment in the Environment Ministry. She currently works as an independent consultant.

Lilliana Arrieta Quesada

Costa Rica, lawyer, consultant in environmental law, Specialist in Public Law at the University of Costa Rica, Master in Tax Law at the University of International Cooperation, Graduated from INCAE of Management for Sustainable Development. Visiting Professor at the University of Externado, Colombia, University of Barcelona, School of Public Law and the University of Zaragoza. Author of several publications. Consultant on environmental issues at national and international level.

Dr. Maria L. Banda

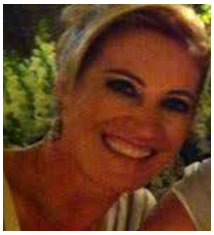
Practicing international law in Washington, D.C. She has written on climate change, global governance, and environmental law. She has worked with several international organizations, as well as the UN Special Representative's team on Business and Human Rights. She is a graduate of the University of Toronto (Hon. BA), Harvard Law School (J.D.), and Oxford University (M.Phil.; D.Phil.), where she studied as a Rhodes Scholar and a Trudeau Scholar.

Nicholas Bryner

Visiting Associate Professor of Law and Environmental Program Fellow at The George Washington University Law School in Washington, DC. He holds a J.D. and M.A. in Latin American & Hemispheric Studies from The George Washington University. His areas of research include the intersection of property law, environmental law, and natural resources, as well as climate change law and international environmental law.

Néstor Cafferatta

Attorney-at-Law. Deputy Director of Environmental Law studies and Professor of the Environmental Damages and Environmental Law Studies at the University of Buenos Aires. He currently serves as Clerk of the Supreme Court of Argentina.



Sílvia Cappelli

Superior Prosecutor in Brazil with action in the environmental area for 24 years. She is Coordinator of the Latin American Network of Environmental Public Ministry. President of the Brazilian Committee of IUCN. Director of the Institute for Law Planeta Verde and Brazil. She was President of the Brazilian Association of Environmental Prosecutors. Professor of Environmental Law in the graduate program in environmental law at the Federal University of Rio Grande do Sul.

Karetta Crooks Charles

Since 2009, has been the Communications and Advocacy Officer of the Saint Lucia National Trust, a non-governmental organization mandated to conserve Saint Lucia's natural and cultural heritage. This Jamaican national holds a Bachelor of Arts in Media and Communication from the Caribbean Institute of Media and Communication, University of the West Indies. Areas of expertise include organizing citizen participatory consultations and youth engagements, advocacy and creative use of media to communicate natural and built heritage matters.

Marcia Edwards Oakley

Law degree from the Faculty of Law of the University of Havana, Cuba and a Master in Management of Intellectual Property by the Cuban Office of Industrial Property. She is a Legal Specialist in the Ministry of Science, Technology and Environment of Cuba. She has completed postgraduate courses on "Contemporary International Environmental Law and its current problems" and "International Trade Law", both at the Higher Institute of International Relations, Ministry of Foreign Affairs of Cuba.

Lorena González Rodriguez

Attorney-at-Law with a Specialty in Damages Law. She holds a PHD from Universidad de Buenos Aires and serves as Professor of Environmental Damages and Environmental Law Studies at the University of Buenos Aires.

Gisela Hathaway

Attorney-at-Law. Master in International Relations. Partner at Hathaway, Alencar & Fischer Law. Member of the International Union for the Conservation of Nature's World Commission on Environmental Law (IUCN/WCEL). Legislative Consultant to the Brazilian House of Representatives. Advisor to the Rapporteur of the Working Group on Lead Contamination and of the Oversight and Control Body 149 of 2013 responsible for seeking liability and redress for social and environmental damages related to mining and smelting activities in Brazil.

Peter Lallas

Advisor in the Front Office of the GEF, former Executive Secretary at the WB Inspection Panel after Mr. Abbott (2007-2014), and previously Director of International Environmental Law Office of the US EPA.

Alejandro Iza

Director of the International Union for the Conservation of Nature (IUCN) Environmental Law Centre (ELC) and Head of the IUCN Environmental Law Programme. He has over 20 years of experience in international, regional and national environmental law and policy formulation, implementation, as well as environmental governance and diplomacy. From a combined academic and practical background, Alejandro Iza's area of expertise includes a broad knowledge of international environmental law, with special focus on biological resources, water and oceans.

María del Luján Flores

Doctor in Law and Social Sciences, Legal Advisor, Ministry of Foreign Affairs of Uruguay, was Permanent Representative of Uruguay to the OAS, Deputy Permanent Representative to the Organization of the United Nations; President of the 6th Committee of the UN General Assembly, Professor of Public International Law. "The obligation to compensate for transboundary harm" Montevideo, 2005, author of books and articles on public international law.

Guillermo Hernán Marchesi

Attorney-at-Law with a specialty in Environmental Law from the University of Buenos Aires. Associate Professor of Environmental Rule of Law and Natural Resources of the Universidad Nacional del Sur, Bahia Blanca, Argentina. Professor of the Specialization in Environmental Law. UBA. Visiting Professor of the Regional Training Program on Environmental Law and Policy, First Edition, led by the Untied Nations Program for the Environment in collaboration with CED (Center for Development Studies of Chile), UPM University of Madrid and CEDDET Foundation, October-December 2012. Visiting Professor of the Regional Training Program on Environmental Law and Policy, 8th Edition, led by the United Nations Program for the Environment, Panama, November 2014. Author of Doctorate articles on environmental rule of law.

Pablo Lorenzetti

Attorney-at-Law with a Specialty in Environmental Law and a PHD from University of Buenos Aires. He is also a Professor of Environmental Damages and Environmental Law Studies at the University of Buenos Aires.

Carlos Lozano Acosta

Colombian environmental lawyer. Mr. Acosta works with the program "Agua Dulce de la Asociación Interamericana para la Defensa del Ambiente" from Bogota, Colombia, and he is an associate researcher for the group "Policy and Legislation in Biodiversity, Traditional Knowledge and Access to Genetic Resources" (PLEBIO) of the National University of Colombia. Mr. Acosta has an LL.M in Environmental Law from the University of Oregon, USA, as a Fulbright Scholar.

Lina Muñoz-Ávila

Attorney with a Ph. D. in Law and specialization in Constitutional Law. Currently serves as Clinical professor and researcher in the Human Rights Research Group of Law School at Universidad del Rosario in Bogota, Colombia. Author of articles, reports and books on Human Rights and Environmental and Constitutional Law with experience in government, national and international NGOs, and academia.

George (Rock) Pring

Professor of Law Emeritus, Sturm College of Law, University of Denver; JD University of Michigan; BA Harvard University; Principal, Global Environmental Outcomes (GEO), consultants; Co-Director of the University of Denver Environmental Courts and Tribunals Study.

Cymie R. Payne

Assistant Professor at Rutgers University. Payne was a member of the Berkeley Law faculty and attorney with the US Department of the Interior; Goodwin, Procter; and the UN Security Council. She has appeared as counsel before the International Tribunal for the Law of the Sea in its deep seabed mining and fisheries advisory opinion cases. The Fletcher School of Law and Diplomacy, MA; University of California, Berkeley, JD.

Alejandro Posadas

Law Professor and director for law graduate programs at the School of Government of the *Instituto Tecnologico de Estudios Superiores de Monterrey (ITESM or Tecnologico de Monterrey*), in Mexico City. He was formerly the environmental attaché of the Mexican Embassy in the United States of America. Alejandro has been a visiting Professor at Duke University Law School, and Law Professor at CIDE Legal Studies Division, ITAM Law Department, and the Graduate Program of the University of the Environment. He has also practiced international trade and investment law with the Canadian firm of Thomas & Partners (currently Borden, Ladner, LLP) and international law as a lawyer at the Mexican Foreign Affairs Secretariat Office of the Legal Advisor.

Catherine (Kitty) Pring

Award-winning professional mediator, alternative dispute resolution (ADR) expert, and organizational systems analyst; Principal, Global Environmental Outcomes (GEO), consultants; Co-Director of the University of Denver Environmental Courts and Tribunals Study.

Antonio Razeto Cáceres

Intern at the International Union for the Conservation of Nature (IUCN) - Environmental Law Centre (ELC) since January 2015. He holds a law degree from the Pontificia Universidad Católica de Chile and is currently studying a Master of Environment at the University of Melbourne.

Gustavo Rinaldi

Lawyer graduated with specialization in environmental law from the University of Buenos Aires. Specialized in Environmental Law as well in the University of Castilla La Mancha, Toledo (Spain). Member of the Institute for a Green Planet in Argentina, of the Expoterra Foundation, and of the IUCN World Commission on Environmental Law. Co-author of the Treaty of Jurisprudence and Doctrine in Environmental Law directed by Nestor Cafferatta (Ed. La Ley- Argentina 2012) and of numerous papers that have contributed to regional doctrine and academic publications.

Juan Carlos Sánchez

Works in the International Union for the Conservation of Nature (IUCN) - Environmental Law Centre (ELC) as a Legal Officer since December 2009. Mr. Sánchez holds a law degree from the University of Costa Rica and a Masters degree on Environmental Governance from the Albert-Ludwig University of Freiburg. Currently he is doing his PhD in the Centre for Water Science, Policy and Law of the University of Dundee and is a Hydro Nation Scholar sponsored by the Scottish Government.

Carlos Sapriza Flores

Lawyer, diplomat, Foreign Service Director Uruguay, Master of Laws and Policy Integration. Mr. Sapriza has served as Deputy Chief of the Embassy of Uruguay in Guatemala, Saudi Arabia and Switzerland.

Federico Zonis

Attorney-at-Law with a Specialty in Environmental Law and a PHD from University of Buenos Aires. He is also a Professor of Environmental Damages and Environmental Law Studies at the University of Buenos Aires.

Ezequiel Santagada

Lawyer (University of Buenos Aires), specialized on environmental law (Catholic University of Argentina, Buenos Aires). He is a professor of Environmental Law and Policy at the Catholic University of Asunción, Paraguay. He is the Executive Director of the Environmental Law and Economics Institute (IDEA) of Paraguay. He is member of the World Commission on Environmental Law of the IUCN since 2004. He has been consultant of UNEP and UNDP.

Introduction

This publication includes the selected essays under each theme addressed during the First Inter-American Congress on the Environmental Rule of Law that took place in Montego Bay, Jamaica on 30-31 March 2015. The Congress was held under the auspices of the Organization of American States (OAS), the United Nations Environment Program (UNEP), the International Union for the Conservation of Nature World Commission on Environmental Law (IUCN- WCEL), and the Caribbean Court of Justice.

These selected essays where presented by contributors during the Congress following a call for abstracts process and are being published as a means to highlight emerging issues and current trends in the Environmental Rule of Law the Americas.

The two-day encounter in Jamaica, brought more than 100 participants, including Chief Justices, Attorneys General, legislators, prosecutors, government officials, high level practitioners and civil society representatives to develop a common understanding of the concept of environmental rule of law and identify current trends in the field in order to respond to the need to intensify Inter-American efforts to identify inclusive responses to the challenges related to environmental law and governance.

The focus of the essays is thematic and procedural under the umbrella of the environmental rule of law. Hence the publication addresses in the following four parts the themes from the Congress agenda:

PART I: Legal Frameworks for Water Resource Management

PART II: Trade, Investment and Environment

PART III: Conflict Prevention and Management in Shared Natural Resources

PART IV: Environmental Enforcement

PART V: Access Rights: Information, Justice and Process

The selected essays illustrate in practical terms the concept of the Environmental Rule of Law as defined and understood by participants in the Congress:

"The environmental rule of law is fundamental for peace, social and economic wellbeing. It is indispensable in ensuring just and sustainable development outcomes and in guaranteeing fundamental rights to a healthy environment in the Americas. The constituent elements of the environmental rule of law include, inter alia, adequate and implementable laws, access to justice and information, public participation equity and inclusion, accountability, transparency, liability for environmental damage, fair and just enforcement, and human rights;"

Table of Contents

15 Introduction

19 I. LEGAL FRAMEWORKS FOR WATER RESOURCE MANAGEMENT

20 International Water Law in Latin America: A critical assessment of existing agreements for improved governance
Antonio Razeto Cáceres; Juan Carlos Sánchez y Alejandro Iza

36 Human Right to Access Water and Sanitation in the Context of Integrated Water Resource Management (IWRM)
Lilliana Arrieta Quesada

43 Water Protection and Mining: Environmental Law Challenges in the Andean Region
Carlos Lozano Acosta

56 The Judges Boundaries in Deciding Water Access Rights
Emb. María del Luján Flores, Carlos Sapriza Flores

77 II. TRADE, INVESTMENT AND ENVIRONMENT

78 The Flexibility of the Rules: Environmental Legislation in times of Economic Slowdown and Crisis
Martha Aldana

91 Challenges in Environmental Impact Assessment
Néstor Cafferatta, Federico Zonis, Lorena González y Pablo Lorenzetti

92 Environmental Access to Justice and Judicial Decision-Making in Mexico in connection to large infrastructure projects
Alejandro Posadas

103 Trade, Investment and Environment: Challenges in Today's Cuba
Marcia Edwards Oakley

107 III. CONFLICT PREVENTION AND MANAGEMENT IN SHARED NATURAL RESOURCES

108 Collective Responsibility for Sound Marine Resource Management: Erga Omnes Obligations and Deep Sea Mining
Prof. Cymie R. Payne

126 Strategic Environmental Assessment: The role of the Judiciary in its Implementation
Gustavo Rinaldi y Guillermo Marchesi

136 The Brazilian House of Representatives' Committee on Human Rights and Minorities Pursues Liability and Redress from Global Mining, Smelting and Financial Corporations
Gisela Hathaway

152 Sustainable development: Linking the environmental and humans rights protection with mining projects in developing countries
Lina Muñoz-Ávila

165 IV. ENVIRONMENTAL ENFORCEMENT

166 Applying the Principle In Dubio Pro Natura for Enforcement of Environmental Law
Prof. Nicholas Bryner

174 The challenges of enforcing nature rights and other regulatory advances in Ecuador
María Amparo Alban;

187 Supporting Policy, Law and MEA implementation: Lessons and Experiences on accountability and compliance (of trails, streams, people and rivers in the Americas)
Peter Lallas y Eduardo Abbott

197 Network Performance by Prosecutors: The Experience of Latin America's Environmental Prosecutor's Network
Silvia Cappelli

201 V. ACCESS RIGHTS: INFORMATION, JUSTICE AND PROCESS

202 The world's 100 laws on ATI and their impact on the strengthening of environmental law
Ezequiel Santagada

217 Specialized Environmental Courts and Tribunals (ECTs) – Improved Access Rights in Latin America and the Caribbean and the World.
George y Catherine Pring

232 Developing a Regional Instrument on Access Rights for Latin America and the Caribbean
Danielle Andrade-Goffe y Karetta Crooks Charles

246 Advancing Access to Justice in Latin America and the Caribbean: Recent Trends and Developments in Environmental Access Rights
Dr. Maria L. Banda

I. LEGAL FRAMEWORKS FOR WATER RESOURCE MANAGEMENT

The Americas has been endowed with 30% of the world's water resources. Issues related to water governance have been highlighted for over a century. The first international environmental agreements signed in the region were focused on water resource governance[1], and laws date back to 1906, when the first Bolivian water law was enacted. [2] In recent years, the importance of water governance has been reflected in water legislation and management reform processes in most of the countries in the region, as well as in programs and proposals for reforming water-related public services, particularly urban drinking water supply and sanitation utilities.[3] Disaster emergencies that result from floods and droughts, as well as landslides triggered by intense rainfall, further highlight the need of an integrated approach to address water and land management effectively. Abstracts on this sub-theme address emerging trends and challenges.

---

1 Organization of American States, Department of Sustainable Development, Policy Series Number 9, March 2006. "Water Management and Climate Change: Lessons from Regional Cooperation".
2 Water Law of November 28th, 1906. http://www.oas.org/dsd/EnvironmentLaw/WaterLaw/home.htm
3 ECLAC. Water governance for development and sustainability. June 2006.

1.1. International Water Law in Latin America: A critical assessment of existing agreements for improved governance

Antonio Razeto Cáceres, Juan Carlos Sánchez y Alejandro O. Iza

Transboundary river basin, international water law, treaties, Latin America

Worldwide, there are 276 transboundary river basins, of which 69 extend over the territory of one or more Latin American States (UNEP 2013). During the last three decades, Latin American countries have implemented reforms to improve water management (Akhmouch, A 2012). However, and in order to ensure an equitable and reasonable use of shared waters, it is necessary to increase States' cooperation and shift towards joint management of water resources, coordinating legal, policy and institutional frameworks at both international and national levels (Aguilar & Iza 2011).

There is relevant literature on shared water governance in different areas of Latin America (Boeglin 2012; Dourojeanni 2001; López & Sancho 2013; Querol 2003). However, there are no systematic analyses. This article aims to assess the legal preparedness of countries in the region regarding their transboundary river basins, by means of surveying water agreements and treaties between co-riparians, and by assessing the quality of these legal arrangements against the "state of the art" rules and principles of International Water Law. This assessment will look at the rules and principles set forth in the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, which incorporates modern principles for legal frameworks of international watercourses, most of which are accepted under customary international law. Additionally, this recently entered into force Convention is considered the legal authority on the subject matter, because of its global legitimacy after being negotiated within the framework of the United Nations and adopted by a General Assembly Resolution.

To evaluate the treaties currently in force this article will use the analytical framework provided by Wouters et al. (2005), which includes an assessment of scope, substantive rules, procedure, institutional and dispute settlement mechanism. Using this framework, the article intends to identify major gaps in treaties and revise what aspects can be strengthened to progressively improve regulation of transboundary waters in Latin America.

INTRODUCTION

There are 276 transboundary water basins in the world (UNEP 2013). Of these, 55 are shared by two or more Latin American states.[4] In this regional context, over the past three decades, reforms have been implemented to improve the management of water resources (Akhmouch 2012). However, this reform has been mostly a national effort exclusive to each state. This means that the cross-border aspect and interdependence among states sharing natural resources has been neglected from a legal perspective.

It is necessary to strengthen cooperation between states in order to ensure equitable and reasonable use of shared waters. The joint management of water resources in the region requires the joint and coordinated implementation of laws, policies, and institutional mechanisms both at international and domestic levels (Aguilar & Iza 2011).

4 In this study, the following twenty countries are considered Latin American: Argentina, Bolivia (Plurinational State of), Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Uruguay, and Venezuela (Bolivarian Republic of). It is important to note that this study considers only those basins shared by two or more countries included in the above list. Consequently, basins such as the Colorado basin, shared by Mexico and the United States, are not analyzed.

There is relevant literature in relation to the governance of shared waters in different Latin American regions (Boeglin 2012; Dourojeanni 2001; Lopez & Sancho 2013; Querol 2003). However, there has not yet been made a systematic analysis from a legal perspective on the legal frameworks for transboundary basins in the region. Therefore, this study aims to assess the developmental state of Latin American countries in relation to international agreements on transboundary waters. The evaluation will be carried out in consideration of the rules and principles established in the 1997 United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses (hereinafter the 1997 Convention)[5], which incorporates modern principles of international water law, most of which were already collected in international customs (Rieu-Clarke, Moynihan & Magsig 2012).

1. METHODOLOGY

This analysis identifies six kinds of international agreements[6] that, in different ways, either totally or partially regulate matters concerning the administration of shared waters:

- Border treaties that contain provisions on the management and use of shared water resources. (Example: the 1938 delimitation treaty between El Salvador and Guatemala);
- Treaties governing a specific use of water. (Example: the 1973 Treaty of Itaipú between Brazil and Paraguay, which regulates the hydroelectric use of shared sections of the Parana River);
- Framework treaties that contain general provisions regarding a basin. (Example: 1969 Treaty of the River Plate Basin between Argentina, Bolivia, Brazil, Paraguay and Uruguay);
- Treaties governing specific matters applicable to all basins shared by the signatory states. (Example: 1994 agreement between the governments of Brazil and Paraguay for the conservation of aquatic fauna in the courses of bordering rivers);
- Treaties partially or totally governing the use of a shared basin. (Example: 1995 agreement for the multiple uses of the resources of the upper Bermejo River basin and the Rio Grande de Tarija: creation of the Binational Commission between Argentina and Bolivia); and
- Treaties that arrange for the fulfillment of studies in a particular basin. (Example: 1955 Preliminary Convention for the Study of the Use of the Waters of Lake Titicaca between Bolivia and Peru).

Within the broad range of treaties covered in this study, only those international agreements which effectively regulate one or more uses for purposes other than navigation in international waters in a particular basin will be analyzed.

It should be noted that in Latin America there are basins that are governed by two or more consecutive and complementary treaties. In this study, these treaties are considered a single legal body. Rio de La Plata deserves special mention because it is regulated as a whole and in a general way by the 1969 Treaty of the River Plate Basin, however its different sub-basins are regulated by other specific agreements of different natures. Given the large size and complexity of the basin and the large number of international agreements regulating its various sections, this study will cover the regulation of each of the sub-basins separately.

Regarding the structure of the analysis, Wouters et.al (2005) developed a "Legal Evaluation Model" which serves as a methodological tool so that the coastal states of a shared basin can identify, in a systematic

---

5 This Convention is globally recognized and accepted, considering it was developed and negotiated within the framework of the United Nations and adopted by resolution of the General Assembly.

6 This study uses two sources of information to define the international basins and treaties to be analyzed. First, it takes into account the transboundary basins included in the Interim Report of Transboundary Waters Assessment Programme, published by the United Nations Environment Programme (UNEP) in 2013. On the other hand, Oregon State University's database is used to evaluate the international agreements. It is important to note that this database includes updated information until 2007. However, the present study includes a review of relevant treaties that have been made after this date as well.

way, the parameters of their rights and legal obligations regarding transboundary waters. It is an interdisciplinary tool that offers a rigorous and objective methodology to identify whether the measures implemented by states are consistent with the international Law of the Sea. This study will use the framework for legal analysis provided by this tool to structure the evaluation of Latin American international agreements on shared waters. This analysis basically includes a review of the scope of the agreements, the substantive regulations, procedural regulations, institutional mechanisms, and mechanisms for conflict resolution.

2. MODERN REGULATIONS OF INTERNATIONAL WATER LAW. 1997 CONVENTION.

Even before its effective date, the 1997 UN Watercourses Convention played a key role in the development of international water law. It has informed the negotiation process, adoption and interpretation of treaties at a regional or basin level, and has also served as a basis for the decisions of international tribunals (Rieu-Clarke, Moynihan & Magsig 2012). The 1997 Convention was adopted by resolution of the United Nations General Assembly on May 21, 1997. However, its effective date was extended to August 17, 2014, after Vietnam¬—in May of the same year—became the thirty-fifth country to ratify the Convention, which was an essential requirement for its implementation, in accordance with Article 36 (UN 2015).

2.1 Scope of Application

This Convention seeks to establish a legal framework for global application with regard to transboundary waters. In Article 3 it states that its provisions are intended to supplement the existing legal framework in each region in three main situations: where there is no international treaty among riparian states; where not all bordering states are part of an existing treaty; or where a particular body of water is regulated by a treaty but the treaty only partially regulates the matters covered by the Convention (Rieu-Clarke, Moynihan & Magsig 2012).

The 1997 Convention provides a comprehensive definition of what is meant by the word "watercourse." In Article 2, paragraph (a) it is defined as "a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus." This is a broad definition that includes the entire area of influence of a basin. Because of this, an instrument of international law regulating the use of transboundary waters between two or more countries should, to the extent possible, regulate the entire geographic area of influence of a basin to comply with the terms of the Convention.

2.2 Substantive Regulations

The fundamental principles declared in the Convention are the principle of equitable and reasonable utilization and participation; the obligation not to cause significant harm; and the protection and preservation of ecosystems.

Regarding the first of these principles, Article 5 obligates states to use and develop an international watercourse "with a view to attaining optimal and sustainable utilization thereof and benefits there from, taking into account the interests of the watercourse states concerned." For its part, Article 6 establishes that equitable and reasonable use of resources requires taking into account all relevant factors and circumstances, of which it includes a non-exhaustive list. This list includes "(a) Geographic, hydrographic, hydrological, climatic, ecological and other factors of natural character; (b) The social and economic needs of the watercourse states concerned; (c) The population dependent on the watercourse in each watercourse state; (d) The effects of the use or uses of the watercourses in one watercourse state on other watercourse states; … (f) The conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect; and (g) The availability of alternatives, of comparable value, to a particular planned or existing use."

In weighing these factors and circumstances, the Convention gives great flexibility to the signatory states. Indeed, Article 6 states that "In determining what is a reasonable and equitable use, all relevant factors are to be considered together and a conclusion reached on the basis of the whole." In this sense, it is important to note the provision in Article 10 which states that any possible use of water is given priority over another. Also, the same regulatory provision states that if there is a conflict between various uses, to proceed with "special regard being given to the requirements of vital human needs."

Secondly, the Convention establishes the obligation to not cause significant harm to other riparian states, the second most important principle of international water law. Article 7 provides that states

"take all appropriate measures to prevent the causing of significant harm to other watercourse states." Even more abundantly, the same article states that in the event that damage is caused anyway, "the states whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures . . . to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation." Controversy has arisen as to which principle takes precedence over the other in any particular case. There is a consensus in the international community that the principle of equitable and reasonable utilization and participation prevails, and that the obligation not to cause harm is instead a factor that must be taken into account to determine when the resource is being used equitably and reasonably. However, to coastal states in the lower sections of a transboundary basin, this predominance has not yet been fully accepted, considering that it reduces their bargaining power (Weiss 2013).

Finally, one of the most innovative aspects of the Convention is the international legal consecration of the principle of protection and preservation of ecosystems, presented in Article 20. This provision is consistent with Article 5 in providing that states should use shared waters in an equitable and reasonable manner, adding that such use should be conducted in ways "consistent with adequate protection of the watercourse." Through these provisions, the Convention recognizes the importance of protecting and preserving the functioning of the ecosystems as the preeminent means of ensuring the availability of sufficient water supply for its multiple uses (Weiss 2013).

2.3 Procedural Regulations

The 1997 Convention contains many provisions for procedural obligations to regulate the relationship between states sharing international waters. These obligations relate mainly to cooperation in a general way, to notification procedures in the event that a state is planning to take measures that would significantly affect another state, and to consultation and exchange of information. All of these obligations intend to ensure that coastal states effectively achieve equitable and rational use of shared waters without causing significant harm to other states' use of the waters. The distinction between substantive and procedural regulations is better made as a way of organizing this analysis, since in reality the implementation of the principles of the 1997 Convention depends entirely on adequate regulation of the procedures, on the good faith of the states and on the constant readiness of the parties to cooperate with one another to achieve efficient and effective governance of shared resources.

Regarding the mutual cooperation that should exist between states, the Convention provides a set of procedural requirements governing the process of dialogue between states. Article 4 stipulates that any coastal state whose water use could be significantly affected may participate in negotiations and consultations on that particular watercourse. Furthermore, Article 9 regulates the obligation of regular exchange of data and information. Between Articles 12 and 19, the Convention governs the notification procedures in the event that a state is planning measures that may have a significant detrimental effect on other states.

2.4. Institutions

The legal framework provided by the 1997 Convention promotes the design of agreements on joint management of shared basins (basin agreements). However, it does not establish a particular obligation for states to enter into these agreements. It simply recommends that the parties implement and adapt the content of the Convention to the individual characteristics of the watercourse. Moreover, in the event that any international instruments already exist, the Convention recommends that states adapt these instruments to the fundamental principles.

Regarding the creation of institutions, the 1997 Convention also provides great flexibility to the parties. Indeed, Article 8 states that "In determining the manner of such cooperation, watercourse states may consider the establishment of joint mechanisms or commissions, as deemed necessary by them, to facilitate cooperation on relevant measures and procedures in the light of experience gained through cooperation in existing joint mechanisms and commissions in various regions." In this sense, the provisions of Article 24 relating to the ordinance of an international watercourse are also relevant: "Watercourse States shall, at the request of any of them, enter into consultations concerning the management of an international watercourse, which may include the establishment of a joint management mechanism."

2.5. Conflict Resolution Mechanisms

The 1997 Convention stipulates that coastal states must use peaceful means to resolve conflicts, and also must mutually agree to submit a dispute to arbitration or to the International Court of Justice.

Furthermore, Article 33 of the 1997 Convention provides for the possibility of forming a "fact-finding commission" that aims to make recommendations for the parties to resolve the dispute fairly. This committee can be convened if no agreement is reached through direct negotiations or arbitration. The recommendations made by the commission must be considered in good faith by the parties, but they are not obliged to implement them.

3. ANALYSIS

Basins whose water use is regulated wholly or partially by legal instruments of international law:

3.1. Catamayo-Chira and Puyango-Tumbes Rivers. (Ecuador, Peru)

In relation to these two basins, this study analyzes the following instruments of international law:

- 1971 Convention for the use of the binational basins Puyango-Tumbes and Catamayo-Chira by Peru and Ecuador.
- 1972 Exchange of notes constituting an agreement to approve the regulations of the Peruvian-Ecuadorian Mixed Commission for the Puyango-Tumbes and Catamayo-Chira basins.
- 1975 modified agreement on the regulations of the Peruvian-Ecuadorian Mixed Commission for the exploitation of the binational Puyango-Tumbes and Catamayo-Chira river basins.

3.1.1. Scope of Application

The 1971 Convention aims for the parties, within their territories, to progressively develop an understanding to implement different forms of cooperation necessary between the two countries for the use of the Puyango-Tumbes and Catamayo-Chira basins (Article 2). In the absence of further indications in the texts of the analyzed international instruments, it can be inferred that they refer to a broad concept of a watershed, including the entire area of influence of the rivers analyzed. This collaboration includes the joint implementation of efforts aimed at securing international financing, the execution of binational projects for water use and conservation programs, and the improvement of watersheds and the installation of meteorological and hydrological stations, among other things (Articles 3, 4, 5, and 6). The agreement regulates specific aspects of the projects to be developed in both basins separately.

3.1.2. Substantive Regulations

The 1971 Convention, in its first Article, makes an explicit recognition of the applicability of the norms of international law with respect to the utilization of water. This interpretation demonstrates a favorable disposition to the use of the principles of international law recognized in the 1997 Convention. This interpretation is confirmed by various provisions throughout the 1971 Convention that reaffirm the willingness of the parties to apply these principles. For example, Articles 7 and 9, referring to projects in the Catamayo-Chira basin, contain the principle of equitable and rational use of water. The first of those provisions states that "the implementation thereof shall be governed by the criteria of rational utilization consistent with the social and economic needs of the communities living in the service areas…" The ninth article provides that, in the event that structural adjustments are necessary, "technical meetings shall immediately be held so that, in the spirit of equity and co-operation, the necessary measures may be adopted to ensure normal operation of the projects scheduled by both countries." Furthermore, Article 1 explicitly recognizes the application of the obligation to not cause significant harm to other coastal states by establishing that the water use by each party must be made "on the basis of their needs and always provided that no harm or damage is caused to the other Party." Finally, the regulation of conservation programs and the improvement of the binational basins demonstrates the implicit recognition of the principle of protection and preservation of ecosystems.

3.1.3. Procedural Regulations

The 1971 Convention and the Rules of the Peruvian-Ecuadorian Mixed Commission for the Puyango-Tumbes and Catamayo-Chira basins include regulations governing the functioning of the Commission, the implementation of projects in both basins, and the exchange of information. They also establish the obligation to report in the event that one of the signatories needs to implement projects in addition to the ones contemplated in the agreement which could affect the joint use program. However, there is no detailed procedure such as that put forth by the 1997 Convention regarding notification and deadlines to respond with regard to planned measures which could have a significant adverse effect on another state. There is also no clear regulation of the procedures for consultations and negotiations on such measures. Despite these facts, the Commission's regulations provide a legal framework to ensure prior notice of measures that could affect the rational and equitable use of shared waters.

3.1.4. Institutional Mechanisms

The Mixed Commission is composed of two national subcommittees, a Peruvian and Ecuadorian. Each of the subcommittees is composed of representatives from various national administrative bodies. The main objectives of the Commission are set out in Article 14 of the 1971 Convention: "(a) To carry out studies on the present state of the basins... in order to draw up a programme of activities and construction work for their conservation and improvement; to determine the financing to be provided by each country; and to carry out the work schedules agreed upon; (b) To draw up a co-ordinated programme for collecting, handling and processing hydrological, meteorological and sediment-measuring information... (c) To prepare all documents and reports which, within their fields of action and in respect of the basins, are requested by either of the Parties. "

3.1.5. Conflict Resolution Mechanisms

No specific mechanism to resolve conflict is established.

3.1.6. Final Remarks

The legal framework established by the international legal instruments provides adequate tools to achieve the rational and equitable use of shared water resources. It also establishes an appropriate institutional mechanism to coordinate cooperation between the two parties. However, they could consider updating the procedural regulations in the event of planned measures that could cause a significant adverse effect, and advance the design of an appropriate mechanism to resolve disputes.

3.2. Laguna Merin. (Brasil y Uruguay)

In this study, the following instruments of international law relating to the management of the international waters of Laguna Merin are analyzed:

- 1963 Exchange of notes constituting an agreement between Brazil and Uruguay which established a joint commission for the development of Laguna Merin.
- 1977 Treaty on cooperation in natural resource use in the basin of Laguna Merin.

3.2.1. Scope of Application

The 1977 Treaty aims to promote the integral development of theMerin Basin (Article 1). The territorial scope includes "Laguna Merin Basin and its areas of direct and measurable influence" (Article 5). According to Article 4, the objective of the actions carried out within the framework of the agreement is: "(a) The elevation of the social and economic level of the inhabitants of the basin; (b) The provision of water for domestic, municipal, and industrial purposes; (c) The flow regulation and flood control; (d) The establishment of an irrigation and drainage system for agricultural

purposes; (e) The protection and proper utilization of mineral, plant, and animal resources; (f) The production, transmission, and utilization of hydropower; (g) The increase in transport and communications, and especially navigation; (h) The industrial development of the region; (i) The development of specific projects of mutual interest."

3.2.2. Substantive Regulations

The principal terms established under the 1977 Treaty are related to the realization of "studies, plans, programs, and projects necessary for the realization of common works for the better use of the natural resources of the basin" (Article 3, paragraph b). In this regard, the parties must declare the areas under their jurisdiction that are necessary for the implementation of joint works as public utility, and practice all relevant administrative and judicial acts to effect the applicable expropriations and establish the corresponding rights (Article 14). Also, according to Article 15, the parties "agree to grant all administrative facilities, the customs duty and tax exemptions which are necessary for the realization of the common work." It does not explicitly recognize the application of the principles of the 1997 Convention, only Article 16 refers indirectly to the principle of not causing significant harm in decreeing that the parties "take appropriate measures to ensure that the various water uses, the exploration and use of the natural resources in the area, within their respective jurisdictions, do not cause significant damage to navigation, to the quantity or quality of water, or to the environment."

3.2.3. Procedural Regulations

The instruments of international law analyzed contemplate certain procedures relating to the study, construction, operation, and maintenance of public works. However, there are no further provisions concerning the obligation to inform prior to the planning of measures that could imply significant damage to the other party.

3.2.4. Institutional Mechanisms

According to Article 6 of the 1977 Treaty, the Uruguayan-Brazilian Joint Commission is responsible for the implementation of the Treaty for the Development of the Laguna Merin Basin. The Joint Commission has two locations: one in the city of Treinta y Tres, Oriental Republic of Uruguay, and the other in the city of Porto Alegre, Federative Republic of Brazil. However, it can meet anywhere in the territory of the contracting parties (Article 7). Article 10 includes an extensive non-exhaustive list of the functions of the Joint Commission. In the same way, Article 9 provides that the Joint Commission members may enjoy freedom of movement on the border and may stay in the territory of the party of which they are not nationals, as well as customs, taxation, and transit privileges.

3.2.5. Conflict Resolution Mechanisms

Article 18 clearly establishes a subsequent and subsidiary order of conflict resolution proceedings that should be followed when faced with "any dispute that may arise between the contracting parties concerning the interpretation or application of this Treaty." First, the dispute shall be presented through the Joint Commission by any of the respective representations. If after 20 days the Joint Commission fails to come to an agreement, it must notify the parties so that they can resolve the issue through direct negotiations. Finally, if the direct negotiations fail, they must resort to peaceful settlement procedures provided for in the international treaties in force between both parties.

3.2.6. Final Remarks

The instruments of international law analyzed establish appropriate cooperative mechanisms for the integral management of the Laguna Merin basin. However, in order to implement a modern rule of international water law, it is necessary to explicitly recognize the principle of equitable and rational use of shared water resources, as well as to design a mechanism to regulate the procedure that the parties should follow when faced with the planning of measures which could mean a significant damage to the other state.

3.3. Lake Titicaca Basin, Desaguadero River, Poopo Lake, and Coipasa Salt Pan System. (Perú y Bolivia)

The following instruments of international law relating to the transboundary waters of Lake Titicaca are discussed below:

- 1955 Agreement establishing a joint commission for study of the Puno-Guaqui railway line and joint use of the waters of Lake Titicaca.
- 1955 Preliminary Convention between Peru and Bolivia concerning a study of the joint use of the waters of Lake Titicaca.
- 1957 Agreement between Bolivia and Peru concerning a preliminary economic study of the joint utilization of the waters of Lake Titicaca.
- 1993 Exchange of notes related to the creation of the Autonomous Binational Authority of the basin of the Lake Titicaca, Desaguadero River, Lake Poopo, and Salar de Coipasa.

3.3.1. Scope of Application

The scope of application of the instruments mentioned above was given by the general objectives of the Binational Authority established in Article 2 of the Agreement of 1993. This Authority's main functions are to promote and conduct activities, programs, and projects and to create rules for order, management, control, and protection of the watershed systems of Titicaca, Desaguadero River, Lake Poopo, and Salar de Copaisa. Also within its functions is to exercise compatibility control over "activities of any kind carried out in the basin, with the rules and parameters of resource use established in the Master Plan and those established by the Binational Authority for protection and ecosystem management." Accordingly, the scope of the analyzed international instruments includes the integrity of the aforementioned water systems.

3.3.2. Substantive Regulations

It does not include an explicit consecration of the guiding principles of the 1997 Convention. However, the provisions of the Agreement of 1993 show that the will of the parties is to protect the ecosystems of the water system, which could be interpreted as an implicit consecration of the principle of protection and preservation of ecosystems.

3.3.3. Reglas de procedimiento

The regulatory aspects of the international instruments governing the water system mainly relate to the functioning of the Binational Commission. However, they do not include a procedure for notification in the event of measures that could significantly affect another state.

3.3.4. Institutional Mechanisms

The 1993 Agreement establishes that the Binational Authority is an "entity of public international law with full autonomy of decision-making and management on technical, administrative and financial matters." The staff of this institution enjoy diplomatic status, and managerial and professional positions are evenly distributed between officials from both countries.

3.3.5. Solución de conflictos

The 1993 Agreement provides that the Binational Commission should act as "first stage of proceedings to hear disputes between the two countries regarding the implementation and interpretation of this agreement." It also provides that both governments must agree on a Dispute Settlement Regulation.

3.3.6. Final Remarks

The international legal instruments analyzed set an adequate precedent to build a modern legal framework adapted to the provisions of the 1997 Convention. The creation of an independent authority with

decision-making power in the areas of management, administration, and finance is remarkable. However, it is important to highlight that the legal instruments analyzed do not recognize the principles of international water law and do not regulate the procedure to be followed in the planning of measures that could adversely impact the other state.

3.4. Sixaola River Basin. (Costa Rica y Panamá).

The following instruments of international law establish the framework for the regulation of the transboundary waters of the Sixaola River Basin:

- 1992 Convention on transboundary cooperation for development. (May 3, 1992)
- 2013 Regulation to establish the bylaws of the Binational Commission of the Sixaola River Basin.

3.4.1. Scope of Application

According to Article 1 of the 2013 Regulation, the Binational Commission of the Sixaola River Basin (Binational Commission) has jurisdiction over the basin, including the sub-basins of the Telire, Coen, Lari, Yorkin, and Uren rivers. It also considers the mouth of the Sixaola River, including adjacent marine and coastal areas.

3.4.2. Substantive Regulations

Article 2 of the regulation explicitly recognizes the implementation of the three guiding principles of the 1997 Convention. This precept argues that both governments will stimulate through the Binational Commission "the equitable and reasonable use of the waters and natural resources that they share, taking into account one another's rights." Additionally, in relation to the obligation not to cause significant harm, the same precept stipulates that both countries should use their natural resources ensuring that "activities within the territory will not cause social, economic, or environmental damage to the neighboring state." Finally, the protection and preservation of ecosystems establishes that "the conservation of environmental goods and ecosystem services are fundamental to economic development and the welfare of the basin."

3.4.3. Procedural Regulations

The 2013 Regulation establishes a series of obligations related to cooperation in managing the Sixaola River Basin. According to Article 2 of the Binational Commission, it serves as a platform for technical and inter-agency information exchange. In this sense, the same provision states that it ". . . will ensure the use of harmonized methodologies, the gathering and exchange of scientific and technological information resources." There is no notification procedure in the event of planned measures that may have an adverse effect on the other state. However, it could be argued that the action framework of the Binational Commission is sufficient to enable states to jointly assess the implementation of such measures.

3.4.4. Institutional Mechanisms

The Binational Commission is a binational and cross-border governance body for the comprehensive management of the basin (Article 3). The Commission consists of an Assembly, composed of various Costa Rican and Panamanian authorities from government agencies and representatives of civil society; a Coordinating Unit, which acts as the administrative body of the Commission; and special working groups that will eventually be established to address specific issues.

3.4.5. Conflict Resolution Mechanisms

Under Article 17 any dispute that may arise concerning the interpretation or implementation of the statutes of the Binational Commission must be resolved through negotiation, conciliation, or other specific means of dispute resolution as decided by the parties. If unable to reach an agreement, the matter will be raised to the Permanent Binational Commission, created by the 1992 Convention.

3.4.6. Final Remarks

The Sixaola River Basin has a legal framework for cooperation that, according to the provisions of the 1997 Convention, can be described as modern. Regulations to establish the statutes of the Binational Commission effectively establish the legal elements necessary to implement a management system that ensures equitable and rational use of water resources, prevents significant damage to another state, and protects and preserves ecosystems..

3.5. La Plata River Basin. (Argentina, Bolivia, Brasil, Paraguay, Uruguay)

The La Plata River basin is regulated as a whole by the following international treaty

- 1969 Treaty of the La Plata River Basin.

3.5.1. Scope of Application

According to Article I, the treaty applies to the La Plata River basin and all of its area of influence, and seeks to join efforts in order to promote the harmonious development and physical integration of the basin.

3.5.2. Substantive Regulations

The sole paragraph of Article I lists the objectives of joint cooperation. These objectives show that there is an implicit recognition of some of the principles contained in the 1997 Convention. Point b of the same article recognizes the principle of equitable and reasonable use when it states that the parties should promote, “The rational utilization of water resources, in particular by the regulation of watercourses and their multipurpose and equitable development.” In the same way, the principle of protection and preservation of ecosystems is partially recognized in paragraph c of the same article, which provides that the parties should promote “the conservation and development of animal and plant life.”3.5.3. Procedural Regulations.

3.5.3. Procedural Regulations

The treaty hardly establishes procedures beyond a general obligation to cooperate to achieve the joint objectives related to the basin.

3.5.4. Institutional Mechanisms

According to Article III, the Intergovernmental Coordinating Committee is recognized as the permanent body for the basin in charge of promoting and coordinating the progress of multilateral efforts designed to ensure the integrated development of the of the La Plata River basin. The same article suggests that a statute should be adopted to regulate the Committee.

3.5.5. Conflict Resolution Mechanisms

The treaty does not contain provisions on dispute settlement.

3.5.6. Final Remarks

The treaty analyzed establishes a legal framework containing general provisions, which are more of a memorandum of understanding to jointly promote the harmonious development and physical integration of the basin, as is clear from Article I. In this sense, it is noteworthy that the principles of equitable and reasonable utilization and protection and preservation of ecosystems are recognized.

3.6. Pilcomayo River (Argentina, Bolivia, Paraguay)

In this study the following instruments of international law relating to the Pilcomayo River basin are analyzed:

- 1994 Statute of the Binational Administrative Commission for the Lower Rio Pilcomayo Riverbed between Argentina and Paraguay.
- 1995 Agreement of the Tri-national Commission for the Development of the Pilcomayo River Basin. (Argentina, Bolivia, and Paraguay)

3.6.1. Scope of Application

The 1994 Agreement provides that the spatial scope of application includes the lower Pilcomayo River basin, in the shared section between the Republic of Argentina and the Republic of Paraguay, located between the town of Esmeralda and the mouth of the Paraguay River. For its part, the 1995 agreement would apply across the entirety of the Pilcomayo River basin, as is clear from the regulation of the functions of the Tri-national Commission: Article IV provides that the Tri-national Commission "will be responsible for the study and implementation of joint projects in the Pilcomayo River which foster the development of the basin."

3.6.2. Substantive Regulations

Both agreements implicitly recognize the application of the principle of equitable and reasonable utilization of water and protection and preservation of ecosystems to regulate the functions of the Binational Commission and the Tri-national Commission, respectively. Article IV of the 1994 Agreement provides that the Binational Commission's function is "the adoption of measures to facilitate the equitable distribution of water..." Also paragraph c refers to "the adoption of measures concerning environmental protection and water quality." For its part, the 1995 Agreement in Article IV, paragraph a provides that the duties of the Tri-national Commission are "to continue the study and work necessary to achieve the multiple, rational and harmonious use of river resources." Meanwhile, paragraph m states that additional functions of the Commission are "to coordinate the adoption of appropriate measures to avoid disturbances in the ecological balance."

3.6.3. Procedural Regulations

Both treaties establish various procedures within the policy framework of the Binational Commission and the Tri-national Commission, respectively. Also, both treaties establish a duty to inform the Parties through the reporting of activities. There are no similar provisions to the 1997 Convention relating to the notification of measures that could affect the uses of shared waters.

3.6.4 Institutional Mechanisms

The 1994 Agreement establishes the Statutes of the Binational Administrative Commission, composed of a representative of each party and advisors that the respective governments deem appropriate. The Binational Administrative Commission acts as the water authority and is responsible for the overall management of the lower basin of the Pilcomayo River, ". . . including everything related to regulation of use and flow, projects and works, and upstream and downstream water quality." For its part, the 1995 agreement establishes the Tri-national Commission, responsible for studies and projects that foster the development of the basin. The Commission consists of a council of delegates under whose agency is the executive director.

3.6.5 Conflict Resolution

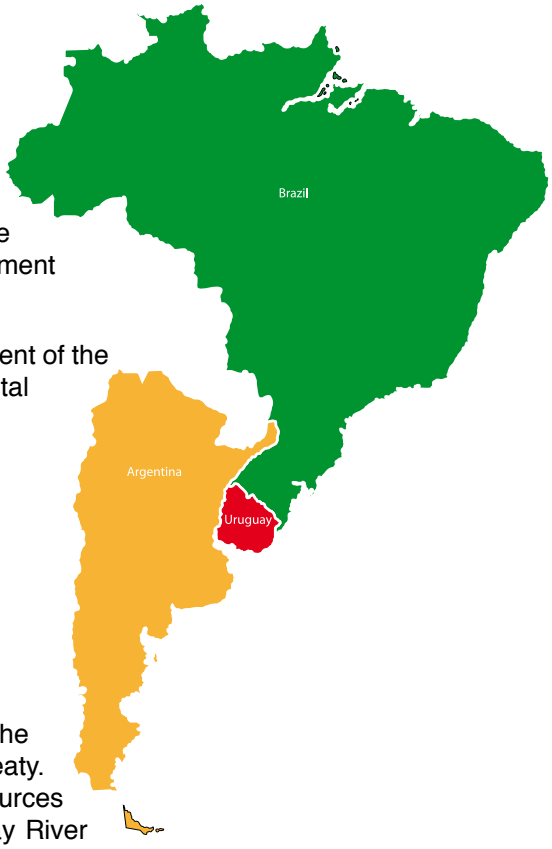
Both agreements establish provisions in the event of any disputes. If the conflict cannot be resolved within the framework of the committees, it should be raised to the party states to seek resolution through direct negotiations.

3.6.6 Final Remarks

The establishment of the Tri-national Commission shows the willingness of the states to work together to obtain an equitable and reasonable utilization of the resources of the basin of the Pilcomayo River. Also,

both agreements have a legal framework that provides the basis to move towards a regulation that recognizes and effectively implements the guiding principles of the 1997 Convention and develops an appropriate procedure in the event of the planning of measures that could significantly affect other states.

3.7. Río Uruguay (Argentina, Brasil, Uruguay)



Next, the following instruments of international law governing the use of the shared waters of the Uruguay River sub-basin will be analyzed:

- 1961 Boundary Treaty of the Uruguay River between the government of the Republic of Argentina and the government of the Oriental Republic of Uruguay.
- 1975 Statute of the Uruguay River between the government of the Republic of Argentina and the government of the Oriental Republic of Uruguay.
- 1980 Treaty between the government of the Republic of Argentina and the government of the Federative Republic of Brazil approving the shared water resources of the border section of the Uruguay River and its tributary the Pepiri-Guazu River.

3.7.1. Scope of Application

The 1975 statute applies to the use of the Uruguay River in the neighboring areas and in the way stipulated in the 1961 Boundary Treaty. For its part, the 1980 Treaty applies to the use of shared water resources in the border sections between Argentina and Brazil on the Uruguay River and its tributary the Pepiri-Guazu River. It is important to note that the treaty regulates mainly the hydroelectric development of the sub-basin, although Article I states that it also regulates the navigability, flood mitigation, and water use for consumption.

3.7.2 Substantive Regulations

The 1975 Statute recognizes the principle of equitable and reasonable utilization of shared waters in Article 1 in defining the purpose of the statute. This regulatory provision states that its purpose is “to establish the joint machinery necessary for the optimum and rational utilization of the River Uruguay.” Furthermore, Article 36 recognizes the principle of protection of ecosystems, providing that “The Parties shall co-ordinate.. the necessary measures to avoid any change in the ecological balance and to control pests and other harmful factors.” Meanwhile, the 1980 Treaty in Article 1 refers to the “rational utilization of its waters for consumptive uses,” partially recognizing the principle of equitable and reasonable utilization of shared waters. The same article states that the works to be executed “... will keep in mind the need to preserve the environment, fauna, flora and water quality,” which could be interpreted as recognition of the principle of protection of ecosystems. Likewise, the obligation to not cause significant harm is recognized in Article III: each country’s utilization of the waters in the sections not shared with other countries will be “according to its needs, whenever it does not cause significant damage to the other country.”

3.7.3 Procedural Regulations

The 1975 Statute extensively regulates the exchange of information between both parties. Furthermore, in the seventh and subsequent articles, it establishes a notification procedure in the event that one of the parties “plans to construct new channels, substantially modify or alter existing ones or carry out any other works which are liable to affect navigation, the flow of the river, or the quality of its waters.” This notification procedure keeps with the obligation to inform in the event of planning measures established by the 1997 Convention. The Treaty of 1980 also briefly delineates a procedure in the case of measures that could significantly affect the other party. Indeed, Article III provides that “any significant harm that may occur downstream as a result of the regulation of the said rivers should be prevented as far as possible, and its assessment and

qualification may not be unilaterally defined." It goes on to establish the obligation to settle claims that arise as a result of these measures as soon as possible.

3.7.4 Institutional Mechanisms

The 1975 Statute established the Administrative Commission of the River Uruguay, composed of an equal number of delegates from each of the parties. This commission operates independently and has its own secretariat. The role of the commission is governed by Article 56 and includes the creation of rules, coordination of studies, preparation of various procedures and formalities and other administrative tasks of coordination and cooperation. The 1980 Treaty established a Coordinating Committee to coordinate the implementation of the rules of cooperation, as well as the performance of the executive bodies in the implementation of programs, research projects, construction, maintenance and operation, among other hydroelectric usage activities. The executive bodies are public entities coordinated by civic power and responsible for implementing and executing usage works. Meanwhile, the 1980 Treaty also contains certain procedures primarily intended to regulate the planning, construction, and operation of hydroelectric facilities.

3.7.5 Conflict Resolution

The 1975 Statute provides in the 58th and subsequent articles a series of steps to be followed in the event of disputes. First, it should be brought before the Commission and, if no agreement is reached, the parties will be notified of the dispute to seek a solution through direct negotiations. If the negotiations do not bear fruit, the matter may be submitted to the International Court of Justice. Meanwhile, the 1980 Treaty simply states that any dispute over the interpretation or application of the treaty shall be settled by "usual diplomatic channels, which will not delay or interrupt the execution of works or the operation of their facilities."

3.7.6 Final Remarks

The instruments of international law analyzed constitute a comprehensive legal framework that conforms to the contents of the 1997 Convention. The 1975 Statute contains regulations that are consistent with modern international water law and establish adequate procedural and institutional mechanisms to comprehensively manage water resources shared by Argentina and Uruguay. Meanwhile, the Treaty of 1980, although it predominantly regulates the hydroelectric development of the Uruguay River basin between Argentina and Brazil, also contains provisions aimed at regulating other water usage in the basin in a rational and equitable manner.

3.8. Cuareim River (Uruguay y Brasil)

The following instruments of international law are analyzed in regards to this shared watershed:

- 1991 Agreement of cooperation for the use of natural resources and the development of the basin of the Cuareim River.
- 1997 Complementary adjustment to the agreement for cooperation for the improvement of natural resources and the development of the Cuareim River basin.

3.8.1. Scope of Application

Article III of the 1991 agreement stipulates that the scope of application is the "Cuareim River basin and its areas of direct and measurable influence that, if necessary, will be determined by an agreement between the contracting parties." The agreement aims to promote the development of the basin. On the other hand, the complementary agreement of 1997 establishes in Article I that "The Complementary Agreement regulates the rational and sustainable use of the River Cuareim."

3.8.2 Substantive Regulations

The 1991 Agreement explicitly recognizes in Article II paragraph b that the parties shall pursue, among other purposes "the rational and equitable utilization of water for urban domestic, agricultural, and industrial purposes." In this regard, Article II of the 1997 Complementary Agreement establishes a hierarchy regarding specific water usage by providing that "priority will be given to drinking water for coastal communities . . . ." In Article II, subsection k it establishes that one of the purposes of the agreement is the "recuperation and conservation of the environment." This provision could be seen as an implicit recognition of the principle of protection and preservation of ecosystems. There is no reference to the obligation not to cause significant harm to other states.

3.8.3 Procedural Regulations

The 1991 Agreement and the 1997 Complementary Adjustment do not hardly contain procedural guidelines, only some provisions for the exchange of information between the parties and the Joint Committee. There are no provisions for the obligation to report the planning of measures that could affect the other party.

3.8.4 Institutional Mechanisms

Article IV of the 1991 Convention states that the Joint Brazilian-Uruguayan Commission for the Development of the Cuareim River Basin will be charged with the execution of its provisions. Interestingly, the same article provides that until the parties approve its statutes and allocate the necessary funds for its operation, the Joint Committee shall be governed by the rules of the Statute of the Uruguayan-Brazilian Joint Commission for the Development of the Merin Lagoon, using its physical and organizational structure. What this provision actually does is merge the administration of the two basins in a single institution, which seems appropriate considering that these are two basins shared by the same parties.

3.8.5 Conflict Resolution

There are no provisions regarding the resolution of possible disputes.

3.8.6 Final Remarks

The Cuareim River watershed has a legal framework that lays the foundation for progress toward a regulation that fully recognizes the modern legal international water management norms. It is important to emphasize the need for appropriate procedures in the event that a state plans measures that could significantly harm the other party. It is also vital to have a mechanism for conflict resolution.

3.9. Bermejo River and its subsidiary Río Grande de Tarija. (Argentina y Bolivia)

The following instruments of international law are analyzed in regards to this shared watershed:

- 1995 Agreement for the use of the resources of the upper basin of the Bermejo and the Grande de Tarija Rivers: the creation of the Binational Commission.

3.9.1. Scope of Application

According to Article I, paragraph a of this agreement, it applies to the upper basin of the Bermejo and Grande de Tarija Rivers, including "all of their area of influence." In this sense, the agreement seeks to promote sustainable development, to optimize the use of natural resources, to create jobs, and to manage water resources in a rational and equitable manner. Among other uses, the agreement explicitly mentions energy production, irrigation, flood control, exploitation of wildlife, industrial, and recreational uses.

3.9.2. Substantive Regulations

The 1995 Agreement in Article I establishes, among other objectives, to enable "the rational and equitable management of water resources." However, the other

provisions of the agreement do not explicit acknowledge the obligation not to cause significant harm to other states or the principle of protection and preservation of ecosystems.

3.9.3 Procedural Regulations

The Agreement includes certain procedures for the operation of the Binational Commission, however there are no provisions for the exchange of information or notification in the event of planned measures that may significantly affect the other party.

3.9.4 Institutional Mechanisms

By way of the 1995 Agreement, the Binational Commission for the Development of the Upper Basin of the Bermejo River and the Rio Grande de Tarija is created. This institution aims to carry out all necessary actions for the development of the basin. It consists of two delegates from each member state.

3.9.5 Conflict Management

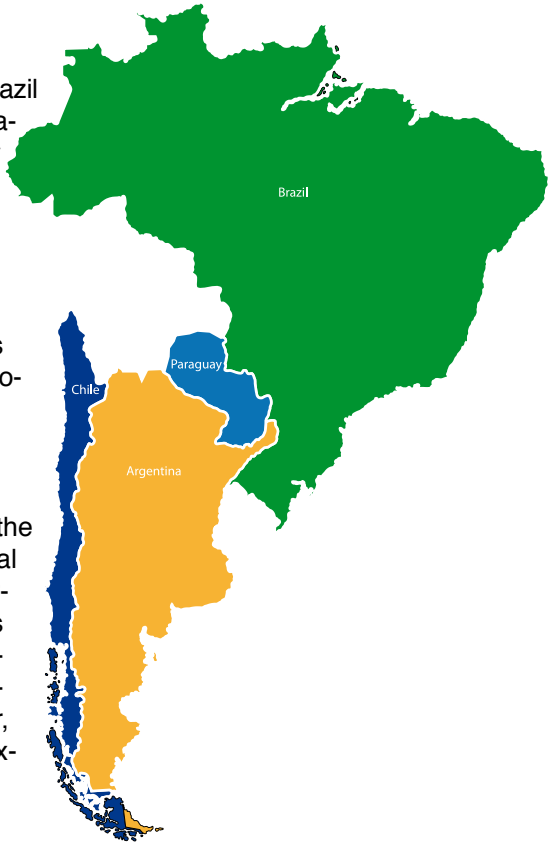
Article XIII stipulates that disputes between the parties which have not been settled through direct negotiations shall be resolved in accordance with the special dispute settlement rules agreed upon by both parties. Additionally, the General Arbitration Treaty signed by both parties on February 3, 1902, will apply.

3.9.6 Final Remarks

The 1995 Agreement provides a legal framework for cooperation for the development of the Bermejo River basin and its tributary, the Rio Grande de Tarija, to coordinate the projects necessary for equitable and rational development of water resources. In this sense, the addition of procedural rules to regulate the exchange of information and notification procedures in the event of planning measures that may significantly affect the other coastal state could strengthen governance in the basin. Also, the explicit recognition of the principles to not cause significant harm to other states and to protect and preserve the ecosystems would approximate this legal framework more closely to the content of the 1997 Convention.

3.10. Paraná River. (Argentina, Brasil, Paraguay)

The sub-basin of the Parana river shared by Argentina, Brazil and Paraguay is regulated extensively, wherein the following international legal instruments are most prominent: 1971 Convention to Study the Use of the Rio Parana's Resources (Argentina, Paraguay); 1973 Treaty of Itaipu (Brazil, Paraguay); 1973 Treaty of Yacyreta (Argentina, Paraguay); 1979 Tripartite Agreement (Brazil, Paraguay, Argentina); and the 1998 technical administrative regulation of the Joint Argentine-Paraguayan Commission on the Parana River (Argentina, Paraguay). However, this study does not analyze these legal bodies because they refer predominantly to the generation and use of hydropower.



3.11. Basins Shared by Chile and Argentina

The basins shared by Argentina and Chile are governed by the 1971 Act of Santiago on Hydrologic Basins and the 1991 Additional Specific Protocol on Shared Water Resources Treaty. The latter, in Article 5, establishes the requirement to carry out actions and programs through general utilization schedules (GUS). A Binational Commission of Economic Cooperation and Physical Integration - Subcommittee on Shared Natural Resources has also been created. However, this study will not analyze the different GUS in place because it exceeds the scope of this study.

CONCLUSION

The analysis conducted shows that only two of the 55 transboundary basins identified in Latin America have a legal framework for cooperation that, according to the provisions of the 1997 Convention, may be regarded as modern. These two basins are the Sixaola River and the Uruguay River.

In the same way, of the basins analyzed in this study, very few have treaties attached to modern precepts of international water law. Only four of them (Catamayo-Chira River, Puyango-Tumbes River, Sixaola River, and Uruguay River) have treaties recognizing the application of the three fundamental legal principles contained in the 1997 Convention. This situation represents a high risk to the political, social, and economic stability of the region, considering the importance of transboundary waters to the development of Latin American nations.

Consequently, it is necessary to promote the development and implementation of legal frameworks that adhere to modern international water law in order to reduce this regulatory vacuum around shared waters that do not have formal cooperation mechanisms established through international legal instruments.

BIBLIOGRAPHY

Aguilar, G & Iza, A 2011, *Governance of shared waters. Legal and institutional issues*, IUCN, Gland, Switzerland.

Akhmouch, A 2012*, Water Governance in Latin America and the Caribbean: A Multi-Level Approach,* OECD Regional Development Working Papers.

Boeglin, N 2012, "Acuíferos transfronterizos: respuestas desde el derecho internacional y vacíos en Centroamérica", *Boletín geológico y minero*, 123, 3, pp. 235-248.

Dourojeanni, A 2001*, Water Management At The River Basin Level : Challenges In Latin America / Axel Dourojeanni R,* CEPAL/ECLAC, Natural Resources and Infrastructure Division, Santiago.

Giordano, M 2003, 'Managing the Quality of International Rivers: Global Principles and Basin Practice', *Natural Resources Journal*, 43, p. 111.

López A & Sancho, R, 2013, "Central America", in Loures, F & Rieu-Clarke, A 2013 (eds.)*, The UN Watercourses Convention In Force: Strengthening International Law For Transboundary Water Management,* Routledge, USA/Canada.

Querol, M 2003*, Estudio Sobre Los Convenios Y Acuerdos De Cooperación Entre Los Países De América Latina Y El Caribe, En Relación Con Sistemas Hídricos Y Cuerpos De Agua Transfronterizos,* CEPAL/ECLAC, Santiago.

Rieu-Clarke, A, Moynihan, R, Magsig, B-O 2012 *'UN Watercourses Convention – User's Guide,* CWLPS, Dundee.

UNEP 2013, Transboundary Waters Assessment Program, TWAP FSP River Basins Component Interim report – preliminary results, UNEP, Nairobi, visto el 6 de febrero de 2015, < http://twap-rivers.org/#results-data-portal>.

United Nations 2015, Treaty collection, visto el 6 de febrero de 2015 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-12&chapter=27&lang=en#EndDec

United Nations Environmental Programme 2007, *Hydropolitical Vulnerability & Resilience along International Waters: Latin America & the Caribbean,* p. 17 & 38, visto el 20 de febrero de 2015, http://www.unep.org/publications/contents/pub_details_search.asp? ID=4035

University of Dundee 2015, UN Watercourses Convention. Online User's Guide, visto el 20 de febrero de 2015 http://www.unwatercoursesconvention.org/the-convention/

Weiss, EB 2013, *International Law For A Water-Scarce World*, The Hague Academy of International Law, Martinus Nijhoff Publishers.

Wouters, P, Vinogradov, S, Allan, A , Jones, P & Rieu-Clarke, A 2005*, Sharing transboundary waters: an integrated assessment of equitable entitlement: the legal assessment model* . IHP-VI Technical Document in Hydrology, no. 74, International Hydrological Programme (IHP) of the United Nations, Educational, Scientific and Cultural Organization (UNESCO).

1.2. Human Right to Access Water and Sanitation in the Context of Integrated Water Resource Management (IWRM)

Liliana Arrieta Quesada

Key Words

IWRM, human Rights, HRBA, standards, indicators, implementation

Human Rights are civil, economic, political, and cultural rights inherent to every human being, and apply regardless of nationality, race, sex, sexual orientation, ethnicity, religion or place of birth, without any discrimination. The human right to water and sanitation is a "basic human right for the enjoyment of life and all human rights" in accordance to the provisions of the Agreement of the United Nations General Assembly, A/64/L.63, 2010.

These rights generate in their holders the legitimacy to demand their respect, protection and fulfillment, and as a counterpart produce the same obligations of the State and guarantee the protection in instances of international justice. However, how can we make sure if a State complies to the satisfaction or not with the regulatory Framework of human rights? For such, standards and benchmarks have been created in order to compare the performance of a state in such given situation. In the case of the human right to access to clean water and sanitation, General Comment No. 15 of the Committee on Economic, Social and Cultural Rights, establishes that States must comply with the following parameters: services must be sufficient and continuous for personal and domestic uses. WHO has considered necessary between 50 and 100 ls of water per person per day. The water source must be within 1,000 meters, and the necessary time to have the water available should not exceed 30 minutes.

In this paper, we seek to establish the link with IWRM, which has emerged as a change in paradigm in water resources management, interpreting parallel global processes, which are interconnected in practice, in relationship to water cycles and basins, to overcome the distribution for use and competition.

In recent decades, water sustainability has been at the forefront of the international public agenda, in the Millennium Development Goals, in treaties and conventions, in regional and global agreements, and agreements in the United Nations General Assembly, while the international community's concern for human rights formally dates back to 1948, with the Universal Declaration of Human Rights.

Human rights are civil, economic, political, and cultural rights inherent to every human being, and which apply regardless of nationality, race, sex, sexual orientation, ethnicity, religion, or place of residence without discrimination. For its part, the human right to water and sanitation is "a human right that is essential for the full enjoyment of life and all human rights," in accordance with the provisions of the resolution adopted by the United Nations General Assembly, A/64/L.63 on July 28, 2010.[8] Human rights are characterized as universal, inalienable, interdependent, and indivisible.

8 For historical precedent, see resolutions 54/175, from December 17, 1999, on the right to development; 55/196, from December 20, 2000, International Year of Fresh Water; 58/217, from December 23, 2003, International Decade for Action, "*Water for Life" (2005-2015); 61/192, from December 20, 2006, 2008 International Year of Sanitation; United Nations Conference on Water, and the Rio Declaration on Environment and Development*, both from June 1992.

While these rights originate in international law, and according to Nikken[9] "their enforceability is not dependent on legislative consecration because it has to do with individual rights that derive from human dignity, which are protected from socially unequal power relations"; the fact is that the incorporation of human rights and their guarantees in national constitutions provides an important guarantee, given that all legislation of lower ranking must comply with the constitution by means of interpretation and content by the actions of state powers.

But what do we mean by "rights"? The origin of the word is found in the Latin root *directum*, "that which is subject to the law," while in legal Spanish the etymological adjective is defined as "just, well-founded, legitimate."[10] Rights respond to a series of hypotheses that govern coexistence in society; that is, the existence of rights requires that there be a context in which at least two people participate, one as a rights-holder and the other as responsible for respecting the rights. In the case of "human rights,"[11] they are the "set of powers and guarantees that anyone should have to protect their physical integrity and moral dignity." Whereas, "fundamental rights" refer to those which are inherent to human dignity and are necessary for the free development of personality.

Moreover, human rights have emerged as an unsurpassable impediment to the exercise of power, and hence as an indivisible element of the modern concept of the rule of law. These rights engender in their holders the legitimacy to demand their respect, protection, and realization, and serve to generate the same obligations of the state before its rights-holders, as well as the duty to uphold those rights vis-a-vis national and international legal systems. The violation of an individual's rights places the responsibility on the state for illicit conduct. This report will further develop the scope of these concepts with respect to the human right to water and sanitation.

Having expounded upon the concept, how is it possible to know if a state satisfactorily complies or not with the regulatory framework for human rights? For this purpose, standards and parameters have been created by which to compare the performance of a state in a given situation. These standards, which may be technical or political, constitute the behavior expected from the state—or a third party in a position of power or that acts in the name of the state, as defined by the theory of belonging in international public law—it is the behavior of public authorities. This criteria allows for the objective evaluation of those obliged to respect, protect, and fulfill rights.

In the case of the human right of access to safe drinking water and sanitation, one of the strongest foundational principles by which to verify its fulfillment is General Comment 15 of the United Nations Committee on Economic, Social and Cultural Rights—hereafter CESCR—adopted in November of 2002[12], which establishes the significance of Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights, and which establishes: "The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible, and affordable water for personal and domestic uses." Meanwhile the right to sanitation is of fundamental importance for human dignity and for the private sphere, particularly in the case of girls and women.[13] Article 1 of General Comment 15 states: *"Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity*."

---

9 Pedro Nikken. XXVIII Curso Interdisciplinario del IIDH. La protección de los derechos humanos: haciendo efectiva la progresividad de los derechos económicos, sociales y culturales [XXVIII Interdisciplinary Course on Human Rights of the Inter-American Institute of Human Rights. The protection of human rights: Making effective the progressivity of economic, social and cultural rights], Revista IIDH, Vol 52, page 56, 2010. Retrieved from: http://www.corteidh.or.cr/tablas/r25563.pdf

10 Real Academia Española dictionary. Retrieved from: http://www.wordreference.com/es/en/frames.aspx?derecho. Also as a partnership or lawful obligation, see Jesús Bogarín Díaz, De nuevo sobre el Concepto Etimológico de Derecho, Derecho y Conocimiento, Vol. 1, ISSN 1578-8202 Facultad de Derecho. Universidad de Huelva. Retrieved from: http://www.uhu.es/derechoyconocimiento/DyC01/B03.pdf

11 Diccionario de la Real Academia Española.

12 United Nations Committee on Economic, Social and Cultural Rights (CESCR). General Comment No. 15, to view the complete text, visit: http://conf-dts1.unog.ch/1%20SPA/Tradutek/Derechos_hum_Base/CESCR/00_1_obs_grales_Cte%20Dchos%20Ec%20Soc%20Cult.html#GEN15

13 The topic of equality between men and women with respect to the enjoyment of human rights has been specifically addressed by the CESCR in General Comment No. 16, during its 34th Session (2005): *"The equal right of men and women to the enjoyment of all human rights is one of t he fundamental principles recognized under international law and enshrined in the main international human rights instruments. The International Covenant on Economic, Social and Cultural Rights (ICESCR) protects human rights that are fundamental to the dignity of every person. In particular, Article 3 of this Covenant provides for the equal right of men and women to the enjoyment of the rights it articulates. This provision is founded on Article 1, paragraph 3, of the United Nations Charter and Article 2 of the Universal Declaration of Human Rights. Except for the reference to ICESCR, it is identical to Article 3 of the International Covenant on Civil and Political Rights (ICCPR), which was drafted at the same time."*

In addition to the General Comments of the committee, the primary reference by which to establish the scope of these fundamental rights is United Nations General Assembly Resolution, A/RES/64/292.

In accordance with the committee and supporting FAO and WHO criteria, to make effective these rights, states should comply with the following parameters: Water supply and sanitation services for each person should be continuous and sufficient for personal and domestic uses. Water for drinking, bathing, and personal hygiene, washing clothes, food preparation, and household cleaning should be afforded particular importance. Based on the above-mentioned considerations, the World Health Organization (WHO), considers between 50 to 100 liters of water per person per day necessary to meet the basic needs enumerated. Water should be healthy, this is to say, it should be free of microorganisms, chemical substances, and radiological threats that constitute a danger to human health. Again, WHO guidelines on safe water quality are the model for national standards. Wastewater and solid waste should be disposed of safely. Services should guarantee privacy and consider the specific menstrual hygiene needs of women, and should recognize cultural, religious, and gender aspects. Services should be located within or nearby the home, or settlement, place of work or educational institution, and should acknowledge the special needs of handicapped persons and children. The compliance guideline established by the WHO is that the water sources should be located within 1,000 meters of the home and the necessary time to access water should not exceed 30 minutes. The costs of water and sanitation services should not exceed five percent of household income, in order to not affect the ability of the family to provide for other basic needs and education.

In addition to being a vital element for human beings, water is a key factor of economic and social development, and also plays a fundamental role in the maintenance of ecosystem functions and services. Nevertheless, just as human rights cannot be analyzed in an isolated manner[14] because they all converge within a single rights-holder, the management of hydraulic resources cannot be assessed independently from its relationship with other vital resources, nor from its relationship with its users, or from its relationship with the climate or the demographic and development processes that impose great pressure in terms of availability, with respect to both quality and quantity.

In this report, we seek to demonstrate the existing linkage between the concepts expounded upon in part one and the concept of Integrated Water Resource Management (IWRM), which has emerged over the last decades as a paradigm shift in water management to overcome problems associated with traditional sectoral focus. IWRM incorporates elements of resource governance and recognizes ecosystem needs. From an IWRM perspective, all economic, social, political, and environmental processes are interconnected in practice, in response to the hydraulic cycle. IWRM promotes the watershed approach.[15] One goal of watershed management is to overcome the distribution of competition through geopolitical spaces, which imposes nonexistent barriers on natural resources and which has been traditional practice, resulting in challenges related to accessibility, quality, and reuse. Access to hydraulic resources has also become a source of conflict among communities and sectors. IWRM has emerged as a systematic process for sustainable development, and as such incorporates a human rights-based approach as an element consubstantial to its nature and the Dublin Principles. Hence, it is necessary that operators of plans and projects and designers of public policy within the space of water resources incorporate IWRM at all stages of the programming cycle—diagnostics, analysis, planning, execution, monitoring, and evaluation—to ensure the fulfillment of the human right to water and sanitation, taking into particular consideration the most vulnerable and marginalized populations.

The Dublin Principles consist of four declarations with programmatic content, which serve as water management guidelines:

1. Fresh water is a finite and vulnerable resource, essential to sustain life, development, and the environment.
2. Water development and management should be based on a participatory approach, involving users, planners, and policy makers at all levels.
3. Women play a central role in the provision, management, and safeguarding of water.

---

14 The General Assembly of the United Nations in its resolution 32/130, adopted during the Vienna Summit of 1993, established the indivisible and interdependent character of all human rights.

15 A human rights-based approach consists of empowering individuals to know and claim their rights, and strengthening the capacity and responsibility of individuals and institutions to respect, protect, and fulfill rights. For further information see: FREQUENTLY ASKED QUESTIONS ABOUT THE HUMAN RIGHTS-BASED APPROACH, Office of the United Nations High Commissioner for Human Rights, NY 2006: http://www.un.org/es/events/humanrightsday/2013/achievements.shtml

4. Water has an economic value in all its competing uses and should be recognized as an economic good.

Those responsible for the implementation of IWRM should take into consideration, in addition to the Dublin Principles, the principles established in Chapter 18 of Agenda 21, specifically point 18.5 and its seven components:

A. Integrated water resources development and management;
B. Water resources assessment;
C. Protection of water resources, water quality, and aquatic ecosystems;
D. Drinking-water supply and sanitation;
E. Water and sustainable urban development;
F. Water for sustainable food production and rural development;
G. Impacts of climate change on water resources.

Addressing the problem of development from a human rights perspective, the emphasis of analysis focuses on the *exercise* of these rights, viewing rights-holders as passive receptors of assistance programs. The human rights-based approach seeks to place the individual at the center of the development process.

A rights-based approach also establishes the principle of equality and freedom between men and women and against all forms of discrimination. This approach is closely linked to the question of accessibility of services for beneficiaries, which accompanies the exercise of fundamental rights. For example, under some regulations, the right to water is linked to capacity to pay, property ownership, or concessions. This is an essential aspect, which requires a timely strategy in order to ensure the delivery of services, and, at the very least, the minimum provision per WHO guidelines for poor populations—persons that structurally have suffered from situations of economic vulnerability, among others. Another characteristic of the rights-based approach is the notion of accountability, which in practice requires not only the development of laws, policy, institutions, administrative proceedings, and practices, but also mechanisms of reparation in cases of omissions or injury, rights-holders empowered by their rights, and organized communities to realize citizen audits and political advocacy. In order for this to be a reality, international law recognizing access to safe water and sanitation must be translated into locally defined criteria to measure progressive improvements and effective compliance.

Once an analysis of most vulnerable populations is conducted to assess the situation of women and children, migrant populations, the displaced, and persons with special needs, it allows for the identification of gaps between reality and human rights theory, enabling the design of specific objectives to guarantee the human right to access to safe drinking water and sanitation. Once these objectives are established, it is possible to proceed to the planning of remedial actions, program design, goals, and strategies; identifying and applying the most appropriate tools; constructing indicators for the monitoring and evaluation of compliance standards for the human right to water and sanitation; and training targeted communities so that they are able to track objectives, identify breaches and barriers, and take action.

From a human rights perspective, questions pertaining to access to safe water and sanitation cannot be examined in isolation. At the international level, the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the American Convention on Human Rights and its Additional Protocol; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention on the Rights of the Child; the Convention on the Rights of Persons with Disabilities; the ILO Convention No. 161; the United Nations Framework Convention on Climate Change; the United Nations Convention to Combat Desertification; and the United Nations Convention on the Law of Non-Navigational Users of International Watercourses offer standards by which to evaluate the effective realization of human rights.

Legal systems regulate the allocation of water; rights to use; permits for use, reuse and disposal; the issuing of fines; the quality required for distinct uses; and how to act in situations of water stress and high vulnerability. Therefore, legal systems are a means by which to guarantee human needs with respect to water resources, as well as ecosystem demands, through the ecological flow and the protection of wetlands of in-

---

16 Tutorial on the Basic Principles of Integrated Hydraulic Resource Management. Cap-Net, UNDP.

ternational importance, among others. They also regulate the participation of social actors and the degree of involvement of the consultations.

In accordance with Cap-Net[16] (2006), legislation on water should at least clarify questions regarding rights and responsibilities of both users and service providers; clarify the role of the state in relation to the stakeholders; formalize the transfer of water use allocations; grant legal status to governing institutions and groups of water users; and ensure the sustainable use of water resources. Regarding human rights fulfillment, the state is obliged to fulfill three conditions:

Respect	States must refrain from interfering, directly or indirectly, with the enjoyment of the right to water and sanitation.
Protect	States are required to impede third parties from interfering by any means with the enjoyment to the right to water and sanitation.
Fulfill	States are obligated to adopt necessary measures to achieve complete fulfillment of the right to water and sanitation.

These changes to the approach necessarily imply institutional changes to confront the challenges of IWRM. An adequate legal framework for the regulation of water resources that integrates the hydraulic cycle, the watershed approach, IWRM, the ecosystems approach, and human rights is essential for advancing sustainable water management. These approaches not only obligate the state and its institutions, they also obligate third parties to participate in the management process as users, suppliers, organs of control, tariff regulators, and NGOs working in the sectors of water and human rights, among others. With respect to hydraulic resources, the state defines and applies public policies, norms, and regulations so that service providers comply with quality standards and establish economic, social, and environmental objectives associated with development processes. To this extent, these policies should consider not only economic aspects, distribution, and access to water, tariffs, fees, permits and licenses, but also the identification and delimitation of sources and recharge zones, management, and flood and drought risk reduction, instances of extreme events, wetland conservation, contamination prevention, and the preparation of detailed watershed management plans. Without question, water is a key factor for economic and social development, and also realizes the vital function of maintaining the integrity of the natural environment.

Currently, demographic changes and uncertainty surrounding climate change have increased pressure on hydraulic resources. The traditional fragmented approach to water management is no longer viable, therefore an IWRM approach is essential. All watersheds and watercourses are different, and have specific functions; therefore, planning processes must take into consideration these differing characteristics.

A technical, social, economic, and environmental perspective provides a guide for optimal integrated planning of water resource management. Objectives must be clearly established to achieve improved efficiency, efficacy, and equity, through water administration systems, for example. The connection between surface water and aquifers must also be considered during planning processes.

The human rights-based approach demands a holistic understanding of access to water and sanitation and requires an explicit orientation towards the most marginalized sectors, with an emphasis on participation, autonomy, responsibility, and transparency. Institutional changes must also reflect a participatory approach, the effective application of the right to information and consultations in conformity with Principle 10 of the Rio Declaration on Environment and Development (1992)[17] which establishes the responsibility to include civil society in the handling of environmental affairs as a management strategy to ensure the governability and sustainability of resources.

---

17 United Nations Conference on Environment and Development, Río de Janeiro.

In the case of Latin America and the Caribbean, a Roadmap Process of Creating an Instrument on the Implementation of Principle 10 of the Rio Declaration[18], has been adopted, which incorporates as sub-principles, among others, transparency, equality, inclusion, and prevention.

In summary, the human rights-based approach in the context of water management offers principles and standards that can be incorporated to provide guidance in IWRM planning. These principles and standards provide orientation in terms of the creation of indicators for monitoring and evaluation of the achievement of the goals that comprise the sustainable development process: combatting poverty and economic divides, and guaranteeing vulnerable and marginalized populations adequate access to resources, both in terms of quality and quantity, and incorporating the concept of information contained in the Rio Declaration, Agenda 21, and all of the human rights conventions adopted by the international community, which have been incorporated into national legal systems vis-a-vis jurisprudence and the ratification of treaties.

States must endeavor to provide water and sanitation services, and in cases in which it is necessary, undertake positive measures and affirmative actions in favor of vulnerable and marginalized persons and groups with the intent to eliminate disparities and guarantee access to water and sanitation services for the poor.

In the case of Costa Rica, the jurisprudence of Constitutional Chamber:[19]

"...recognizes, as a part of Constitutional Law, the fundamental right to safe water, derived from the fundamental right to health, life, a healthy environment, nutrition, and a dignified life, and which has also been recognized in international instruments regarding human rights applicable to Costa Rica..."

This ruling was issued in 2003, and at that time, the right to drinking water had to be derived from other expressly recognized rights. However, since the United Nations General Assembly passed resolution A/RES/64/292 in 2010 (cited previously), which recognizes the human right to water and sanitation, it is no longer necessary to derive this right from the rights of health, nutrition, or quality of life, for example. On the contrary, the declaration of the United Nations explicitly states: "[It] recognizes the right to safe water and sanitation as a human right essential to the full enjoyment of life and all other human rights." As can be observed, today, the human right to water and sanitation is seen as the premise for the exercise and enjoyment of other fundamental rights.

Colombian constitutional jurisprudence has considered that[20]

"*It is evident that there are numerous legal arguments that allow for the consideration of the right to clean water as a fundamental right, more particularly when through this and through effective access from the provision of aqueduct services, it is fulfilling one of the essential aims of the state, which is to provide a solution to unsatisfied basic needs of people, and because with the guarantee of this right, other fundamental rights are protected, which are as transcendental as the right to live in dignified conditions and the right to health."*

Another resolution relevant to this report is Colombian Constitutional Ruling No. T-888 of 2008, also preceding the resolution of the United Nations General Assembly, which establishes that

...safe water constitutes a fundamental right which forms **part of the essential nucleous of the right to a life in dignified conditions** when referring to human consumption. Along these lines, the court has stated that the right to water shall be protected by means of *acción de tutela* [constitutional writ of protection of human rights] when attributed to life, health, and sanitation of people, but not when directed at other activities, such as agrofishery exploitation or uninhabited terrain. (The words in bold do not pertain to the original document.)

---

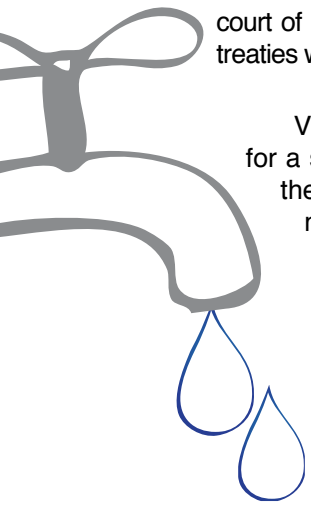
18 Complete version available at: http://www.cepal.org/cgi-bin/getprod.asp?xml=/rio20/noticias/paginas/8/48588/P48588.xml&xsl=/rio20/tpl-i/p18f-st.xsl&base=/rio20/tpl-i/top-bottom.xsl

19 Vote No. 4654-2003 of the Constitutional Chamber of Costa Rica.

20 Colombian Constitutional Court, Ruling No. T-055/11

Peru has experienced similar developments with regard to constitutional jurisprudence. The ruling of the Constitutional Tribunal of Peru, denoted in Docket No. 6546-2006-PA/TC of November 7, 2007, acknowledges that "water is the fundamental element for preservation and development, not only for existence and quality of human life, but also for other fundamental rights like health, employment, and environment."[21]

In the case of the Inter-American System of Human Rights, the court has incorporated these considerations into many of their rulings, the most renowned being the case of the Indigeneous Community Xákmok Kásek vs. Paraguay, in the fundamental resolution of August 24, 2010, paragraph 214, and the case of Indigeneous Community Sawhoyamaxa vs. Paraguay, ruling on March 29, 2006, paragraph 168. These resolutions not only address the issue of access, but also the quality standards that make water suitable for personal use.



Other relevant jurisprudence on the recognition of water as a human right is the ruling rendered by the court of Córdoba, Argentina, in Docket No. 500003/36, which makes evident the incorporation of international treaties within national regulations as a source of law:

> VIII) In relation to the contamination of household water wells, and, as a consequence, the petition for a safe water system, the petitioners have proven through chemical analysis of water samples that the contamination was caused by nitrates and fecal coliforms as well as excessive water hardness, making it not suitable for human consumption (cfr. fs. 3/6). Considering this, it is appropriate to affirm the Universal Declaration of Human Rights (December 10, 1948), which enjoys constitutional hierarchy in accordance with Article 75, Section 22 of the National Constitution, Article 25, which establishes the right to a standard of living adequate to ensure health and well-being, which is reiterated in greater detail in Articles 11 and 12 of the International Covenant on Economic and Social Rights (also incorporated in our constitution), recognizing the latter [to mean] the enjoyment of the highest attainable level of physical and mental health attainable, remembering that state parties have pledged to make available "the maximum extent of their resources" for the progressive achievement of the rights recognized in the said treaty.

As set forth in this report, the topic of clean water and the quantities adequate to supply basic human needs are not matters that corresponds solely and exclusively to governments and technicians. On the contrary, it is the basic exercise of the fundamental rights of every person, independent of their migratory condition, origin, sex, nationality, age, or other conventional or legal restriction. The right to clean water and sanitation is recognized as a fundamental human right by the United Nations General Assembly. In spite of this obvious truth, to guide the international community towards effective recognition of the right, to ensure that advances towards its fulfillment are periodically peer reviewed, and to continue relying on the technical and financial support of the international community, the most effective path is through integrated management of hydraulic resources, IWRM.

---

21 Cited by Elizabeth Salmón in the article: "El Derecho Humano al Agua y los Aportes del Sistema Interamericano de Derechos Humanos" [*"The Human Right to Water and the Contributions of the Inter-American Rights System*"], Revista de Filosofía, Derecho y Política, Nº 16, July 2012, ISSN 1698-7950.

1.3. Water Protection and Mining: Environmental Law Challenges in the Andean Region

Carlos Lozano Acosta

Key Words

Basins, environmental damage, mining, conflicts of jurisdiction, water

The development of mining projects with serious impacts on water sources, both on the surface and groundwater, has been increasing in several Andean countries, including Colombia. These countries have a strong constitutional tradition of protecting the environment and different levels of incorporating international environmental law into their domestic legal systems. Thus, the strongest environmental regulations are associated to the protection of water as a fundamental basis to prevent violations of the right to a healthy environment and the right to health.

However, significant legal tension exists between several Andean countries between environmental water legislation and mining rights. This tension seems to resolve in favor of a weakening of environmental law and an advantage to the profile of mining regulations, which in some laws has been elevated to the category of public interest, which means that it prevails over other norms and rights. In the resolution of such tension, the constitutional provisions and the relevant environmental laws have been ignored.

This tension should be resolved through consistent application of relevant international environmental law and constitutional provisions on the environment; very vigorous in several countries in the region. In order to achieve this, I propose to develop rules, that will be explained throughout the article, to solve issues such as conflicts of jurisdiction between environmental and mining authorities, as well as local and national authorities; questions regarding ownership rights and exploitation of resources; prevailing provisions in overlap cases between mining projects and protected areas; regulatory approaches for watershed protection; legal management devices for underground water sources and legal assessment of its connectivity with surface waters; the legal assessment of cumulative impacts of water resources; the rules of evidence of damage to water sources and the interaction with rules on biodiversity and hazardous waste.

INTRODUCTION

This article aims to examine the tensions between the relevant environmental standards for water protection and for mining in three countries in the Andean region: Colombia, Ecuador, and Bolivia. It also intends to explore elements that give solutions to these tensions. The selection of these case studies is a sampling of convenience, however, it corresponds to three of the four current members of the Andean Community of Nations.

First, it analyzes the constitutional frameworks of Colombia, Ecuador, and Bolivia in relation to environmental protection and mining. Then, the study reviews the details of legislation and regulation, as well as the way these two components of the legal systems of the countries in question are related, in order to show the dilemmas faced by operators when making decisions on freshwater sources potentially affected by mining activities. Finally, some approaches that may be helpful in reasonably overcoming these tensions are discussed, including those of legal institutions that have been used in some of these countries.

1. Ecological Constitution: The Colombian case

The constitution of Colombia has been described as an "ecological constitution."[22] The state has an obligation to protect the "natural wealth of the nation" and property, though

22 Constitutional Court of Colombia, C-283 of 2014, M.P. Jorge Iván Palacio, (2014).

it is a right it also has a social function, and consequently an ecological function.[23] State duties in this field have been developed by the precedent:

The protection of a healthy environment and natural resources is a duty of the state as well as of private individuals (CP Articles 8, 58, and 95). Under express constitutional mandate (CP Articles 49, 79, 80, and 334) and Colombia's international commitments (Convention on Biological Diversity, Article 14), it corresponds to the state to meet a number of specific duties on environmental issues that no law, important as it may seem, can ignore."[24]

Environmental protection functions must be fulfilled, concurrently, by the authorities of both national and local levels.[25]

The right to a healthy environment is guaranteed by the constitution and by the judges who interpret it. It has been developed in case law as "a set of basic conditions surrounding a person and allowing for their biological and individual survival, which in turn ensures their normal performance and comprehensive development in the social environment. In this sense, a healthy environment is a fundamental right for the survival of the human species."[26] Although it is a collective right, it can be connected with other fundamental rights, and in that instance, it can be protected through the constitutional writ of protection of human rights, the institutional equivalent to protection in other jurisdictions.[27]

The duty of the state to ecosystems unfolds in several ways. It has a duty to protect "the diversity and integrity of the environment" and to conserve areas of special ecological importance. In the same way, it must also plan the use of natural resources in order to ensure sustainable development, as well as their restoration and conservation.[28] It also intervenes in matters of exploitation of natural resources and land use.[29] It must control environmental degradation and cooperate with other countries to protect the environment. Finally, economic freedom may be limited for environmental reasons,[30] and the exploitation of natural resources results in royalties paid to the state.[31]

Environmental clauses in the Colombian constitution are a sufficient basis for protecting freshwater sources, in particular those relating to the conservation of areas of special importance. All together, they enable both the adoption of measures by the state and the protection of those systems from third parties.

2. The Ecuadorian Constitution: Energy sovereignty and the rights of nature

In the Ecuadorian constitution, the rules of environmental protection are advanced, and allusions to nature are found beginning in the preamble. Sustainable development and the protection of natural heritage is a primary duty of the state. This constitution establishes the right to water and considers the resource as "for public use, inalienable and non-transferrable, essential for life"[32] and the population has a right to a healthy and ecologically balanced environment "that ensures sustainability and good living."[33] While it attaches importance to the use of resources, it says energy independence cannot affect the right to water, and it considers the conservation of ecosystems and biodiversity[34] as "public interest." [35]

Natural resources are considered inalienable, non-transferrable, and not subject to foreign authority, in particular minerals and hydrocarbons.[36] But on the other hand, soil conservation "especially topsoil" is a na-

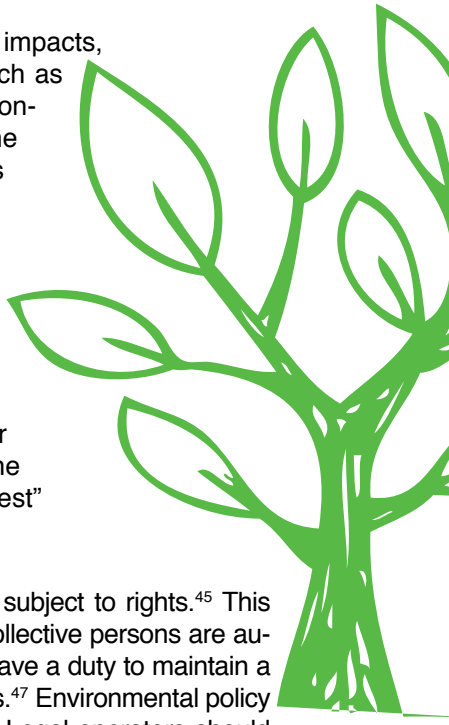
---

23 Republic of Colombia, Political Constitution, Article 58, (1991).
24 Constitutional Court of Colombia, C-328 of 1995, M.P. Eduardo Cifuentes Muñoz, (1995).
25 Constitutional Court of Colombia, C-598 of 2010, M.P. Mauricio González Cuervo, (2010).
26 Constitutional Court of Colombia, SU-442 of 1997, M.P. Hernando Herrera Vergara, (1997).
27 Ibid.
28 Republic of Colombia, Political Constitution, Article 79, (1991).
29 Article 334.
30 Article 233.
31 Article 360.
32 Constitution of Ecuador, Article 12, (2008).
33 Article 14.
34 Article 400.
35 Ibid.
36 Article 408.

tional priority, according to the constitution. Therefore, its use must be sustainable, and it is protected against pollution, desertification and erosion, as there is a mandate for conservation of watersheds, water resources, and the ecological caudal.

All activities affecting the quality and quantity of water must be regulated,[37] and water authorities, which have their own functions, should cooperate with environmental authorities. The sustainability of ecosystems and human consumption are priorities for water use. Water hoarding and privatization are prohibited. [38]

The state should take "appropriate" action to avoid negative environmental impacts, whether or not there is certainty of harm.[39] The protection of certain ecosystems such as deserts, wetlands, dry forests, cloud forests, and mangrove forests have constitutional status,[40] the ecological functions of protected areas should be maintained and the management of natural heritage must be subject to "the principles and guarantees enshrined in the constitution."[41]



In the Ecuadorian constitution, certain subjects have special protection from the environment. Indigenous communities have the right to free, prior, and informed consultation about the exploitation of non-renewable natural resources in their territories. The constitution protects the ability of ecosystems to regenerate, as well as the rights of future generations.[42] The responsibility for environmental damage in Ecuador is objective and involves not only environmental restoration, but also compensation for victims and legal action for environmental damage not prescribed.[43] Everyone has the right to an effective recourse in this matter, "without prejudice to [his or her] direct interest" to demand the protection of the environment.[44]

One of the most innovative things about Ecuador is that nature is considered subject to rights.[45] This includes respect for life cycles and processes and ecosystem restoration. Individual or collective persons are authorized by the constitution to demand the guarantee of these rights.[46] Citizens, in turn, have a duty to maintain a healthy environment, to respect the rights mentioned and rational use of natural resources.[47] Environmental policy has a cross-cutting nature and should be respected by all state authorities at all levels. Legal operators should apply the interpretation most favorable for the protection of nature in the event of doubt, when dealing with the standards of environmental law.[48]

Finally, extractive activity is prohibited in protected areas. However, the constitution establishes an exception: by the initiative of the Republic and upon "previous declaration of national interest" by the national legislature. This last institution may call for a referendum on the issue, but it is discretionary.[49] This provision opens the door to mining in protected areas in almost every case where there is a common will between the national government and parliament.

3. Bolivia: Constitution, the rights of nature, hydrocarbons, and minerals

The Bolivian constitution has a strong emphasis on both subsurface resources and environmental protection. According to the constitution, among the state's objectives are the promotion of responsible and planned utilization of natural resources, as well as environmental conservation.[50] The rights to food and water are recognized, including water and sewage services.[51]

---

37 Article 411.
38 Article 282.
39 Article 396.
40 Article 406.
41 Article 404.
42 Article 395.
43 Article 396.
44 Article 397.1.
45 Article 10.
46 Article 71.
47 Article 83.6.
48 Article 395.
49 Article 407.
50 Plurinational State of Bolivia, Political Constitution, Article 9.6 (2009).
51 Articles 16 and 20.

In the top statute of Bolivia everyone has the right "to a healthy, protected, and balanced environment."[52] This privilege extends to collective subjects, future generations, and other living things. Indigenous people have the right to territory, to live in a healthy environment "with proper management and use of ecosystems" and to manage their natural resources.[53] Anyone is entitled to use legal mechanisms to protect the environment, in addition to the legal obligations that the authorities have.[54] Environmental crimes are declared imprescriptible and the mitigation of their effects and the management of environmental liabilities should be promoted by the state and by society.[55]

The natural heritage, including natural resources, "is of public interest and of strategic importance for the sustainable development of the country."[56] These are publicly owned, indivisible, and imprescriptible. Their exploration and exploitation is directed by the state directly or through other people. Royalties are compensation for their exploitation, which will "protect collective interest." [57]

Water is a fundamental right, an essential component of ecosystems, and its use and access is based on the principles of complementarity, solidarity, reciprocity, equity, sustainability, and diversity.[58] It is also considered a strategic resource, with social, cultural, and environmental functions. Privatization and concession is prohibited.

The Bolivian constitution recognizes the finiteness of water resources in all their forms, surface and groundwater, guarantees "the priority of water use for life,"[59] and requires sustainable use. The watershed approach is present. Rivers, lakes, ponds, glaciers, and groundwater and transboundary waters are subject to constitutional protection. Also, the use of land should be according to "ecological balance." [60]

The state is responsible for the management of minerals and should exercise control throughout the mining production chain. The rights of individuals over minerals, under state authorization, are protected by the constitution. However, the mining concession areas are not transferable between individuals.

The state and its citizens have an obligation to protect, conserve, and sustainably use natural resources. The public has a right to be consulted in advance on how decisions may impact the environment.[61] Production and use of techniques that affect the environment are regulated.[62] At the same time, the Environmental Impact Assessment must be transversal to all productive activity. Persons conducting activities that impact the environment must correct, minimize, remedy, compensate, and mitigate damages. The exploitation of natural resources should be guided by citizen participation and conservation of ecosystems[63] and must comply with environmental regulations. Similarly, the industrialization of natural resource use is a priority for the state.

The Bolivian constitution recognizes agro-environmental jurisdiction, which deals with matters related to agriculture, forestry, water, environment, natural resource and biodiversity use, conservation of species, and general matters that have to do with the environment.[64] It also recognizes contractual disputes related to the use of renewable natural resources. This jurisdiction has the vocation to become an important development tool for domestic environmental law.

Finally, protected areas are recognized, but the constitution says nothing about their overlap with mining operations. However, regarding their overlap with collective territories, which can be similar, it mentions that the management will be performed on a shared basis.[65] Forest resources are also protected constitutionally, and the Amazon basin is considered strategic—therefore warranting special protection, among other reasons—for its water resources.[66]

---

52 Article 33.
53 Article 30.
54 Article 34.
55 Article 347.
56 Article 345.
57 Article 351.
58 Article 373.
59 Article 374.
60 Article 380.
63 Article 352.
64 Article 189.
65 Article 385.
66 Article 390.

4. Legislation and Regulation in Colombia: Ecological constitution and public interest mining

The relationship between environmental law and mining in Colombia is extremely complex. The country has a National Environmental System (SINA, by its Spanish acronym) created in 1993, that has been followed with great interest as a case study in Latin America. This system, after the 1991 Constitution, is preceded by a regulation which remains in force, the National Code of Renewable Natural Resources,[67] which comprehensively treats environmental policy issues, hazardous waste, ownership and use of resources, permits and concessions, air, water, flora and fauna, among others. This standard introduced significant reforms with environmental perspective to the Colombian Civil Code, especially in what has to do with water. Also, it developed legally and innovatively for the time institutions such as the environmental impact study, landfills, and the management of ecosystem damage.

Colombia's environmental policy is governed by the principles of sustainable development, in the terms of the Rio Declaration.[68] Biodiversity has priority protection,[69] meaning that water does as well, given the latter's role in the survival of the first. Although it must take into account scientific evidence, Colombian legislation establishes the precautionary principle,[70] environmental costs must be internalized and economic instruments should be used to prevent environmental degradation.[71] Environmental impact studies are the basic tool for decision-making in this field, and the policy should be participatory and decentralized.[72]

Persons using elements that may cause pollution are obliged to inform the national government and consumers about the risks to the environment and health of people.[73]

Waters are considered state property,[74] "of public domain, inalienable and imprescriptible"[75] unless they begin and end on the same property, in which case they shall be private by exception.[76] Also considered state property are mountainous peaks, glaciers, and groundwater.[77] Riverbeds and water quality cannot be modified without permission, which can be denied when the works are risky.[78] Citizens should use the resource efficiently and allow official supervision, as well as access to data on their use.[79] Water intended for human consumption and food production will receive special protection, as well as "sources that are in declared protected zones."[80]Thus, the use of water for human consumption has priority over any other objective[81] In these cases, the discharge of pollutants and toxic chemicals from industrial sources will be "prohibited or conditional."

In the National Park System one cannot dump, use, or abandon toxic substances that can damage ecosystems, such as what happens in mining projects. "Zones of moorlands, sub-basins, springs, and aquifer recharge areas" are given special protection under the law.[82] In any case, mining and petroleum activities, as well as the dumping of toxic substances, are prohibited in national parks.[83] However, the Colombian Ministry of Mines has issued mining rights within these areas.

Water concessions are governed by the principles of public utility and social interest.[84] Their conditions can be modified depending on the state of water resources, and it is a transferable right, with prior authorization. Water concessions for mining use must not damage aquatic resources.[85] Similarly, mining activity

---

67 Republic of Colombia, Decree 2811 of 1974, "For which is issued the National Code of Natural Renewable Resources and Environmental Protection," (1974).
68 Republic of Colombia, Law 99 of 1993. Article 1.1, (1993).
69 Article 1.2.
70 Article 1.6.
71 Article 1.9.
72 Ibid.
73 Republic of Colombia, Law 23 of 1973, For which extraordinary powers are granted to the President of the Republic to issue the Code of Natural Resources and Environmental Protection and to enact other provisions, Article 15, (1973).
74 Republic of Colombia, Decree 2811 of 1974, "For which is established the National Code of Renewable Natural Resources and Environmental Protection," (1974).
75 Article 80.
76 Republic of Colombia, Civil Code, Article 677. (1887).
77 Republic of Colombia, Decree 2811 of 1974, Article 83, (1974).
78 Article 132.
79 Article 133.
80 Article 137.
81 Republic of Colombia, Law 99 of 1993, Article 1.5, (1993).
82 Article 1.
83 Republic of Colombia, Decree 622 of 1977, For which is partially regulated Chapter V, Title II, Part XIII, book II of the Decree-Law No. 2811 of 1974 on the national park system, Article 30, (1977).
84 CRN Article 92.
85 Republic of Colombia, Decree 2811 of 1974, Article 146 (1974).

should avoid contamination of waters that are necessary for a population or for agricultural and industrial use.[86] In addition, the Ministry of Health is empowered to determine the water quality conditions for human consumption.[87]

The holder of land rights will have at the same time the preferential right to groundwater use.[88] This rule is significant from the perspective of acquifer protection, because the preferential guarantee not only implies prevalent access to the resource, but it also protects against third party activities that could deteriorate, and thus undermine, the preferential right in question. It is significant particularly in those cases where the aquifers are not renewable because they are not connected to other bodies to enable their refilling.

Groundwater may be subject to concessions, but it has protection from the progressive decline, pollution, and deterioration in quality through limitations or even the revocation of concessions.[89] In fact, the change in hydrogeological circumstances is a possible cause for the modification of permits.[90]

Finally, environmental legislation requires that open-pit mining should perform environmental restoration on the ground involved with the operation.[91]

As you can see, the environmental legislation in Colombia has been particularly vigorous. Since the 1990s, the legal system has become more "green." This may be due to three related factors. The first is the new constitution of 1991, which incorporated the perspective of an "ecological constitution" and its associated clauses. Second, the effect of the Earth Summit on domestic legislation. Finally, the wave of creation of Ministries of Environment, which in Colombia had legal status with Law 99 in 1993. It is a relatively detailed and comprehensive piece of legislation, which constitutes a framework for economic activities that can affect water sources, including mining.

However, the Colombian legal system attends to a scene of collisions between environmental law and mining, which intensified with the mining code issued in 2001. This standard includes a number of provisions that are in tension with the protection of water.

First, mining operations, at all stages, are of public utility and social interest. In principle, this would be a useful definition. Indeed, it is in harmony with the state-owned resources that are, without a doubt, strategic for any nation. Furthermore, it should be an argument in favor of strong regulation and more and better liability regulations. Also, only the regulations in place at the time of their adoption can be applied to concession contracts, unless the new rules are more favorable to the holder. [92]

However, the idea of public utility, which is positive, has mainly resulted in the legal authority of mining rights-holders to demand the precedence of their rights over virtually any other. First, the expropriation of others' property in their favor is practically automatic, without mentioning the distinct obligations.[93] In this way, multiple forms of property rights, including possession and tenancy, are effectively subordinated to the rights of mining. In other words, mining exploration and exploitation has an overriding status in the legal system. The only limitation under the law is the prohibition of expropriating other extractive projects. Moreover, in some cases property rights may be associated with fundamental rights, such as previous consultation, repair, or cultural identity.[94] Therefore, expropriations by mining projects may affect them.

Local authorities are not allowed to exclude territories under their jurisdiction from mining activities.[95] This possibility, in accordance with the mining code, is the exclusive power of the national government. This provision comes into conflict with the powers that local authorities have to regulate land use, because obviously there is no way to make such regulation without taking into account the effects that mining has on the soil. Those powers of local governments over the soil are associated in turn with the protection of the environment, including watersheds.[96] Thus, the exclusion of local governments from the mining system ends up affecting

---

86 Ibid.
87 Republic of Colombia. Law 9 from 1979, Sanitary Code, (1979).
88 Republic of Colombia, Decree 2811 from 1974, Article 151, (1974).
89 Article 152.
90 Article 153.
91 Republic of Colombia, Law 99 from 1993, Article 60, (1993).
92 Republic of Colombia, Mining Code, Article 46, (2001).
93 Republic of Colombia, Mining Code, Article 13, (2001).
94 Republic of Colombia, Constitutional Court, T-235 of 2011, M.P. Luis Ernesto Vargas, (2011).
95 Republic of Colombia, Mining Code, Article 37, (2001).
96 Republic of Colombia, Law 388 from 1997, Article 10, (1997).

its protective capacity, which in turn entails legal obligations on proper use of natural resources; protection of forest reserves and regional national parks, and in general the conservation of areas of ecological relevance.[97]

In addition to the above, environmental licensing in Colombia is undergoing a flexibility process that has taken place through decrees 1728 from 2002, 1180 from 2003, 1220 from 2005, 2820 from 2010, and 2041 from 2014.

First, a series of steps are being removed from the licensing process through obligatory regulatory reforms that modify legal provisions. Operations that should require this permission have come along, but no longer require it. The most notable of these is mining exploration, which now does not require a license after the amendment introduced by Decree 1728 from 2002. The impacts of this activity can be significant, but nevertheless, the Colombian state has not reintroduced that permission into legislation.

Moreover, the terms of decision are being shortened. In principle, it is advantageous that the procedure is undergone as quickly as possible. However, the capacity of the licensing agency has not been accordingly increased, raising questions about how that authority will resolve issues faster using the same resources, which in and of themselves are scarce. In general, civil servants whose employment is precarious, have work overload; evaluation scales are not appropriate in terms of cumulative impacts; and sampling analyses are not representative. Furthermore, scientific and legal analyses lack a coherent relationship.

Also, regulatory reforms tend to weaken the rights to participate in the mining system both for local governments and for the communities affected by projects. Although there is a legal debate in Colombia about the power to order mining in Colombia, the Constitutional Court settled it in the judgment C-123 in 2014. In it, they argued that the constitutional principles of territorial autonomy and a unified state should be interpreted harmoniously. Therefore, the court ordered the national government to agree with local authorities on environmental protection measures authorizing mining exploration and exploitation so that there is active and effective participation.[98]

Regulatory reforms tend to allow mining operations in strategic ecosystems that provide water for human consumption, even though this contradicts legal provisions that have greater regulatory status. Indeed, Article 10 of Decree 2041 from 2014 says that the projects that are the object of licensing, including mining, must have prior approval from the Ministry of Environment when trying to intervene in the Ramsar wetlands, moors, or mangrove forests. Forest reserves, meanwhile, can be extracted in order to develop projects of public utility and social interest.

In reaction to the judgment, the Colombian government issued Decree 2691 in 2014, which creates a mechanism by which local governments can request protective measures from the Ministry of Mines. This entity has the final and discretionary word, upon the presentation of technical studies, on whether to adopt the measures or not. On the other hand, they should consult the mining companies. Possible protective measures in any case are subject to the evaluation of their economic impact.

The problems with this decree are summarized in that it does not allow agreement on measures, but it makes a request of one of the parties that should be participating in the agreement; grants consultative status to mining companies that can be converted into a veto; and pushes local authorities to the background in the mining system in a way that takes away power from regional governments and somehow attributes it to the mining sector, against the constitution. And it is done by decree. On the other hand, it somehow displaces SINA from decisions that typically fall under environmental management, and for which they have a clear role in the law. Again, such changes cannot be made through regulations.

5. Legal and regulatory development in Ecuador

Environmental legislation in Ecuador considers water to be “part of the natural heritage of the state.”[99] It is also recognized as “strategic national heritage for public use, of inalienable domain, imprescriptible, indefeasible, and essential for life, a vital element for nature and fundamental for food sovereignty.”[100]

---

97 Republic of Colombia, Law 388 from 1997, Article 10.1.B, (1997).
98 Republic of Colombia, Decree 2041 from 2014, Article 11.
99 Republic of Ecuador, Organic Law on Water Resources, Uses y Exploitation, (2014).
100 Article 1.

In keeping with the trend in the region, Ecuador considers mining a strategic sector. This status gives the state an important role in both the regulation and operation, but it also allows, in exceptional cases, it to make concessions to the private sector and confers certain powers to municipal governments.[101] Thus, the government administers, controls, regulates, and manages the mining policy, based on the principles of efficiency, precaution, prevention, and sustainability. [102]

Mining, as in other Andean countries, is considered a public utility "at all stages, within and outside of mining concessions." Mineral deposits and the minerals they contain, and "general products of the subsoil" are inalienable, indefeasible, imprescriptible, and undeniable property of the state. [103]

Therefore, "all of the rights as may be necessary proceed"[104] so that, as happens in Colombia and Bolivia, the rights from mining concessions[105] take precedence over other forms of property rights. Although state ownership of minerals is independent of particular land ownership,[106] the status of the right to mine prevails.

Special Mining Areas allow the government to characterize areas with exploration potential and restrict concessions during their term.[107] Unlike Colombian law, the Mining Law of Ecuador does not establish reserves of information on geological surveys, although it does confer preferential rights to the state mining company. On the other hand, the information the miners give to the Ministry is public.[108] The mining concession confers a mining title, which in turn gives a regulated personal and transferable right, enforceable against third parties with similar claims. It allows "to prospect, explore, exploit, benefit, smelt, refine, market and sell all mineral substances that exist and can be obtained in the area of the concession,"[109] with prior procedure of environmental licensing and water permits.

Mineral exploration in Ecuador is unregulated, except in protected areas.[110] The environmental permit for mining is not global. In fact, to implement the project it is necessary to have two types of prior administrative acts: the environmental license itself and the act on affected water bodies issued by the Central Water Authority.[111] The holder must present all environmental impact studies, which are approved by the competent authority for the license, although mining activities without prior authorization can always be carried out when they offer financial guarantees.[112] In other words, environmental studies are the basis of decision-making for the environmental permit.

Later, they must carry out compliance audits to verify performance in terms of management plans and environmental regulations. Medium and large mining require the approval of environmental specifications for the initial exploration period.[113] After fulfilling the requirements, if the environmental authority does not respond within six months, it can be understood that the license was granted.

The concession distinguishes between the exploration and exploitation stages. It incorporates a rule that the operations of the mining industry must respect the biophysical limits of nature [114] and establishes the principle of damage remedy. Both standards, at least from their design, have enormous potential in terms of regulatory power. The expiration does not extinguish the liability for environmental damage,[115] and in turn, these damages can actually be the cause of the lapse.[116] If there is damage to bodies of water, their assessment will be based on the opinion of the Central Water Authority.[117] In any case, environmental damage generates objective liability.

---

101 Republic of Ecuador, Law (45) on Mining, (2009).
102 Article 1.
103 Article 16.
104 Article 15.
105 Article 17. "By mining rights it is understood to mean those that come from both the mining concession titles, mining exploitation contracts, licenses, and permissions, as well as the authorizations to install and operate smelting and refining plants, and commercial licenses."
106 Article 16.
107 Article 24.
108 Article 73.
109 Article 31.
110 Article 28.
111 Article 26.
112 Article 78.
113 Ibid.
114 Article 27.
115 Article 109.
116 Article 115.
117 Ibid.

Exploration, in turn, is divided into the initial and advanced stages. The first requires the approval of environmental specifications,[118] in the face of which also operates positive administrative silence, except when the lack of background decisions assists the delay of the holder of mining rights in the provision of information.[119] The requirements for approval are that the information is accurate and that the management plan is consistent with the project. As for advanced exploration, it is required to file an environmental impact statement, which aims to predict the adverse effects of the project.[120] It must include the environmental management plan. For advanced exploration to continue, the environmental impact statement should garner a favorable decision by the authority.[121] To do this, information must also be truthful and the management plan "particular and in accordance with the project." [122]

Exploitation and associated activities require environmental impact studies that should be conducted under terms of reference approved by the authority. If the environmental impact study obtains a favorable decision, upon payment of a pre-established fee, the environmental license will be issued.[123] However, environmental studies may be rejected if information is not verifiable, if the terms of reference were not taken into account or if there are changes in the project.[124] The projects are backed by financial guarantees and policies, which if effective, disqualify the asker from requesting another environmental permit for the same project. They must submit periodic environmental reports. The breach of obligations may result in the revocation of the license.[125] Similarly, the refusal of mining rights must have the view of the environmental authority.

For the renewal of concessions, the holder must have a favorable report from the Ministry of Environment. As is the case in Bolivia with environmental licensing, in Ecuador positive administrative silence operates in the renewal of titles, in extending the terms of exploration and in application for the subscription of the mining contract.[126] In any case, water use should have permission from the Central Water Authority. The water used should be treated, without contaminants [127] "or meeting the permissible limits established by environmental regulations."[128] The dumping of mining waste in water bodies is prohibited and is grounds for termination of the concession.[129] Unlike in Bolivia, where it is the responsibility of the Ministry of Mines, in Ecuador the Ministry of Environment may suspend the license as a precaution against the risk of environmental damage, based on the "precautionary" principle.[130]

The use of mercury is prohibited by the Ecuadorian mining law. Failure to comply with this prohibition is grounds for revocation of mining rights, in addition to criminal law sanctions that may arise.[131] This prohibition is very significant, given the enormous problems of environmental degradation resulting from the use of mercury in placer mining, either artisanal or small-scale, or in some cases, illegal and associated with criminal groups, as in Colombia.[132]

The precautionary principle has been incorporated operationally in Ecuadorian mining regulations. The pollution of bodies of water by hazardous waste is prohibited, but the modification of watercourses is permissible, with a prior environmental study.[133]

After the exploration, a mining concession contract must be requested. Such contracts must contain "the obligations of the mining concession in matters of environmental management."[134] This is a substantial difference, for example, from the Colombian system, where environmental issues are notably excluded from the mining concession contract, without harming the powers arising from the environmental license.[135]

Finally, participation in mining projects, as a potentially useful tool for the protection of water sources, is included in the Ecuadorian legal system. However, its scope is limited because the opinion of those consult-

118 Republic of Ecuador, Environmental Regulation on Mining Activities, Ministry of Environment, Article 11, (2014).
119 Ibid.
120 Ibid.
121 Article 19.
122 Ibid.
123 Article 26.
124 Article 30.
125 Article 54.
126 Republic of Ecuador, Law (45) on Mining, Article 36, (2009).
127 Republic of Ecuador, General Regulation on the Law of Mining, Article 97H, (2009).
128 Article 79 and Environmental Regulation for Mining Activities, Article 99.
129 Republic of Ecuador, Law (45) on Mining, Article 81, (2009).
130 Republic of Ecuador, Environmental Regulation for Mining Activities, Article 140, (2014).
131 Article 86.
132 Presidency of the Republic of Colombia, "Criminal mining is a high-value objective, advised President Santos," (2014).
133 Republic of Ecuador, Environmental Regulation for Mining Activities, Article 74, (2014).
134 Republic of Ecuador, Law (45) on Mining, Article 41, (2009).
135 Republic of Colombia, Mining Code, Article 45, (2001).

ed is not binding and only requires the state to resolve through an administrative act.[136] The impacts should be reported promptly to the authorities, and they in turn must give the public access to the information.[137]

6. Bolivia: environmental regulations for mining authorities

Bolivian environmental legislation is abundant in environmental protection rules that attach obligations to both the authorities and other individuals.[138] However, many of these obligations are generic and are challenged by other provisions related to the extractive sector—even within the regulation itself. From a procedural perspective, the active legitimation to file lawsuits over environmental degradation events is unique to state authorities and the individual or collective persons directly affected.[139] Now everyone has the duty to report to the authorities, but this does not mean that it has legal standing in the judicial sense of the word. According to some authors, these provisions remain anchored in a private law perspective.[140]

Bolivian mining rights give rise to pre-constituted or acquired rights, both of private agents and cooperatives and state enterprises.[141] In environmental matters, the requirements are flexible and tend to facilitate the development of mining projects through accessory rights and global permissions. Participation in the various administrative procedures is practically exclusive to those who have mining rights, be it the applicant or a third party claiming to have them, and the Ministry of Mining and Metallurgy has a disproportionate power over the verification of compliance with environmental obligations,[142] which should correspond to the portfolio of this branch. Substantive restrictions on the effects of large-scale mining are not visible, particularly on groundwater source restrictions.

The legislation recognizes the strategic importance of minerals, and their exploitation is considered of public interest for the development of the country,[143] so it is up to the state to manage, control and administer them on behalf of the collective interest. As also occurs in Colombia and Ecuador, this provision confers prevalence to mining rights[144] over other types of rights, and even plays a role when there are fundamental prerogatives at stake in the pre-consultation. However, the Environment Act provides that the exploitation of natural resources should be done in a way that does not cause damage.[145]

Holders of mining rights also hold accessory rights to take advantage of other resources within the concession area, including timber.[146] They also enjoy prevalent rights in superficial areas, enforceable against property rights, possession, or tenancy in neighboring properties.[147] The same occurs with superficial rights in concession zones or in neighboring lands. By nature, this right has the purpose of allowing for not only the enjoyment of constructions, but also the ground-level property. These can be considered acquired rights.[148]

Rights of way, rights to use and land can be expanded "when the need or purpose of the establishment changes." [149]

Moreover, opposition to prospecting and exploration licenses or administrative mining contracts can only be given by those who consider that "their mineral rights are wholly or partially affected."[150] By contrast, opposition is not possible for reasons of public interest, by affecting other heritage rights or by violation of fundamental rights. Nor is it permissible to exercise opposition to potential or proven environmental damages that contradict the terms of protection of water sources. This provision clearly gives a prevalence to mining rights over virtually any other rights, including fundamental rights, with the exception of other mining rights that were made first.

---

136 Republic of Ecuador, Law (45) on Mining, Article 87, (2009).
137 Article 88.
138 Among others, see the Plurinational State of Bolivia, Framework Law for Mother Earth and Holistic Development to Live Well, (2012) and Law of the Rights of Mother Earth (2010).
139 Framework Law for Mother Earth and Holistic Development to Live Well, Article 39, (2012).
140 Ariel Pérez, Derechos de la Madre Tierra: ¿Quién tiene capacidad para defenderlos?: Nueva Crónica, Plural, (s.f.)
141 Plurinational State of Bolivia, Law of Mining and Metallurgy, Article 94, (2014).
142 "Environmental Control. The Ministry of Mining and Metallurgy, will ensure compliance with environmental regulations, in the sphere of competition." Law of Mining and Metallurgy, Article 222, (2014)
143 Ibid, Article 208.
144 Understood as those that "give title-holders the legal authority prospect, explore, exploit, benefit, smelt, refine, market and sell mineral resources, through their own mining activities that fully or partially complement the mining production chain." Ibid, Article 92.
145 Plurinational State of Bolivia, Environmental Law, (1992).
146 Plurinational State of Bolivia, Law of Mining and Metallurgy, Article 107, (2014).
147 Article 108.
148 Article 113.
149 Article 110.
150 Article 165.

Water usage is also incorporated into mining rights, although there must be prior authorization from the corresponding environmental authority.

The prospecting and exploration license is granted by the Jurisdictional Authority of Mining (AJAM, by its Spanish acronym), and may include the marketing of the results of this activity.[151] At this stage, the environmental authorities are not involved in the decision-making process of the mining authority, although the Environmental Regulation for Mining Activities includes a set of rules on how the exploration should be performed.[152] The exploration license is also solicited from the mining authority, and in turn requires an environmental license.[153] However, the operating license allows the treatment of minerals acquired from third parties, for purposes of concentration, refining or smelting.[154] Exploration operations do not require prior consultation, despite their potential environmental and social impacts.[155]

The environmental mining permit in Bolivia is governed by the principles of economy, positive administrative silence, and speed.[156] By law, all activities with the potential of generating environmental impact should be assessed by the Environmental Impact Declaration.[157]

In Bolivia, prior to the issue of the current mining law, the Environmental Regulation for Mining Activities was issued, under which environmental licenses could take the form of category 3 or 4 Dispensation Certificates, Declarations of Environmental Impact (DIA, in Spanish) or Declarations of Environmental Suitability (DAA, in Spanish),[158] and it was global in nature, as it included all of the "environmental protection requirements" for mining operations. Its term was indefinite, unless grounds for termination were established, and it enabled the proprietor the periodic evaluation of mitigation measures as well as the ability to decide, under certain assumptions, always informing the environmental authorities, if it required the introduction of corrective measures to achieve the goals of prevention and control.[159] Under the regulation in question, the termination of the license only proceeded due to invalidity, lapse, or relapse into the "commission of administrative infractions."[160]

The regulation provided that any mine operator was required to conduct a baseline environmental audit, but that it wa not responsible for the environmental degradation resulting from mining activities, as long as they had complied with "current permissible limits" provided in the environmental regulation.[161] It also established the admissibility of mercury use, although it made it a requirement to ultimately recover and treat this element in order to prevent its release into the environment. The same happens with the filtration mining waste into the water, according to the limits established in the Regulation on Water Contamination.[162]

Similarly, it permitted the injection of wastewater into aquifers,[163] in spite of the regulation on these sources contained in the Regulation on Water Contamination.[164] Waterproofing to prevent leaks in such reservoirs was not required when they did not have current or future use as water sources for several reasons: first, the depth and location that make them not viable for use from an economic-technological point of view; second, when it is demonstrated that the leak will not adversely affect the "commercial exploitation of aquifers containing minerals, hydrocarbons or that produce geothermal emissions."[165]

In sum, the impacts on aquifers that matter are those that prevent conducting business with them. This approach is useful for the protection of certain features that are important to the groundwater. However, it ignores other attributes that should be subject to legal protection, such as their purpose to supply, recharge and filter, among others.

---

151 Article 154.
152 Plurinational State of Bolivia, Environmental Law for Mining Activities, Chapter III, (1997).
153 Plurinational State of Bolivia, Law on Mining and Metallurgy, Articles 171 and 172, (2014).
154 Numeral VI.
155 Article 207.
156 Article 112.
157 Plurinational State of Bolivia, Law on the Environment, (1992).
158 Plurinational State of Bolivia, Law on Mining and Metallurgy, (2014).
159 Article 10.
160 Article 13.
161 Article 16.
162 Plurinational State of Bolivia, Regulation on Water Contamination, (1995).
163 Article 28.
164 Article 63.
165 Article 30.

Finally, one of the most environmentally problematic aspects of the Bolivian legislation is the possibility of mining in protected areas, "after complying with environmental regulations."[166] While not all conservation structures are strict, the mining projects, particularly those that are large-scale, defy sustainable use in these legally protected natural areas. The laws in these areas have no substantial distinction from those for mining operations carried out in non-protected areas; the legal standard is basically similar. Moreover, it contradicts the provisions of the Framework Law on Environment, which are considered in the public interest, in order to preserve them.[167]

FINAL REFLECTIONS AND PROPOSALS

Tensions between environmental clauses and the different mining regulation schemes in several countries of the Andean region appear to be due to the increasing importance of mining in national economies. Similarly, pressure from environmental sectors through judicial activity and the constituents has resulted in vigorous environmental clauses in constitutional systems and in some laws. By contrast, in the regulations is where one can find a major point of divergence in normative production, particularly in Colombia. However, Ecuador and Bolivia have important exceptions to environmental protection, including within the text of their constitutions.

The idea of the public utility and social interest of mining is a constant in the legal systems in the Andean region. Regardless of whether it is in the text of the constitutions, in the laws, or in the regulations, it consistently gives preference to the rights associated with mining over other types of property rights, even fundamental rights. It is without a doubt a challenge for the materialization of the rights to a healthy environment, collective ownership, participation, life, and health. The tension does not seem to have resulted from the constitutional courts in the region. At the same time, opposition to mining rights on the grounds of public interest should be possible. But for now, in the Andean region, it only seems feasible for those who have better mining laws. The environmental standards of highest standing should not be subordinated to mining regulations for the mere fact that the latter are considered of public interest.

While the management of strategic natural resources should remain in the public interest, it is necessary to refine the definition of what this means: before the subordination of virtually all the rights of citizens to those associated with mining, the design of different levels of supervision, access to information, and public debate should all be legally protected.

Environmental deregulation of certain segments of mining operations also seems to be a constant in the region. The simplification of permits, together with standardization through global authorizations for projects of strategic interest, is evident in the case of Colombia. Now, this has not resulted in better regulatory standards for a crucial mining issue: the assessment and regulation of cumulative impacts, which continues to be a pending issue in Colombia, Ecuador, and Bolivia. Sometimes there seems to be a tendency to assimilate the improvement of processes with policy reform. Mineral exploration should be licensed because no activity that has the potential to impact water sources should be deregulated.

The legal distinction between soil and subsoil, although it makes sense from an economic standpoint, is entirely artificial from an ecosystem perspective. Therefore, it is a challenge for environmental law. Property regimes are certainly different, but the management should be integrated and follow the rules and precedent. There is no way to exploit the subsoil without causing effects on the soil; subsoil management, therefore, is also soil protection. The mining code should take into account at least the environmental impacts to the ground and its uses, and the skills of governments in its regulation.

Protected areas should not be based primarily on prohibitive schemes. However, the exclusion of certain high-impact activities seems advisable, particularly if they affect strategic ecosystems for water supply. Exceptions should be strictly regulated, with exhaustive responsibilities. Conversely, a high level of discretion awarded to the executive and legislative branches to allow mining projects in these areas should not be an option. While in Bolivia and Ecuador these are enabled at the legal and constitutional level, in Colombia there is a concession for mining titles that contradicts laws and decrees.

---

166 Plurinational State of Bolivia, Law on Mining and Metallurgy, Article 220, (2014).
167 Plurinational State of Bolivia, Law on the Environment, Article 60, (1992).

Positive administrative silence should not be possible in the process of acquisition of mining rights, as is the case of Bolivia and Ecuador, and they should without prejudice penalize officials who fail in their duty to respond promptly to permissions. Because of its impacts, mining is an activity whose legal admissibility should, in all events, be demonstrated. This would be consistent with provisions like the one in Article 6 of the Colombian Mining Code, which recognizes the non-applicability of mineral property, despite the material possession of such resources or of the premises where they are discovered.

The termination of mining rights for serious environmental damage is an innovation of environmental law that deserves to be replicated. Conversely, the absence of this clause in the set of grounds for termination of the right to exploitation makes it more difficult to protect sensitive ecosystems.

Assumption schemes should be used for environmental protection, provided they are consistent with due process. The interpretation of the regulations, in the case of doubt, should be the more favorable ones for nature, as provided by the constitution of Ecuador. The conservation of freshwater ecosystems must be considered in the public interest, with full legal effect.

The application of environmental law should be crosscutting and connecting all state authorities, but without invading the specific competencies of each sector. Environmental law must adapt to the ecological reality. The focus on watersheds and ecosystems should be included in relevant standards, and it would be important to open the debate about whether the hydrological cycle should have the good fortune of being legally protected. Standards should be adaptive and resilient to issues such as ecological flow and assimilative capacity.

1.4. The Judges Boundaries in Deciding Water Access Rights

Maria del Lujan Flores y Carlos Sapriza Flores

Key Words

Quantitative empirical legal analysis, jurisprudence effective mechanisms

This paper analyzes the impact of the jurisprudence of the Inter-American Court in the evolution of the right to water as a human right. The investigation is focused on an empirical and quantitative legal approach.

One of the characteristics of the adopted approach is to assign the a greater scope to the jurisprudence than the provisions of Article 38 of the Statute of the International Court of Justice, demonstrating that the effect of judgment goes beyond the specific case, and at the same time, changes the perception of the relationship between legal orders with the Inter-American system. At the same time, the paper takes into account the links generated between internal norms and the existing norms at the Inter-American system.

Two relevant variables are examined, one is the degree to which an institu- tion has been treated by the case of the Inter-American Court, and the other is the impact that the institution poses in the domestic legal systems.

In this process, it can be seen that if a subject has been addressed further by the Court, its degree of incorporation will be grater. An example of such is the case of access to information. In this regard an analysis of comparative law reveals the incorporation of Habeas Data to Latin American constitutions has been greater than in the case of the right to water whose treatment by the Court has been more limited is made.

The context in which both institutions have developed, especially as other human rights concerns with these two lines of jurisprudence have interacted with are also discussed.

The existence of a relationship between the degree of jurisprudential development of the issues to inter-American level and extent of dissemination at the level of domestic legal systems enables the development of more efficient specific legal mechanisms which are addressed as tools designed to consolidate and strengthen rights such as access to water or the right to a healthy and ecologically balanced environment.

1. Evolution of the right to water

It is usually considered the starting point of the recognition of the right to water and sanitation the Universal Declaration of Human Rights, particularly if one takes into account that the right to water is closely related to the right to life .[168]

During the sixties, continued development of the right to water and sanitation. The most important point was the signing of the International Covenant on Economic, Social and Cultural in 1966.[169]

---

168 In this regard, the Declaration adopted and proclaimed by General Assembly in its resolution 217 A (III) of 10 December 1948 establishes the right to life in Article 3 while Article 25 establishes the right to a "standard of living adequate" which guarantees the individual and his family "health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary"
Artícle 25

169 Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entered into force on January 3, 1976.

1.1. Article 11

" 1. The States Parties to the present Covenant recognize 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. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent…"

It should be noted that economic and social rights were considered "progressive the full realization", as enshrined in the Covenant itself in its second article, the absence of clear identification, or even conditioning the country's economic performance

The issue was discussed at the United Nations Conference on the Human Environment held in Stockholm from 5 to 16 June 1972. In particular Principle 1 introduces a reference to water. Clear the human right to enjoy adequate living conditions in an environment of quality referred to, which can be interpreted as including water and sanitation, especially if you take into account that there were clear references to both rights by the various delegations .[170]

1.2. Principle 1

"Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated."

Although not binding, these references make steps in the consecration of law.

In 1976, at the First United Nations Conference on Human Settlements Habitat I, which took place in Vancouve, Canada, from 31 May to 31 June, reference was made to the need to prioritize programs water and sanitation.

The following year came a new development with the United Nations Conference on Water, Mar del Plata. Among the resolutions that make up the action plan highlights the second, which explicitly recognizes the right of access to safe water for all people and urged to give priority to drinking water supply and sanitation in development policies.[171] The mechanism continues to see water as a right of progressive realization.

In 1979 another major change occurs when signing the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which establishes the obligation of states to provide appropriate living conditions for rural women, including access to water and health services in Article 14.[172]

In 1990 the World Summit for Children, New York, in his statement drives the emergence of the right to water and sanitation took place.

---

170 During the general debate the issue of the right to water and sanitation as human rights was address as shown in the following paragraph of the Report of the United Nations Conference on the Human Environment "48. Many speakers, from both developing and developed countries, agreed that the ruthless pursuit of gross national product, without consideration for other factors, produced conditions of life that were an affront to the dignity of man. The requirements of clean air, water, shelter and health were undeniable needs and rights of man. P. 50"

171 E/CONF 70/29. The resolution states in the considering: "(a) All peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs;" while recommends "(a) That where human needs have not yet been satisfied, national development policies and plans should give priority to the supplying of drinking water for the entire population and to the final disposal of waste water; and should also actively involve, encourage and support efforts being undertaken by local voluntary organizations;"

1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

172 This article provides "1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

…

h. To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications." Available at http: http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm

(2) We will work for a solid effort of national and international action to enhance children's health, to promote pre-natal care and to lower infant and child mortality in all countries and among all peoples. We will promote the provision of clean water in all communities for all their children, as well as universal access to sanitation.

From 6th to 12 March, 1995 the World Summit for Social Development in Copenhagen took place, in which the Heads of State and Government assume a series of commitments in which includes providing water and sanitation to their populations.[173]

b) Focus our efforts and policies to address the root causes of poverty and to provide for the basic needs of all. These efforts should include the elimination of hunger and malnutrition; the provision of food security, education, employment and livelihood, primary health-care services including reproductive health care, safe drinking water and sanitation, and adequate shelter; and participation in social and cultural life. Special priority will be given to the needs and rights of women and children, who often bear the greatest burden of poverty, and to the needs of vulnerable and disadvantaged groups and persons;

In 1999 the General Assembly of the United Nations adopted resolution 54/175 entitled "The Right to Development". As a right associated with it, the right to drinking water and sanitation is contemplated.[174]

On September 8, 2000 the Millennium Declaration, Heads of State and Government undertake to achieve specific reductions in the number of people without water and sanitation is approved[175]:

19. We resolve further:

"To halve, by the year 2015, the proportion of the world's people whose income is less than one dollar a day and the proportion of people who suffer from hunger and, by the same date, to halve the proportion of people who are unable to reach or to afford safe drinking water."

An important milestone occurred with the General Comment No. 15 (2002) The right to water (articles 11 and 12 of the Covenant) by the UN Committee on Economic, Social and Cultural Rights.[176] The Committee conducted a double process. On the one hand, it links the right to life and the right to a decent life, second, it referred to the right to water recognized in relation to specific groups, such as women, children, elderly or prisoners of war enshrined in other agreements. The Committee derives this right in paragraph 1 of article 11 of the Covenant referring to a number of rights emanating from the right to an adequate standard of living, stating that the Covenant does an exhaustive list and that the right to water is necessary is done both to ensure an adequate standard of living, the need to enjoy the right to adequate housing and adequate food under paragraph 1 of Article 11, so as to achieve the enjoyment of the right to health referred to in paragraph 1 Article 12. It also derives from the right to life and human dignity.

Throughout the following years the United Nations system was consolidated law. For example, by resolution 7/22 of the Human Rights Council "Human rights and access to safe drinking water and sanitation" approved without a vote on March 28th, 2008.[177]

In 2010 came a new important development, this time in the General Assembly of the UN, adopted a resolution enshrining the right to water.[178] While General Assembly resolutions are not binding principle, it represented a further step in the consolidation of access to water and sanitation as a right, being remarkable, that there were no votes against the resolution.

The action of the various UN bodies is reinforced each other. One example is the resolution of the Human Rights Council A/HRC/RES/18/1 (September 2011) which makes clear reference to resolution 64/292 of the General Assembly.[179]

---

173 Document A/CONF.166/9 dated April 19, 1995. Copenhagen Declaration on Social Development, Second commitment b

174 Article 12 of that resolution states "12. Reaffirms that, in the full realization of the right to development, *inter alia*:
(*a*) The rights to food and clean water are fundamental human rights and their promotion constitutes
a moral imperative both for national Governments and for the international community;". Available at: http://www.un.org/en/ga/search/viewdoc.asp?symbol=A/RES/54/175&referer=http://www.un.org/depts/dhl/resguide/r54_resolutions_table_eng.htm&Lang=E

175 Resolution A/55/L.2 of the United Nations General Assembly

176 E/2003/22, E/C.12/2002/13 Committee on Economic, Social and Cultural Rights, Report on the twenty-eight and twenty-ninth sessions . Economic and Social Council Annex IV

177 This resolution is designating an independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation

178 Resolution A/RES/64/292. United Nations General Assembly (july 2010)

179 A/HRC/RES/18/1

6. " Water is required for a range of different purposes, besides personal and domestic uses, to realize many of the Covenant rights. For instance, water is necessary to produce food (right to adequate food) and ensure environmental hygiene (right to health). Water is essential for securing livelihoods (right to gain a living by work) and enjoying certain cultural practices (right to take part in cultural life). Nevertheless, priority in the allocation of water must be given to the right to water for personal and domestic uses. Priority should also be given to the water resources required to prevent starvation and disease, as well as water required to meet the core obligations of each of the Covenant rights."

2. The right of access to drinking water and sanitation

Firstly we refer to drinking water, this is a right that has achieved greater recognition that the right to sanitation. We start from the definition contained in General Comment 15, "Implementation of the International Covenant on Economic, Social and Cultural Rights, The right to water (articles 11 and 12 of the Covenant)"[180]

"2. The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements."

It should be noted that although the Committee recognizes that water is needed for food production and thus is linked to the right to adequate or necessary for securing livelihoods and thus the food right to earn a living by work, or necessary for certain cultural practices and thus linked to the right to participate in cultural life, **the priority in water allocation should be given for use with personal and domestic purposes as well as to prevent starvation, disease or enforce the fundamental obligations under the Covenant.**

The Committee notes that there are four key aspects: the action must be available, understanding it as a continuous supply in sufficient numbers to meet personal and domestic needs amount, the right must be exercised in a sustainable manner, ie so that it can exercise also future generations, the water must have the necessary quality for personal or household use, must be accessible, understood both from the physical point of view, that is placed in the home or workplace or in its immediate vicinity, since economic point of view, must be available to the entire population, essentially use should not compromise the enjoyment of other rights ultimately should be no discrimination between users.

On sanitation, this was defined as:

"63. The independent expert is of the view that sanitation can be defined as a system for the collection, transport, treatment and disposal or reuse of human excreta and associated hygiene."

The touchstone of the Rapporteur to determine the existence of an autonomous law is the concept of dignity. Lack of sanitation attentive to the dignity of persons:

"Sanitation, more than many other human rights issues, evokes the concept of human dignity; you must consider the vulnerability and shame that so many people experience every day when, once again, are forced to defecate in the open, in a bucket or a plastic bag. It is the indignity of this situation that causes embarrassment.[181]"

With respect to the obligations that emerge from this new right for states are of availability, which means that there is number of facilities adequate sanitation to ensure that waiting times are reasonable, quality, namely that services are safe from a technical point of view (avoiding accidents) and hygiene, physical accessibility, that is reasonably available. Affordable, meaning that the cost should be reasonable and governments should formulate policies to address the situation of those who can not afford them. Finally is the acceptability, ie facilities and sanitation must be acceptable from a cultural point of view.

As an important step in the development of the right to drinking water and sanitation noted factor was the adoption of resolution 64/292. Entitled "The human right to water and sanitation" in the UN General Assembly.

---

180 HRI/GEN/1/Rev.7 at 117 (2002). Available at http://www1.umn.edu/humanrts/gencomm/epcomm15s.html

181 A/HRC/12/24, July 1st 2009 "Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Catarina de Albuquerque"

The resolution includes two key paragraphs. The first is recognizing the drinking water and sanitation as a human right:

" Recognizes the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights; "

This is done as opposed to regard it as a component or necessary to give effect to other rights factor, as it considered the representative of the United Kingdom at the time of the vote.[182]

The problems giving rise to the recognition of the existence of a right to water, are several. The first is the magnitude of the commitments[183], since there is no clear determination of the limits of the new law. Several countries seemed to say that while access to safe water and sanitation is an essential component to the right to life as possible, as an independent right, has other features that are within the economic and social rights and thus as progressive.[184]

The second paragraph, which would be binding under international law of human rights, with areas of public international law, such as cooperation between States.

Calls upon States and international organizations to provide financial resources, capacity-building and technology transfer, through international assistance and cooperation, in particular to developing countries, in order to scale up efforts to provide safe, clean, accessible and affordable drinking water and sanitation for all;

The interaction of the obligations that could emerge from the play of both areas was also a concern for some delegations.[185]

The increasing development of the obligation to compensate for transboundary harm should be taken into consideration[186]. To devote a right to clear environmental link, change the existing balance of rights and obligations between developing States under the obligation to repair transboundary harm. This is an issue that probably gain more weight in the interstate agenda[187]. In this sense, just think of the existence of shared natural resources as the Guarani Aquifer in Latin America. This gives this right a large projection on various areas of public international law.

Furthermore, these observations are particularly relevant in the case of Latin American countries as they reveal inconsistencies surrounding the recognition of the right to water as a right. It is one of the most homogenous blocks should however be noted.

---

182 On the ocassion the United Kingdom said "the United kingdom does not believe that there exist at presente sufficient legal basis under international law to either declare or recognize water or sanitation as free-standing human rights. Neither a right to water nor a right to sanitation has been agreed upon in any United Nation human rights treaty; nor is there evidence that they exist in customary international law. The United Kingdom does believe that there is a right to water as an element of the right of everyone to an adecuate standard of living. We also believe that inadecuate sanitation has a negative impact on the protection of human rights, such as the right of everyone to enjoyment of the highest attainable estándar of physical and mental health.

183 Likewise , at the time of adoption of the resolution , the representative of Australia affirmed "Australia has reservation about the process of Declaring new human rigths throught a General Assembly resolution. In particular, we are concerned obligations that the precise status and nature of such rights will be uncertain, and uncertainly makes consensus difficult."

184 "Moreover, we interpret this recognition of the right to drinking water and sanitation strictly as an effort to promote access to this vital resource, al ways subject to the domestic law of each State. "Similarly, Guatemala undersands that the adoption of the resolution will create no international or inter-State right or obligation."

185 Thus, the Delegation of Brazil stated "We consider that Human rights to water and sanitation is compatible with the principle of the sovereign right of States to use their own water resources, as reflected in the 1992 Rio Declaration on Environment and Development". Also with regard to the rights of states the representative of Ethiopia "We strongly believe that the right to water and sanitation cannot been seen in isolation, particularly without taking into account, in the firts place, the rights of resource-poor countries, which deserves new cosnideration when negotiating the right or access to water or other related issue." It should be noted that in 2011 this country began construction of the project on the Blue Nile "Grand Ethiopian Renaissance Dam".

186 Flores, María del Luján "La obligación del Estado de reparar los daños transfronterizos", Carlos Álvarez Editor, Montevideo, 2005, pág. 282. With regard to customary international law states "In considering the customary law in this area is a significant evolution in recent decades can be seen . Indeed a host of provisions in treaties and resolutions of international organizations, a number of declarations and pronouncements by government and non-governmental level influenced the practice of States concerning transboundary damage repair . The behavior of these from the maxim". "sic utere tuo ut alienum non laedas" and a series of judicial and arbitral decisions as well as a set of principles in pregnancy was confirmed two standards of customary international law : the obligation to prevent reduce and control the transboundary harm and the duty to cooperate in preventing such damage through various notification means such as the procedure for consultation, negotiation and environmental impact as sessment.

187 For the purpose of illustrating this trend see for example the recent case between Uruguay and Argentina. Pulp Mills on the River Uruguay (Argentina v. Uruguay). Available at http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=88&case=135&code=au&p3=0

3. The limits of the current approach

In 2012 Judge Margarette Macaulay raises the issue of roads required for the recognition of economic and social rights[188].

When developing an explanation of vote in the case Suárez Peralta vs. Ecuador, Ferrer Judge Mc Gregor Possot analyzes the mechanism followed by the Court for the purpose of developing certain rights of economic and social nature. The Court essentially extends the right to life using the concept of decent life and establishing a connection between the concept of decent life and other rights. Subject to qualify for a major breakthrough, Ferrer said that the strategy followed by the Court, has limitations because "there are some components of social rights that can not be led back to standards of civil and political rights"[189]. Melish develop further the scope of these limitations[190].

It is important to distinguish between the constraints of a particular approach, such as developing water rights from the right to life, saying it is a component of the right to a decent life, the constraints of a structural nature, ie the characteristics of the judicial activity.

4. The nature of jurisprudence

The starting point is to determine the nature of the case. Traditionally the doctrine gave great importance to Article 38 of the Statute of the International Court of Justice on this issue[191]. Barberis[192] and Virally[193], denied the character to jurisprudence formal source of law , limiting the source material. Linked to this position, although others would formally recognize the nature of the source material, they still recognize that it has an importance that transcends the formal aspects as Jimenez de Arechaga[194] or in a somewhat more detached from traditional, Brownlie position[195]. Finally others like Abi Saab affirm the existence of effects beyond the particular case[196]. This expressly Pastor Ridruejo this is hardly an issue where there is doctrine[197].

It is conceivable that, with the multiplication of courts, the doctrine increasingly recognize the importance of the courts as a source of general and abstract rules. The best argument for the ability of the

---

188 Corte IDH. Caso Furlan y Familiares Vs. Argentina. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 31 de agosto de 2012. Serie C No. 246

189 Corte IDH. Caso Suárez Peralta Vs. Ecuador. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 21 de mayo de 2013. Serie C No. 261. Párrafo 57 de la explicación de voto.

190 Sobre este aspecto, véase Melish, Tara J. "The Inter-American Court of Human Rights: Beyond Progressivity", en Langford, Malcolm (ed.), Social Rights Jurisprudence: Emerging Trends in Comparative and International Law, Cambridge University Press, 2008, capítulo 19. La autora afirma "Nonetheless, significant problems arise in the more nuanced, but equally important cases in which these latter rights are insufficiently refined to interrogate effectively all aspects of economic, social and cultural rights violations. It is particularly problematic in litigating the crucial elements of adequacy, availability, accessibility and quality as core components of the rights to health, to education and to housing. These con cepts often cannot be captured by the broadness of 'life', 'integrity', 'property' or 'participation' – at least not without serious norm dilution or un derbreadth of coverage."

191 Artículo 38
1. La Corte, cuya función es decidir conforme al derecho internacional las controversias que le sean sometidas, deberá aplicar:
a. las convenciones internacionales, sean generales o particulares, que establecen reglas expresamente reconocidas por los Estados litigantes;
b. la costumbre internacional como prueba de una práctica generalmente aceptada como derecho;
c. los principios generales de derecho reconocidos por las naciones civilizadas;
d. las decisiones judiciales y las doctrinas de los publicistas de mayor competencia de las distintas naciones, como medio auxiliar para la determinación de las reglas de derecho, sin perjuicio de lo dispuesto en el Artículo 59.
2. La presente disposición no restringe la facultad de la Corte para decidir un litigio ex aequo et bono, si las partes así lo convinieren.

192 Barberis, Julio A. "Formación del derecho internacional", Editorial Abaco de Rodolfo Depalma, Buenos Aires, 1994, página 220

193 Virally, Michel "Fuentes de derecho internacional" en "Manual de derecho internacional público" editado por Max Sorensen, fondo de cultura Económica, México, 2000, páginas 177 a 181

194 Jiménez de Aréchaga, Eduardo "Derecho Internacional Público ", Tomo I, Fundación de Cultura Universitaria, Montevideo, 1993, Pg 181 "Court decisions that address issues of international law are listed in Article 38 of the Statute of the Court, together with the doctrine as " subsidiary means for the determination of rules of law," subject to the provisions of Article 59 of the Statute , this article provides that the decision of the Court is not mandatory , but the parties to litigation and the case has been decided . Undoubtedly, however, that in practice , international courts in their decisions , the attorneys in their arguments and authors in their works of doctrine give great weight to the existing judicial decisions. This trend has been accentuated by the creation of a permanent judicial body such as the Court of The Hague , which has shown a definite tendency to follow precedent followed by other courts and by itself".

195 Brownlie, Ian "The sources of the law governing maritime delimitation" en "El Derecho Internacional en un mundo en transformación", Fundación de Cultura Universitaria, Montevideo, 1994, Vol II, página 741. The author claims " "In the context of the law of the sea, there is a certain element of precedent in the reference to legal concepts and items of judicial reasoning from earlier decisions. Whilst this is unlike precedent in its more orthodox form, it is a striking phenomenon, and the fact that the majority of maritime delimitation cases are based upon special agreements has not diminished its significance. The phenomenon, has been most obvious in the sphere of continental shelf delimitation and the Chamber which decided the Gulf of Maine case, involving a single maritime boundary, still found it necessary to draw upon the rules formulated by the Court in the North Sea Cases."

196 Abi- Saab, Georges "Les sources du droit internacional: essai de déconstruction" en "El Derecho Internacional en un mundo en transformación". Fundación de Cultura Universitaria, Montevideo, 1994, Vol I, pg 34. The author claims "Pour ce que est de la jurisprudence, c´est du pur formalisme artificiel que de dire qu´ elle ne fait qu´interpréter la matière normative déjà existante, sans ajouter en ce faisant à sa substance".

197 Pastor Ridruejo, "Curso de derecho internacional público y organizaciones internacionales", Editorial Tecnos, Madrid, 2000, pg 82

courts to generate general abstract rules, comes from own analysis of jurisprudence. By way of example by observing the application that the court of a treaty we ask. Are we facing the ability to determine the meaning of a provision beyond the text of the treaty? Is it an interpretation that goes beyond the particular case?

With regard to the first question, it should be noted that the playability of the Inter-American Court of Human Rights is very extensive. For the purposes of analyzing this from a practical perspective, it may be the case Artavia Murillo and others (IVF) v Costa Rica[198]. One of the points of this case involved the interpretation of Article 4 paragraph 1 of the Covenant of San Jose de Costa Rica established

1. "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."

The Court for its part, interpreted the right to life is protected from the introduction, which is a development of some entity in relation to a literal interpretation of Article 4 paragraph 1.

1"189. Taking the above into account, the Court understands the word "conception" from the moment at which implantation occurs, and therefore considers that, before this event, Article 4 of the American Convention cannot be applied. In addition, the term "in general" infers exceptions to a rule, but the interpretation in keeping with the ordinary meaning does not allow the scope of those exceptions to be specified."

Analyzing the example it could be argued that the Pact of San José de Costa Rica is not applied from a traditional Kelsen scheme where the treaty is the norm of higher rank automatically premium to failure or at least support an interpretation that is not one hundred percent coincide with this.

The law can produce effects in general and abstract manner and under certain circumstances take precedence over the treaty text.

The second point has already been partially treated. Indeed, as Ferrer claimed in relation to economic and social rights, the Court has developed a consistent jurisprudence

The development of this concept came in 1999 from the Case of the "Street Children[199]"

"144. The right to life is a fundamental human right, and the exercise of this right is essential for the exercise of all other human rights. If it is not respected, all rights lack meaning. Owing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible. In essence, the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence. States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur and, in particular, the duty to prevent its agents from violating it."

As shown Case "Juvenile Reeducation Institute[200]"

"159. the State has an ineluctable obligation to provide those persons with the minimum conditions befitting their dignity as human beings, for as long as they are interned in a detention facility, As the Court previously indicated (supra paragraphs 151, 152 and 153), in order to protect and ensure the right to life and the right to humane treatment of persons deprived of their liberty and in its role as guarantor of those rights. The European Court of Human Rights has likewise held that:

under [Article 3 of the Convention], this provision the State must ensure that a person is detained in conditions which are compatible regarding for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well- being are adequately secured by, among other things, providing him with the requisite medical assistance.163"

---

198 Court H.R., Case of Artavia Murillo et al ("In vitro fertilization") vs. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. ... Merits, Reparations and Costs. Judgment of November 28, 2012. Series C No. 257

199 Court HR . Case of the " Street Children " (Villagrán Morales et al) vs. Guatemala . Background. Judgment of November 19 , 1999. Series C No. 63.

200 Court HR . Case "Juvenile Reeducation Institute" vs. Paraguay . Preliminary Objections , Merits, Reparations and Costs. Judgment of September 2, 2004. Series C No. 112

This line of jurisprudence is maintained in the case Yvon Neptune[201]

"182. Regarding the lack of security in the National Penitentiary, the Court has recognized that the State's international obligation to ensure to all persons the full exercise of their human rights includes the obligation "to design and apply a penitentiary policy that prevents critical situations" that endanger the fundamental rights of the prisoners in their custody[202]. The Court considers that the formulation and effective implementation of a preventive strategy to avoid the escalation of violence in the penitentiary centers is essential to ensure the life and personal safety of prisoners and also to guarantee that persons deprived of liberty are provided with the conditions needed to live with dignity."

That is, ten years after sentencing in the case "Street Children" changes the concept of the right to life, extending it to include the right to a decent life, are maintained. Jurisprudence clearly generates rules that go beyond the specific case.

4.1. Variations in the jurisprudence

The existence of lines of jurisprudence does not mean that they can not be variations . In fact they are inherent in the legal dynamics. For example the right to life was a particularly strong line of the Court, among other reasons, to have worked the issue of enforced disappearances. The Case of Baldeón García Vs. Peru illustrates this point[203.]

"82. The right to life is a fundamental right, the full exercise of which is a prerequisite for the enjoyment of all other human rights.45 If this right is violated, all other rights become meaningless. Because of its inherent nature, any restrictive approach to this right is inadmissible.46 In accordance with Article 27(2) of the Convention, this right is part of the fundamental entitlements that cannot be repealed insofar as it is regarded as one of the rights that may not be suspended in time of war, public danger, or other emergency that threatens the independence or security of the States Parties47."

It can be compared for example with the aforementioned case Artavia Murillo et al. (in vitro fertilization) vs. Costa Rica[204]

"259. Consequently, it is not admissible that the State argue that its constitutional norms grant a greater protection to the right to life and, therefore, proceed to give this right absolute prevalence. To the contrary, this approach denies the existence of rights that may be the object of disproportionate restrictions owing to the defense of the absolute protection of the right to life, which would be contrary to the protection of human rights, an aspect that constitutes the object and purpose of the treaty. In other words, in application of the principle of the most favorable interpretation, the alleged "broadest protection" in the domestic sphere cannot allow or justify the suppression of the enjoyment and exercise of the rights and freedoms recognized in the Convention or limit them to a greater extent that the Convention establishes."

To understand the balance between unbridled creation of judges and the mechanical application of the standard, it is necessary to resort to the concept of discretion of the judge.

Judges have discretion within a sphere or scope. Within the same, psychological, axiological and sociological aspects they are expressed without conflict with the provisions of the rules. The discretion is a space in which for example becomes relevant the personality of the judge.

It originated in semiotics, particularly in the multiple possibilities of interpretation of a text. However, outside this range, there is objectivity in the legal system. So for example, in the case of the "Street Children", the judges could not have said that the right to life implied the right to a decent life, as they did. But they could not have rejected the existence of the right to life.

---

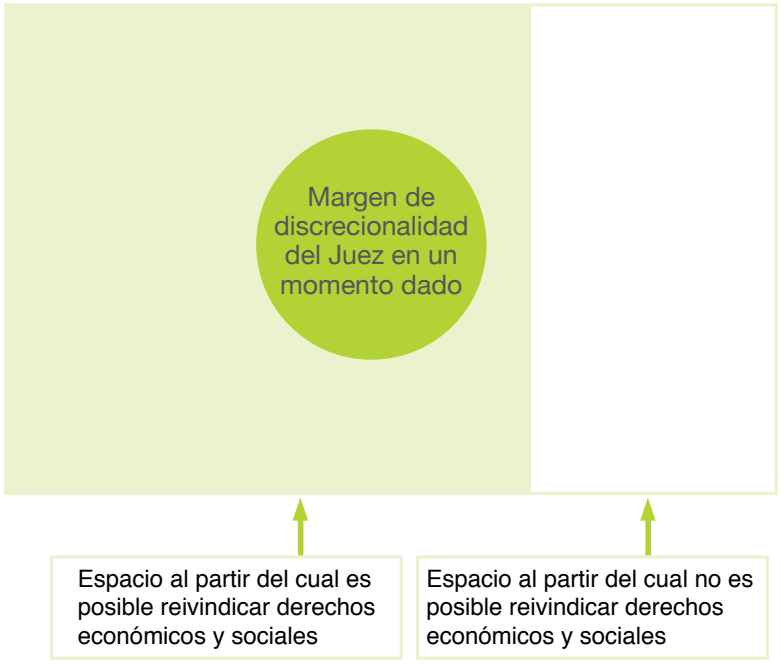
201 Court HR . Yvon Neptune vs. Haiti case. Merits, Reparations and Costs. Judgment of May 6, 2008. Series C No. 180

202 Cf. Case of the "Juvenile Reeducation Institute", supra note 137, para. 178. See also Case of Urso Branco. Provisional Measures regarding Brazil. Resolution of the Inter-American Court of Human Rights of April 22, 2004, eleventh considering. In similar vein, the European Court has established that Article 3 of the European Convention provides for the obligation on the State to adopt preventively concrete measures to protect the physical integrity and health of persons deprived of their liberty. Cf. ECHR Affaire Pantea c . Roumanie , arrêt du 3 juin 2003, Reports of Judgments and Decisions 2003 -VI (extraits), para. 190.

203 Court HR . Case of Baldeón García v. Peru Merits, Reparations and Costs. Judgment on April 6, 2006. Series C No. 147

204 Artavia Murillo et al. (in vitro fertilization) vs. Costa Rica. Paragraph 253.

Figure 1



If the judge exceeds the decision space that allows the system, its decision becomes perceived as erroneous or arbitrary. The closer to the outer limit the judge , the greater the chances that his ruling is revoked, in those legal systems in which it is possible to be located.

In short, the discretion is presented as a decision space where the standard maintains a high degree of validity.

Moreover, this range undergoes transformations. Consolidating a jurisprudential line , it is moving the discretion, as shown in Figure 1.

Moreover, the space of discretion also changes depending on other legal variables such as the number of judgments of a system[205].

The presence of discretion in the judicial activity has a strong impact on how the rules interact. Forcing to disregard the application of rules mechanically. Through an Aristotelian syllogism. While not the only factor, is particularly relevant.

The law has a double aspect, on one hand, there is the possibility to analyze the legal systems through ontology, as with many types of identification that can be found. This would be impossible to be a discipline in terms of cutting formalist positivism.

As noted Mario Bunge[206] in relation to the principle of determination:

"Determinism in the large sense, is that ontological theory whose necessary and sufficient components are: the genetic principle, or principle of productivity, according to which nothing can arise out of nothing or pass into nothing and the proinciple of lawfulness, starting that nothing happens in an unconditional and altogether irregular way- in short, in a lawless, arbitrary manner."

Determinism Bunge supports as noted, many categories, among which are: statistics, causal, mechanical, structural and random among others. Different types of determination are irreducible to one another,

---

205 About attempts to measure changes in the discretion of the European Court of Human Rights can be work Flores, María del Lujan and Sapriza, Carlos "Un modelo matemático del Tribunal europeo de Protección de los Derechos Humanos a partir de un análisis jurídico empírico " Anuario del Instituto Hispano Luso Americano de Derecho Internacional Vol 21 (2013) paginas 281-303.

206 Bunge, Mario"La Causalidad: El principio de causalidad en la ciencia moderna", Editorial sudamericana, Buenos aires, 1997. Pg. 48

but are related and do not act in pure form, excluding other categories[207]

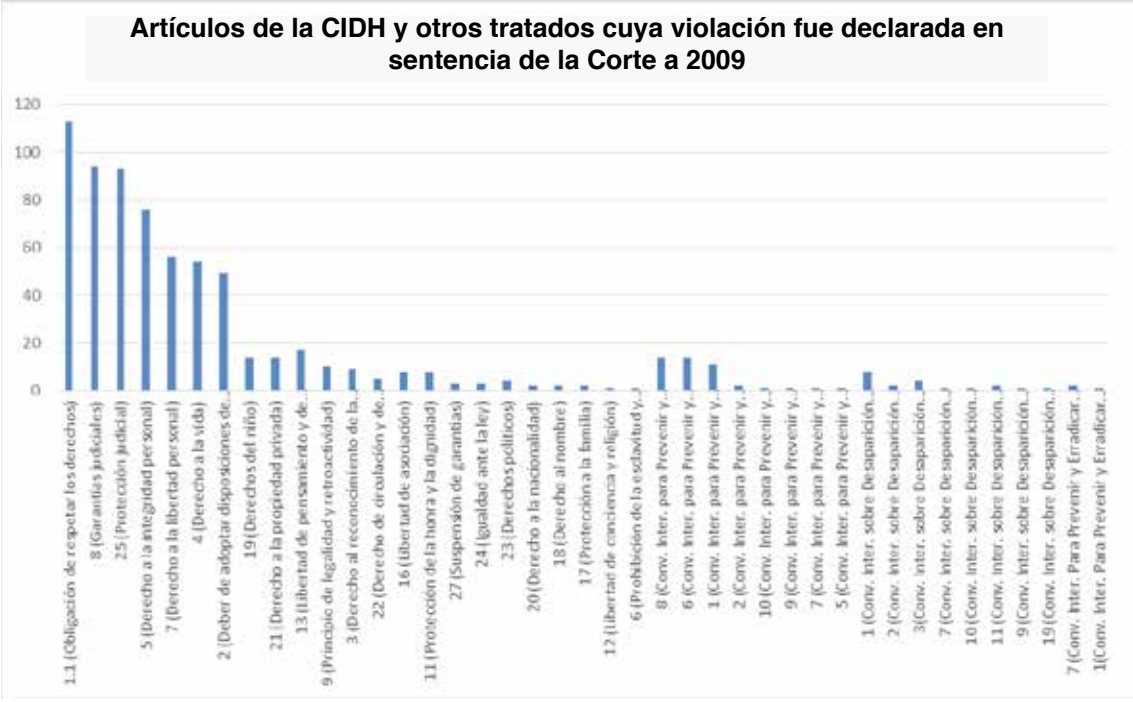
In this context, the empirical analysis reveals as essential to understand the dynamics of legal systems and for the reasons mentioned above logical analysis has limitations, which implies the possibility of developing a quantitative legal analysis. The jurimetría is the right econometrics what the economy.

Data from the Inter-American Court of Human Rights are analysed below:

Total violations by article from the beginning of the activities of the Inter-American Court of Human Rights until 2009	
ARTICLE	**Viol.**
1.1 (Obligation to respect rights)	113
8 (Right to Fair Trial)	94
25 (Right to Judicial Protection)	93
5 (Right to Personal Integrity)	76
7 (Right to Personal Liberty)	56
4 (Right to Life)	54
2 (duty to adopt provisions under its domestic law)	49
19 (Rights of the Child)	14
21 (Right to Property)	14
13 (freedom of thought and expression)	17
9 (Freedom from Ex Post Facto Laws)	10
3 (Right to Juridical Personality)	9
22 (Freedom of Movement and Residence)	5
16 (Freedom of Association)	8
11 (Right to Privacy)	8
27 (Suspension of Guarantees)	3
24 (Right to Equal Protection)	3
23 (Right to Participate in Government)	4
20 (Right to Nationality)	2
18 (Right to a Name)	2
17 (Rights of the Family)	21
12 (Freedom of Conscience and Religion)	22
6 (Freedom from Slavery)	23

207 Bunge, Mario, Op cit, pg 40

8 (Inter-American Convention to Prevent and Punish Torture)	14
6 (Inter-American Convention to Prevent and Punish Torture))	14
1 (Inter-American Convention to Prevent and Punish Torture)	11
2 (Inter-American Convention to Prevent and Punish Torture)	2
10 (Inter-American Convention to Prevent and Punish Torture)	1
9 (Inter-American Convention to Prevent and Punish Torture)	1
7 (Inter-American Convention to Prevent and Punish Torture)	1
5 (Inter-American Convention to Prevent and Punish Torture)	1
1 (Inter-American Convention on The Forced Disappearance of Persons)	8
2 (Inter-American Convention on The Forced Disappearance of Persons)	2
3(Inter-American Convention on The Forced Disappearance of Persons)	4
7 (Inter-American Convention on The Forced Disappearance of Persons)	1
10 (Inter-American Convention on The Forced Disappearance of Persons)	1
11 (Inter-American Convention on The Forced Disappearance of Persons)	2
9 (Inter-American Convention on The Forced Disappearance of Persons)	1
19 (Inter-American Convention on The Forced Disappearance of Persons)	1
7 (Inter-American Convention on The Forced Disappearance of Persons)	2
1(Inter-American Convention on The Forced Disappearance of Persons)	1
Source: Annual reports of the IACHR 2007, 2008 and 2009	



The data clearly show that not all items appear with equal frequency in the jurisprudence of the Court. The concentration of cases has implications for the development of jurisprudential lines and therefore in the development of standards.

5. Jurisprudential evolution of the right to water and sanitation

The jurisprudential line of the right to water as a prerequisite for realizing the right to a decent life component. It is not a particularly strong line. There are few cases. To this a strong bond with the situation of some groups such as migrant or indigenous experiencing situations of particular vulnerability adds. The result is a fragmentary development.

The first relevant judgment Case Yakye Axa Indigenous Community vs. Paraguay , 2005[208]. In this case, there are two important aspects. One is the right to a decent life as illustrated by paragraph 66.

"Special detriment to the right to health, and closely tied to this, detriment to the right to food and access to clean water, have a major impact on the right to a decent existence and basic conditions to exercise other human rights, such as the right to education or the right to cultural identity. In the case of indigenous peoples, access to their ancestral lands and to the use and enjoyment of the natural resources found on them is closely linked to obtaining food and access to clean water. n this regard, said Committee on Economic, Social and Cultural Rights has highlighted the special vulnerability of many groups of indigenous peoples whose access to ancestral lands has been threatened and, therefore, their possibility of access to means of obtaining food and clean water [209]."

The second important aspect is the link between indigenous peoples to land, another important line of jurisprudence which reinforces the right to water but not necessarily logically.

205. "The common basis of the human rights violations against the members of the Yakye Axa Community found in the instant Judgment is primarily the lack of materialization of the ancestral territorial rights of the members of the Community, whose existence has not been challenged by the State. Furthermore, the State has expressed throughout this proceeding before the Court its willingness to grant lands to the members of the Community. Thus, in the brief with its reply to the application it stated that

[b]earing in mind the general interest sought by the substantive matter, even though the State of Paraguay does not agree with the grounds for the application, it acquiesces to the request for reparations and therefore, through the appropriate authorities, it will order the granting of lands to the applicant [C]ommunity, within the [C]ommunity´s traditional territory, with the area authorized by the legislation in force, that is, 100 hectares per family, for which purpose it will allocate financial resources that it has already requested from the Legislative [...].

The property that will be granted to the [C]ommunity will be purchased by the State in the manner and under the conditions authorized by the legislation in force, without affecting the rights of third parties who are likewise protected by that legislation and the American Convention, for which reason it undertakes no commitment to conduct an unlawful expropriation or confiscation [...]."

Two years later a new development occurs also linked to indigenous peoples.[210]

126. "The State seems to recognize that resources related to the subsistence of the Saramaka people include those related to agricultural, hunting and fishing activities. This is consistent with the Court's previous analysis on how Article 21 of the Convention protects the members of the Saramaka people's right over those natural resources necessary for their physical survival (supra paras. 120–122). Nevertheless, while it is true that all exploration and extraction activity in the Saramaka territory could affect, to a greater or lesser degree, the use and enjoyment of some natural resource traditionally used for the subsistence of the Saramakas, it is also true that Article 21 of the Convention should not be interpreted in a way that prevents the State from granting any type of concession for the exploration and extraction of natural resources within

---

208 Court H.R., Case of the Yakye Axa Indigenous Community vs. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125.

209 Cfr. U.N. Doc. E/C.12/1999/5. The right to adequate food (art . 11), (20th session, 1999), para. 13, and U.N. Doc Doc . HRI / GEN / 1 / Rev.7 at 117. The right to water (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) (29th Session 2002), para. 16.5

210 Court HR . Case of the Saramaka People Vs. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172

Saramaka territory. Clean natural water, for example, is a natural resource essential for the Saramakas to be able to carry out some of their subsistence economic activities, like fishing. The Court observes that this natural resource is likely to be affected by extraction activities related to other natural resources that are not traditionally used by or essential for the survival of the Saramaka people and, consequently, its members (infra para. 152). Similarly, the forests within Saramaka territory provide a home for the various animals they hunt for subsistence, and it is where they gather fruits and other resources essential for their survival (supra paras. 82–83 and infra paras. 144–146). In this sense, wood-logging activities in the forest would also likely affect such subsistence resources. That is, the extraction of one natural resource is most likely to affect the use and enjoyment of other natural resources that are necessary for the survival of the Saramakas."

The next event in 2009 is also linked to the rights of indigenous peoples, children and the right to life.[211]

170. "It was not until June 23, 1999 that the President of the Republic of Paraguay issued the aforementioned Presidential Order Nº 3789 declaring the Sawhoyamaxa Community in a state of emergency. However, the measures adopted by the State in compliance with such order cannot be considered sufficient and adequate. Indeed, for six years after the effective date of the order, the State only delivered food to the alleged victims on ten opportunities, and medicine and educational material in two opportunities, with long intervals between each delivery (supra para. 73(64) to (66).) These deliveries, as well as the amounts delivered, are obviously insufficient to revert the situation of vulnerability and risk of the members of this Community and to prevent violations to the right to life, to the point that after the emergency Presidential Order became effective, at least 19 persons died (supra para. 73(74)(1), (5) to (16), (20), (22) and (27) to (30).)"

177. "As regards to the right to life of children, the State has, in addition to the duties regarding any person, the additional obligation to promote the protective measures referred to in Article 19 of the American Convention, which states the following: "[E]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state." Thus, on the one hand, the State must undertake more carefully and responsibly its special position as guarantor, and must adopt special measures based on the best interest of the child. The aforesaid cannot be separated from the likewise vulnerable situation of the pregnant women of the Community. States must devote special attention and care to protect this group and must adopt special measures to secure women, specially during pregnancy, delivery and lactation, access to adequate medical care services."

In these cases, please note that the lines of jurisprudence such as the right of children and girls are particularly strong when analyzed in relation to other rights.

This line continued in 2010 with the Indian case Xákmok Kásek Vs. Paraguay. Interestingly, in this case, the Court set a specific minimum amount of water[213].

"The Court observes that the water supplied by the State from May to August 2009 amounted to no more than 2.17 liters per person per day[214]. In this regard, according to international standards, most people need a minimum of 7.5 liters per day per person to meet all their basic needs, including food and hygiene[215]. Also according to international standards, the quality of the water must represent a tolerable level of risk. Judged by these standards, the State has not proved that it is supplying sufficient amounts of water to meet the minimum requirements. Moreover, the State has not submitted updated evidence on the provision of water during 2010, and has not proved that the Community has access to safe sources of water in the "25 de Febrero" settlement where it is currently located. To the contrary, in testimony given during the public hearing, members of the Community indicated, with regard to the provision of water, that "currently, if it is requested,

---

211 Court HR . Sawhoyamaxa Indigenous Community vs. Paraguay. Monitoring Compliance with Judgment. Order of the President of Inter-American Court of Human Rights of May 20, 2009

212 *Cf. Case of the "Mapiripán Massacre", supra* note 9, para. 152; *Case of the Indigenous Community of Yakye Axa, supra* note 1, para. 172, and Case of "Juvenile Reeducation Institute" supra note 211, para. 160. In that sense, also, *Cf. Juridical Condition and Human Rights of Children. Advisory Opinion AO*-17/02 of August 28, 2002. Series A No. 17, paras. 56 and 60.

213 Case of the Xákmok Kásek Indigenous Community. v. Paraguay. Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214

214 For this data recorded by the Court : (total liters of water delivered by the State / number of community members who live in February 25)=N1;N1/ period in which such assistance has been provided in calendar=number of liters of water per person per day.

215 Comité de Derechos Económicos, Sociales y Culturales, ONU. Observación General No. 15. El derecho al agua (artículos 11 y 12 del Pacto), (29º período de sesiones 2002), U.N. Doc. HRI/GEN/1/Rev.7 at 117 (2002). párr. 12. See J. Bartram and G. Howard, "Domestic Water Quantity, Service Level and Health", WHO, 2002. WHO/SDE/WSH/03.02: "Based on estimates of requirements of lactating women who engage in moderate physical activity in above-average temperatures, a minimum of 7.5 litres per capita per day will meet the requirements of most people under most conditions. This water needs to be of a quality that represents a tolerable level of risk.". Also see: P.H. Gleick, (1996) "Basic water requirements for human activities: meeting basic needs", Water International, 21, pp. 83-92.

it is not supplied; sometimes it takes a long time; sometimes there is no more water," and that "[they] suffer a great deal during droughts, because, where they move[d] to, in '25 de Febrero,' there is no water tank, there are no lakes, nothing, just forest." [216] They stated that during droughts, they go to a cistern located around seven kilometers away [217]."

As in previous cases, the right to water is linked to the right to life.

Also in 2010 came the Case of Vélez Loor vs. Panama, which joined the jurisprudential line of the rights of persons under detention, while focused on the water as a component of a decent life[218].

215. "The Court considers it proven that in June 2003, while Mr. Vélez Loor was held at La Joyita Prison, there was a problem in the water supply that affected the prison population. The evidence provided demonstrates that the shortages of drinking water at La Joyita had been frequent (supra para. 197) and that in 2008 the State took some measures in that regard [219]. The Court notes that the lack of drinking water is a particularly important aspect of prison conditions. In relation to the right to drinking water, the United Nations Committee on Economic, Social and Cultural Rights has called on States Parties to adopt measures to ensure that "[p]risoners and detainees are provided with sufficient and safe water for their daily individual requirements, noting the requirements of international humanitarian law and the United Nations Standard Minimum Rules for the Treatment of Prisoners." [220]. Furthermore, the Minimum Rules establish that "[p]risoners shall be required to keep their persons clean, and to this end they shall be provided with water and with toilets as are necessary for health and cleanliness," and that "[d]rinking water shall be available to every prisoner whenever needed." [221]. Consequently, States must take steps to ensure that prisoners have sufficient safe water for daily personal needs, inter alia, the consumption of drinking water whenever they require it, as well as water for personal hygiene [222]."

216. "The Court considers that the absence of minimum conditions to guarantee the supply of drinking water within a prison constitutes a serious failure by the State in its duty to guarantee the rights of those held in its custody, given that the circumstances of incarceration prevent detainees from satisfying their own personal basic needs by themselves, even though these needs, such as access to sufficient and safe water, are essential for a dignified life " [223]

In 2012 a new case occurs linked to the displaced indigenous populations[224]

183. "This Court has verified that the living conditions in Pacux have not allowed its inhabitants to return to their traditional economic activities. Instead, they have had to participate in economic activities that have not provided them with a stable income, and this has also contributed to the disintegration of the social structure and the cultural and spiritual life of the community. In addition, the facts of the case have proved that the inhabitants of Pacux live in very precarious conditions, and that their basic needs in the areas of health, education, electricity and water are not being fully met (supra paras. 85 and 86). Therefore, although Guatemala has made efforts to resettle the survivors of the massacres of the Río Negro community, it has not created the conditions or provided the means that are essential for repairing or mitigating the effects of its displacement, which was caused by the State itself."

216 Cfr. Declaration of Maximiliano Ruíz, supra note 28.

217 Cfr. . Declaration of Maximiliano Ruíz, supra note 28.

218 Court H.R. Case of Vélez Loor vs. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218

219 In this regard, in the proceedings before the Commission, the Director General of the Penitentiary System of the Republic reported that "[t]he water problems were evident with the increase in the population at La Joya Complex," and that after many efforts, "in late 2008, the water treatment plant was upgraded with suction equipment, processing, storage and new distribution, was accomplished, providing full coverage of potable water, 24 hours a day, to all of La Joya Complex." Note No. 0045-DGSP-AFP issued by the Director General of the Prison System Ad dressed to the Deputy Minister of Public Security on May 27, 2009 (Evidence file, volume VIII, annex 29 of the answer to the application, pages 3242 and 3243).

220 United Nations Committee on Economic, Social and Cultural Rights , General Comment No. 15 (2002) on the right to water (articles 11 and 12 of the International Covenant on Economic , Social and Cultural Rights), adopted by the Committee at its 29 th session (2002) , HRI / GEN / 1 / Rev.7 , 2002 , para . 16.g) (record of evidence, volume V , appendix 23 to the autonomous brief of pleadings, motions and evidence, page 2002). Also see, Organization of American States General Assembly, AG / RES. 2349 (XXXVII -O / 07) Resolution on "Water, health and human rights", adopted at the fourth plenary session, held on June 5, 2007, paragraphs one through three.

221 UN Standard Minimum Rules for the Treatment of Prisoners , adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders , held in Geneva in 1955 and approved by the Economic and Social Council in its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, Rules 15 and 20 (2).

222 *Recently, the UN General Assembly recognized that "the right to safe water and sanitation is a human right essential to the full enjoyment of life and all human rights". UN General Assembly resolution 64/292 at its 108th plenary session of 28 July 2010 on "The human right to water and sanitation". A/ Res/64/292, August 3, 2010, para. 1.*

223 Cf. Case of the "Juvenile Reeducation Institute", supra note 208, para. 152; *Case of Montero Aranguren et al* (Detention Center of Catia), supra note 207, para. 87, and García Asto and Ramírez Rojas, supra note 99, para. 221

224 Court H.R. Case of Río Negro Massacres vs. Guatemala, Preliminary Objection, Merits, Reparations, and Costs, Judgment of September 4, 2012, I/A Court H.R., Series C No. 250

Finally in 2013 we find the case of Afro-descendant Communities displaced from the Cacarica River Basin, following the line that develops the right to water in relation to the right to personal integrity , while includes lines such as freedom of movement and residence[225]

323. "The measures of basic assistance provided by the State during the period of displacement were insufficient, because the physical and mental conditions that those displaced had to face for almost four years were not in keeping with the minimum standards required in such cases. The overcrowding, the food, the supply and management of water, as well as the failure to adopt measures with regard to health care, reveal non-compliance with the State's obligation to provide protection following the displacement, with the direct result of the violation of the right to personal integrity of those who suffered the forced displacement."

324. "Consequently, the State failed to comply with its obligations to ensure humanitarian assistance and a safe return, within the framework of the right to freedom of movement and residence, and the protection of the right to personal integrity, recognized in Articles 22(1) and 5(1) of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of the Cacarica communities that were in a situation of forced displacement over a three- to four-year period."

6. Access to information

6. Access to information

The Commission has defined this right as[226]:

1. "The right of access to information is a specific manifestation of the freedom of expression protected by article 13 of the American Convention. It is a manifestation of this freedom that is particularly important for the consolidation, functioning and preservation of democratic systems of government; as such, it has received significant attention in international case law and doctrine."

On the one hand, it is a right that is more visible than that of the right to drinking water and sanitation as Article 13 of the Pact of San José de Costa Rica is examined[227]. To this must be added that it has had a much more extensive jurisprudential development that the right to drinking water and sanitation[228].

---

225 Corte IDH. Case of the Afro-descendant communities displaced from the Cacarica river basin (operation genesis) vs. Colombia judgment of november 20, 2013. (preliminary objections, merits, reparations and costs). Serie C No. 270

226 2009 Annual Report of the Office of the Special Rapporteur For Freedom Of Expression, Inter-American Commission on Human Rights. https://www.oas.org/dil/esp/acceso_a_la_informacion_lineamientos_CIDH.pdf

227 This Article states that: Article 13. Freedom of Thought and Expression
1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: a. respect for the rights or reputations of others; or b. the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

228 Court HR. La Colegiación Obligatoria de Periodistas (Arts. 13 y 29 American Convention on Human Rights). Advisory Opinion OC-5/85 November 13, 1985. Series A No. 5; Court HR. Case of "La Última Tentación de Cristo" (Olmedo Bustos and others) vs. Chile. Merits, reparations and costs. Judgment of February 5, de 2001. Series C No. 73. Para. 66; Court HR. Case of Ivcher Bronstein Vs. Peru. Merits, reparations and costs. Judgment of February 6 de 2001. Series C No. 74. Para. 148; Court HR. Case of Herrera Ulloa Vs. Costa Rica. Preliminary objection, merits, reparations and costs. Judgment of July 2, 2004. Series C No. 107. Para. 117. Court HR. Case of Ricardo Canese Vs. Paraguay. Merits, reparations and costs. Judgment of August 31,2004. Series C No. 111. Para. 77; Court HR. Case of Palamara Iribarne vs..Chile. Merits, reparations and costs. Judgment of November 22, 2005. Series C No. 135. Para. 79; Court HR. Case of López Álvarez Vs. Honduras. Merits, reparations and costs. Judgment of February 1, 2006. Series C No. 141. Para. 163; Court HR. Case of Claude Reyes and others Vs. Chile. Merits, reparations and costs. Judgment of September 19, 2006. Series C No. 151. Para. 75; Court HR. Case of Kimel Vs. Argentina. Merits, reparations and costs. Judgment of May 2, 2008 Series C No. 177 Para. 53. Court HR. Case of Ríos and others Vs. Venezuela. Preliminary objection, merits, reparations and costs. Judgment of January 28, 2009. Serie C No. 194 Para. 346 y 347. Court HR. Case of Perozo y otros Vs. Venezuela. Preliminary objection, merits, reparations and costs. Judgment of January 28, 2009. Series C No. 195. Para. 116 y 375. Court HR. Case of Ríos and others Vs. Venezuela. Preliminary objection, merits, reparations and costs. Judgment of January 28, 2009. Series C No. 194. Para. 346 y 347; Court HR. Tristán Donoso vs. Panama. Preliminary objection, merits, reparations and costs. Judgment of January 27, 2009. Series C No. 193. Para. 110; Court HR. Case of Anzualdo Castro Vs. Peru. Preliminary objection, merits, reparations and costs. Judgment of September 22, 2009. Series C No. 202, para. 113.; Case of la Masacre de las Dos Erres Vs. Guatemala. Preliminary objection, merits, reparations and costs. Judgment of November 24, 2009. Series C No. 211para. 149; Court HR. Case of Gomes Lund and others ("Guerrilha do Araguaia") Vs. Brazil. Preliminary objection, Merits, reparations and costs. Judgment of November 24, 2010. Series C No. 219 para. 199; Court HR. Case of Cabrera García and Montiel Flores Vs. México. Preliminary objection, merits, reparations and costs. Judgment of November 26, 2010. Series C No. 220, para. 242; Court HR. Case of Contreras y otros Vs. El Salvador. Merits, reparations and costs. Judgment of August 31, 2011 Serie C No. 232 para 170; Court HR. Case of González Medina and family Vs. Dominican Republic. Preliminary objection, merits, reparations and costs. Judgment of February 27, 2012 Series C No. 240 para. 266; Court HR. Case of Pueblo Indígena Kichwa de Sarayaku Vs. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245 para. 230.; Court HR. Case of García y Familiares Vs. Guatemala. Merits, reparations and costs. Judgment of November 29, 2012 Serie C No. 258 para. 157; Court HR. Case of J. Vs. Peru. Preliminary objection, merits, reparations and costs. Judgment of November 27, 2013. Series C No. 275 para. 217; Court HR. Case of Rochac Hernández and others Vs. El Salvador. Merits, reparations and costs. Judgment of October 14, 2014. Series C No. 285 para. 209.

In the mid eighties, the treatment of Article 13 of the Pact of San José de Costa Rica, focused on the dissemination of information. Later this article was gaining ground control concept of governance.

7. Influence of Court on Constitutional reforms in Latin American

A first way to determine the influence of the Inter-American legal system is the analysis of the draft constitutional reforms, in order to determine if they include references to the jurisprudence of the Inter-American Court.

To do this, we have selected 2006 as the key date as it was from the Yakye Axa vs. Paraguay that the Inter-American Court developed its jurisprudence. Thus, we have not considered the cases of Nicaragua, Panama and Uruguay as occurred before the Court's case law developed.

Analyzed cases: Mexico[229] Chile[230], Costa Rica[231], Colombia[232] and El Salvador[233] and Peru[234], only if the latter are clearly influenced by the jurisprudence of the Court. Mexico was the only one of the cases analyzed in which the right has been incorporated.

This leads us to conclude that there is an influence at the constitutional level, but it is relatively weak.

However, it is interesting to examine the case of Habeas Data. In this case, the key sentence was the case of Claude Reyes vs. Chile 2005, although unlike the right to water, the evolving jurisprudence of the Court has been more gradual. Ten of the fourteen Latin American constitutions analyzed as incorporated by 2005. Clearly we are also facing a weak influence.

DATE OF INCORPORATION OF THE INSTITUTES TO THE CONSTITUCIONS				
State	Habeas Data	Article	Right to Water	Article
Guatemala*	1985	31		
Nicaragua*	1995	26	1995	105
Brazil	1988	5		
Colombia	1991	15		
Paraguay	1992	132		
Peru	1993	200		
Argentina	1994	43		
Bolivia	2009	130	2009	16
Ecuador	1998	66	2008	3
Venezuela**	1999	28		
Panama	2004	44	2004	114

229 Decree states that reformed the fifth paragraph and sixth paragraph taken across at its subsequent order, the article 4 is added. Of the Constitution of the United Mexican States (DOF 08-02-2012). Available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&cad=rja&uact=8&ved=0CF8QFjAH&url=http%3A%2F%2Fwww.diputados.gob.mx%2FLeyesBiblio%2Fproceso%2Flxi%2F203_DOF_08feb12.pdf&ei=qWIpVee5OMrdsATLsYHIAg&usg=AFQjCNEsSOlSQRDbzxNhnz-PrrQitcNrUw . There is no mention of the jurisprudence of the Inter-American Court of Human Rights.

230 Constitutional reform enshrining the public domain waters and sets the state of environmental disaster due to water scarcity. Bulletin No. 9525-07. It entered the Constitution, Law and Justice on August 21, 2014. Available at http://www.camara.cl/pley/pley_detalle.aspx?prmID=9938&prmBL=9525-07 . There is no mention of the jurisprudence of the Inter-American Court of Human Rights

231 See record No. 17,793 of July 28, 2010."REFORM OF ARTICLE 50 OF THE CONSTITUTION TO THE WATER A HUMAN RIGHT" Available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0CkQFjAB&url=http%3A%2F%2www.asamblea.go.cr%2FDiputadas_Diputados%2Fdiputada_mireya_zamora%2Fdocumentos_relevantes%2FREFORMA%2520AL%2520ART%25C3%258DCULO%252050%2520DE%2520LA%2520CONSTITUCI%25C3%2593N%2520POL%25C3%258DTICA%2520PARA%2520HACER%2520DEL%2520AGUA%2520POTABLE%2520UN%2520DERECHO%2520HUMANO.pdf&ei=w1cpVYzJMOXZsASC5oDACw&usg=AFQjCNEqL7OpsesUJ9KAaf5jPdQjXdiIHw&bvm=bv.90491159,d.cWc . There is no mention of the jurisprudence of the Inter-American Court of Human Rights in this case

232 Text approved in first debate in the First Committee of the Honorable House of Representatives to bill no. 171 , 2008 House of Representatives " through which called for a constitutional referendum constitutionalise water protection and other related provisions ". Available at http://www.bdlaw.com/assets/htmldocuments/COLOMBIA_-_Draft_Law_171_2008.PDF

233 http://rnes.sv/foro-del-agua-y-pddh-reiteran-necesidad-de-ratificar-articulo-69-sobre-derecho-humano-al-agua/

234 Opinion went to the Bills We 412/11 CR - 547 /2011- CR , 566/1111 -CR , 1386/2012 -CR , 1411/12 -CR, CR 1456/12 and 1518/12 / CR seeking reform the constitution , incorporating the right to water as a fundamental right. Available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0CC8QFjAC&url=http%3A%2F%2Fwww2.congreso.gob.pe%2FSicr%2FTraDocEstProc%2FContdoc02_2011_2.nsf%2F0%2Ffc91e5e446f14cc505257bf8007e551f%2F%24FILE%2F00412DC04MAY02122013.pdf&ei=e1opVcO6IM-xsATElYB4&usg=AFQjCNGWXvcaKDBYVy5-T2Xb7ZAAEvVieg in this case if there was a clear reference to the jurisprudence of the Inter-American Court of Human Rights in the case Sawhoyamaxa Indigenous Community vs. Paraguay.

Honduras	2013	182		
Uruguay			2004	47
Dominican Republic**	2010	70	2010	61
Mexico	2009	16	2012	4

* Access to data is limited to public databases

** We Included Venezuela and Dominican Republic although they did not accept the jurisdiction of the Inter-American Court of Human Rights during part of the period

Source: Author.

In fact, it is likely that the jurisprudence of the Inter-American Court of Human Rights end up having more influence on the inclusion of the right to water in the constitution in the case of Habeas Data.

On this basis one could think of a provisional hypothesis: the role of **the Court, rather than the development of new institutes, focuses on the development of existing** (so still you can not perform this kind of development). This conclusion is reached by observing that there is a large number of cases prior to the development of key judgments both in relation to the right to water as the Habeas Data. The main impact of the Court lies in the dissemination of these institutes.

8. The developments at the judicial level

At the judicial level, the picture is different. Sentences found in several countries that refer to the jurisprudence of the Inter-American Court of Human Rights. Nevertheless, We examine two relevant variables. First, it is the degree to which an institution has been treated has been treated by the case law of the Court and the second is the impact that this institute has in domestic legal systems. As an indicator of the first variable is the number of judgments of the Inter-American Court of Human Rights , as an indicator of the second resort to the judgments of domestic law and the jurisprudence of the Court mentioned in relation to the right to information and the right to water.

Our hypothesis is that the domestic impact of the jurisprudence of the Court is greater for the right to information which has since been further development in the Inter-American Court in the case of the right to water.

An analysis of the cases, it appears that prevail cases of access to information on those water rights. Moreover, in the domestic jurisprudence, also premium access to information, with references to the jurisprudence of the Inter-American Court of Human Rights against the right to water, as shown in the table below

QUOTES FROM THE CASE LAW OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS	
State	**Jurisprudence stands right to information**
Argentina	Yes
Bolivia	No
Chile	Yes
Paraguay	Yes
Uruguay	Yes
Colombia	Yes
Mexico	Yes
Guatemala	Yes
Panama	Yes
Brazil	Yes
Peru	Yes
Costa Rica	Yes

Source: Author.

It is clear that the predominant influence of the judgments of the Inter-American Court of Human Rights concerning the right to information against the influence of the judgments of the Inter-American Court of Human Rights concerning the right to water in the domestic jurisprudence of countries the region.

The question is whether this dominance could be due to chance. To determine what the odds of that happening are, we have used the binomial test. We assume the hypothesis that there is a 50% probability that kind of law prevails over the other in each country. This is called the null hypothesis. Then we have an alternative hypothesis, which states that the likelihood that prevails lines jurisprudence is not the same, this is called the alternative hypothesis. We will test the null hypothesis and remain standing discard the alternative hypothesis.

To test it, we have used the binomial test. Using the language R:

data: 12 and 12

number of successes = 12, number of trials = 12, p-value = 0.0004883

alternative hypothesis: true probability of success is not equal to 0.5

95 percent confidence interval:

0.7353515 1.0000000

sample estimates:

probability of success

In fact, if we analyze the content of some of the judgments, we similar conclusions. Thus, the judgment of the Constitutional Court of Colombia T - 740/11 dated October 3, 2011, refers to the situation of the right to water in the Inter-American System[235].

In the judgments of the Inter-American Court of Human Rights, likewise, have been able to find only indirect references to the right to water, linking it to the right to life. In that sense the most important cases concern two Paraguayan indigenous communities were displaced from their ancestral lands to lands with fewer natural resources for their livelihood.

The perspective present in the sentence, is developing a right closely linked to the right to life.

In the case of Uruguay 's Judgment No. Please note. 267 / 12. 3ºTº Civil Court of Appeals dated 05/10/2012 [236]

Then no doubt that any solution must from undisputed fact in this degree, that COMCAR conditions were, upon being detained at the plaintiff, those reported in the above reports and held as certain in the judgment in resource; namely overcrowding, lack of potable water, dilapidated state of the cells and common areas (rooms, bathrooms), need for physiological needs in the presence of other prisoners, poor hygiene, etc.

This in turn determines the clear existence of lack of service, in both of these deplorable conditions it can only be concluded that the provisions violated by the art.26 of the Constitution of the Republic and other international standards referred to in the contested decision that integrate the set of inherent rights of the human person recognized in the art.72 of the Charter (ie Article 5 Universal Declaration of Human Rights, arts.7 and 10 International Covenant on Civil and Political Rights, among others).

Based on the conditions targeted in the judgment, the reports of the Parliamentary Commissioner and the UN Rapporteur added that seeing as facts to be considered admitted to this degree, it is translatable Inter-american held by the Court of Human Rights in the case "Hilaire, Constantine and Benjamin et al Trinidad Tobago "dated June 21, 2002, in which they expressed:" The Court has also stated that anyone deprived of liberty shall be treated with dignity and that the State has a responsibility and duty to ensure humane treatment while in detention.

In this case , it is clear the influence of the Inter-American Court of Human Rights concerning the right to water, but indirectly, through the conditions of detention than the salt water references.

236 http://bjn.poderjudicial.gub.uy/BJNPUBLICA/hojaInsumo2.seam?cid=128

Also visible in Mexico, associated as in the case of Uruguay, the situation of prisoners [237]

Based on the constitutional reforms on human rights, June 10, 2011, effective from the day, in terms of article 1., All persons shall enjoy the rights recognized by the Constitution and treaties international of the Mexican State is a party. Regarding the right of access, water and sanitation provision for personal and domestic consumption as sufficient, safe, acceptable and affordable, the 4th article. Constitution provides that the State shall guarantee the law and define the bases, supports and arrangements for access and equitable and sustainable use of water resources, establishing the participation of the Federation, the states and municipalities. Then, with respect to persons deprived of liberty, this right is recognized in international instruments, reports and documents of authorized bodies such as the General Comment No. 15 of the UN Committee on Economic, Social and Cultural Rights-on the right to water-; Standard Minimum Rules for the Treatment of Prisoners; Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas; Report on the Human Rights of Persons Deprived of Liberty in the Americas; International Committee of the Red Cross and Inter-American Court of Human Rights -Case vs. Velez Loor Panama. Accordingly, the Committee on Economic , Social and Cultural Rights developed General Comment Number 15, November 2002, which states that the vital fluid is a limited natural resource and a public good essential for life and health, and the human right to water is indispensable to live in dignity and precondition for the realization of other human rights. In this sense, and in line with the "pro persona principle" whereby the legal interpretation should always seek the greatest good for the man, the human right to water is one to have sufficient, safe, acceptable, accessible and affordable water for personal and domestic use; an adequate supply is necessary to prevent death, and to meet consumer needs, cooking and personal and domestic hygiene , which is achieved with the water supply for each person must be sufficient and continuous for personal and domestic uses ; the amount available for each person should correspond to the guidelines of the World Health Organization; therefore, water facilities and services must be accessible to all, without discrimination, within the jurisdiction of the State party. Therefore, if the water and the services and facilities must be accessible to all of fact and law, including the most vulnerable and marginalized sectors of the population, without discrimination, to ensure the protection of this human right, the States parties should take steps to eliminate discrimination when it deprives people of the means or entitlements necessary for exercising their right to water; They must also ensure that the allocation of water resources and investment, facilitating access to all members of society; because the changes should not be to the benefit of a privileged fraction of the population, but invested in services and facilities that result in favor of a wider sector pursuant to a non-restrictive interpretation, based on the principle pro homine, which allows to attend a interpretation of the right to water in accordance with the principles supported by the Federal Constitution and human rights contained in the aforementioned international instruments, from an interpretation that favors at all times to the most comprehensive protection.

The Bolivian law also cites the jurisprudence of the Court but in this case, through a general reference, which is clearly linked to the development of the fragmentary nature of the right to water inter-America.[238]

The fundamental right to water constitutes an autonomous right linked to the right of access to basic services, allows configuration of the right of access to drinking water (preamble and Art. 20. I and III of the CPE), which can be linked or relate to the specific case in accordance with the principle of interdependence (art. 13 I of the CPE) to the right to health, to housing, to adequate food, among other individual rights that have to do with a standard of living adequate and decent, what the Constitution called the ' living well ' intended state (preamble and art. 8. II CPE), or what the Inter-American Court of Human Rights called the right of access to a dignified existence.

9. Courts and environmental governance

The participation of communities in making decisions that affect them is an irreversible and closely linked to the development of human rights phenomenon. Analyzing this in relation to the right to water and

---

237 Localización: [TA]; 10a. Época; T.C.C.; Gaceta S.J.F.; Libro 12, Noviembre de 2014, Tomo IV; Pág. 2928. I.9o.P.69 P (10a.). Amparo en revisión 158/2014. 2 de octubre de 2014. Unanimidad de votos. Ponente: Emma Meza Fonseca. Secretario: Martín Muñoz Ortiz. Availableathttp://200.38.163.178/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e1fdfdf8fcfd&Apendice=1000000000000&Expresion=Hasta interamericana&Dominio=Rubro,Texto&TA_TJ=2&Orden=1&Clase=DetalleTesisBL&NumTE=184&Epp=50&Desde=-100&=-10 0 & Index=0& InstanciasSeleccionadas=6,1,2,3,4,5,50,7&ID=2008053&Hit=14&Ds= 2008940,2008925,2008931,2008872,2008652,2008663,2008705,2008501,2008504,2008436,2008180,2007981,2008049,2008053,2007639,2007364,2007426,2007427,2007428,2007253,2007090,2007189,2007048,2006647,2006472,2006482,2006483,2006497,2006417,2006225,2006165,2006237,2006179,2006180,2006181,2006306,2005917,2005794,2006058,2005616,2005525,2005526,2005533,2005477,2005731,2005657,2005682,2005698,2005425,2005296&tipoTesis=&Semanario=0&tabla=

138 SENTENCIA CONSTITUCIONAL PLURINACIONAL 1696/2014 Sucre, September 1rst 2014 Available at: en javascript:__doPostBack('ctl00$MainContent$WucBuscarJurisprudencia1$WucDatosJurisprudencia1$GvwResoluciónBusqueda','SeleccionarResolución$4')

sanitation, the Special Rapporteur has drawn attention to them stating that they are a human right in itself.[239]

The Environmental governance is an issue that has acquired and probably gain more weight on the international agenda. His relationship with the judicial activity is important, but its links are not entirely clear.

There are two ways to appreciate the problem of judicial activity. Both are complementary. The first is to sensitize judges, seeking first affect the space that allows discretion and secondly aiming to facilitate dynamic rules to disseminate environmental standards.

However, the real key to the dynamic rules at the judicial level are not necessarily located in the activity of the judge but that of the many users of the system. Indeed, it is through the development of case law that rules are generated.

Social participation in the judicial system is a key to achieving an inclusive, democratic legal system that reflects the true trends affecting society phenomenon.

It is true that not enough of them. Social participation in the system of administration of Justice ensures that the system reflects the problems of users but not necessarily to be the criteria of good governance in environmental matters, i.e. rules that reflect the values needed to sustain human development in a sustainable manner.

The incorporation of standards through other mechanisms such as the adoption of laws in parliament is complementary and allows to some extent, perhaps more than through the courts, promoting these criteria.

Throughout the process, please note that many of the aspects that we consider as "volunteers", can be viewed as functions of other social variables in a major media are beyond the will of individuals. As an example we can cite the perception of corruption. While it is true that it can be to fight, the fact remains that seen through a scientific perspective; it can be considered as a function of the modernization process.

The ultimate goal is to achieve a system that considers the multiple dimensions of environmental issues, and promote a policy developments adjusting to the preservation of a healthy and balanced environment. The development of this system should be inclusive , contemplating participation in the development of standards equal to those who by virtue of their will and rationality are authorized to do so.

Clearly you can not attaining only with the legal system. The concept of environmental governance is extremely broad and to maintain a balanced evolution requires such a continuous human development. If this virtuous circle is broken, other sub legal systems such as the judiciary or the legislature, faced with the need to promote agendas that do not reflect social realities and therefore tensions and ruptures occur in societies that are unsustainable in the long run. It is not logical in the care of the environment in extremely poor societies or those very polarized and a very significant number of people living in poverty. Only be achieved at the expense of limiting freedoms, which makes it of questionable viability in the long term.

10. The possible effect of an advisory opinion on the inter-American system

Recent years have shown the growing use of international tribunals in the political strategy of States. Examples of this are the advisory opinions on the use of nuclear weapons in 1995 , the Construction of a Wall in the Occupied Palestinian Territory in 2003[241] or the Declaration of Independence of Kosovo in 2008[242].

---

239 A/HRC/24/44 "Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque". 76. The participation of concerned communities in decision-making processes is a human rights principle and a human right in itself. Some see it as a hurdle as it costs money and time. However, meaningful participation is also a guarantee of sustainability – as the integral basic sanitation (SABA) model in Peru or the safe water committees in Nicaragua have shown, the participation of communities in the design, construction, management and operation of services creates a greater willingness to use and to pay for water and sanitation, and better entrenches hygiene habits. True participation requires meaningful opportunities to freely and actively influence decisions, not mere superficial consultation or information sharing (A/HRC/18/33, paras. 68-69). Such a process entails providing information through multiple channels, enabling participation in transparent and inclusive processes, ensuring that funds are appropriately spent on interventions that are needed and strengthening the capacities of individuals and civil society to engage (ibid.).

ICJ, Legality of the Threat or Use of Nuclear Weapons. Available at http://www.icj-cij.org/docket/index.php?p1=3&p2=4&code=unan&case=95&k=e1&p3=0

241 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. Available at http://www.icj-cij.org/docket/index.php?p1=3&p2=4&code=mwp&case=131&k=5a&p3=0

242 Accordance with international law of the unilateral declaration of independence in respect of Kosovo. Available at http://www.icj-cij.org/docket/index.php?p1=3&p2=4&code=kos&case=141&k=21&p3=0

In environmental matters, the proposal is interesting to note Palau, channeled through the UN General Assembly , a consultative opinion on climate change in 2012. Palau 's initiative marks an attempt to expand the spaces where debate climate change, while sitting minimum basis on which the negotiations were led[243].

In this context, the possibility of requesting an advisory opinion on the inter-American system is revealed as a mechanism that presents interesting perspectives for developing environmental legislation in the system.

The objective of an eventual inquiry should be the development of an autonomous right to water, to unify and strengthen the developments that have taken place in the jurisprudence of the Court from 2005 to date.

The state of the subject at the present time, provides a glimpse significant opportunities to enshrine the right. There is favorable and continuity recent case law, although it is fragmented in its description of law. Also as noted jurisprudential lines that can be invoked to develop it are strong. In fact it is highly likely that without the advisory opinion the evolving jurisprudence end to enshrine this right in broad terms but obviously the process will be slower.

CONCLUSIONS

The right to water is a right in gestation is gradually establishing itself as autonomous right , although its origins in the American system , was inextricably linked to the right to life and health . There is little inter-American statements concerning this right. It is interesting to compare the degree of development of water rights to access to information. The latter has been the subject of more judicial and incorporated more constitutions pronouncements.

The right to water has been parallel but not identical ways in the universal system and the inter- regional. A universal level the Comment 15 establishes it as an autonomous right while it has not yet been given in the inter traditionally linked subordinating it to other rights.

There is a very active group of Latin American countries in the field who have put the issue on the table, but have not given conditions for the Court to carry out a homogenizing action at the regional level.

In the American system the piecemeal approach that emerged, in the sense of being referred to certain groups in vulnerable situations and in their quality of component life worthy as opposed to the character of autonomous duty applicable to all human categories are perceived. Also in the regional system problems arise regarding its enforceability. This is related to the Protocol of San Salvador and Articles 26 and 29 of the Pact of San José de Costa Rica. By making the Court a broad interpretation and link to the right to life, avoids the problem of limitations on progressive development which is attributed to economic, social and cultural rights. However this has a cost in terms of the scope of the law and in particular in their relationship with other rights that may conflict, by way of example with property rights.

The approach continues today, reinforces the fragmented nature of the right to water. The right to develop in a balanced way, especially in his relationship with others, it is necessary to take water as the center. Something similar can be achieved through the formulation of an advisory opinion, which has the advantage of reducing the tensions inherent in the progressive nature of the right. The advisory opinion lessen the impact of the progressive nature attributed to economic, social and cultural rights, which will eventually have an impact on the position taken by the Court in this regard.

A universal level, Latin America was instrumental in the development of the right to water. By way of example. Bolivia introduced draft resolution enshrining this right in 2010 before the UN General Assembly and has also been important the degree of diffusion that has had this law in Latin American constitutions.

What is the role of the Court in that context? On the one hand standardize and extend the right. Speed adoption level of domestic legal systems, which has not yet been achieved by the scant jurisprudence.

In sanitation and drinking water right there is a substantive difference is also reflected in the jurisprudence of the Court, whose development is even lower. In this regard it should also appealed to advisory opinions that will strengthen the system dynamics

---

243 Beck, Stuart y Burleson, Elisabeth "Inside the system, Outside the Box: Palau's pursuit of Climate Justice and Security at the United Nations" at Transnational Environmental Law, 3:1 (2014), pages 17-29 Cambridge University Press.

II. TRADE INVESTMENT AND ENVIRONMENT

In pursuit of economic growth and development, the Western Hemisphere continues to support economic integration and the benefits of globalization, including through increased trade. Trade represents one important development driver, but it can also be a source of environmental pressures. Trends regarding sustainability in investment, linkages with climate change law and policy, and supporting environmental compliance by using market based instruments and planning tools as well as challenges regarding Environmental Impact Assessment are analyzed in abstracts submitted under this sub-theme to inform decision making from the national to the global dimensions.

2.1. The Flexibility of the Rules: Environmental Legislation in times of Economic Slowdown and Crisis

Martha Aldana

Environmental legislation, environmental permits, environmental enforcement

The state of the world economy has a direct impact on environmental management in developed countries as well as in the Latin American region. Indeed, the global and regional economy are suffering a crisis that has direct impact on the implementation of environmental legislation from the perspective of environmental permits as well as in the field of environmental enforcement.

This paper analyzes this hemispheric trend from the environmental management experience in Peru.

In regard to environmental permits, legislation is under approval that would allow the joint issuance of the approval of environmental impact assessment (EIA) and additional permits. In turn, it is proposed to validate the use of baselines of studies already approved, in order to avoid the cost of collecting that information from the field.

In regard to environmental enforcement, there is already a legislation which provides that the audit authority will only sanction an environmental offense when the affected party has not remedy the administrative measure to be issued to comply with the obligation unfulfilled. That is, the non-compliance is not punished but the offender is given an opportunity to rectify and only if it does not comply with adopting this measure correction is punished. This sanction, according to Peruvian regulation, is not to be applied for the full amount of the fine but for an amount not exceeding 50% of the fine (except in the serious cases, where the full amount can be applied). Likewise, the audit authority regulates incentives to encourage voluntary compliance with environmental legislation and encourages the consideration of rights to supervise the offender.

In this context, the article ponders if, indeed, "flexing" environmental management is the only way to survive downturns and crises or are rather, we are going back to times when it was considered that the environmental protection was a luxury we could only afford if we lived in developed countries having to survive on the environmental cost of needed economic growth.

INTRODUCTION

The state of the global economy has a direct impact on environmental management, both in developed countries and in the countries in the Latin American region. In effect, the global, regional—and in particular the Peruvian— economies are suffering a deceleration that has a direct impact on the content and approaches of environmental legislation.

As the experts say, "What Peru has experienced in 2014 is also what has happened on the Latin American front. We have faced a deceleration that is understandable in the current scenario due to the international financial crisis."[244] Faced with this reality and seeking to alleviate the risk that the economy will not continue to grow as it has in recent years, environmental management is seen as a means to decrease the acuteness of the problem and to ensure that environmental issues are not an obstacle for investment growth.

In this article this hemispheric trend of investment promotion applied to the field of Peruvian environmental management is analyzed.

To this end, the major milestones in the history of Peruvian environmental legislation and the institutional framework for environmental impact assessment and environmental control are presented. With this

244 Interview with Juan José Marthans. Diario Perú 21. http://peru21.pe/opinion/medidas-mef-resultan-insuficientes-2212246

initial framework, the main measures that are being proposed and implemented to make environmental management more flexible are presented. Finally, we present how the practical implementation of these environmental regulations, particularly in the area of environmental control, reflects this trend today.

1. A brief history of Peruvian environmental legislation and institutions

Peruvian environmental legislation has its birth in the Code on the Environment and Natural Resources approved by the Legislative Decree No. 613 in September 1990.

Before this regulation, the country relied on certain rules governing natural protected areas, natural resources, and environmental sanitation, but it had no established regulations designed to prevent and control the environmental impact of economic activities, nor had a regulation of the social and environmental aspects of these activities been developed.

1.1. In terms of environmental impact assessment

Among its major developments, the Code on the Environment and Natural Resources of 1990 established the mandate to develop the Environmental Impact Studies (EIA, in Spanish),[245] which should be developed by duly registered entities.

Its approval produced, in the moment, criticism due to investment fears that this kind of regulation generated. In this context, within a set of investment promotion regulations that took place in the following year, 1991, many of the provisions of the Code were amended or repealed. Among these changes, environmental responsibilities were reallocated to the sectoral authorities; that is, to the corresponding ministries from the productive, extractive, and existing service sectors whose main and natural priority was, and is, investment promotion, but not its enforcement and control.

Thus, beginning in 1993 with the adoption of the environmental protection regulation for mining operations, environmental regulation based on the already established sectoral scheme was initiated. Within this framework, the first sectoral environmental regulations related to the activities of hydrocarbons (1993), electricity (1994), the manufacturing industry (1997), and fisheries (1999) were issued. These regulations developed the sectoral regulation of the evaluation of environmental impact, comprising the regulations applicable to the procedures of revision and approval of the studies of environmental impact (by the environmental sectoral authorities[246]), citizen participation, and to a lesser extent, included regulations on the environmental consequences of the development of these activities. In turn, at the organizational level, specialized branches were established (with different hierarchical ranks) within the various ministries, which were created for the task of implementing the sectoral environmental regulations that were underway.

Given the regulatory and institutional dispersion, in 2001 the National System of Environmental Impact Evaluation Law—SEIA[247] was approved as a system that sought to organize and standardize the regulation of this instrument of preventive environmental management. Nevertheless, this very same rule left its own validity up to its passing, noting that until this regulation was approved, the above-mentioned sectoral environmental regulations would continue to be applied.

With the creation of the Ministry of Environment (MINAM[248]) in May 2008, it opened a new chapter not only institutionally but also in Peruvian environmental legislation. For instance, in June 2008, several articles from the SEIA Law [249] were amended. In turn, in September 2009, the approval of the regulation of the SEIA Law by the Supreme Decree No. 019-2009-MINAM was achieved.

---

245 In the book, "La Evaluación del Impacto Ambiental en el Perú" (National Environmental Society. Lima, 2000), Manuel Pulgar-Vidal, current Minister of the Environment of Peru, criticizes the emphasis that the Environmental Code put on the EIA as a document, putting aside the focus of environmental impact assessment as a process.

246 Initially, EIA's legislation only granted the national government power in adopting the EIA. Since 2008, with Legislative Decree No. 1078, this regulation has been amended to note that regional governments could also assume that power in the context of transferring functions that are regulated by the rules of decentralization. In the case of the Mining Energy Sector, from the Annual Plan of Sectoral Transfers in 2004, the process was initiated to transfer this function to the regional governments for approval of smaller activities such as the activities of small-scale and artisanal mining.

247 Law No. 27446 from April 23, 2001.

248 The predecessor agency to the Ministry of Environment was the National Environment Council (CONAM), created in 1994 as a coordinating body in the area of the Presidency of the Council of Ministers.

249 Legislative Decree 1078. This regulation includes the repeal of the provision that subjected the validity of the SEIA Law to its own approval.

This regulation established the mandate to issue adequate environmental sectoral regulations adapted to the new SEIA regulations for the sectors (ministries) without existing environmental standards, or to update the existing environmental regulations. These new regulations require relying on the prior favorable opinion of MINAM in accordance with the amends of the SEIA Law from 2008.

In the first case, the sectors that did not already have environmental regulations were the housing sector (September 2012) and the agriculture sector (November 2012), that, to date, have issued their sectoral environmental regulations.

In the case of updating existing environmental regulations to adhere to the regulations of the SEIA Law, they have been able to approve new environmental regulations for mining and hydrocarbons (both in November 2014). MINAM expects to complete its sectoral regulatory alignment process soon, which has been established as one of the goals of the AgendAmbiente 2015-2016.[250]

An important milestone in the field of Peruvian environmental impact assessment has been the creation of an authority within the environmental sector with the task of reviewing and approving the EIA[251] which, as mentioned above, has become task of the sectoral environmental authorities. This new authority is the National Service of Environmental Certification for Sustainable Investment (SENACE).

The consensus to make the environmental sector the one to assume this important function was achieved with the participation of all the sectors involved and was reflected in a report published in October 2014.[252] In fact, a trigger for this change in the institutional framework of environmental impact assessment was related to socio-environmental conflicts that occurred in the country in 2011 that led to the failure to execute a mining project of great economic importance,[253] and even led to the fall of a cabinet of ministers.

SENACE is a new institution that is in the process of being established in preparation to assume, progressively, powers in current environmental impact assessment that are still under the responsibility of sectors. The timeline for transferring functions that includes the eight sectors that exercise these functions, from a period of time beginning this year (2015) until 2020[254] has already been approved.

1.2. On matters of environmental auditing

Peruvian environmental auditing has a somewhat similar history. In 1992, the first environmental audit regulation was issued. This regulation[255] established the figure of audit and inspectorate firms that must be registered with the Ministry of Energy and Mines (MEM), and should be hired by the holders of mining, electricity and oil rights to verify their compliance with environmental obligations applicable to these activities. In turn, it was established that no MEM official could carry out inspection visits to these production activities, except in the case of emergency visits. At this stage, Peruvian environmental auditing was subject to potential conflicts of interest due to the contractual relationship between the owner of the activity and the regulator.

In a next stage, there were various changes in the institutional framework applicable to the field of environmental auditing, which resulted in the creation of an autonomous agency in charge of these functions, first assuming enforcement in the energy sector (1996)[256] and then in the mining sector (2007)[257]. Nevertheless, to the degree to which it had been created, in 2008, the citizens demanded that the Ministry of Environment should be the entity responsible for environmental auditing. For that reason, in the mandate for the creation of MINAM, the Agency for Assessment and Environmental Control (OEFA) was created as a part of this ministry body. The OEFA began to assume responsibility for environmental control for mining activities (medium and large scale mining) in 2010, having later assumed such functions for energy activities (2011), fisheries and aquaculture

---

250 Ministry of Environment. AgendAmbiente 2015-2016. Result 34. Product 354.1 Regulations, mechanisms and legal, technical, standardized, and appropriate provisions to the National System of Environmental Impact Assessment (SEIA).

251 In particular, SENACE, according to its founding law, will be in charge of the review and approval of the category of EIA for activities that generate significant environmental impacts, called detailed Environmental Impact Studies (EIA-d). There is a bill that would also give this power to the EIA for projects that are developed for moderate environmental impact, which are called semi-detailed EIA (EIA-sd).

252 Multisectoral Commission Report created by Supreme Resolution No. 189-2012-PCM. Axis Strategic Environmental Management. Published in the Diario Oficial El Peruano October 18, 2012.

253 We refer to the Conga Mining Project in Cajamarca region, which included an investment of 4,800 million dollars.

254 Supreme Decree No. 006-2015-MINAM. Approves the Timeline for the Transfer of Functions to the National Service Sectoral Authorities of the Environmental Certification for Sustainable Investment-SENACE under Law No. 29968.

255 Decree-Law No. 25763

256 Initially this authority was under the purview of the Ministry of Energy and Mines (December 1996), but this changed quickly. In February 1998, the Supervisory Agency for Investment in Energy (OSINERG) entered the sphere of the Presidency of the Council of Ministers.

257 OSINERG became OSINERGMIN when it assumed the functions of mining control. 258 To date it has assumed the functions for four activities of the manufacturing industry: cement, beer, paper, and tanneries.

(2012), and manufacturing (2013).[258] It is expected to continue, gradually, to assume sectoral environmental auditing responsibilities from the national government.

In 2013, in turn, a law was passed that sought to strengthen environmental auditing through regulations that, on the one hand, tripled the ceiling of applicable fines, and on the other hand, established the legal feasibility of allowing the correction of breaches of environmental obligations provided that they do not generate environmental or health risks.[259]

This approach is aimed at promoting balanced audit that, on the one hand, fosters compliance through deterrence with severe fines and, on the other hand, promotes the fulfillment of the obligations of the title-holders for economic activities. The policy of promoting and sanctioning title-holders of economic activities appeared to be integrated in a reasonable balance to achieve the objectives of environmental protection, including the protection of the environmental rights of citizens.

Both histories, both for environmental evaluation and for environmental auditing, are parallel histories that are aimed at achieving a greater consolidation in the environmental sector against the power of the sectoral authorities in their roles in investment promotion. However, although it could be said that the trends of both the legislation and the institutional framework were focused on strengthening the environmental sector, the current economic slowdown in not only the country but the entire region, is forcing Peruvian environmental management to enter a new era, the era of the easing of environmental regulations as a response to the need to promote investment.

2. EIA terms of environmental flexibility

The main business concern in the administrative procedures of environmental impact assessment are the possible delays in processing. In a study prepared by the Directorate of Strategic Management of SENACE, it is noted that these procedures may take up to four times the legal window;[260] including delays arising from the issue of technical opinions by authorities involved as pundits in these procedures.[261]

The guidelines given in the framework of the new trend of investment promotion sought to reduce these windows by legal mandate. For example, the timeframe given to the entities participating in the environmental assessment procedure, in their capacity as competent authorities in the areas of water resources and natural protected areas, was reduced from 50 to 30 days.[262] This was later integrated into the law,[263] which was passed in order to promote investments in 2014.

In fact, delays in timeframes, with attention to records, are not solved by regulations that shorten deadlines without analyzing the reasons behind such delays. Therefore, with the creation of SENACE, they have been promoting the implementation of e-government mechanisms such as the Single Window Environmental Certification, which aims to ensure greater speed for records of environmental impact assessment (or environmental certification as it is called in Peru) and, also, the possibility of processing more than one environmental permit at a time.[264]

In turn, considering that a significant portion of the remarks made in the procedure for approval of the environmental studies refer to what is indicated in the baseline of the EIA, a supervisory or support figure has

---

258 To date it has assumed the functions for four activities of the manufacturing industry: cement, beer, paper, and tanneries.

259 Law 30011, law amending the Law on the National System of Evaluation and Environmental Auditing.
Article 11.-General functions
b) Direct supervisory function: it includes the power to conduct follow-up and verification actions in order to ensure compliance with the obligations established in the environmental regulation on the part of the concerned parties. Additionally, it includes the power to take preventive measures.
The supervisory function has the additional aim of promoting voluntary correction of alleged breaches of environmental obligations, as long *as administrative disciplinary proceedings had not been initiated, whether a correctable infraction and the act or omission did not generate risk, damage to the environment or to health.* In these cases, the OEFA may archive the file of the corresponding investigation.
By order of the Board of Directors, the provisions are regulated in the preceding paragraph.
(the emphasis added is our own).

260 The legal window for processing these procedures is 120 working days.

261 Strategic Management Division. Analysis of the application of deadlines in the processing of environmental certification records in the mining and energy sector (2013-2014). In turn, this study shows that the average time used to issue technical opinions in the procedures of review and approval of Environmental Impact Studies as 36 percent, on average, which are used in acts of mere notification of documents between the authorities and between the competent environmental authority and the concerned party.

262 Supreme Decree No. 060-2013-PCM. Approves special arrangements for the implementation of administrative procedures and other measures to promote projects of public and private investment. Article 3.

263 Law No. 30230. Article 21.

264 We refer to Bill No. 3941, which proposed the "Integrated Environmental Certification" through which environmental certification, together with a group of 12 others, would issue environmental permits that the concerned party voluntarily requests, which can be processed together.

been established in the process of preparing the study, through which the authority in charge of environmental certification (EIA review and approval) will seek to ensure that at this stage the proper collection of information necessary for the development of the baseline is made.[265] In this way it seeks to avoid the delays and costs to rectify, during the approval procedure of the study, observations related to the gathering of field information. The regulation in this area is in the approval process.

A measure to promote investment in environmental impact assessment recently has been raised in Peru, and it is referred to as "the sharing of the baseline study." In effect, Bill No. 3941, submitted by the Executive Authority to Congress, stated that the owner of an investment project can opt for the sharing of information from the baseline of an EIA[266] previously approved by the competent authority, that the owner can use the project baseline of any economic sector no older than five years to determine if there are variations to the information contained in the baseline, and that the authority can request an update or supplement as noted in the study.

In these cases, the existing baseline would form the basis of the new investment project. Thus, the holder would avoid bearing the cost of carrying out the baseline study and consequently save time but, in turn, would result in the risk that this involves that environmental studies which have been developed with for a particular project in a specific sector that could be used in the environmental assessment of others, distorting the objective of conducting baseline studies in the first place, which is not to take inventory of natural resources, but to acquire knowledge of the main characteristics of a particular area in relation to environmental factors that may be affected by a particular project.

3. Environmental flexibility in terms of environmental auditing

In the case of environmental auditing, regulations promoting investment in recent times have been more aggressive. In effect, in July 2014 a law was passed (Law No. 30230) which established an exceptional penalty system replacing the current regime that sought the then applicable balance between sanctions and promotion of compliance, for one that is preventive, promotional, and educating in environmental control. In effect, Law No. 30230 stated in its Article 19 that within three years of its term, the OEFA will privilege actions aimed at the prevention and correction of infringing conduct to the environment.

According to the provisions of this rule, for the next three years, the OEFA will process procedures through which they will not impose sanctions, but rather they will commission corrective measures to reverse infringing conduct. If compliance with corrective measures is verified, the case will come to an end. If corrective measures are not taken, only then, the OEFA shall be empowered to impose the corresponding sanction. Penalties in such cases may not exceed 50 percent of the fine that would correspond. In turn, the law states that this rule of a discounted fine does not apply in the following cases:

- Very serious offenses that generate a real and very serious threat to the life and health of people.
- Activities undertaken without relying on the environmental management instrument or authorization to commence operations or in prohibited areas.
- Repeat offense, understood as being the commission of the same offense in a period of six months since the resolution was upheld that sanctioned the first offense.

These three cases, according to what is stated in Law No. 30230, are the cases in which the offender who has not complied with corrective measures does not deserve the 50 percent reduction of the fine imposed. However, when the OEFA issued a regulatory standard for this article,[267] it amended the meaning of what is regulated in Law No. 30230. In effect, the regulatory standard of the OEFA notes that if there exists a verified administrative offense in any of the cases mentioned above, it will directly correspond to the imposition of fines without the 50 percent reduction of the amount of the applicable fine, with no regard for whether or not corrective actions are being taken.[268]

---

265 This function is regulated in the law creating SENACE, Law No. 29668. First Final Supplementary Provision. It also is regulated in the mining environmental sectoral legislation, comprising not only the support in developing the EIA baseline, but also the development of the study.

266 The draft legislation states that this provision would apply to the detailed Environmental Impact Studies (EIA- d) and the semi-detailed Environ mental Impact Assessment Studies (EIA -sd).

267 Approved by Board of Directors resolution No. 026-2014-OEFA/CD from July 24, 2014.

268 In turn, this regulatory standard established complementary rules which state that the regulations contained in Law No. 30230 do not weaken the power to impose administrative measures other than corrective measures, similarly it empowers the intervention any natural or legal person with a legitimate interest as a third party in the disciplinary procedures of the OEFA.

For the regulations to be solid and not subject to possible discussion in the judicial sphere, they must be consistent with these laws that are intended to regulate. In this case, however, the regulatory standard from the OEFA clearly exceeds the legal mandate, which could lead to legal challenges that do not favor the unquestionable role that the auditory authority should have.

This does not mean, in any way, that we agree with the regulation established by said Article 19 of Law No. 30230. Our claim is that the standard, before the adoption of this regulation, already favored balanced, not extreme, regulation in environmental auditing.

Now with the new regime established by Article 19, the deterrent effect that every penalty system should have is removed, to the extent that the concerned party will be informed of the first offense and will not be the object of punishment, but of correction, or of an educational warning regarding his misconduct, which could result in non-compliance.

However, this does not lead us to argue that it is legally viable for a regulation, as issued by the OEFA, to replace the regime established by a regulation with the force of law.

Additionally, after the issuance of the new regime introduced with Article 19, the OEFA has been issuing a series of regulations with a clear focus on promoting the rights of the concerned party and best practices rather than controlling the misconduct that may occur.[269]

Returning to the previous stage of strengthening environmental auditing, it should be emphasized that among the regulations that were issued before Law No. 30230, in order to promote balance in environmental control, the OEFA, for example, had already established the principle of non-confiscation by providing that the penalty to be applied shall not exceed 10 percent of the annual gross income earned by the infringer in the year prior to the date on which the infringement is committed,[270] and in turn it had regulated that imposed sanctions can be both monetary and non-monetary, i.e. applicable warnings for less serious breaches.[271] In turn, the OEFA already had a methodology for the graduation of penalties established under the principles of reason and proportionality,[272] which seeks to give objectivity and predictability in the determination of the applicable fine.

The explanatory manual for this methodology for calculating fines expressly stated:

> ...The determination of the sanctions imposed on the concerned party mainly has three objectives: (i) discouraging violations of environmental legislation; (ii) providing equitable and reasonable treatment to the concerned party; and (iii) ensuring the expeditious resolution of environmental problems.
>
> The first and foremost objective (disincentive) is that penalties deter the offender from re- engaging in the same behavior (specific disincentive) again and, at the same time, deter others from incurring penalties for similar conduct (general disincentive).
>
> For a penalty—in particular, a fine—to effectively discourage behaviors that are considered harmful, it is necessary for both the offender and the public to assume that the sanction will place the offenders in a worse position than the situation they would be in if they had not committed the offense.
>
> These rules were adopted by the OEFA, taking as a reference the provisions of the policies of the Environmental Protection Agency of the United States,[273] which constitute the international standard for the imposition of sanctions. In effect, for the fines to be effective, they must be dissuasive.

---

269 These standards have been issued as follows:
- Registry of Best Environmental Practices Regulation by the OEFA. Board of Directors Resolution No. 034-2014-OEFA/CD.
- Incentive Scheme Regulation in the field of environmental control by the OEFA. Board of Directors Resolution No. 040-2014-OEFA/CD
- Supervised Rights Guide. Board of Directors Resolution No. 037-2014-OEFA/CD.
- Rules for handling defect complaints through the Assessment Agency and Environmental Control - OEFA. Board of Directors Resolution No. 009-2015-OEFA/CD.

270 General rules for exercising the sanctioning powers of the Agency for Assessment and Environmental Control. Board of Directors resolution No. 038-2013-OEFA/CD, Thirteenth Rule.

271 General rules for exercising the sanctioning powers of the Agency for Assessment and Environmental Control. Board of Directors resolution No. 038-2013-OEFA/CD, Seventh Rule.

272 Methodology for the Calculation of Base Fines and the application of the aggravating and mitigating factors to be used in the graduation of sanctions. Presidency of the Board of Directors Resolution No. 035-2013-OEFA/PCD.

273 United States Environmental Protection Agency. Policy on Civil Penalties. EPA General Enforcement Policy # GM – February 21, 1984, p. 3-6. Cited by the OEFA in the explanatory manual on methodology for calculating base fines and the application of the aggravating and mitigating factors to be used in the graduation of sanctions.

The OEFA, in turn, had complied by issuing regulations for voluntary correction of infringements of minor importance,[274] where breaches of conduct that would qualify as less important are those detailed below:

I. Relating to the submission of information

- **I.1** Failure to submit the Report or Environmental Monitoring Report in the prescribed time, or an incomplete submission and/or in a mode other than that requested.
- **I.2** Failure to submit the Plan of Solid Waste Management in the prescribed time, or an incomplete submission and/or in a mode other than that requested.
- **I.3** Failure to submit the Hazardous Solid Waste Management Manifesto in the prescribed time, or an incomplete submission and/or in a mode other than that requested.
- **I.4** Failure to submit the Declaration of Solid Waste Management in the prescribed time, or an incomplete submission and/or in a mode other than that requested.
- **I.5** Failure to submit the Annual Environmental Report or Environmental Management Annual Report in the prescribed time, or an incomplete submission and/or in a mode other than that requested.
- **I.6** Failure to submit other information or documentation required by the Entity of Environmental Control in the prescribed time, or an incomplete submission and/or in a mode other than that requested.

II. Relating to the management and handling of solid waste and non-hazardous materials

- **II.1** Failure to segregate non-hazardous waste, or incorrect segregation.
- **II.2** Failure to mark storage sites, or marks them inappropriately.
- **II.3** Failure to maintain containers of non-hazardous materials.
- **II.4** Failure to label containers of non-hazardous materials.
- **II.5** To temporarily store empty containers in open land or in areas not covered by the regulations.
- **II.6** Improper disposal of non-hazardous waste.

III. Relating to environmental commitments

- **III.1** Violating the environmental commitments set forth in the Environmental Management Instrument, relating to the storage of non-hazardous solid waste or the identification of waste containers.
- **III.2** The temporary disposal of waste in a manner other than that stated in the Instrument of Environmental Management, due to production, cleaning equipment, or changing equipment.
- **III.3** The temporary storage of empty containers in areas not included in the Instrument of Environmental Management.

Therefore, the OEFA already had a policy framework that sought to give greater rationality to the intervention of the environmental monitoring authority, and it regulated the provisions of Law No. 30011 amending the SINEFA Law, including voluntary correction figure but delimiting the application of this tool to minor breaches that did not constitute significant environmental risks.

In the list of correctable infractions, for example, the findings relating to the non-delivery, incomplete delivery, or delivery in a mode other than requested of information were included, as well as solid waste management, but limited to only non-hazardous waste. Therefore, not all breaches were legally rectified, but rather only those of lesser magnitude and less environmental risk.

In this OEFA regulation, in turn, cases where the correction of non legally feasible infractions were established as the following:

a) When the behavior that qualifies as one of minor significance obstructs the exercise of the function of direct OEFA supervision.

274 Regulations for voluntary correction of breaches of lesser significance. Board of Directors Resolution No. 046-2013-OEFA/CD.

b) When the concerned party has previously carried out conduct similar to the behavior of minor significance.

c) When the behavior refers to the remission of Environmental Emergency Reports.

As indicated, when Law No. 30230 (April 2014) was issued, the OEFA already had a legal framework that sought a balanced, rational, and predictable intervention in environmental auditing. We would understand that this law was what was sought to give a political signal to investors in the sense that what environmental auditing seeks is to achieve compliance with environmental regulations, and that this is accomplished more through the imposition of corrective measures, not through the imposition of sanctions. Indeed, some corrective measures have a greater deterrent effect than the sanctions themselves, as could be the case with a measure of the temporary closure of a well for the extraction of hydrocarbons due to the pollution it could be causing. But this is not always applicable, and as discussed in the examples presented below, corrective measures do not produce the expected effect, or simply, they are not always fulfilled, generating a bad sign for the environment of compliance that should be fostered.[275]

In turn, in the regulatory standard of the OEFA it has established that if the administered remedy to the infraction is not relevant to what was prescribed, the authority shall be limited only to declare the existence of administrative responsibility, which will be taken into account to determine the recurrence in future disciplinary proceedings.196

In turn, the OEFA's regulatory standard has been established that if the concerned party rectifies the infringement, the dictation of the corrective measure will not be relevant, in which case the authority shall be limited only to declare the existence of administrative responsibility, which will be taken into account to determine the recurrence in future disciplinary proceedings .

The problem lies there then, that the legal environmental sanctioning system in Peru now does not create disincentives to committing infringing conduct. On the contrary, there are now incentives to not comply, as the concerned party will know that it will have the opportunity to rectify the infringement and therefore, doing a cost-benefit analysis, it could result more beneficial to breach, and if a violation is detected, it will rectify the infringement instead of complying with its obligations in the first place because of the general deterrent effect that arises from the existence of any applicable sanction.

This situation, in our view, transgresses the principles of prevention and sustainability set out in the General Environmental Law[276] and, above all, the principle of authority in environmental control.

4. Practical consequences of regulatory relaxation

Given that the regulatory relaxation suggested above regarding environmental impact assessment has not yet been approved, we could not submit case studies on this subject.

Instead, in terms of environmental auditing, we can find information that reveals the current state of things. To this end, we have chosen a particular date, the last business day of the year, to discuss the resolutions issued by the competent authority to determine first the environmental sanctioning administrative procedures (i.e. Directorate Control, Punishment and Application of Incentives - DFSAI of the OEFA) in 2013 and 2014, in order to then analyze the effect of the resolutions issued at both dates; the results of which we present below:

---

275 Board of Directors resolution No. 026-2014-OEFA/CD. Regulations that facilitate the implementation of the provisions of Article 19 of Law No. 30230- Law which establishes tax measures, simplification of procedures, and permits for the promotion and revitalization of investment in the country. Article 2.2

276 General Environmental Law. Law No. 2861.1
Preliminary Title
Rights and Principles
Article VI.-Of the precautionary principle
Environmental management has as main objectives to prevent, monitor, and avoid environmental degradation. Where it is not possible to eliminate the causes, mitigation, recovery, restoration, or eventual compensation measures that apply are adopted.
Article V.-Of the sustainability principle
The management of the environment and its components, as well as the exercise and protection of their rights under this law, are based on the balanced integration of social, environmental, and economic aspects of national development, as well as on meeting the needs of present and future generations.

First instance resolutions issued on the last business day of the year	Total number of resolutions issued	Archived resolutions	Resolutions issued with sanctions	Resolutions that only determine administrative responsibility	Corrective measures imposed
2013: 27.12.13	20	5	15	-	-
2014: 31.12.14	30	18	-	12	7

As shown in the table, in 2013, the last working day of the year, 15 resolutions were issued with sanctions. These sanctions, according to what is stated in the resolutions, included penalties with fines ranging from 2 UIT (approximately US$2,500) to 333 UIT (approximately US$420,000). In turn, within the sanctions issued, three resolutions were emitted that established dates of suspension of operations in the event of fishing activities. No corrective measures were issued.

In 2014, as shown in the table, no penalty sanctions (or warnings) were issued, being that they issued 12 resolutions that declared administrative responsibility, other than the resolutions on file. Of the 12 resolutions listed, seven also contained corrective measures, and therefore in five resolutions there were no established obligations for implementing such measures.

Therefore, on the same date in two different years, they went from the issue of sanctions to the issuance of resolutions that do not sanction, but merely state that the administrator is legally responsible for the infringement committed without any legal consequences of such a declaration (rather, the reoccurrence of future infractions will be referred to the consideration of this infraction).

As for specific issues, we analyze how the regulation of sanctions applicable to infringements on Maximum Permissible Limits (LMP) for mining have evolved:

Infraction: exceed the Maximum Permissible Limits (LMP) of wastewater in the development of mining activities				
	Until November 2012	**Since November 2012**	**Since November 2013**	**Since July 2014**
Legal basis	Ministerial resolution No. 353-2000-EM/VMM. Item 3.2	Supreme Decree No. 007-2012-MINAM item 6.2.3	Board of Directors resolution No. 045-2013-OEFA/CD	Board of Directors resolution No. 026-2014-OEFA/CD
Applicable penalty or fine	50 UIT (approximately US$63,000 dollars)	up to 10,000 UIT (approximately US$12 million dollars)	from 3 UIT (approximately US$3,800 dollars) to 25,000 UIT (approximately 31.6 million dollars)	Will be directly sanctioned only if exceeding the MPL would generate a real and very serious risk to the life and health of people, or in the case of recidivism, ranging from 150 UIT (US$190,000) to UIT 15,000 (19 million dollars).[277] In the other cases of MPL excesses, only administrative responsibility is declared, and corrective measures are imposed, if they are applicable. If the failure of the corrective measure is verified, it is punishable by 50% of the value of the applicable fine.
Type of fine	Fixed fine	Adjustable fine in a single open range	Adjustable fine with 16 ranges of penalties considering the percentage of exceeded over the limit and the greatest environmental risk of the parameter	Adjustable fine applying to one of 16 ranges of sanctions, as a real and very serious damage to human life and health has been generated.

Each exceeded parameter is sanctioned?	YES	YES	NO, only one exceeded parameter is sanctioned, the other exceeded parameters are considered as aggravations of the same infraction.	NO, only one exceeded parameter is sanctioned, the other exceeded parameters are considered as aggravations of the same infraction.

As can be seen, penalties for the excess of the Maximum Permissible Limits of mining effluents have had a particular evolution. This was the type of offense that was most frequently found in the statistics of first instance sanctions in the OEFA, with approximately 25 percent of all sanctions imposed.[278] From the development of this regulation, it can be seen that it has gone from fixed penalties to adjustable fines that through their stricter penalties sought to achieve a deterrent effect, given that they could reach very high amounts (however, as indicated the sanctions could not exceed 10 percent of the annual income of the offender), to the current situation in which there are no sanctions for the pollution generated from mining activities, but rather what is done upon verification of the excess of an LMP is that they issue a corrective measure, and only when the failure to implement this measure is verified can this act be sanctioned.

In turn, although initially considered a punishable offense, each verified excess of the LMP, under the latest regulations issued by the OEFA, was no longer viable because it is only permissible to sanction one offense— in the event of finding various offenses verified in a field visit—with the other LMP offenses qualifying as aggravations of the first infraction. This was another regulation that the OEFA had before the enactment of Law No. 30230.

To better understand the current state of things, we will look at a particular case. In DFSAI Resolution No. 774-2014-OEFA / DFSAI from December 29, 2014, it states that having verified the excess of LMP of total suspended solids (STS) in the monitoring point called SV-09W during a Special Supervision 2010 visit, in addition to declaring administrative liability , the following is designated as a corrective measure:

> "It is ordered that the Mining Company San Valentín S.A., as a corrective measure, must comply with the following: (i) Within thirty (30) working days from the date of notification of this resolution, the maintenance and cleaning of the wastewater solids mine treatment system, of the working plant, and of the subdrainage of Tailings Deposit No. 2 must be carried out. In such a way, the checkpoint SV-09W meets the Maximum Permissible Levels with respect to the parameter of total suspended solids (STS) in accordance with current environmental regulations."

Thus, having verified that it had exceeded an LMP, the corrective measures consists of performing maintenance and cleaning the treatment system to achieve compliance with the parameter exceeded, and only if it does not comply with this measure may be a penalty be imposed. Previously, at the other extreme, often only penalties were imposed and no corrective measures were issued. Ideally, in terms of environmental protection, which also seeks to sanction infractions, in addition, administrative measures are imposed that seek to revert the environmental impact or to control the environmental risk caused by this breach. It seems that we have gone from one extreme to another.

Another issue. In the case of infractions relating to the breach of the commitments established in the Environmental Impact Study (EIA),[279] in hydrocarbon activities (natural gas), we have the following evolution of the regulation on sanctions:

---

278 According to statistics from the Department of Control, Sanctions, and Application of Incentives (DFSAI), first instance for the issuance of sanctions by the OEFA, from October 2010 to July 2014, the sanctions for breaching the MPL of mining effluents reached 24.3 percent of the total sanctions issued by this authority.

279 In Peruvian law, there is reference to the breach of the Environmental Management Instruments (IGA), which includes all three types of environ mental studies: Category I: Environmental Impact Statements which are applicable for projects with minor environmental impacts, Category II: Semi-detailed Environmental Impact Assessment Studies (EIA-sd) and Category III: Detailed Environmental Impact Assessment Studies (EIA-d), which are regulated by Law No. 27446 and its regulation approved by Supreme Decree No. 019-2009-MINAM.

Infraction: violating the provisions of the EIA or performing activities without EIA approval			
	Until February 2014	Since February 2014	Since July 2014
Legal basis	Board of Directors resolution No.-388-2007 - OSINERG Numeral 3.4.3	Board of Directors resolution No. 049-2013-OEFA/CD	Board of Directors resolution No. 026-2014-OEFA/CD
Applicable penalty of fine	Up to 10,000 UIT (approximately US$12 million dollars)	From formal warning to 25,000 UIT (approximately 31.6 million dollars)	Will be directly sanctioned only if the EIA breach would generate real and very serious damage to the life and health of people, or in the case of recidivism, ranging from 150 UIT (US$190,000) to UIT 25,000 (31.6 million dollars).[280] In the other cases of EIA breaches, only administrative responsibility is declared, and corrective measures are imposed, if they are applicable. If the failure of the corrective measure is verified, it is punishable by 50% of the value of the applicable fine.
Type of fine	Adjustable fine in a single open range	Fine adjustable in 10 ranges of applicable sanctions considering whether it fulfilled the obligation to	Fine adjustable in 10 ranges of applicable sanctions considering whether it fulfilled the obligation to inform the authority of the initiation of work or if generates or not actual
Is all action distinct from what is established in the EIA sanctioned?	YES	NO, if it is a clear improvement there are no penalties. This rating is determined by the direct supervisory authority of the OEFA.	NO, if it is a clear improvement there are no penalties. This rating is determined by the direct supervisory authority of the OEFA.

In this case, the regulations that were applied and had a deterrent effect in that they established as an applicable sanction a maximum penalty of a fine of up to 10,000 UIT, without regard for whether corrective measures or other administrative measures could be imposed. When the OEFA's scale for criminalizing this infraction is adopted, ranges of applicable sanctions will apply, which range from a simple warning to UIT 25,000; without being able to levy a sanction for an amount exceeding 10 percent of annual revenues of the concerned party, as already indicated.

However, with the new regime, the breaches of the provisions of the EIA will not be sanctioned directly, but the authority will be limited to declare the administrative responsibility of the offender. As noted, with the new regime, the offender has been proven as such will be subject to the imposition of a corrective measure, which can result in not being relevant and therefore, would not correspond to issuance.

Let us examine another case. In resolution No. 761-2014-OEFA/DFSAI from December 23, 2014, the existence of administrative responsibility was declared of Pluspetrol Peru Corporation S.A., upon having discovered the following infractions:

(i) An area of 3 m2 (three square meters) corresponding to the Warehouse of Chemical Inputs - Drilling in the Mipaya Location was not waterproofed, violating the commitment established in the Environmental Impact Study for the Expansion of the Program of Drilling and Development of Lot 56;

(ii) A retaining wall for secondary containment in the Warehouse of Hazardous Solid Waste in the Mipaya Location was not implemented, violating the commitment established in the Environmental Impact Study for the Program of the Expansion of Drilling and Development of Lot 56;

280 The definition of infractions which exceed the MPL, approved by Board of Directors resolution No. 045-2013-OEFA/CD from November 13, 2013, in item 14 is defined as "exceeding the MPL established in the applicable regulations, generating real damage to human life or human health," but in this case only apply, according to what is stated in the Board of Directors resolution No. 026-2014-OEFA/CD , if they are cases of real and very severe damage to human life and human health.

In both cases, the resolution notes that these behaviors constitute breaches of the commitments set out in the Environmental Impact Study for the Program of the Expansion of Drilling and Development of Lot 56, and that such conduct violates the provisions of the Regulation for Environmental Protection in Hydrocarbon Activities, approved by Supreme Decree No. 015-2006-EM.[281] However, in connection with the issuance of corrective measures, it reads as follows

"Furthermore, pursuant to Numeral 2.2 of Article 2 of the regulations that facilitate the implementation of the provisions established in Article 19 of Law No. 30230 - law which establishes tax measures, simplification of procedures and permits for the promotion and revitalization of investment in the country, approved by the resolution of Board of Directors No. 026-2014-OEFA/CD , declares that it is not appropriate to order corrective measures in respect to infringing conducts (i) and (ii), as the Supervision Directorate of the Agency for Environmental Assessment and Enforcement verified that Pluspetrol Perú Corporation S.A. rectified the infringing conducts during field observation."

In this way, even if it is related to the management of chemical substances and hazardous waste, with the subsequent environmental risk involved,[282] the verification by the authority of the breach shall have no legal effect on the concerned party because the party ultimately fulfilled, although done during field observation, the mitigation measures established in the environmental study.

This new flexible approach to environmental control in the country, objectively, is legalizing the generation of environmental risks, endangering the quality of the environment and the effectiveness of the EIA, in that its enforcement is subject to the ability of the authority to verify breaches in the field and not according to the need to achieve the central objective of environmental prevention, which is the ultimate goal of the environmental impact assessment. This leads, in turn, to a situation where the environmental rights of the people are vulnerable.

In fact the focus of intervention in environmental auditing from 2013 to 2014 has changed substantially. As of this year, before sanctioning a fine, it seeks to warn offenders about the wrongfulness of their actions, even those that generate environmental risks, seeking that they take corrective measures indicated by the authority. That which could be considered positive and necessary, could result in being dangerous and unsustainable.

This new approach to environmental auditing with an educational emphasis might have been appropriate at the start of the implementation of environmental auditing in the country. However, after almost 20 years, this new trend can only be explained as the need to seek means to reduce the slowdown of the national economy by promoting investment at the expense of environmental matters.

Apparently, it is presumed that the agents of economic activities, rather than spending money on fines, now invest in the implementation of corrective measures to reverse situations of environmental risk that their violations generate. It is an innocent assumption that is not consistent with the need to ensure, through disincentives that signal the existence of a real penalties, that they make the investments required to meet environmental obligations and really internalize the investment in being responsible with the environment.

It may seem that we are going backwards, going back to 20 years ago when the importance of environmental conservation was misunderstood and qualified as a threat to the necessary economic growth in all countries, especially in still in development.

CONCLUSION

a) Peruvian legislation, management and institutions have evolved in the last 20 years towards strengthening the environmental sector.

b) In terms of environmental impact assessment, the environmental sector will be assuming the role of evaluating the EIAs for larger projects, which has been the responsibility of the sectoral authorities that promote private investment.

281 In particular, reference is made to Article 9 of said regulation, which regulated the obligations of the party concerned in relation to the compliance with what is stated in the EIA. This regulation has now been abolished, replaced by the new regulation for Environmental Protection in Hydrocarbon Activities approved by Supreme Decree No. 039-2014-EM, which establishes a similar rule.

282 The environmental risk that resulted from these offenses is explicitly noted in the decision itself under review in items 31 and 45 thereof.

c) In terms of environmental auditing and enforcement, the environmental sector already has assumed jurisdiction to oversee various economic activities previously under the sectoral authorities, and it is predicted to continue in the same way.

d) In the context of the economic slowdown in the country, since 2013 they have been adopting various mechanisms intended to promote investment and to ensure that environmental requirements are not an obstacle for such purposes.

e) In this regard, they have issued regulations that seek to optimize the processing of environmental studies in conjunction with the approval other permits, and it has been proposed to share the baseline studies to prevent rights-holders from having to produce such a study again if it had already been previously approved, even if the study had been prepared for other activities in other sectors.

f) In turn, regulations have been issued that allow economic activities to generate environmental risks, having limited the legal capacity of the environmental control authority to effectively sanction environmental violations.

g) The practical application of these regulations, especially in the field of environmental auditing, allows for involved parties to not comply with their environmental obligations, which jeopardizes the integrity of the environment and, consequently, affects the validity of the environmental rights of people.

BIBLIOGRAPHY

Aldana, Martha. La Fiscalización Ambiental en el Perú: Orígenes, Estado Actual y Perspectivas Futuras. En Revista Derecho y Sociedad Edición 41. Año XXIV- 2013.

Gómez, Hugo y Granados, Milagros. El fortalecimiento de la fiscalización ambiental. En “El nuevo enfoque de la fiscalización ambiental”. Organismo de Evaluación y Fiscalización Ambiental. Lima, 2013.

Pulgar Vidal, Manuel. “La Evaluación del Impacto Ambiental en el Perú”. Sociedad Nacional del Ambiente. Lima, 2000.

De la Puente, Lorenzo. La evaluación ambiental previa: consideraciones en torno de los proyectos mineros y de hidrocarburos. En Revista de Derecho Minero y Petrolero. Lima, 2004.

Brañes, Raúl. Informe sobre el Desarrollo del Derecho Ambiental Latinoamericano. Programa de Naciones Unidas para el Medio Ambiente. México, 2001.

2.2 Challenges in Environmental Impact Assessment

Néstor Cafferatta, Federico Zonis, Lorena González and Pablo Lorenzetti

Key Words

Policy instruments and environmental management, Cumulative strategic or integrated environmental impact assessment; Environmental Governance.

The environmental policy instrument of environmental impact assessment, is one of the most suitable tools to protect the environment. However, we consider it necessary to extend its legal, executive and judicial structure, including the strategic variant of the cumulative or integrated environmental assessment to ensure greater suitability or effectiveness, the necessary planning, environmental governance, sustainability, forecast or prediction of works, activities, investments, or economic developments (industrial or commercial).

The Argentinean Court has considerable experience in relation to a case "SALAS, Dino and other c / Salta, Province" 29/12/2008 pronouncements, because of a series of forest enterprises or expansion of the agricultural frontier (of sojera activity), owned by private investors, with probable detriment by removing or cutting of more than one million (1,000,000) hectares of native forests, stationed in four departments in the north of the Province, and in particular the local peasantry with indigenous communities (wichi) that inhabit the affected region.

In the case, investors had authorization or clearance permits granted by the Provincial State, for filing individual environmental impact assessments, without a prior all-encompassing environmental impact study, so the Court ordered the permits suspended until the Province of Salta, jointly with the Ministry of Environment of the Nation, undertake a study of cumulative, comprehensive or strategic impact.

The same solution resulted in a case resolved by the Constitutional Court of Costa Rica, in the case of Marino THE BAULAS Guanacaste National Park. ("Padilla Gutiérrez, Clara Emilia and others. 16.12.08, Supreme Court of Costa Rica c / SETENA, National Environmental Technical Secretariat).

The importance of the environmental assessment of projects, policies and programs, with a holistic, all-encompassing and comprehensive, or strategic, cumulative or collective vision should be strengthened, not only at the executive level, but also legislative and judicial.

2.3 Environmental Access to Justice and Judicial Decision-Making in Mexico in connection to large infrastructure projects

Alejandro Posadas

Derecho de acceso a justicia, aplicación y cumplimiento, inversión y recursos energéticos

Energy reform in Mexico is creating an expectation of increased investment in gas shale in the Northeastern part of the country. This will require availability of sufficient amount of water to explore and exploit reserves. Water is not abundant in the area and overall the Nation has yet to cover 100% of the population's basic water consumptions needs. This article argues that it is necessary to establish appropriate standards of review, evidence, and standards of deference, that can ensure effective substantive access rights, while providing authorities the opportunity to explicitly justify actions upon balanced and equitable policies that promote investment and protect the environment and water resources.

INTRODUCTION

On September 2014, the Water Utility of Monterrey City in Mexico, the local public utility (*Servicios de Agua y Drenaje de Monterrey* hereinafter "SAyDM" by its acronym in Spanish) announced the results of the public bidding process to build a 372 kilometers aqueduct to bring water from the Panuco River in the State of San Luis Potosí to the City of Monterrey in the State of Nuevo Leon. When and if constructedthis would be the largest aqueduct carrying water from one basin to another in the country. The total cost of the project according to the government is of 17,684 million pesos (approximately $1,178,000,000 USD). A consortium of four companies was selectedthrough the bidding process.

Heated controversy has surrounded the project, especially in the city of Monterrey. For example, "Reforma" the national newspaper covered a a press conference called by a number of organizations, including the influential employees Union COPARMEX from Nuevo Leon opposing the project (Ramos, 2015). The organizations claim the governmental project and the decision-making process were riddled with problems, including lack of availability of necessary public information regarding technical, legal, economic and environmental issues. The main issues raised by these and other organizations as well as the academic sector have been focused on questioning transparency in the decision-making process, the lack of public participation, the claim that Monterrey has sufficient water, the cost of the project in the face of more efficient alternatives, the potential social and environmental implications of drawing and carrying water from another region and pumping it from sea level.

Further, members of the opposing groups to the project shared with the author –outside of the press conference-their concerns that the project underlying motives may be providing water for the development of the fracking industry in Nuevo Leon. Recognizing these concerns, a leading engineer for one of the companies winning the project published a letter in the online version of Forbes magazing addressing the fracking argument as one of the myths raised to oppose the project (Armento, 2014). His response to this "myth" was to point out that the title of national waters assignment involved only allows the use of water for urban public use.

The Monterrey VI case anticipates a novel debate in the country around water uses, environmental sustainability, public decision-making processes and needed energy investment and development. The debate is mirrored or perhaps framed by the legal system. A number of legal issues, some of very recent development, involve differing policy choices that would have to be weighted, balanced and, at its best, reconciled in the near future. Courts will play a relevant role in this process.

The constitutional human right to access to water for human consumption is on one end of the legal and policy conflict. Next to it we find the constitutional human right to a safe environment, and the constitutional duty for the government to conduct the Nation's development on a sustainable basis. On the other end we find the revamping of the constitutional and legal energy regime to attract and inject private investment to the declining State-owned energy industry.

In the gradient in between, we find the social, economic and political value and implications of how water is allocated, used, conserved and reused; how we make decisions in an emerging democracy that touch on complex environmental and economic issues with the strongest levels of public participation and consultation at the local and national levels; what remedies the law will provide to effectively review and assess decisions and decision-making processes, and; how can we effectively promote socially responsible investment in the energy sector to detonate needed economic activity to improve the lives of all Mexicans.

If Courts, as has been the trend in the last twenty years in Mexico, play an increasingly active role as one of the relevant venues to address these issues, they will need to develop appropriate standards for evaluating the evidence on the basis of the best information available and to reason policy decisions in their legal resolutions. In this paper I seek to evaluate why is this necessary and what are the policy, legal and social criteria and implications involved given our current legal system and access to environmental remedies.

In the second section of the paper I make a brief overview of the major questions surrounding the Monterrey VI project, as well as the general legal background regarding water and energy law. In the third section of the paper I address the major available legal resources and remedies that could be the subj. In the fourth and concluding section I raised the need for appropriate judicial standards and potential implications.

1. THE MONTERREY VI PROJECT

1.1 Monterrey VI Issues

According to documents submitted by the Water Utility of the City of Monterrey (*Servicios de Agua y Drenaje de Monterrey* or SADM) to the North American Development Bank (NADBank) the 372 kilometers long aqueduct would carry 5m3/s (114 million gallons of water daily). The water would be taken from the Panuco River in San Luis Potosi and delivered to the existing Cerro Prieto-Monterrey that currently provides water to the city and metropolitan area of Monterrey in the State of Nuevo Leon. The Government of Nuevo Leon, the SADM and the Water National Commission (CONAGUA) entered into an institutional agreement to develop the project (Decreto 2014). The project would require six water-pumping stations.

What are the main issues raised to question Monterrey VI? According to the analysis of a group of university professors, considering the trends in water consumption in the area, the current water sources guarantee a complete offer for the demand until the year 2030 [283]. In addition, Monterrey is one of the metropolitan areas that have made significant progress in a generating a growing culture of water conservation that has resulted in water consumption declining trends. For example industrial water consumption in the area has diminish 3% annually for the last 10 years and home consumption 1% annually during that same period. If water demand is covered for the next fifteen years, the question is where is the additional water going and how is it going to be paid?

Their analysis also points to the fact that the financial and economic projections presented by the developers assumes the aqueduct would be fully functional and carrying its total capacity of water from day one and every day of the year. This is impossible given that the historical data for the source of the waters indicate that during almost one third of the year there is no sufficient water in the basin to pump water into the aqueduct. The argument then is that the cost for the taxpayer that the construction and operation of the aqueduct will represent is higher than the actual water it will pump and deliver for consumption.

The professors also take issue with the fact that the environmental impact evaluation does not include all of the ecological implications of the water pumping or the costs of cleaning the water from a basin that is contaminated by the industries and agriculture of the central Mexican States. The analysis also involves other alternatives for providing water to Monterrey that are less costly and have minor or none environmental impact and that would not require the use of energy and implicated gas emissions of pumping the water.

For example, they point out that the Monterrey Water Utility loses 28% of the water through leaks in its infrastructure. Although the utility is one of the most efficient in the country, it would be feasible to bring that percentage down to a 15% more in line with leading international standards. The city of Melbourne for example has a 10% loss. The investment would be a fraction of the Monterrey VI project and could add twelve more

283 Interview and unpublished documents shared with the author. The analysis was done by the following people: Martin Bremer, geophysics, Ernesto Enkerlin, ecology, Ricardo Padilla, architecture, Daniel Buitrille, chemistry, Lucy Ortiz, accounting, Mariano Nuñez, environmental law, Raul Rubio, media, Celina Fernández, sociology, Nora Toscano and Oscar Bulnes, landscaping architecture, Cosijoopii Montero, reforestation, Alfredo Gonzalez, civil engineering, Malaquias Aguiree and Alfonso Martinez.

years of full meeting of the water demand. All this without considering other alternatives that could improve the water cycles in the region and water filtration and recovery and that could have additional environmental and ecological services co-benefits for the basin.

In a report prepared by WWF in 2007 where they evaluated the experience of seven inter-basin water transfer schemes, similar to the Monterrey VI project, in different parts of the world, they conclude that while these projects can solve water supply issues in water shortage areas, they involve significant social and environmental costs (WWF, 2007). These social and environmental costs are both for the providing and receiving basins and their communities. Environmentally, inter-basin water transfer schemes interrupt river connectivity, disrupt fish spawning and migration, alter natural water flows sometimes at great ecological cost, contribute to salinization and water table lowering in coastal areas, and facilitate the transfer of invasive species from one basin to the other. Interestingly, WWF mentions that what stands out in all of these projects are that: a) apart from hydropower, their driving is usually promoting agriculture in water poor areas; b) there is typically a failure to examine alternatives that may limit or prevent the costs associated with the project, and; c) they constantly involve government failures ranging from lack or non-existing consultations with affected communities, to failure to give sufficient weight to the environmental, social and cultural impacts of the projects.

Another issue that is raised with the project is one in connection to the overall context of water demand in Mexico. If the metropolitan area of Monterrey has complete water demand covered for fifteen more years at least does it make sense to incur the cost of building such infrastructure? Should the investment be geared somewhere else?

What is the general situation of water access in Mexico for human need as a starter? CONAGUA, the National Water Commission estimates that approximately 9 million people do not have access to clean water in Mexico and 11 million do not have appropriate sewage services (CONAGUA, 2011). The agency does not envision that universal coverage can be reached in Mexico by 2030.

Sustainability is another important factor and perhaps the most pressing issue in the near future in connection with the administration of water as a natural resource nationally. In the last 70 years the availability of water per person in Mexico has plummeted by more than 60% (Carlos Perez, 2013) (CEMDA & Environmental Law Institute, 2013). Restoring sustainability is foremost an environmental and ecological issue, as well as a cultural one in terms of societal commitment to conservation. UN-Water has identified intensifying water scarcity as the “most pressing problem related to water management in Mexico” (2012). The greater scarcity is the result of unregulated economic development, population growth, pollution of surface water and groundwater, drought, and the early effects of climate change (UN-Water, 2012) (Buono & Posadas, 2015).

The national water sustainability issue has a special legal significance when we consider that Mexico is perhaps the first country to incorporate into its Constitution the human right to water for personal consumption and sanitation (Reforma constitucional, DOF: 08/02/2012). The Constitutional provision reads:

> *“Every person has the right to the access, disposition, and sanitation of water for personal and domestic use in a sufficient, salubrious, acceptable and accessible manner”. Article 4 of the Mexican CONSTITUTION*

The Constitution establishes that the State shall guarantee this right and that the Law will provide the means to realize it. All levels of government, in collaboration with society at large, shall contribute within their sphere of power to that endeavor. (Buono & Posadas 2015). The constitutional amendment incorporates the human right following language already developed by General Comment 15 by the Committee on Economic, Social and Cultural Rights of the United Nations (2003).

Constitutional Article 4 must be read in conjunction with articles 25, 27 and 115 of the Constitution. Article 25 establishes that the development of the country must be conducted in an integral and sustainable manner (Constitución Política de los Estados Unidos Mexicanos, article 25 (1917)). The extent of this mandate is not completely clear, but recognized experts consider that applied to water this means that decisions regarding water infrastructure, clean water and sewage public services, and all uses of water sources must consider social, economic and environmental impacts, as well as inter-generational duties (CEMDA & Environmental Law Institute, 2013). Article 27 defines national water bodies as public goods property of the Nation (Constitución Política de los Estados Unidos Mexicanos, article 27 (1917)). These public goods are

inalienable and can only be exploited by private parties through concessions granted by the Federal Executive Power. These include:

- The waters of the Mexican territorial sea in the extension established by International Law
- All internal sea waters
- Lakes and estuaries connected permanently or intermittently to the sea
- The water of interior lakes linked to constant currents
- The water of rivers and its effluents from its origin to their connection to the sea, lakes or estuaries belonging to the Nation
- The water of any current, lake, lagoon or estuary that serves as an international border, as the border between two States, or that crosses between two States or an international border
- Water out of springs flowing from beaches, maritime zones, currents, rivers or any other water sources property of the Nation
- Water extracted out of mines
- Streams, beds or banks of lakes in the extension established by Law

The owner of the land can extract water found only beneath her property. However, the President can establish limitations to such right based on public interest considerations. All other waters not listed as national waters are considered part of the property where they flow. However, when they flow through two or more properties, the states can regulate them.

The current National Waters Act implements Article 27 of the Constitution in connection to national bodies of water. This law however will be superseded by the General Water Law Congress must enact in fulfillment of the mandate found in a transitory article of the human right of access to water for human consumption constitutional reform. Finally, Article 115 of the Constitution establishes that municipal governments have the power and duty to provide clean water and sewage public services (Constitución Política de los Estados Unidos Mexicanos, article 115 (1917)).

Thus the Federal government administers national waters through CONAGUA. States can regulate underground waters and Municipalities are in charge of providing water and sewage public services. Article 115 of the Constitution establishes this power and mandate. CONAGUA is in charge of infrastructure projects for the use and transportation of national waters. The agency is administratively organized through water basins and assigns volumes of national waters to State and Municipal governments, as well as permits private uses of water through administrative concession agreements. Decisions regarding the uses of water are taken by the Water Basin Councils that are presided by CONAGUA.

As can be seen from this general overview, the legal water regime in Mexico is complex but mostly privileges a public or government administration approach. Given that national waters are the predominant source of water, the federal government through CONAGUA is the prominent player on water infrastructure issues. However collaboration with local governments is necessary especially regarding public water services where Municipalities are in charge of providing them.

Finally, it is important to underscore that the current National Waters Law allows CONAGUA itself or through the Basin Council to change or modify the uses of water. Therefore, even though currently the assignment of water under the Monterrey VI project is stated as water for urban public use, nothing in the law restricts CONAGUA to change that decision once the aqueduct is constructed.

Based on this, and the fact that there is evidence water is not urgently needed in Monterrey, the question is whether there is a hidden agenda behind Monterrey VI. The fact that fracking has been identified as such hidden agenda makes sense.

The U.S. Energy Information Administration (EIA) estimates that 545 trillion cubic feet of this valuable resource underlie Mexico (EIA, 2014). Most of the shale gas is located in the northern part of the country (Buono & Posadas, 2015). The Secretariat of Energy of Mexico (2012) has identified the Burro-Picacho, the Tampico-Misantla, and Burgos basins as priority areas with shale oil and gas potential. The Secretariat believes that the shale oil and gas potential, especially in these three areas, is confirmed and would represent,

if developed, several decades of oil and gas production at 2013 production rates. The basins are situated in the northern states of Chihuahua, Nuevo León, Coahuila and Tampico. The Burro-Picacho and the Burgos are an extension into Mexico of the Eagle Ford formation in Texas. Mexico is ranked sixth among countries with the largest shale gas technically recoverable resources The Government of Nuevo Leon has not been shy in expressing its intent of making the fracking industry in the State the new economic driver.

Hydraulic fracturing requires large amounts of water. During the hydraulic fracturing process, fracturing fluid—which can be 99% water—is forced into the well at a pressure that exceeds the breaking point of the rock formation. The Secretariat of Energy estimates that the development of each shale gas well will require around 21 million litres of water (Secretaría de Energía, 2012), Mexico is rated to have high average water stress over the Burgos and Sabinas shale play areas that go through the State of Nuevo Leon (World Resources Institute, 2014).

2. Potential Remedies and Access to Justice

The Monterrey VI project therefore stands in a new context of human rights and energy reforms. Just recently, on April 2, the Governor of Nuevo Leon declared that the Monterrey VI project was a reality and that it was moving forward (Ares, 2015). He declared that given that the concessions had been granted and the contracts signed the project could not be cancelled as the governments were exposed to the payment of damages. Through interviews conducted, I am aware of a criminal complaint filed against the project by a group of citizens in September 2014. The media has also reported an *amparo* suit filed by a group of organizations in November 2014 (Vázquez, 2015). The news report states that the pleading was filed in connection with the lack of consultations.

It is difficult to imagine that a criminal complaint would prosper specially filed at the local level given the political capital the Governor of Nuevo Leon has invested in pushing the project forward. Proving bribery or some other crime in connection with the bidding process or contracts is difficult by itself. However state elections are around the corner and that might shift the political balance.

What about the amparo claim for lack of an appropriate consultation process? The project is subject to an environmental impact assessment authorization. The environmental impact assessment was submitted to SEMARNAT in September 2012. It was approved without a public consultation. The reason for this lies in Article 34 of the General Law on Environmental Protection and Ecological Balance (LGEEPA for its Spanish acronym, article 34 (1988)) and Article 40 of its Regulations in connection with Environmental Impact Assessments (LGEEPA, article 40 (1988)). These provisions contain two significant and controversial rules regarding publicity and public consultations on environmental impact assessments: a) first, environmental impact assessments are to be made available to the public, and; b) second, SEMARNAT has a discretionary authority to conduct a public consultation process at the request of any member of the community potentially affected. In practical terms, the provisions limit significantly the possibility of conducting a public consultation especially of large regional infrastructure projects (Clariond, 215)[284]

The Regulations establish that SEMARNAT will make available the environmental impact statement at its central office and at the regional office where the project will be conducted. It does not mandate that the Secretariat make any effort to reach out to the communities that may be affected by the project, other than publishing every week on the Ecological Gazzette the list of environmental impact authorizations processes initiated. Further, once the authorization is listed in the Gazzette, the "any member" of the community that may request a public consultation has 10 days to do so.

Only organizations dedicated to reviewing the Gazzette or that may have other sources of information may be able to pick up, review and identify a member of a community affected to request the conduct of a public consultation. Needles to say, having the environmental impact assessment available at the central and regional offices is almost entirely a pro-forma publicity beyond the reach of communities that may be affected and reside far from such offices.

In the case of Monterrey VI this was true. There was no public consultation for the environmental impact assessment authorization of the largest aqueduct to be constructed in Mexico because no one requested one. Not one single member of any community in the four States that may suffer repercussions for the taking, carrying and discharging of the waters was able to request a consultation. What happens naturally in these cases is that communities and non-governmental organizations opposing the project require time and information to build up their views, and this tends to happen when the decisions authorizing the project are made

284 Eugenio Clariond señaló que no hubo negociación o consulta alguna en el proceso. En su opinión fue una idea del Gobernador de Monterrey y Aguas de Monterrey que decidieron simplemente que había que traer 5m3 de agua adicionales a Monterrey.

public. Most communities live unaware they had an opportunity to request a public consultation or even that there is an environmental impact assessment authorization process. Thus the ineffectual public consultation provisions of the LGEEPA result in litigation, protest and media pressure as the only possible ways of expressing the public views on infrastructure projects.

Just recently the Mexican Supreme Court resolved a seminal case regarding environmental impact authorizations and consultations regarding indigenous peoples (*Acueducto Independencia*. Amparo en Revisión 631/2012 (2013)). Such case involved an amparo filed by members of the indigenous Yaqui tribe against coincidentally an aqueduct that would draw waters potentially affecting their rights to 50% of affluent river waters for their agricultural needs. The Supreme Court confirmed the constitutional protection to the Yaqui tribe based on their conventional right to be consulted of any administrative act or legislation that may affect their communities, environment and access to natural resources. In resolving the case, the Supreme Court relied especially in the application of Covenant 169 of the International Labor Organization and the applicable precedents on indigenous consultations resolved by the Inter-American Human Rights Court.

The decision nullified the environmental impact assessment authorization granted and mandated that consultation with the Yaqui tribe be conducted in a culturally appropriate manner, in principle through their leaders and representatives, informed, in good faith and with the objective of reaching consent or agreements. The decision did not address the substantive right to the waters claim by the Yaquis, only their constitutional right to be effectively consulted.

For the purposes of this analysis the decision has limited direct value. The high degree of protection and consultations requirements established by the Court was based on the special conditions and protections afforded by the Constitution and international agreements to indigenous peoples.

Aside from the case of indigenous peoples, the Constitution addresses public participation and consultations in connection only with the national democratic planning system. Article 26 (Constitución Política de los Estados Unidos Mexicanos (1917)) establishes that the formulation of the National Development Plan and of the ensuing government development programs must be done through public consultations and public participation as further established in the corresponding statutory laws.

There is one precedential thesis (*tesis jurisprudencial*) where a circuit court declared a Municipal Regulation on street publicity as unconstitutional because it was passed and published without a previous public consultation (Jurisprudencia. Tesis XIX.5o.12 A (TCC: 9º época, enero, 2004)). The Municipal Code of the State required every Municipal regulation to be submitted to public consultation but the Street Publicity Regulations of the Municipality was passed without conducting one. The Federal Circuit Court stated in its reasoning that a public consultation was not an institution without legal relevance, as it found its Constitutional basis on Article 26 in connection with governmental development planning. The Court reasoned Street Publicity Regulations sought to provide order regarding potential visual pollution and to regulate safety issues and therefore the public consultation is relevant. The lack of public consultations resulted in the Court declaring the Regulations unconstitutional.

In that case however, the conduct of consultations was mandated by law for every Municipal Regulation. This is not the case of federal environmental assessment authorizations, where the law provides only to be conducted upon request and then still as a discretionary decision of SEMARNAT. The precedent I argue does indicate a direction for linking more closely the right of consultations and government planning at a Constitutional level and may give room for more persuasive arguments and more favorable precedents on public consultation rights. There is no doubt that the construction of a mega-project as the Monterrey VI aqueduct is a significantly relevant governmental planning decision.

Environmental law in Mexico provides for another more substantive remedy. Article 180 of the LGEEPA (LGEEPA, ARTICLE 180 (1988)) introduced for the first time in Mexico a broader standing now recognized in the Amparo Law called legitimate interest (Ley de Amparo, article 5 (2013)). Under Article 180, any natural or legal person of a community potentially affected by a public work or activity can file an administrative review proceeding or a claim before the Federal Administrative Tribunal. The complaint must consist of the claim that the public work or activity violates environmental law, including natural protected areas decrees and programs and environmental official norms.

Two other interesting aspects of this provision relate to the evidentiary standard, as the claimant must show that the public works or activities has caused or may cause damage to the environment, to natural resources, to wildlife or public health. Therefore on one hand, the provision can be used as a preventive claim where imminent threat of damage can be shown, and not only as an after the fact actual damage claim. On the other hand, the imminent or actual damage extends not only to the environment, natural resources and

wildlife, but also to public health. The breath of the provision is quite potent. A potential claim regarding the Monterrey VI project, as a mega-infrastructure public work of the federal and local administrations may constitute a fascinating case of scientific evidentiary claims before Mexican courts. This may require an important pool of resources from potential complainants.

The National Waters Law provides no specific comparable remedy. It only provides that any person may recur to the popular denunciation remedy provided again under the LGEEPA (Ley de Aguas Nacionales, article 124 BIS (1992)) . Under this remedy, any person, regardless of where he lives, may present a complaint before the *Procuraduria Federal de Protección al Ambiente* (the Federal Environmental Attorney Office -PROFEPA, for its Spanish acronym) (LGEEPA, chapter VII, (1988)).

PROFEPA will be in charge of investigating whether a violation of environmental law has occurred. The person submitting the complaint may collaborate with PROFEPA by providing evidence, documents and information she may possess. PROFEPA must address the information submitted by the complainant in its decision. The problem with this remedy is that it relies completely on what PROFEPA investigates and determines regarding the complaint. PROFEPA has limited resources and as any other investigative agency cannot fully investigate all complaints and environmental law violations that come to its knowledge. In addition, PROFEPA and CONAGUA are both agencies under the umbrella authority of SEMARNAT. In a case like Monterrey VI, PROFEPA would be investigating and reviewing the decisions made by its sister agency and its own superiority SEMARNAT.

Given the legal nature of water under the Mexican legal system as a public resource belonging to the Nation, there is limited room under administrative water law for private claims against a water infrastructure projects unless there could be a civil damage resulting from the construction. Now, environmental damages actually produced as a result of the public work could be the subject of a claim under the newly passed Environmental Liability Act (Ley Federal de Responsabilidad Ambiental (2013)). This Law is now being tested and it is perhaps too soon to know how the courts will construe it. However, as drafted, it presents relevant opportunities and challenges.

A claim under the Environmental Liability Act can be brought by: a) any member of a community adjacent to where the damage occurred; b) by an environmental non-governmental organization, or; c) by PROFEPA. The subject matter of the claim is the damage to the environment, separate and without prejudice to any civil damage that may arise (Ley Federal de Responsabilidad Ambiental, article 28 (2013)).

The preferred remedy offered by the Environmental Liability Act is environmental restitution (Ley Federal de Responsabilidad Ambiental, article 10 (2013)). A person found liable under the Act must restore environmental conditions to the situation or baseline existing immediately before the damage was produced. Only where full or partial restoration is not factually possible, or where three conditions established by the Law are met, compensation must be paid in lieu of restoration. These conditions however are quite controversial, especially because one of them involves SEMARNAT issuing a statement certifying that the works and illicit acts that provoked the damages, are actually environmentally sustainable and licit (Ley Federal de Responsabilidad Ambiental, article 14 (2013)). This provision is a “catch 33” provision given that damages caused by illicit conduct are then after the fact declared by the federal environmental authority legally and environmentally right. It is quite a difficult concept to grasp.

A further caveat must be considered. The Environmental Liability Act establishes criteria to limit liability resulting of an environmental damage (Ley Federal de Responsabilidad Ambiental, article 6 (2013)). A person will not be liable for a environmental damage where an environmental impact assessment was required and submitted, the environmental impact assessment included these potential effects, and the authorization was granted by SEMARNAT. This takes us back to the relevance of the environmental impact assessment being conducted and authorized appropriately and the significance of providing substantive public consultations and expert input especially in mega-infrastructure projects.

A deficient environmental impact assessment seeking to promote the infrastructure project may have diverse consequences in court proceeding and in public opposition to a project. This may lead eventually to the own remedies that the investors may have for a project approved and then stopped by public opposition or domestic litigation. In projects involving foreign investors, they could eventually trigger the investment protection provisions of the North American Free Trade Agreement (NAFTA) and its investor-State arbitration (NAFTA, article 116 (1993)). Mexico has had now a number of these investment arbitrations and a few of them involving environmental issues. Actually in the first NAFTA investment arbitration Mexico lost, the case of Metalclad Corporation, the whole conflict arising out of the sitting of a hazardous waste landfill had at its center the complaint that it was based on a lenient and technically faulty environmental impact assessment authorization.

It is still early to know how courts will construe these liability limitations of the Act. A restrictive interpretation of the liability exceptions may strengthen the remedy and consequently the right of access to justice and the protection of the environment. Mexican Law also introduced a few years ago environmental collective actions (Decreto del 30 de agosto 2011 (2011)), as well as the availability of collective amparos (Ley de Amparo, article 5.I. (2013)). These remedies may also be evaluated within the pool of legal resources available for potential litigants in a case such as Monterrey VI.

Thus Mexican Law provides a number of environmental and constitutional legal resources that may assist communities and persons affected by an infrastructure project. I have addressed some of their limitations and opportunities. However, one common feature in the Mexican legal system that can have a significant role on their effectiveness is the evidentiary issue.

Infrastructure projects, the interplay between environment and other constitutional rights, and energy projects, constitute complex issues demanding diverse public policy and rule choices that require the presentation of specialized and complex evidence in court proceedings. A few years ago, the Mexican Supreme Court introduced the Daubert standard into Mexican Law in resolving a contradiction between two different jurisprudential thesis issued by two different federal circuit courts in paternity test cases (SCJN, Contradicción de tesis 154/2005(2005)). Basically what the Supreme Court stated was that for courts to validly rely on an expert opinion in a scientific area, it is necessary for such opinion to meet a two prong test: a) that the scientific evidence be relevant for the case at hand, and; b) that the scientific evidence be trustworthy. In order to be trustworthy such evidence must have been the result of the application of the scientific method. The Court continued and provided some non-exhaustive criteria for courts to know when such scientific evidence is trustworthy as derived from the scientific method, such as for example, that the evidence has been submitted to empirical tests or refutability tests, that it has been subjected to review and acceptance by the scientific community, that its standard of error be known, or that criteria exists for its application.

I am unaware of any study done yet about the impact of the Daubert standard in lower courts proceedings in Mexico. Daubert has been controversial in the United States (Heinzerling, 2006), although countries in different jurisdictions such as Canada, Great Britain, Italy and Colombia have also adopted it. The main issue with the standard set in Daubert is that its effect has generally been restricting scientific evidence rather than facilitating a more robust valuation of it in court proceedings. It is true some industries, such as traditionally the tobacco industry, have financed scientists to cast doubt on existing scientific data available about the harm of the product. Daubert sought in some manner to guide courts in assessing good from bad science. However complex cases, such as health and environmental ones, many times involve difficult scientific issues that science has not yet addressed or fully resolved.

In addition, it is always important to remember that the scientific agenda is different and in many respects opposite to the litigation agenda. For a start, science is inquisitorial, critical, constantly examines itself, and seeks objectivity, litigation is adversarial, position-based, seeks regularity or certainty, and seeks a solution to a conflict through a limited use of resources and time. Therefore the best scenario possible in litigating complex issues involving scientific evidence is to allow the most ample presentation of evidence and the possibility to question it in the most robust way, in the light of relevant legal principles and standards. Ultimately, proof is the factual element to which a legal rule or standard may apply. Evidence should be evaluated not in absolute terms (as law sometimes pretends to do), but in relative terms consisting of whether evidence makes more or less likely a certain fact was, is or may be. Proof is a matter of degree necessary to provide facts of a legal relevance, in order to take legal decisions, to resolve conflicts hopefully, or at least to resolve cases.

Judges as decision makers must ultimately decide whether the evidence is sufficient, and whether it is appropriate or relevant for the application of the rule. These are legal decisions, not scientific per se (although based on science), and must be taken, especially in complex cases, accepting a degree of uncertainty that must be addressed by Law, its principles, purposes and application. What would allow a judge to make the best possible legal decision in a given case is to have the best available information possible. This is where we find the intersection of law and science, of rules and technical evidence.

How is this encouraged or limited? In the light of this discussion, one aspect that limits a robust presentation and testing of scientific and highly technical evidence in our legal system is its predominantly written nature and the controlled manner of presenting evidence. We will call this the traditional legal proceeding. The Mexican Constitution was amended in 2008 to introduce federally and statewide the adversarial system in criminal proceeding. As a spillover of this reform, a number of States have also introduced the principles and procedures of the adversarial system into other type of cases, such as commercial and family proceedings. However, the federal remedies dealing with environmental issues and the amparo proceeding are still predominantly traditional ones.

In connection in particular to technical and scientific evidence, its production is controlled because expert testimony is requested and tested through previously written questions prepared by the parties and approved by the judge. These questions are usually originally prepared when the pleadings are made and, given there is no discovery process, the questions are usually very general, vague, hypothetical or of limited use for judicial decision making. The questioning of the expert witness through a list of previously written questions, qualified by the judge as to their conformity to evidence rules, usually do not give rise to a robust testing of the evidence offered and then again are of limited value for the judge. Finally, the presentation of the expert testimony is usually done in a special hearing for this purpose, where most of the time the judge is not present, but a judicial clerk. The judge will usually read the transcript of this hearing to prepare the decision.

In other words, it is a system that privileges the letter of the law and not the facts. If the saying in the Anglo-Saxon legal system is “give me the facts, and I will give you the law”, the opposite would be the saying in our traditional system. There is no space for testing complex evidence through cross-examination or re-direct questioning, or through presenting different expert testimony. The Judge will not have the opportunity of watching an expert defending, limiting or admitting finer scientific evidentiary issues and drawing conclusions from such testing. Hearings therefore under the traditional system actually have a limited value. Lawyers actually do not make a final argument before the judge where they bring together the evidence and its testing, and the legal issues involved.

Most of the arguments are done in the original written pleadings and in ex-parte communications. Ex-parte communications are a shameful staple of our legal tradition, accepted with little questioning and vigorously defended by many lawyers. Ex-parte communications is in fact the way to litigate a case all the way from lower local courts to the Mexican Supreme Court. Many years ago I was involved in an amparo proceeding with a Law School strategic litigation legal clinic and we requested the judge we wanted to make our arguments orally at the amparo constitutional hearing, The case was about freedom of speech and freedom of religion issues. The law provides this can be done but the judge and his clerks made every effort to convince us not to do so. Their question was why we wanted to do so? They could not understand it because nobody does. We finally did before a quite grumpy judge who eventually ruled against us.

CONCLUSION

The transformation of the Constitutional and legal system in Mexico represents a new epoch in the country’s political and social development. It is marked by the demands and new realities of its society, the initiatives taken in response by its political actors, and its part of the new challenges and developments at the regional and international levels. It is an epoch marked by the rise of human rights, by the strengthening of political, social and economic rights, and in particular of those of a collective nature, such as the rights to public participation, transparency and accountability, to a sustainable development, to a healthy environment, water, and health, among others. At the same time, the economies, historical discrimination and lack of equal opportunities backlogs, poor educational systems, institutional and infrastructural limitations, among other factors, remain as significant factors that restrict and limit the possibilities of detonating the rise of living standards across the board, and especially of an important part of society that remain economically, socially and politically underprivileged and vulnerable.

The need to detonate a more vigorous economic development and the real and perceived opportunities presented by remaining natural resources, such as hydrocarbons, or mining, resurface in a new fashion in the region in a new epoch of rights and social participation in public affairs. In this context, courts in particular, as well as other institutions in charge of resolving or conciliating conflicts, are faced with the challenges of addressing these tensions. Monterrey VI is just an example of these types of issues. However, courts to meet these challenges must constantly renew themselves and incorporate best practices to strengthen the quality of their decision-making processes and the opportunities not only to access justice, but to substantively access justice: meaning providing parties the best opportunity of being fully heard, of conflicts being fully assessed, and of facilitating the production of the best information possible to make sound decisions that can effectively be enforced.

BIBLIOGRAPHY

Ares, F. (2015). Monterrey VI ya inicio: Rodrigo Medina. El Horizonte en línea. Retrieved from: http://elhorizonte.mx/a/noticia/554427/monterrey_vi_ya_esta_en_marcha_gobernador

Armenta, H. (2014). Acueducto Monterrey VI: mitos y realidades. Forbes. Retrived from: http://www.forbes.com.mx/acueducto-monterrey-vi-mitos-y-realidades/

Centro Mexicano de Derecho Ambiental y el Instituto de Derecho Ambiental & Environmental Law Institute. (2013). La instrumentación del derecho constitucional al agua en México: recomendaciones para su regulación. México: Tinker Foundation Incorporated.

Clariond, E. (2015). Proceedings from JPAC Regular Session 15-01: Green Growth and Sustainable Competitiveness in North America. N.L., México: EGADE Business School.

Conagua, Semarnat. (2011). Atlas del agua en México 2011. Retrived from: http://www.conagua.gob.mx/CONAGUA07/Noticias/SGP-18-11.pdf

Conagua, Semarnat. (2013). Programa Nacional Hídrico 2014-2018. Retrived from: http://www.conagua.gob.mx/conagua07/contenido/documentos/PNH2014-2018.pdf

Conagua, Semarnat. (2011). Situación del Subsector Agua Potable, Alcantarillado y Saneamiento. Retrieved from: http://www.conagua.gob.mx/CONAGUA07/Publicaciones/Publicaciones/SGAPDS-40-12.pdf

Constitución Política de los Estados Unidos Mexicanos, article 25, DOF 07-07-2014 (1917), reprinted as amended in DOF 07-07-2014.

Constitución Política de los Estados Unidos Mexicanos, article 26, DOF 07-07-2014 (1917), reprinted as amended in DOF 07-07-2014.

Constitución Política de los Estados Unidos Mexicanos, article 27, DOF 07-07-2014 (1917), reprinted as amended in DOF 07-07-2014.

Constitución Política de los Estados Unidos Mexicanos, article 115, DOF 07-07-2014 (1917), reprinted as amended in DOF 07-07-2014.

Decreto por el que se declara reformado el párrafo quinto y se adiciona un párrafo sexto recorriéndose en su orden los subsecuentes, al artículo 4o. de la Constitución Política de los Estados Unidos Mexicanos. DOF: 08/02/2012 (2012).

Decreto por el que se modifica la denominación del Capítulo I del Título Primero y reforma diversos artículos de la Constitución Política de los Estados Unidos Mexicanos. DOF: 10/06/2011 (2011).

DECRETO por el que se reforman y adicionan el Código Federal de Procedimientos Civiles, el Código Civil Federal, la Ley Federal de Competencia Económica, la Ley Federal de Protección al Consumidor, la Ley Orgánica del Poder Judicial de la Federación, la Ley General del Equilibrio Ecológico y la Protección al Ambiente y la Ley de Protección y Defensa al Usuario de Servicios Financieros. DOF: 30/08/2011 (2011).

Decreto por el que se reforman y adicionan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos, en Materia de Energía. DOF: 20/12/2013 (2013).

Heinzerling, L (2006). Doubting Daubert. 14 J.L. & Pol'y 65.

Instituto Nacional de Geografía y Estadística. (2012). Censo General de Población y Vivienda 2000. Retrived from: http://www3.inegi.org.mx/sistemas/glosario/default.aspx?clvglo=cp&c=14060&s=est

Jurisprudencia. Contradicción de Tesis. Pleno de la SCJN. P./J. 20/2014 (SJF: 10ª época, abril, 2014). Retrieved from: http://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?ID=2006224&Clase=DetalleTesisBL

Jurisprudencia. Tesis XIX.5o.12 A (TCC: 9º época, enero, 2004. Retrieved from: http://sjf.scjn.gob.mxSJFSist/paginas/DetalleGeneralV2.aspx?Epoca=1e3e1fdfdf8fcfd&Apendice=1000000000000&Expresion=REQUISITO%2520DE%2520CONSULTA%2520P%25C3%259ABLICA&Dominio=Rubro,Texto,Precedentes,Localizacion&TA_TJ=2&Orden=1&Clase=DetalleTesisBL&NumTE=12&Epp=20&Desde=-100&Hasta=-100&Index=0&InstanciasSeleccionadas=6,1,2,3,4,5,50,7&ID=1 2030&Hit=3&IDs=2005071,166366,182030,188189,191647,203614,204888,209258,219013,221681,249381,812840&tipTesis=&Semanario=0&tabla=

Ley de Aguas Nacionales, article 124, DOF 11-08-2014 (1992), reprinted as amended in DOF 11-08-2014.

Ley de Amparo, reglamentaria de los artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos, article 5, 129. DOF 14-07-2014 (2013), reprinted as amended in DOF 14-07-2014.

Ley de la Agencia Nacional de Seguridad Industrial y de Protección al Medio Ambiente del Sector Hidrocarburos, article 7, DOF 11-08-2014 (2014).

Ley Federal de Responsabilidad Ambiental, article 6, 10, 28 DOF 07-06-2013 (2013).

Ley General del Equilibrio ecológico y la protección al ambiente, article 34, 40, 180, chapter VII. DOF 04-06-2012 (1988), reprinted as amended in DOF 04-06-2012.

Ley de Hidrocarburos, article 41, DOF 11-08-2014 (2014).

Organización para la Cooperación y Desarrollo Económicos. (2014). Hacer posible la reforma de la gestión del agua en México. Retrived from: http://www.oecd.org/gov/regional-policy/Hacer%20Posible%20Reforma%20Agua_Mexico_Jan18.pdf

North American Free Trade Agreement, article 116, DOF 20-12-1993 (1993).

Perez, C. (2014). Perspectiva para la Instrumentación del Derecho Humano al Agua desde la Suprema Corte de Justicia de la Nación. México.

Presidencia de la República. (2013). Reforma Energética. Retrieved from: http://cdn.reformaenergetica.gob.mx/explicacion.pdf

Ramos, M. (2015). Llama IP A parar proyecto Monterrey VI. Reforma. Retrieved from:http://www.reforma.com/aplicacioneslibre/preacceso/articulo/default.aspx?id=480028&urlredirect=http://www.reforma.com/aplicaciones/articulo/default.aspx?id=480028

Secretaría de Energía. (2012). Estrategia Nacional de Energía 2012-2026. Retrived from: http://www.sener.gob.mx/res/PE_y_DT/pub/2012/ENE_2012_2026.pdf

Sentencia del Segundo Tribunal Colegiado del Décimo Octavo Circuito. Amparo en revisión. AR AD 381/2011 (2012).

Suprema Corte de Justicia de la Nación. Acueducto Independencia. Amparo en Revisión 631/2012 (2013). Retrived from: http://www.sitios.scjn.gob.mx/codhap/sites/default/files/engrosepdf_sentenciarelevante/12006310.025-1742_0.pdf

Suprema Corte de Justicia de la Nación. Contradicción de tesis 154/2005 (2005). Retrieved from: https://www.scjn.gob.mx/Transparencia/Epocas/Primera%20sala/Novena%20%C3%A9poca/2005/20.pdf

Suprema Corte de Justicia de la Nación. Recurso de Inconformidad 49/2014 (2014). Retrieved from: http://www2.scjn.gob.mx/juridica/engroses/cerrados/Publico/14000490.016-2289.doc

The right to water (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2003), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 105 (2003).

United States Energy Information Administration Mexico. (2014). Mexico is a mayor non-OPEC oil producer and is among the largest sources of U.S. oil imports. Retrived from: http://www.eia.gov/countries/analysisbriefs/Mexico/mexico.pdf

United Nations Water. (2012). UN-Water Country Brief. Retrived from: http://www.unwater.org/fileadmin/user_upload/unwater_new/docs/Publications/MEX_pagebypage.pdf

Vázquez, M. (2015). Monterrey VI está sustentado, dice Conagua. Pulso San Luis Potosí en línea. Retrieved from: http://pulsoslp.com.mx/2014/12/19/monterrey-vi-esta-sustentado-dice-conagua/.

World Resource Institute. (2014). Global Shale Gas Development: Water Availability & Business Risks. Retrived from: http://www.wri.org/publication/global-shale-gas-development-water-availability-business-risks

World Wildlife Fund. (2007). Pipedreams? Interbasin water transfers and water shortages. Retrieved from: http://www.panda.org/freshwater

2.4. Trade, Investment and Environment: Challenges in Today's Cuba

Marcia Edwards Oakley

Key Words

Economic growth, investment promotion, environmental protection, integration, Comparative Law, challenges, harmonization.

The Constitution of the Republic of Cuba includes among its postulates the protection of the environment and does not conceive an economic growth that causes the loss of biodiversity, water pollution and soil degradation.

The Environmental Law No. 81 gives the legal force to the above, by setting the Cuban environmental policy and the special protection to specific areas of the environment.

Law No. 118, the Foreign Investment Law and Decree-Law No. 313 of the Special Development Zone Mariel, recently came into force.

Law No. 118 strengthens the protection of the environment and heritage of the nation. Article 20 provides that there shall not be approved investments that cause damage to the environment and an evaluation is mandatory from an environmental perspective, by the Ministry of Science, Technology and Environment, unlike Law 77 that only indicated for some cases.

Decree Law 313 creates the Special Development Zone Mariel seeking investment promotion with environmental feasibility that provide clean technologies and contribute to local development. The Ministry of Science, Technology and Environment is a permanent representative in the Commission that approves investment proposals, together with the Ministry of Economy and Planning and the Ministry of Foreign Trade and Foreign Investment, among others.

This paper aims to demonstrate that trade, foreign investment and environmental protection can be harmonized. The Cuban experience will extend to the rest of Latin America and the Caribbean, as part of the new integration mechanisms. It would be useful to conduct a comparative study of the laws of other countries in the region on these issues, with a view to improving our performance to the challenges imposed.

According to Cañizares, trade is economic activity that through exchange, transfers goods from producers to consumers or to other producers. [285]

This activity aimed at satisfying the material and spiritual needs of human beings generates countless operations involving actions such as the transport of vehicles, logging, the trapping of animal species, and the emission of gases into the atmosphere, to name a few. The great challenge of modern society is undoubtedly to carry trade to a higher level of satisfaction for the actors involved in it, together with the taking of a set of measures to prevent this activity from endangering the planet's sources of wealth and the right to live in a healthy environment.

In Cuba the protection of the environment is not a pending issue. The 1976 Constitution of the Republic embraces it among its postulates as a faithful reflection of the importance the state gives to the subject, and to the education of its citizens from an early age with regard to the care and conservation of everything that nature wisely and generously gives us.

This is the reason why the country's economic growth is inconceivable without the adoption of measures to prevent that the strength of economic relations and the introduction of new technologies, coupled with a steady diversification of stage actors in the world of trade, lead to impacts such as biodiversity loss, water pollution, and soil degradation, among others.

Law No. 81 of July 11, 1997 on the Environment was enacted to give legal force to previous con-

285 CAÑIZARES ABELEDO, Diego Fernando. *Derecho Comercia*l. EDITORIAL DE CIENCIAS SOCIALES, LA HABANA 2012. Primera Parte. Ep.II. p 43.

ceptions by defining and establishing the Cuban environmental policy, the instruments for its implementation and management, and the distinctive protective features of specific areas of the environment.

As an aspect of significance, this law provided for the Ministry of Science, Technology and Environment to grant environmental licenses for any activity or project liable to cause damage to the environment. As a complement, two resolutions were issued that established the regulation of the process of Environmental Impact Assessment as a way to obtain those licenses.[286]

Within the complex world of trade, investment stands out as a way to diversify production and access new markets and novel technologies intending to improve the quality of human life.

As Cañizares says, investment is present, so when wealth is taken away from consumption, it is spent on instrumental commodities such as machinery, raw material, etc. or in productive services.[287] The author himself classifies the investment as public or private according to what it does, and as autonomous or prompted depending on the reason that necessitates it. It can also be domestic or foreign, with the latter being an advantageous option particularly for developing countries that turn to the injection of capital to improve the quality of products and services, to create jobs, and to modernize industry.[288]

Foreign investment in Cuba emerged in the '80s with the establishment of Cuban and foreign joint ventures and other forms of international economic partnership. The legal backing for these companies deriving from foreign investment came with the enactment of **Decree-Law No. 50 of February 15, 1982 "On Economic Associations between Cuban and Foreign Entities."**

According to the Decree-Law, these associations were created to carry out lucrative activities that will contribute to the development of the country, and they could choose to form a joint venture, among other models. It also regulated everything concerning the establishment of the ventures, the labor, and commercial and financial aspects, but in some way made reference to protecting the environment from the effects that the activities of these companies would undoubtedly cause. The collapse of the socialist bloc and the tightening of the economic blockade against Cuba by the United States of America, together with the globalization of the world economy led our state to make changes in the economic sphere; in particular, we began a new process of foreign investment stimulation in Cuba, diversifying its forms and range. In this way, the **Law 77 of September 5, 1995 "Law on Foreign Investment"** [289] came to light.

The objective of this law was to promote and encourage foreign investment in the Republic of Cuba to carry out lucrative activities that strengthen the economic capacity of the country and contribute to its sustainable development on the basis of respect for independence, national sovereignty, and the protection and rational use of natural resources.

Thus, the Cuban government made it clear from the preamble of the law that the investment of foreign capital could not become a predator of our rivers, beaches, forests, and other natural resources, for all of the many benefits they bring to the national economy, and that causing damage to the environment of any kind would require them to pay damages. [290]

However, the approval of the **Guidelines for Economic and Social Policy of the Party and the Revolution**, as of April 18, 2011, reinforced the need to temper the legislation on foreign investment to the process of updating the Cuban economic model. Specifically, guideline 129 of the Policy on Science, Technology, Innovation, and Environment refers to the design of a comprehensive policy that raises economic efficiency, expands exports, and substitutes imports, protecting the environment, heritage, and national culture. It thus reinforces the importance of the provisions of the legislation on environmental matters, and the Ministry of Science, Technology and Environment takes on the role of protagonist to reclaim the mission it was assigned.

---

286 Resolutions No. 77 of June 28, 1999 and No. 132 of August 11, 2009 of the Ministry of Science, Technology and Environment.
287 Cañizares Abeledo, Derecho Comercial. *Editorial de Ciencias Sociales,* Havana 2012. Second Part. Ep XIX. p 255.
288 CAÑIZARES ABELEDO Ob cit. Segunda Parte. Ep XIX. pp 255-257
289 Law No. 77 from September 5, 1995 ¨Ley de la Inversión Extranjera¨ Gaceta Oficial Extraordinaria No. 3, September 6, 1995.
290 Ley No. 77 de 5 de septiembre de 1995 ¨Ley de la Inversión Extranjera¨ Cap. XIV.

In response to the above statement **Law No. 118 on Foreign Investment** [291] was enacted, which in its first articles, stipulates that those investments that cause damage will not be approved, and it establishes the obligation to submit all proposals for consideration by the Ministry of Science, Technology and Environment in order to assess their suitability from the environmental perspective, as opposed to the previous standard which only required it for some cases.

This cycle is coming to a close with the enactment of **Decree-Law 313 of the Mariel Special Development Zone**, created among other objectives to attract foreign investment, generate exports, promote the replacement of imports, and create new jobs. In close connection with the provisions of the new Law on Foreign Investment, in the Mariel Special Development Zone they encourage those investments with environmental feasibility, which provide clean technologies, and contribute to local developmen.[292]

The Mariel Special Development Zone is directed by an office, which has among its purposes to respect and enforce all measures regarding the protection of natural resources, by the licensees and other users of the area.

The Ministry of Science, Technology and Environment is among the permanent representatives of the commission that evaluates requests for establishment in the area of the licensees and users, and its opinion is mandatory consultation material for the office that directs the Special Development Zone. Indeed, the Minister of Science, Technology and the Environment issued **Resolution No. 150 dated September 20, 2013 Regulations for carrying out the Environmental Impact Assessment in the Mariel Special Development Zone**, which contains a specific procedure for this activity in that particular area.

We will now analyze the relationship between environmental protection and foreign investment in some other Latin American countries.

BOLIVIA

Bolivia's **Law of Mother Earth** defines the environment and natural resources as the heritage of the nation. Also, among other things, it establishes environmental policy and institutional framework, it defines which acts degrade the environment and makes the Environmental Impact Assessment available for any work or activity likely to cause this degradation, a process that ends with the so-called Declaration of Environmental Impact. [293]

Moreover it has measures to protect natural resources in general, for non-renewable natural resources, protected areas, and energy resources. The National Secretariat of the Environment (SENMA) is the body responsible for drawing up and directing national environmental policy, and among its roles is to approve, reject and control the Environmental Impact Assessments nationwide.[294] In this country we encounter the Investment Promotion Act, which provides everything concerning the legal framework of the investment process, it defines the subjects involved in this, and the principles on which the regulation is based, highlighting the state control over the investing process, whether it is with national or foreign participation, public, or private.

However, with regard to environmental protection, the law only puts forth as one of its principles that the investor program should be implemented with respect for Mother Earth.[295] This provision stands out when the state approves foreign investment in any economic sector of the country in an attempt to eradicate poverty and economic, social, and regional inequalities.

Precisely because the Bolivian government is willing to incentivize those public and private initiatives in the agricultural, industrial, mining, or forestry spheres aimed at environmental protection and sustainable development,[296] we believe that this is insufficient to protect the earth and its biodiversity.

NICARAGUA

The Republic of Nicaragua enacted the **General Law of Environment and Natural Resources**.[297] This provision, although it defines the environment as heritage of

---

291 Law No. 118 from March 29, 2014 ¨ Ley de la Inversión Extranjera¨ Gaceta Oficial Extraordinaria No. 20, April 16, 2014.
292 Decree-Law 313 of September 19, 2013 ¨De la Zona Especial de Desarrollo Mariel¨ Gaceta Oficial Extraordinaria 06 from September 23, 2013.
293 Law No. 1333 from April 27, 1992. Article 26
294 Chapter II. Article 7.
295 Law No. 516 from April 4, 2014. Article 3, inc. E.
296 Cap II. Art 90
297 Law No. 217 from March 27, 1996.

the nation similarly to its Bolivian counterpart, devotes a section to the treatment of the environment in public investment,[298] and within the section devoted to natural resources, it provides standards for obtaining rights of use and exploitation them. Also in this law there are specific provisions for the use and exploitation of biological diversity.

The National Environmental Commission is responsible for environmental problems, and it forms part of the Ministry of the Environment and Natural Resources, which is the body which presides over and is the regulator and law-maker where the country's environmental policy is concerned.

In **Law No. 344 on the Promotion of Foreign Investment dated May 24, 2000**, the state endorses the rights and obligations of investors, defines the concept of capital and the settlement of disputes related to foreign investment, but there is not a specific reference to the protection of the environment and natural resources. In the rule of law, this aspect is contemplated within the obligations of the investor.[299]

ECUADOR

In Ecuador the **Environmental Management Act**[300] is in force, which sets out the principles and guidelines of environmental policy, the responsibility of the public and private sectors in environmental management and the system of checks and sanctions for violations of the environment and natural resources. Special mention is made of the term sustainable development as a guarantee of the conservation of heritage and natural resources.

The National Environmental Authority is the government branch responsible for coordinating, directing and controlling the Decentralized National System on Environmental Management, whose roles include approving plans and national projects for environmental management and identifying those activities and projects the require the completion of an environmental impact study. Consistent with the above, Title III called Instruments of Environmental Management deals with the issue of public or private investment projects that may have an impact on the environment.

The **Law on the Promotion and Guarantee of Investment**[301] aims to promote effective contribution to the country's economic and social development, the growth of productive areas, and the use of appropriate technologies, among other things, but within the law we found, just as in the Nicaraguan regulation, little support for the Environmental Management Act related to foreign investment. Here it only puts forth the obligation of domestic foreign investors to preserve the environment and natural resources, as well as to repair the damage they cause.[302]

Even if the state's ban on the continuation of a company's activity that causes environmental damage can be foreseen, we believe the legislature should deepen and expand the treatment of this topic, especially foreign investment, given the valuable natural resources of that country.

Our humble opinion, by way of conclusion, is that the states whose legislation on environmental matters and foreign investment we have studied, should review and update these provisions seeking the right balance between the progress of our peoples and the care and conservation of our natural resources, many of which have been declared human heritage and that today are at risk of not being able to be enjoyed by future generations. Just today, in Cuba, the state aims to increase and consolidate the activity of foreign investment, but always on the basis of issuing the fewest legal provisions necessary in order to preserve what is pride of all Cubans: a healthy environment, full of beauty and natural resources that ensure the sustainable development of the country.

---

298 Chapter II. S. VIII. Article 46.
299 Decree 74-2000 Regulation of the Law No. 344, Law on the Promotion of Foreign Investment.
300 Environmental Management Act. Officially Registry Supplement 418 from September 10, 2004.
301 Law No. 46 RO/219 of December 19, 1997. Law on the Promotion and Guarantee of Investments.
302 Title VIII. Article 29.

III. CONFLICT PREVENTION AND MANAGEMENT IN SHARED NATURAL RESOURCES

Physical coexistence on earth inevitably results in the sharing of natural resources, thus, sharing a border may mean shared forests, ecosystems and water resources. However, sharing is not limited to geographical borders. The commons that is earth invariably dictates that all countries and all peoples collectively take part in sharing certain of its natural resources. In doing so, there is a corresponding responsibility to manage them soundly. The increased number and intensity of Disasters currently experienced by the region impact availability and access of natural resources generating resulting in tensions that further highlight the need for sound management of border and other natural resources, through the consideration of key approaches and principles of environmental management and international law. Abstracts under this sub-theme theme consider innovative schemes in the management of shared resources and tools for prevention.

3.1. Collective Responsibility for Sound Marine Resource Management: Erga Omnes Obligations and Deep Sea Mining

Cymie R. Payne

Key Words

Deep seabed; erga omnes; global commons; marine environment; Law of the Sea; UNCLOS

International law recognizes that there is a collective interest in protecting the marine environment. This paper traces the emergence of the erga omnes principle (rights or obligations owed toward the international community as a whole) at the International Court of Justice, the International Tribunal for the Law of the Sea and in commentaries; evaluates the development of collective interest and collective enforcement doctrines. It then considers how the principle can be applied to protect ocean resources with respect to the International Seabed Authority's development of regulations for deep seabed mineral resource exploitation.

International law recognizes that there is a collective interest in protecting the marine environment. The Law of the Sea Tribunal (ITLOS) contributed an important application of this principle in its Advisory Opinion on sponsoring state responsibility and liability for deep sea mining activities in the 'Area' (the seabed, ocean floor and subsoil beyond the limits of national jurisdiction). ITLOS affirmed that where sponsoring states are in breach of their obligations, liability is to the international community, that is, it is erga omnes. The common heritage nature of marine resources implies that all states share these rights. However, states' rights and duties with respect to governance of high seas resources need to be clarified. Enforcement of conservation obligations is a particular challenge for global commons, where an obligation erga omnes that is owed to all might be enforced by none. This paper traces the emergence of the erga omnes principle at the International Court of Justice, ITLOS and in commentaries. It then considers how it can be applied to protect ocean resources preventively through environmental assessment. The International Seabed Authority's recent work on regulations for exploitation of deep seabed mineral resources is discussed as an example of an international organization coordinating with states sponsoring mining in high seas regions, as deep sea mining moves from experimental to full-scale industrial status.

INTRODUCTION

The deep seabed is a global commons area that is subject to the international community's collective governance. It is also the target of resource extraction. As deep seabed mining moves from experimental to full-scale industrial status, it tests the oversight capability of individual states that sponsor mining in high seas regions. The Law of the Sea Convention (LOSC)[303] and international law provide consequences when a state fails to ensure that companies operating under its sponsorship observe appropriate measures and as a result the marine environment is damaged. But in areas beyond national jurisdiction, what is the extent of this state liability and how are consequences for damage to these global commons effectuated? For example, may any

303 United Nations, The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index, Final Act of the Third United Nations Conference on the Law of the Sea, Introductory Material on the Convention and Conference, U.N. Pub. Sales No. E.83.V.5 (1983).

state use enforcement measures [304] against another state that violates an internationally recognized obligation owed to the international community? [305] Si If it may, what are the limits? More important, experience teaches us that prevention of harm in the first place would be of even greater value. Enforcement of conservation obligations is a particular challenge with regard to global commons, where an obligation *erga omnes* – one that is owed to all – might be enforced by none.

When the International Tribunal for the Law of the Sea (ITLOS) affirmed, in its 2011 advisory opinion[306] that states sponsoring deep seabed mining in areas beyond national jurisdiction (Area)[307] have legal obligations to the international community as a whole, it drew on the International Law Commission (ILC) statement of customary international law.[308] El International law recognizes that there is a collective interest of the international community in protecting the marine environment based in both treaty and customary international law. For example, the Institut de Droit International has said that states owe obligations relating to the environment of common spaces 'to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all States to take action.' [309] These obligations *erga omnes* are in contrast to most international obligations, which are generally from one state to one other. The common heritage nature of the deep seabed in areas beyond national jurisdiction, as stated in the LOSC, implies that all states share mutual rights and obligations related to this interest. The scope of this paper is limited to the high seas, and does not touch on what kind of legal interest states have in ocean resources that lie within the maritime jurisdiction of a state.

The task of administering activities in the Area is taken up by the International Seabed Authority (ISA), which began to develop regulations for the exploitation of deep seabed minerals in 2014.[310] ISA regulations for the preliminary stages of prospecting and exploration are already in force. Regulations requiring environmental assessment for mining (exploitation) have the potential to be important components of a larger governance regime for preventing damage to the marine environment. The ISA's clarification of states' rights and duties to enforce governance of the deep seabed and its associated high seas resources will test the doctrine of international community rights and duties.

The deep seabed is situated in a place none of us are likely to go. Along the mid-oceanic ridge system of the Atlantic, Pacific, Caribbean and Indian Oceans fluids rich in minerals are emitted from submarine vents at temperatures from 25-350°C, at depths reaching about 4000-6000 meters below the sea surface. [311] In 1976 the world was amazed to learn that these hydrothermal vents are a source of energy that many life forms have utilized in developing complex and varied ecosystems without sunlight or photosynthesis.[312] The vents are also sites where molten minerals spew from beneath the earth's crust, harden, and form deposits on the seabed. There are abyssal plains where minerals precipitate out of seawater to form iron, manganese, nickel and copper nodules and cobalt-rich crusts containing valuable minerals. The response of deep seabed ecologies to anthropogenic impacts ranges from fragile to robust. While the hydrothermal vent systems are expected to be relatively resilient, the abyssal plain ecosystems where polymetallic nodules are found are considered vulnerable to dis-

---

304 'Enforcement' is used in this Article to mean a full range of preventive measures and measures responding to breaches of the law, distinct from its meaning in the context of the UN Charter. Cf. Christian J. Tams, Individual States as Guardians of Community Interests, in From Bilateralism to Community Interest: Essays in Honour of Bruno Simma (U. Fastenrath, R. Geiger, D.-E. Khan, A. Paulus, S. von Schorlemer, and C. Vedder, eds., Oxford 2011) at 381 ("'enforcement" may be said to encompass measures designed to ensure observance of the law, and more specifically, observance through responses against breaches of the law (as opposed to preventive measures aimed at avoiding breaches, or verification measures seeking to assess whether the law has been breached.)')

305 The subject of this article is states only. Some would argue that the 'international community' should be defined more broadly to include international organizations and non-state actors. Philippe Sands, Principles of International Environmental Law 189 (Cambridge 2d ed. 2007) at pp 191-195. Sensitivity to rights and obligations of deep seabed users is evidenced in Cindy Lee Van Dover's reporting on voluntary codes of conduct adopted by deep seabed researchers (Laurent Godet, Kevin A. Zelnio, and Cindy L. Van Dover, Scientists as Stakholders in Conservation of Hydrothermal Vents, 25:2 Conservation Biology 214-222 (2011)) and mining companies (International Marine Minerals Society, Code for Environmental Management, published by the International Seabed Authority as ISBA/16/LTC/2 (2010)).

306 Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, Case No. 17, Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, International Tribunal for the Law of the Sea (Feb. 1, 2011).

307 LOSC, artículo 1(1), define la "Zona" como "los fondos marinos y oceanicos y subsuelo más allá de los limites de la jurisdicción nacional"

308 International Law Commission, Report of the International Law Commission on the Work of its 53rd Session, UN Doc A/56/10, Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected (Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries) (2001).

309 The Institut de Droit International, Resolution on Obligations erga omnes in international law, article 1 (2005).

310 LOSC, article 145; ISBA/20/C/31, paragraph 3; International Seabed Authority, Developing a Regulatory Framework for Mineral Exploitation in the Area (March 2015); Aline Jaeckel, An Environmental Management Strategy for the International Seabed Authority? The Legal Basis, 30 The International Journal of Marine and Coastal Law 1-27 (2015).

311 Information, including maps of the deep seabed, can be found at http://www.isa.org.jm. For a description of the deep seabed biota, Cindy Lee Van Dover, Depths of Ignorance, 14:9 Discover 37-39 (1993). Salvatore & Charlotte Salpin, *Bioprospecting of Genetic Resources in the Deep Seabed: Scientific, Legal and Policy Aspects* (UNU-IAS, 2005) at 9.

312 Carolyn Searce, Hydrothermal Vent Communities, CSA Discovery Guides (CSA 2006), available at: http://www.csa.com/discoveryguides/vent/review.pdf.

turbance.[313] However, the state of knowledge about the deep seabed is so limited that we simply do not know what is there and how it will respond to the effects of mining.

Mining interests based in several countries are beginning to explore and intend to exploit deep seabed minerals. More than 20 exploration contracts have been signed between the International Seabed Authority and countries including Russia, China, Japan, Germany, the United Kingdom and France.[314] They are hoping to recover economically valuable quantities of gold, copper, and other minerals. Environmental risks, to the extent that they can be identified at this early stage of deep sea research, would result from the expected chronic operational disruption of the seabed and possible pollution of the adjacent water column, as well as the pollution and risk of accident from the ships and other equipment. [315], las At this moment, when neither the potential wealth nor the risked environmental damage has occurred,[316] private and state-owned mining enterprises expect to conduct their activities within an internationally agreed legal framework, since much of the deep seabed is beyond national jurisdiction and in an area considered a global commons.

'Commons' does not always mean the open access pasture with too many perversely incentivized herders that Garret Hardin described.[317] In legal instruments and scholarship it may refer to common areas, common concerns, or common heritage [318] Each of those terms has diverse and evolving connotations. Common areas are those places located beyond national jurisdictional boundaries, such as Antarctica and the high seas; they are sometimes referred to as 'common property' or *res communis*. Common concern [319]. shifts the focus from place to problem: climate change, loss of biodiversity, and environmental destruction from armed conflict are environmental concerns that affect the international community and require cooperation to address.[320]; Common heritage of humankind (formerly mankind) became a well-known concept during the Law of the Sea negotiations in the 1970s, standing chiefly for the rights of developing nations to share in the benefits of the marine environment; [321] it is now enshrined in the Law of the Sea Convention (LOSC) as an attribute of the deep seabed in zones beyond national jurisdiction.[322] While economists have focused on the open access aspect of global commons and have insisted that governance can only be achieved through privatization or government intervention, contemporary legal perspectives also incorporate concepts of collective rights and duties. Moreover, research on institutions for collective action led by Ostrom, Young, McCay and others demonstrates that Hardin's description of the commons is simplistic and that slight changes in conditions (such as face-to-face communication between participants) can produce near-optimal outcomes.[323] Brunnée rightly emphasizes that governance of these global commons is difficult to capture in the standard state-centric international law framework.

---

313 Lisa W. Drew, The Promise and Perils of Seafloor Mining: Can minerals be extracted from the seafloor without environmental impacts? 47:3 Oceanus (2009), Originally published online November 20, 2009, available at: https://www.whoi.edu/oceanus/feature/the-promise-and-perils-of-seafloor-mining; Alexis Khripounoff, Jean-Claude Caprais, Philippe Crassous and Joël Etoubleau, Geochemical and biological recovery of the disturbed seafloor in polymetallic nodule fields of the Clipperton-Clarion Fracture Zone (CCFZ) at 5,000-m depth, 51(5) Limnol. Oceanogr., (2006) 2033–2041 (las propiedas físicas y químicas de los sedimentos perturbaron 26 años previos de observaciones y no cambiaron significativamente a lo largo del tiempo y no han mostrado señales de recuperamiento; los samples han demostrado que la fauna bentónica se ha recuperado).

313 International Seabed Authority website, available at: https://www.isa.org.jm/deep-seabed-minerals-contractors; see also, Nautilus Minerals web site at: http://www.nautilusminerals.com/s/Clarion-Clipperton.asp.

314 Lisa W. Drew, The Promise and Perils of Seafloor Mining: Can minerals be extracted from the seafloor without environmental impacts?, 47:3 Oceanus (2009), Originally published online November 20, 2009, available at: https://www.whoi.edu/oceanus/feature/the-promise-and-perils-of-seafloor-mining.

315 Lisa W. Drew, The Promise and Perils of Seafloor Mining: Can minerals be extracted from the seafloor without environmental impacts?, 47:3 Oceanus (2009), Originally published online November 20, 2009, available at: https://www.whoi.edu/oceanus/feature/the-promise-and-perils-of-seafloor-mining.

316 Lisa W. Drew, The Promise and Perils of Seafloor Mining: Can minerals be extracted from the seafloor without environmental impacts?, 47:3 Oceanus (2009), Originally published online November 20, 2009, available at: https://www.whoi.edu/oceanus/feature/the-promise-and-perils-of-seafloor-mining.

317 Garrett Hardin, The Tragedy of the Commons, 162 Science 1243-1248 (1968).

318 ILC rapporteur Shinya Murase reviewed these concepts for the topic 'protection of the atmosphere' in his first report. International Law Commission, First Report on the Protection of the Atmosphere, UN Doc. A/CN.4/667 (2014) paras 86-90.

319 UN General Assembly Resolution 43/53, Protection of global climate for present and future generations of mankind (1988) para. 1 ('Recognizes that climate change is a common concern of mankind, since climate is an essential condition which sustains life on earth.'); 1992 United Nations Framework Convention on Climate Change, preamble. The International Law Commission debated 'the application of the concept 'common concern of humankind' to characterize the legal status of the atmosphere rather than either res communis or common heritage of mankind,' a position with supporters and detractors. International Law Commission, Report of the International Law Commission on the Work of its 66th Session, UN Doc A/69/10, paras. 84, 104-109 (2014).

320 Jutta Brunnée, Common Areas, Common Heritage, and Common Concern, in The Oxford Handbook of International Environmental Law (D. Bodansky, J. Brunnée, and E. Hey, eds., Oxford 2007). Peter H. Sand, Environmental Damage Claims from the 1991 Gulf War: State Responsibility and Community Interests in From Bilateralism to Community Interest. *Gabčikovo-Nagymaros Project (Hung v Slov)*, 1997 ICJ Rep. 7, sep op Weeramantry.

321 Arvid Pardo, Thirteenth Statement to the Committee on the Peaceful Uses of the Seabed and the Ocean Floor, 23 March 1971 in The Common Heritage: Selected Papers on Oceans and World Order 1967-1974 (Malta University Press 1975) at p. 223, see also p. 202.

322 LOSC, article 136. See also, 1972 UNESCO Convention on the Protection of the World Cultural and Natural Heritage; the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies; and the 1997 Universal Declaration on the Human Genome and Human Rights. Hague Academy of International Law – Centre for Studies and Research in International Law and International Relations, The Cultural Heritage of Mankind (James Nafziger & Tullio Scovazzi, eds, Brill 2008). For some, the specificity of the LOSC article 136, which states 'The Area and its resources are the common heritage of mankind.' and article 133, which defines resources, for the purposes of this part of the LOSC, as 'all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules', excludes biological resources from the 'common heritage'. Arico & Salpin at p. 7. Considering the much broader use of the term in international law, this does not seem a supportable position.

323 Elinor Ostrom, A diagnostic approach for going beyond panaceas, PNAS, vol. 104 no. 39, 15181–15187, 15183 (2007); Bonnie J. McKay, The Ocean Commons and Community, 74 Dalhousie Review310 (1994-1995).

The motivating concept for this study is the need to understand how collective rights and responsibilities for the global commons have developed and their capacity to respond to the needs of the Anthropocene Era.[324] Human influences have caused profound ecological change as the 'empty' world (where the activities of a human population estimated at roughly 8 million people in 8,000 BCE had relatively little impact on the rest of the planet) has been replaced by our 'full' world (where advanced technology and the production of energy and consumer goods for 6.8 billion people has radically altered the atmosphere and biosphere, on the scale of the transformation wrought by the first photosynthetic organisms).[325] The challenge for governance systems is to adapt to the changed circumstances brought by technology, consumption and population growth to achieve goals that include preservation of functioning, complete ecosystems and other indicators of sustainability.

The deep seabed provides a useful case study of how a global commons newly subject to the pressures of technology and population might be governed through the rule of law. While the region is still remote and generally unaffected by human activity, new extraction technology and markets for deep seabed minerals are increasing the number, as well as strength, of human impacts, making it an exemplar of a Full World issue. Stakeholder interests are varied; they are concerned with the money to be made from resource extraction, control over critical mineral resources, extraction of thermophile genetic resources, and preservation of untouched marine ecosystems for scientific and ethical reasons.[326] The legal framework for the oceans is a range of multilateral instruments, customary international law and innovative global administrative law.

This inquiry applies doctrinal analysis of the principle '*erga omnes,*' as it has developed through decisions of the International Court of Justice, the International Tribunal for the Law of the Sea's Seabed Disputes Chamber, and the International Law Commission. It traces the development of collective interest and collective enforcement doctrines, and then considers how the doctrine can be applied to ocean resources. The ISA's initial work on regulations for exploitation of deep seabed mineral resources is discussed as an example of an international organization coordinating with the states sponsoring mining in high seas regions and with mining companies, as deep sea mining moves from experimental to full-scale industrial status. The paper evaluates

---

324 The Anthropocene has been described as 'a new geological epoch, marked by climatic and environmental change caused by humans.' Michael Balter, Archaeologists say that the 'Anthropocene' is here - but it began long ago, 340 Science 261-262 (2013) (discussing the various starting points for the Anthropocene that are recommended by various scientific disciplines). See also F. Biermann, K. Abbott, S. Andresen, K. Bäckstrand, S. Bernstein, M. M. Betsill, H. Bulkeley, B. Cashore, J. Clapp, C. Folke, A. Gupta, J. Gupta, P. M. Haas, A. Jordan, N. Kanie, T. Kluvánková-Oravská, L. Lebel, D. Liverman, J. Meadowcroft, R. B. Mitchell, P. Newell, S. Oberthür, L. Olsson, 2 P. Pattberg, R. Sánchez-Rodríguez, H. Schroeder, A. Underdal, S. Camargo Vieira, C. Vogel, O. R. Young, A. Brock, R. Zondervan, Navigating the Anthropocene: Improving Earth System Governance, 335 Science 1305-06 (calling for, inter alia, strengthening 'the integration of the social, economic, and environmental pillars of sustainable development, from local to global levels' and closing 'remaining regulatory gaps at the global level').

325 U.S. Census Bureau, International Database. [check cite] Rockström, J., W. Steffen, K. Noone, Å. Persson, F. S. Chapin, III, E. Lambin, T. M. Lenton, M. Scheffer, C. Folke, H. Schellnhuber, B. Nykvist, C. A. De Wit, T. Hughes, S. van der Leeuw, H. Rodhe, S. Sörlin, P. K. Snyder, R. Costanza, U. Svedin, M. Falkenmark, L. Karlberg, R. W. Corell, V. J. Fabry, J. Hansen, B. Walker, D. Liverman, K. Richardson, P. Crutzen, and J. Foley Planetary boundaries: exploring the safe operating space for humanity. Ecology and Society 14(2): 32 (2009), [online] URL: http://www.ecologyandsociety.org/vol14/iss2/art32/; updated by Steffen et al. Planetary Boundaries: Guiding human development on a changing planet. Science, January 2015.

326 Cindy Lee Van Dover, Tighten Regulations on Deep-Sea Mining, 470 Nature 31-33 (2011). http://www.telegraph.co.uk/news/worldnews/northamerica/usa/1439628/Lost-worlds-of-the-ocean-threatened-by-trawlers.html

the legality of states acting alone or in partnership to assert collective rights. Finally, it concludes that the recognition of international community interests in the Advisory Opinion has advanced this principle, which is so important in the Full World; and that further work is needed to develop the potential of enforcement measures.

1. The Evolution of Erga Omnes - International Court of Justice and International Law Commission

This section explains the international legal community's recognition and the scope of erga omnes obligations as a tool of norm enforcement and notes contrary views that reject the doctrine. First, it reviews the familiar articulation of obligations owed to the international community as a whole by the ICJ in the Barcelona Traction case. However, there may frequently be no forum where a state can seek an injunction even if its right to do so on behalf of the international community is recognized. In that case, states may find that they can assert their *erga omnes* rights and obligations in other institutions,[327] where the special nature of the obligation provides a normative basis for the right to speak or act on behalf of the international community. It is here that statements by highly respected legal bodies, such as the ICJ and the International Law Commission (ILC), may shape the norm and endow it with greater authority. As will be seen with regard to environmental impact assessment (EIA),[328] this process also works in reverse: the international bodies look to state practice as an essential component of general international law.[329]

The existence of obligations *erga omnes*, those 'obligations of a State towards the international community as a whole', was recognized by the ICJ in 1970. In the *Barcelona Traction* case, judging whether a state (Belgium) had standing to act on behalf of its nationals who were shareholders in a foreign (Canadian) corporation that suffered losses at the hands of a host state (Spain), the ICJ said:

In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[330]

The principle would have functioned, in that case, as a customary international law basis for Belgium's standing to litigate the dispute at the ICJ; necessary because 'only the party to whom an international obligation is due can bring a claim in respect of its breach.'[331] Here the ICJ decided, categorically, that the rights at issue in the case were not *erga omnes*, and that therefore Belgium would have to rely on other bases to pursue the claim. The ICJ identified what would, in its view, be clear (but not exclusive) examples of obligations *erga omnes*: prohibitions on aggression, genocide, slavery and racial discrimination.[332] The coincidence of the first three of these with jus cogens norms, that is, norms that prevail despite any contrary law, should not lead to the assumption that all *erga omnes* obligations are also *jus cogens*; they are not.

The *Nuclear Tests* case is the next example of the ICJ's analysis of *erga omnes*. New Zealand argued the claim that France's nuclear testing program in the Pacific Ocean was illegal on its own behalf and also on behalf of the international community, the Cook Islands, Niue and the Tokelau Islands. In the interim measures phase, the ICJ decided that New Zealand might be able to establish a legal interest regarding its claims.[333] In the next phase, the ICJ resolved the case as moot by finding that France's unilateral declaration of its intent to halt atmospheric nuclear weapons testing had legal effect. Of relevance to the principle, the Court stated that France's announcement was 'made outside the Court, publicly and *erga omnes*,' and thus was 'an undertaking to the international community.'[334] The ICJ relied on what it characterized as France's *erga omnes*

---

327 Here 'institution' is used to refer to 'systems of rights, rules, and decision-making procedures,' such as environmental and resource regimes; 'distinct from organizations, which are material entities typically possessing personnel, offices, budgets, a legal personality, and so forth.' Oran R. Young, Leslie A. King, and Heike Schroeder, 'Summary for Policy Makers,' in Institutions and Environmental Change: Principal Findings, Applications, and Research Frontiers, xiii (MIT Press: Cambridge, MA 2008).

328 Here the term EIA is used, following the Advisory Opinion. The ISA uses environmental impact statement (EIS). EIA refers to a process, EIS to the resulting document, however there is a tendency to choose one term.

329 Cymie R. Payne, Proceedings of the Annual Meeting (American Society of International Law) Vol. 105, (March 23-26, 2011), pp. 66-66c, 66.

330 *Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain)* [1970] I.C.J. Rep. 3 at para. 33; see also ILC Commentaries, (A/56/10 at p. 278).

331 Id. at para 35 (quoting Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, pp. 181–182). This is found in domestic law: 'Some countries' constitutions or laws provide for an actio popularis, the ancient Roman law action by an individual or group in the name of the general public. These laws typically provide that "any person" can sue the government when it breaks a law and can be found in the Netherlands, Portugal, Spain, Estonia, Slovenia, and other countries.' George (Rock) Pring and Catherine (Kitty) Pring, Greening Justice: Creating and Improving Environmental Courts and Tribunals (2009) at 37.

332 *Id.*at para 34.

333 Nuclear Tests (New Zealand v. France), Interim Protection Order, [1973] I.C.J. Rep. 135 at 139; Philippe Sands, Principles of International Environ mental Law 189 (Cambridge 2d ed. 2007). Australia brought a parallel case, also arguing that it represented both its own interests and those of other states. Nuclear Tests (Australia v. France), Nuclear Tests (Australia v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973, p. 99; *Nuclear Tests (Australia v. France), Judgmen*t, I.C.J. Reports 1974, p. 253.

334 *Nuclear Tests (New Zealand v. France),* Judgment, [1974] I.C.J. Rep. 457 at paras 51-53. The ICJ used the same language was used in the parallel case, Nuclear Tests (Australia v. France).

commitments as legally binding to terminate New Zealand's claims. A limitation of this case is that the Court might have found standing for New Zealand on account of its own injuries rather than a breach of collective rights; on the other hand, France claimed New Zealand's harm was 'negligible'—a point on which the Court did not make findings—so perhaps the Nuclear Tests case does represent an instance of standing based on a collective right.[335]

Whaling in the Antarctic was the most recent ICJ case to address collective rights in the context of Australia's challenge to Japan's Antarctic whaling program.[336] The judgment did not refer to erga omnes rights, nor did it affirm collective rights or obligations as such. However, the ICJ did not require either Australia or New Zealand (as intervenor) to identify a special injury that it suffered, thus implicitly recognizing that Japan breached an obligation owed to all states parties to the International Convention for the Regulation of Whaling (ICRW). This makes sense, as whales are not associated with particular states, but rather they travel through various territorial waters and the high seas, so no state may claim them as its own.[337] Judge Sebutinde commented on the collective approach taken to regulation under the ICRW.[338] Judge Cançado Trindade observed that in the ICRW, living marine resources have come to be considered a 'common interest' reflected in the implementation of the ICRW through 'collective guarantee, collective decision making and collective regulation'. [339]

The *erga omnes* principle thus may function to allow enforcement of obligations in cases of grave breach, by conferring standing on a state even if it did not suffer injury to its nationals or territory. Some treaties specifically provide for enforcement by any party, even if it has not itself been directly harmed.[340] The International Law Commission stated the customary international law position that,

> [Article 48] 1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
>
> (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
>
> (b) the obligation breached is owed to the international community as a whole.[341]

An example of article 48(1)(a), would be the rights of states parties to the Convention on International Trade in Endangered Species (CITES), where the treaty goals provide the 'collective interest of the group' and the treaty commitments establish the obligation.[342] Non-treaty conservation obligations are addressed by article 48 as well.

Standing is a prudential requirement most often associated with backward-looking compensation claims brought after damage has been done, whereas the real heart of environmental governance is prevention of damage. *Erga omnes* may have been showcased in *Barcelona Traction* as a standing rule, but the doctrine will do real work enforcing community environmental rights if it has a role in preventing harm, dis-

---

335 Note the similarity to the Shrimp/Turtle case, where the World Trade Organization Appellate Body recognized the U.S. interest in conserving species of highly migratory sea turtles and found that the U.S. could be justified in adopting extraterritorial conservation legislation, but without specifying whether it relied on the presence of the turtles in U.S. waters at times or if the U.S. could have sustained its measures with respect to species never found in U.S. territory. The Appellate Body made several references to the international community interest in conservation ('in the light of contemporary concerns of the community of nations about the protection and conservation of the environment … Given the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources') Appellate Body Report, United States-Import Prohibition on Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Nov. 6, 1998) at paras 129, 131.

336 *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, Judgment, 31 Mar. 2014.. The ICJ recognized obligations erga omnes in two cases which are not discussed here: East Timor (Portugal v Australia), para. 29); and Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), paras 155–60.

337 Australia might have been able to justify a claim that Japan's breach specially affected Australia, given the proximity of the whaling activity to Australia's territory. But the better analysis is by analogy to the ILC's example of a breach by a state party to the Antarctic Treaty, in which case 'the other States parties should be considered as injured thereby and as entitled to seek cessation, restitution (in the form of the annulment of the claim) and assurances of non-repetition.' ILC, State Responsibility, p. 119.338 Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening), Judgment, 31 Mar. 2014, Separate Opinion of Judge Cançado Trindade, para. 71, available at: http://www.icj-cij.org/docket/index.php?p1=3&p2=1&case=148&code=aj&p3=4. See Cymie R. Payne, ICJ Halts Antarctic Whaling – Japan Starts Again, 4:1 Transnational Environmental Law 181-19 (2015).

338 *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening), Judgment*, 31 Mar. 2014,, Separate Opinion of Judge Sebutinde, para. 3.

339 *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening), Judgment,* 31 Mar. 2014, Separate Opinion of Judge Cançado Trindade, para. 71, available at: http://www.icj-cij.org/ docket/index.php?p1=3&p2=1&case=148&code=aj&p3=4. See Cymie R. Payne, ICJ Halts Antarctic Whaling – Japan Starts Again, 4:1 Transnational Environmental Law 181-19 (2015).

340 The Montreal Protocol (any party can enforce) and the Basel Convention (any party can report noncompliance) illustrate this.

341 International Law Commission, Report of the International Law Commission on the Work of its 53rd Session, UN Doc A/56/10, Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected (Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries) (2001).

342 Peter H. Sand, 'Scientific Whaling': Whither Sanctions for Non-Compliance with International Law? 19 Finnish Yearbook of International Law 93-124 (2011) at note 97.

cussed below in the context of environmental assessment of deep sea mining through the ISA. In addition to administrative enforcement by such multilateral international bodies, sanctions such as trade bans may also be promising alternatives for individual states or small groups of states to assert their rights to enforce *erga omnes* obligations. Commentators do find support for 'the right of a state to bring an action in its capacity as a member of the international community to prevent significant damage from occurring to the environment in areas beyond its national jurisdiction.'[343] The legality of such unilateral and collective measures are controversial, leading others to suggest that international treaty bodies would be a 'more effective and realistic' means of enforcement.[344]

2. ITLOS Seabed Disputes Chamber: Deep Seabed Mining Advisory Opinion

Concerned that it might incur liability for damage from deep seabed mineral exploration, the island nation of Nauru requested the ISA to seek an advisory opinion from the Seabed Disputes Chamber of ITLOS regarding the responsibility and liability of states that sponsor contractors to mine the deep seabed in areas beyond national jurisdiction, the zone that is referred to as the 'Area'. The Advisory Opinion was duly rendered in 2011. It identifies certain obligations for conservation of the deep seabed as erga omnes. This section describes and analyzes the Advisory Opinion's treatment of erga omnes obligations and its implications for other global commons.

Deep seabed areas that lie beyond any national jurisdiction are legally considered commons areas. In a reflection of law's changing views, in the time of the empty world, the high seas were considered res nullius – a thing belonging to no one. Now, in the time of the full world, they are considered res communis – a global commons.[345] By their nature as sites of unique biodiversity, conservation of the deep seabed areas is the concern of the international community. They are common areas because they lie beyond any state's national jurisdiction in the zone that has been designated 'the high seas' by custom and treaty law. Finally, by the specific terms of the LOSC, the deep seabed in areas beyond national jurisdiction is defined as the common heritage of humankind and labeled the 'Area'. [346]

The Area is defined in article 1(1) of the LOSC as 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.' Article 136 of the Convention states that 'The Area and its resources are the common heritage of mankind.'[347] The ISA has established an administrative regime to manage the exploration of the Area in conformity with the LOSC. The legal status of the Area is further defined in article 137, which states that 'All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act.'

To give effect to the common heritage nature of the Area, the LOSC negotiators agreed to a special regime for its eventual exploitation that is intended to provide international, multilateral oversight and to ensure that developing and industrialized states both have access to its mineral resources. Any exploration or exploitation of the Area must be sponsored by a state party to the LOSC and conducted under the control of the ISA.[348]

The Republic of Nauru and the Kingdom of Tonga, as parties to the LOSC, decided to sponsor commercial mining companies. As developing states, they recognized that they needed a better assessment of their potential liability should damage to the environment result. Nauru proposed to the ISA Council that it seek an advisory opinion from ITLOS' Seabed Disputes Chamber on the responsibility and liability of sponsoring states. The questions that the ISA eventually put to the Chamber were:

---

343 Philippe Sands, Principles of International Environmental Law (Cambridge 2d ed. 2007) at 189.

344 P. Birnie, A. Boyle and C. Redgwell, International Law and the Environment (2009), p. 236.

345 For the most famous debate over this question, see Hugo Grotius, The Free Sea (David Armitage, ed., Richard Hakluyt, trans. Liberty Fund: Indianapolis 2004.) and John Selden, Mare Clausum: Of the Dominion, or, Ownership of the Sea (Lawbook Exchange ed. 2014).

346 Regrettably, the LOSC uses the term 'mankind;' this article uses the term 'humankind' except in direct quotations.

347 *See also* UN General Assembly Resolution 2749 (XXV) of 17 December 1970 ('The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind.'). The Area has been described as 'formally subject to an international (treaty-based) public trust regime'. P.H. Sand, 'Public Trusteeship for the Oceans', in Tafsir M. Ndiaye & Rüdiger Wolfrum (eds.), Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah (Martinus Nijhoff Publishers 2007) p. 536.

348 It is not uncommon for commercial entities to seek sponsorship from foreign states. For example, the US company Lockheed Martin created a subsidiary to obtain British sponsorship. Lockheed Martin press release (14 March 2013) http://www.lockheedmartin.com/uk/news/press-releases/2013-press-releases/uk-government-sponsors-lockheed-martin-uk-subsidiary-for-licence.html The United States is not a party to the LOSC, although it did sign the Convention. US mining interests must, therefore, be sponsored by another country to participate in exploitation of the Area and the US does not have a voice in the elaboration of the regulatory scheme. The US has nonvoting observer status with the International Seabed Authority.

1. What are the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area in accordance with the Convention, in particular Part XI, and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982?

2. What is the extent of liability of a State Party for any failure to comply with the provisions of the Convention, in particular Part XI, and the 1994 Agreement, by an entity that it has sponsored under Article 153, paragraph 2 (b), of the Convention?

3. What are the necessary and appropriate measures that a sponsoring State must take in order to fulfill its responsibility under the Convention, in particular Article 139 and Annex III, and the 1994 Agreement?

The Advisory Opinion characterized sponsoring state obligations as '*erga omnes*.' The reference arose in the discussion of legal consequences when mining-related damage occurs, where the Chamber acknowledged that '[i]t may be envisaged that the damage in question would include damage to the Area and its resources constituting the common heritage of mankind, and damage to the marine environment.'[349] The Chamber identified a list of potential claimants for compensation in that situation: 'the [International Seabed] Authority, entities engaged in deep seabed mining, other users of the sea, and coastal States.'[350]

The rights that entitle these possible claimants to compensation are based on their common interest in the marine environment, seabed minerals included. It is submitted that the same rights therefore also authorize *preventive* measures to protect the marine environment. But before that point is discussed, some clarity is needed to understand the relationship between the international community, these identified rights holders, and the justification for their standing.

After noting that the LOSC tasks the International Seabed Authority to act 'on behalf' of humankind, the Chamber stated that 'each State Party may... be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area.'[351] It quoted article 48 of the ILC Draft Articles on State Responsibility in support of this right:

> 1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
>
> (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
>
> (b) the obligation breached is owed to the international community as a whole. [352]

According to the ILC Commentary, Article 48(1)(a) refers to rights of states parties to a treaty or benefiting from an interest protected under customary international law, which have an interest in its observance by other parties even if they sustain no other injury from the breach.[353] Parties to the Law of the Sea Convention fit easily into this category. Article 48(1)(b), also quoted by the Chamber, refers to obligations *erga omnes* that extend beyond parties to a treaty to the entire international community. The rights of the identified rights holders are bolstered by their particularized interests, which, though not specified in the Advisory Opinion, could

---

349 ITLOS, Case No. 17, Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in The Area (2011). The relevant paragraphs are:

> 179. Neither the Convention nor the relevant Regulations … specifies … which subjects may be entitled to claim compensation. It may be envisaged that the damage in question would include damage to the Area and its resources constituting the common heritage of mankind, and damage to the marine environment. Subjects entitled to claim compensation may include the Authority, entities engaged in deep seabed mining, other users of the sea, and coastal States.
>
> 180. No provision of the Convention can be read as explicitly entitling the Authority to make such a claim. It may, however, be argued that such entitlement is implicit in article 137, paragraph 2, of the Convention, which states that the Authority shall act 'on behalf' of mankind. Each State Party may also be entitled to claim compensation in light of the erga omnes character of the obligations relating to preservation of the environment of the high seas and in the Area. In support of this view, reference may be made to article 48 of the ILC Articles on State Responsibility, which provides: Any State other than an injured State is entitled to invoke the responsibility of another State ...if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole.

350 It finds the rights of the International Seabed Authority in the LOSC, where 'such entitlement is implicit in article 137, paragraph 2, of the Convention, which states that the Authority shall act 'on behalf' of mankind.'

351 Advisory Opinion, para 180.

352 International Law Commission, Report of the International Law Commission on the Work of its 53rd Session, UN Doc A/56/10, Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected (Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries) (2001).

353 ILC, at p. 126.

be that miners would be harmed by damage to the seabed, other users of the sea by damage to the water column, and coastal states by pollution of their waters.[354]

The Chamber's statement may be read as treating all states—whether parties to the LOSC or not—as rights holders under a customary law theory that the marine environment and the Area are the heritage of all humankind. Even if an individualized interest in the resources that might be damaged were necessary, a substantial number of states would be potential rights holders. An argument that is consistent with the position that even non-LOSC parties might be claimants is based on the fact that the LOSC is considered to be a codification of customary international law. Note, however, that some consider both the common heritage element of the Law of the Sea Convention and the ILC Draft Articles' article 48 to be progressive rather than customary law.

If all states parties to the LOSC have a right to enforce its obligations, and all states are beneficiaries of the parallel customary international law, then all states have enforcement rights. Duncan French observed that some may find the Seabed Disputes Chamber's approach radical – and they would surely consider this interpretation of it even more so – but he also concluded that 'the Advisory Opinion undoubtedly fits with the tenor of the governance of the Area generally, and it is unclear how objectionable most members of the international community will consider these findings in light of the particular nature of the Area.' [355]

3. Implementation of the *Erga Omnes* Principle

The general principle that obligations are owed to the international community is only useful when the content of those obligations is defined. Assuming that the right to take such measures is now established, the next concern is the content of the obligations and the mode of enforcement. Ideally, the international community will be able to take prospective measures to prevent harm and retrospective measures to ensure remediation and accountability for harm. Mengerink, et al. emphasize that 'the great expense and near impossibility of restoring many deep-ocean ecosystems,' puts a premium on avoiding damage.[356] Where prevention fails, states acting on behalf of the community may seek compensation, as contemplated in the Advisory Opinion, other forms of reparation, cessation of the act, assurances and guarantees of non-repetition.[357] Alternatively, action on behalf of the international community might be entrusted to an international treaty body capable of administrative and enforcement functions.[358]

It has been observed that the Commission on the Limits of the Continental Shelf (CLCS) has already disregarded the *erga omnes* nature of the Area. Oxman reports on 'its implicit disregard of the legal interests of all states in the integrity and limits of the international seabed area protected by the principle of the common heritage of mankind by ordering that the technical comments [on claims] submitted by [states lacking sovereign interest] are not to be considered.'[359] In light of the strict confidentiality of the CLCS's proceedings, this is perhaps not surprising: only a coastal state making a submission to the CLCS may participate in its proceedings, and that only in a very limited way.[360] There is no apparent role for a counter-claim that a submission infringes on the common heritage of humankind, nor may the ISA challenge a CLCS delimitation.[361]

---

354 Though the Chamber does not reference it, the International Law Commission offers the example of 'a coastal State specially affected by pollution in breach of an obligation aimed at protection of the marine environment in the collective interest' in its explanation of article 48(1)(b). ILC at p. 127.

355 Duncan French, 26 From the Depths: Rich Pickings of Principles of Sustainable Development and General International Law on the Ocean Floor—the Seabed Disputes Chamber's 2011 Advisory Opinion, The International Journal of Marine and Coastal Law (2011) 525–568.

356 Kathryn J. Mengerink, Cindy L. Van Dover, Jeff Ardron, Maria Baker, Elva Escobar-Briones, Kristina Gjerde, J. Anthony Koslow, Eva Ramirez-Llodra, Ana Lara-Lopez, Dale Squires, Tracey Sutton, Andrew K. Sweetman, Lisa A. Levin, A Call for Deep-Ocean Stewardship, 344 Science 696, 697 (2014).

357 ILC, Jochen A Frowein, Obligations erga omnes, Max Planck Encyclopedia of Public International Law (2008) www.mpepil.com.

358 Oxman argues that this is the best approach. Bernard H. Oxman, The Territorial Temptation: A Siren Song at Sea, 100 Am. J. Int'l L. 830, note 47 (2006). Mary Turnipseed, Michael C. Blumm, Duncan E.J. Currie, Kristina M. Gjerde, Peter H. Sand, Mary C. Wood, Julie A. Hambrook Berkman, Ryke Longest, Gail Osherenko, Stephen E. Roady, Raphael D. Sagarin, Larry B. Crowder, 'Using the Public Trust Doctrine to Achieve Ocean Stewardship' in, Rule of Law for Nature - New Dimensions and Ideas in Environmental Law (Christina Voigt, (ed.) Cambridge University Press, forthcoming)(proposing a new high-seas governance regime based on the public trust doctrine, possibly through a new multilateral treaty).

359 Bernard H. Oxman, The Territorial Temptation: A Siren Song at Sea, 100 Am. J. Int'l L. 830, note 47 (2006).

360 The CLCS's stringent Rules of Procedure require it to respect the confidentiality of "any data and other material, not otherwise publicly available" that a submitting state so classifies, Annex II(2); its deliberations are confidential and the records "contain only the title or nature of the subjects or matters discussed and the results of any vote taken. They shall not contain any details of the discussions or the views expressed", AnnexII(4)(3). The Rules allow the CLCS to meet in public if it so decides, Rule 23; its secretary-general must publish an executive summary when the CLCS receives a submission, Rule 50; confidentiality applies to the submission, Rule 51(3); coastal states may attend the consideration of their sub missions, Rule 52, and certain other meetings with the Commission, Annex II(15); cooperation with international organizations, Rule 56; the Commission may consult with specialists in any manner it chooses, Rule 57. CLCS/40/Rev.1 (2008).

361 John E. Noyes, The Common Heritage of Mankind: Past, Present, and Future, 40 DENV. J. INT'L L. & POL'Y 447 (2012) at 467-468 ('Article 187 limits the jurisdiction of the SBC in contentious cases to disputes involving "activities in the Area"; this limitation precludes the Authority from challenging the legality of continental shelf outer limits set by a coastal state.').

This section examines how EIA represents a preventive measure to conserve the deep seabed that might be enforceable as an obligation erga omnes.[362] The ISA regulates prospecting, exploration and exploitation as separate activities, with different standards reflecting the potential for harm to the resource. Prospecting merely requires notice to the ISA. Exploration involves sampling and other activities on the seabed for which the ISA has promulgated separate legal requirements for each type of mineral.[363] Exploitation has not yet commenced and the ISA is in the process of developing regulations. To date the ISA has published a stakeholder survey and proposals for draft regulations.[364] Here the focus is on the proposals for EIA for the exploitation regulations, which the ISA addressed in a 2011 technical workshop.[365]

3.1. EIA Review

Environmental assessment is a preventive [366] governance technique. If implemented in a timely and transparent way it could provide the essential information about proposed deep seabed mining activities that the international community needs to protect its interest in the seabed and marine environment.[367] The Advisory Opinion characterizes EIA as a customary international law obligation of sponsoring states,[368] as well as a direct obligation under the 1994 Agreement and International Seabed Authority regulations. The ISA's draft framework for exploitation regulations refers to the rights of coastal states and suggests that coastal state impacts should be included in the EIA.[369]The principle that rights and duties associated with the Area are owed to the international community more generally implies that the international community also has the right (and perhaps the duty) to participate in the EIA process.

Generally, EIA requires entities planning an activity with potentially significant impacts on the environment to carefully and systematically assess foreseeable impacts and to publicly disclose the findings. Alternative approaches to achieving the project goals, allowing for mitigation of impacts to be evaluated, and consideration of a 'no action' alternative are included as best practice. The disclosure is intended to assure that the costs and benefits of the activity are carefully weighed before they are undertaken, with the goal of eliminating activities that pose a disproportionately high risk of harm to the environment. The proponent of the activity has the duty to provide the EIA, while the relevant public has the right to review it and to comment on it.[370] It might even be said that the responsible public has a duty to participate in this way. Effective EIAs require the decision maker to seriously consider the public's comments and respond to them substantively.[371] The effectiveness of the EIA process depends on how complete the disclosure is, how informative the public comments are, and how authentically the decision maker considers the public comments.[372]

The ISA will establish specific standards for the EIA required in the authorization process for exploitation in the Area. The Annex to the 1994 Agreement, an integral part of the LOSC, requires mining companies to conduct an environmental impact assessment and to provide for review and approval by both the state sponsoring the company's activity in the Area and the International Seabed Authority Secretary-General (ISA-SG).[373] EIA

---

362 Note: the Seabed Disputes Chamber did not itself make this finding.

363 Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area; Regulations on prospecting and exploration for polymetallic sulphides in the Area and Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area. See http://www.isa.org.jm/en/mcode.

364 International Seabed Authority, Developing a Regulatory Framework for Mineral Exploitation in the Area: Stakeholder Engagement (February 2014).

365 International Seabed Authority, Technical study; no. 10: Environmental management needs for exploration and exploitation of deep sea minerals: report of a workshop held by the International Seabed Authority in collaboration with the Government of Fiji and the SOPAC Division of the Secretariat of the Pacific Community in Nadi, Fiji, from 29 November to 2 December, 2011 (2012).

366 Makgill, R. and Linhares, AP., 'Deep Seabed Mining - Key Obligations in the Emerging Regulation of Exploration and Development in the Pacific', in Warner, R. and Kaye, S. (eds.) Routledge Handbook of Maritime Regulation and Enforcement (forthcoming) at notes 46-47.

367 United Nations Conference on Environment and Development, Rio de Janiero, Brazil, June 3-4, *Rio* Declaration on Environment and *Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (August 12, 1992), http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.

368 This is consistent with the ICJ's decision in the *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* Merits, Judgment, I.C.J. Reports 2010, which the Chamber cites.

369 International Seabed Authority, Developing a Regulatory Framework for Mineral Exploitation in the Area: Report to Members of the Authority and All Stakeholders (March 2015), p. 30.

370 See, e.g., Aarhus Convention, article 6.

371 The obligation to notify and consider comment from affected states is also found in the Lac Lanoux Arbitration, UNRIAA, vol. XII (Sales No. 63.V.3), pp. 281 et seq. (original French text); ILC Transboundary Watercourses, commentary at 112-113.

372 See, e.g., UNEP, Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach (2004); Barry Sadler, International Study of the Effectiveness of Environmental Assessment (Canadian Environmental Assessment Agency & International Association for Impact Assessment,1996).

373 Annex to the 1994 Agreement section 1, paragraph 7 ('An application for approval of a plan of work shall be accompanied by an assessment of the potential environmental impacts of the proposed activities and by a description of a programme for oceanographic and baseline environmental studies in accordance with the rules, regulations and procedures adopted by the Authority.'). LOSC article 206 also requires environmental assessment ('When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205.')

has not been required for prospecting or exploration,[374] and concerns have been expressed that mining companies have not been forthcoming with regard to environmental review obligations that they already have.

To effectuate the international community's rights and duties, the right to access information must be accompanied by a process to make the EIA available for review and comment by interested states. (Although this paper focuses on obligations owed to states, civil society is a partner in implementing public interest rights and therefore transparency and participation measures should logically include civil society.) The ISA's draft framework for exploitation regulations contemplates public participation in the environmental review process, in sections addressing the contents and processing of applications for exploitation. The scope of participation is not yet defined; commentary in the draft framework suggests that 'mankind as a whole has, arguably, a vested interest' but also that practicalities of 'procedure, timings and costs' should be considerations.[375] An earlier ISA study generally referred to consultation with 'interested parties and stakeholders', while not prescribing the nature of the consultation or of the parties consulted.[376]

Notice of a proposed project is the first step, once the right to participate is established. Publishing the EIA on the ISA website could be considered constructive notice, shifting the burden to interested states to pay attention.

Although the ISA's discussion of exploitation regulations emphasizes transparency, its commitment to access is ambiguous and limited by confidentiality requirements in its procedural rules for its subsidiary bodies – particularly the Legal and Technical Commission.[377] For example, while observers are permitted to attend Assembly and Council meetings except when the meetings are private,[378] the Finance Committee and the Legal and Technical Commission meet in private.[379] These two bodies have crucial roles, particularly the Legal and Technical Commission (LTC), which makes recommendations to the Council on a range of critical issues including the work plans for activities that form the agreement between mining companies and the ISA, and which is charged with preparing 'assessments of the environmental implications of activities in the Area' under LOSC, article 165(2)(d).

The Convention itself includes several provisions addressing confidential information. For example, LOSC, article 163, states that members of the commissions, 'shall not disclose, even after the termination of their functions, any industrial secret, proprietary data which are transferred to the Authority in accordance with Annex III [Basic Conditions of Prospecting, Exploration and Exploitation], article l4, or any other confidential information coming to their knowledge by reason of their duties for the Authority'; article 168 applies a similar provision to Secretariat members.[380] Applications for activities in the Area are required to include 'information relating to mapping, testing, the density of polymetallic nodules and their metal content,' some of which may be considered subject to these confidentiality restrictions contained in the LOSC.[381] However, Annex III, article 14, paragraph 2 states that 'data necessary for the formulation by the Authority of rules, regulations and procedures concerning protection of the marine environment and safety, other than equipment design data, shall not be deemed proprietary.'

---

374 ISBA/16/LTC/7. See ISA Technical Study no. 10 (2012).

375 ISA, *Developing a Regulatory Framework for Mineral Exploitation in the Area* (2015) at p. 18.

376 ISA, Technical Study no. 10 (2012) at p. 18.

377 ISA, Rules of Procedure of the Legal and Technical Committee, Rule 6 ('The meetings of the Commission shall be held in private unless the Commission decides otherwise.'); Rule 11, the oath required of members ('I shall not disclose, even after the termination of my functions, any industrial secret, proprietary data which are transferred to the Authority in accordance with the Convention and the Agreement, or any other confi dential information coming to my knowledge by reason of my duties for the Authority.'); Rules 12 and 13 which re-state the Rule 11 confidentiality and provide for its enforcement; Rule 53(4) ('the Commission may determine that [presence of ISA members and entities working in the Area] be limited at certain stages when confidential information is being discussed').

378 ISA, Rules of Procedure of the Assembly, Rule 43; Rule 82; Rules of Procedure of the Council, Rule 39, Rule 75.

379 ISA, Rules of Procedure of the Finance Committee, Rule 31.

380 Because of the legal significance of the provisions contained in the LOSC, the relevant article is reproduced here:

> Article 14 - Transfer of data
>
> 1. The operator shall transfer to the Authority, in accordance with its rules, regulations and procedures and the terms and conditions of the plan of work, at time intervals determined by the Authority all data which are both necessary for and relevant to the effective exercise of the powers and functions of the principal organs of the Authority in respect of the area covered by the plan of work.
>
> 2. Transferred data in respect of the area covered by the plan of work, deemed proprietary, may only be used for the purposes set forth in this article. Data necessary for the formulation by the Authority of rules, regulations and procedures concerning protection of the marine environment and safety, other than equipment design data, shall not be deemed proprietary.
>
> 3. Data transferred to the Authority by prospectors, applicants for contracts or contractors, deemed proprietary, shall not be disclosed by the Authority to the Enterprise or to anyone external to the Authority, but data on the reserved areas may be disclosed to the Enterprise. Such data transferred by such persons to the Enterprise shall not be disclosed by the Enterprise to the Authority or to anyone external to the Authority.

381 LOSC, Resolution II Governing Preparatory Investment in Pioneer Activities Relating to Polymetallic Nodules, para. 3(a).

The current presumption that the work of the LTC is confidential excludes non-members of the Commission – some members of the International Seabed Authority, observer states and civil society – from the decision making process. Stakeholders commenting on ISA's development of exploitation regulations criticized the LTC'S lack of transparency.[382]

A central concern addressed by the LTC confidentiality rule – common to commercial activities affecting public natural resources that are subject to public participation and transparency requirements – is that valuable commercial information should be protected. This may be justified by the commercial entities' desire to protect information for business reasons, and some information may not be relevant to environmental stewardship.[383] However, there are remarkably few definitions of what constitutes secret, proprietary information.[384] The following definition is provided in ISA Technical Study No. 10:

Confidential information: Details of classified information relating to a manufacturing or industrial process or trade secret used in carrying on or operating any particular undertaking or equipment or information of a business or financial nature in relation to the proposed activity...[385]

Stakeholder comments from the UK and France observed that some information might be protected as confidential.[386] Comments from the MIDAS (Managing Impacts of Deep-sea Resource Exploitation) Project were the most explicit as to the type of information that should be considered confidential:

Commercial information such as nodule abundance and composition should only be made public with due consideration for each stakeholder's individual position. Clearly information that is confidential from a strategic or marketing perspective should be respected as such and clear undertakings should be given that confidentiality will be respected. In most instances the compilation of pooled information will avoid the risk of individual breaches of confidentiality. One would prefer a situation where pooled information on all four aspects of the survey be made public without isolating individual organizations or stakeholders for comment.[387]

On the other hand, commercial confidentiality, unless it is narrowly construed, is inconsistent with the purpose and obligation of EIA.[388] The ISA's EIA draft template includes a provision that seems contrary to the guidance of the Advisory Opinion:

Confidential information: Details of classified information relating to a manufacturing or industrial process or trade secret used in carrying on or operating any particular undertaking or equipment or information of a business or financial nature in relation to the proposed activity should be clearly defined. Such information would be classified as 'confidential information' and excluded from the EIS before the document is made available for public review.[389]

The ISA recognizes that the Exploration Regulation approach to confidential information may not be suitable for the exploitation context. It notes, in the framework report, that some stakeholders have called for a presumption that all data is public unless demonstrated otherwise, and refers to the Extractive Industries Transparency Initiative as an example of the trend toward greater disclosure in the industry more generally.[390]

---

382 IUCN, Comments on ISA Stakeholder Survey; World Wildlife Fund, Comments on ISA Stakeholder Survey, available at: http://www.isa.org.jm/survery/March-2014/stakeholder-responses.

383 A limited exception is provided in Article 4(4) of the (Aarhus Convention). Industry's concern is noted in ISA, Technical Study no. 10 (2012) at p. 32 (ISA Technical Study no. 10).

384 The US defines it as information that is 'exempt from public disclosure pursuant to the Freedom of Information Act, 5 U.S.C. § 552(b)(4) and 10 C.F.R. § 2.790(a)(4)'. This is based on the Trade Secrets Act, 18 U.S. Code § 1839(3),

> 'the term "trade secret" means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if—
>
> (A) the owner thereof has taken reasonable measures to keep such information secret; and
>
> (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, the public'.

385 ISA Technical Study no. 10 at p. 28.

386 UK; IFREMER (French Research Institute for the Exploitation of the Sea) advised on-line publication of EIS 'while taking into account confidentiality and proprietary considerations related to mining operations.' Comments on ISA Stakeholder Survey, available at: http://www.isa.org.jm/survery/March-2014/stakeholder-responses.

387 The MIDAS Project describes itself as 'a unique combination of scientists, industry, social scientists, legal experts, non-governmental organisations and small and medium enterprises. MIDAS Comments on ISA Stakeholder Survey, available at: http://www.isa.org.jm/survery/March-2014/stakeholder-responses.

388 Transparency and participation issues apply equally to the review and approval of contracts for exploitation; that is not the focus of this paper.

389 ISA, Technical Study no. 10 (2012) at p. 28.

390 International Seabed Authority, Developing a Regulatory Framework for Mineral Exploitation in the Area: Report to Members of the Authority and All Stakeholders (March 2015) at pp. 33, 42.

The statement that shifting the presumption to transparency would not apply to confidential information and data undercuts these statements.[391] The ISA proposes to address this as a high-level issue.

The ISA has options that balance these two interests. For example, it is possible to require disclosure of information relevant to environmental impacts in the Area from the proposed activities while allowing irrelevant confidential information to be redacted from documents made available to the general public; in such a case, at a minimum, any omitted information should be identified in the EIA as to its nature and the reason it is withheld.[392] The Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, Regulation 7, provides for this: 'data and information relating to the protection and preservation of the marine environment, in particular those from environmental monitoring programmes, shall not be considered confidential' – but the apparent transparency is negated because the regulation allows a three-year period of nondisclosure.[393] Timeliness of disclosure is also essential. ISA Regulations also allow non-disclosure of the coordinates of a prospecting/exploration area.[394] Similar provisions are found in exploration contracts and regulations for other minerals. This type of restriction would interfere with international community oversight of exploitation approvals.

While neither the Convention nor the ISA procedures explicitly require that other stakeholders should be informed, the ISA has stated that it will 'facilitate public participation in accordance with Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998.'[395]The public participation model used to develop exploitation regulations addresses contractors, international organizations, non-government organizations, scientific institutions and universities, private entities, and individuals;[396] non-party states are not identified as a category, but could presumably participate along with these other groups.

For LOSC parties, disputes over enforcement of environmental review may be pursued at one of the mandatory dispute settlement forums required by the Convention: ITLOS, the ICJ, or an arbitral tribunal, depending on the declarations made by the parties.[397] For non-parties, jurisdiction of a court or arbitral tribunal would require other treaty commitments or it will not exist. Otherwise, there is no mandatory dispute settlement mechanism to enforce customary international law and obligations *erga omnes*.[398]

CONCLUSION

The emergence of the *erga omnes* principle, further developed by the Seabed Disputes Chamber of the ITLOS, has implications for other areas of international law, including other areas of environmental law and *jus cogens*. The Deep Seabed Advisory Opinion makes an association of the common heritage nature of the deep seabed resources with the doctrine of *erga omnes* obligations, a logical and eminently appropriate application of the doctrine. This paper has shown international law's evolving recognition that certain legal obligations to protect the environment are owed to the international community as a whole – particularly through decisions of the ICJ and ITLOS and the analytical work of the ILC. It has argued that the obligations extend beyond compensation for environmental harm to measures that will prevent harm, of particular importance in the fragile deep sea region. It has considered whether the obligations defined in the Advisory Opinion extend to non-LOSC parties and concluded that they do. Thus it follows that measures intended to prevent environmental damage from deep sea mining, such as EIAs prepared in advance of the exploration or exploitation of the deep seabed, should include notice to interested representatives of the international community, as well as right of review, comment and consideration.

---

391 Ibid. at p. 33.

392 This would be consistent with the Aarhus Convention, Article 4(6) and with domestic jurisdictions such as NEPA practice in the US. County of San Diego v. Babbitt, 847 F.Supp. 768, at 777 (US District Court, S.D. California,1994) (finding that documents such as sub-leases containing commercial information that were not relevant to the consideration of environmental impacts of the project did not need to be disclosed); US National Park Service guidance: 'If documents and materials are determined to be privileged or protected, the index of record must identify the documents and materials, reflect that they are being withheld, and state on what basis they are being withheld.' Available at: http://www.nature.nps.gov/protectingrestoring/DO12Site/tabs/tab5.htm.

393 Annex to ISBA/19/C/17 (2013); see also Regulations 36 and 37, Ibid.

394 ISA, Technical Study no. 10 (2012) at p. 32.

395 International Seabed Authority, Developing a Regulatory Framework for Mineral Exploitation in the Area: Stakeholder Engagement (February 2014), p. 10.

396 International Seabed Authority, Developing a Regulatory Framework for Mineral Exploitation in the Area: Report to Members of the Authority and All Stakeholders (March 2015), p. 2.

397 LOSC, Parts XI, section V; XV

398 Rudiger Wolfrum, Enforcing Community Interests Through International Dispute Settlement: Reality or Utopia? in From Bilateralism to Community Interest: Essays in Honour of Bruno Simma at 1138 (discussing ICJ rejection of 'a right resident in any member of the community to take legal action in vindication of a public interest' in the *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa))*.

Brunnée describes developments in international law that protect global commons, common concerns, and common heritage as 'against the grain of the foundational structures of international law,'[399] which are rooted in the Westphalian system of sovereignty. As yet, there is not a robust practice in international law of successful claims and other measures taken by states to protect the global commons. The Advisory Opinion's importance to legal recognition of the international community's common interests is that it adds a bit of mud to the straws provided by the ICJ dictum in the Barcelona Traction case, its analysis in the Nuclear Tests case, and the implied support for collective treaty claims in Whaling in the Antarctic to make a solid brick in the structure of international law. The ILC encouraged this development of law of community interests in commenting that,

> In case of breaches of obligations under article 48, it may well be that there is no State which is individually injured by the breach, yet it is highly desirable that some State or States be in a position to claim reparation, in particular restitution. In accordance with paragraph 2 (b), such a claim must be made in the interest of the injured State, if any, or of the beneficiaries of the obligation breached. This aspect of article 48, paragraph 2, involves a measure of progressive development, which is justified since it provides a means of protecting the community or collective interest at stake.[400]

It remains to be seen whether states have the will to assert the interests of the international community.

---

399 Brunnée at 553.
400 ILC at 127.

BIBLIOGRAFÍA

Salvatore Arico & Charlotte Salpin, Bioprospecting of Genetic Resources in the Deep Seabed: Scientific, Legal and Policy Aspects (UNU-IAS, 2005).

Michael Balter, Archaeologists say that the 'Anthropocene' is here - but it began long ago, 340 Science 261-262 (2013)

F. Biermann, K. Abbott, S. Andresen, K. Bäckstrand, S. Bernstein, M. M. Betsill, H. Bulkeley, B. Cashore, J. Clapp, C. Folke, A. Gupta, J. Gupta, P. M. Haas, A. Jordan, N. Kanie, T. Kluvánková-Oravská, L. Lebel, D. Liverman, J. Meadowcroft, R. B. Mitchell, P. Newell, S. Oberthür, L. Olsson, P. Pattberg, R. Sánchez-Rodríguez, H. Schroeder, A. Underdal, S. Camargo Vieira, C. Vogel, O. R. Young, A. Brock, R. Zondervan, Navigating the Anthropocene: Improving Earth System Governance, 335 Science 1305-06 (20XX).

P. Birnie, A. Boyle and C. Redgwell, International Law and the Environment (2009).

Jutta Brunnée, Common Areas, Common Heritage, and Common Concern, in The Oxford Handbook of International Environmental Law (D. Bodansky, J. Brunnée, and E. Hey, eds., Oxford 2007).

Abram Chayes and Antonia Handler Chayes, The New Sovereignty (Harvard University Press, 1995).

Commission on the Limits of the Continental Shelf, Rules of Procedure, CLCS/40/Rev.1 (2008).

Lisa W. Drew, The Promise and Perils of Seafloor Mining: Can minerals be extracted from the seafloor without environmental impacts? 47:3 Oceanus (2009), Originally published online November 20, 2009, available at: https://www.whoi.edu/oceanus/feature/the-promise-and-perils-of-seafloor-mining.

Duncan French, From the Depths: Rich Pickings of Principles of Sustainable Development and General International Law on the Ocean Floor—the Seabed Disputes Chamber's 2011 Advisory Opinion, The International Journal of Marine and Coastal Law (2011) 525–568.

Jochen A Frowein, Obligations *erga omnes*, Max Planck Encyclopedia of Public International Law (2008).

Laurent Godet, Kevin A. Zelnio, and Cindy L. Van Dover, Scientists as Stakeholders in Conservation of Hydrothermal Vents, 25:2 Conservation Biology 214-222 (2011).

Garrett Hardin, The Tragedy of the Commons, 162 Science 1243-1248 (1968).

IFREMER (French Research Institute for the Exploitation of the Sea) advised on-line publication of EIS 'while taking into account confidentiality and proprietary considerations related to mining operations.' Comments on ISA Stakeholder Survey, available at: http://www.isa.org.jm/survery/March-2014/stakeholder-responses.

Institut de Droit International, Resolution on Obligations *erga omnes* in international law (2005).

International Law Commission, Report of the International Law Commission on the Work of its 66th Session, UN Doc A/69/10 (2014).

International Law Commission, Report of the International Law Commission on the Work of its 53rd Session, UN Doc A/56/10, Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected (Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries) (2001).

International Law Commission, First Report on the Protection of the Atmosphere, UN Doc. A/CN.4/667 (2014).

ILC Transboundary Watercourses, commentary

International Marine Minerals Society, Code for Environmental Management, published by the ISA, Rules of Procedure of the Legal and Technical Committee.

ISA, Rules of Procedure of the Assembly.

ISA, Rules of Procedure of the Council.

ISA, Rules of Procedure of the Finance Committee.

International Seabed Authority, ISBA/16/LTC/2 (2010))

ISBA/16/LTC/7.

ISBA/19/C/17 (2013), Annex.

International Seabed Authority, Technical study; no. 10: Environmental management needs for exploration and exploitation of deep sea minerals: report of a workshop held by the International Seabed Authority in collaboration with the Government of Fiji and the SOPAC Division of the Secretariat of the Pacific Community in Nadi, Fiji, from 29 November to 2 December, 2011 (2012).

International Seabed Authority, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area; Regulations on prospecting and exploration for polymetallic sulphides in the Area and Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area. See http://www.isa.org.jm/en/mcode.

International Seabed Authority, Decision of the Council of the International Seabed Authority relating to the summary report of the Chair of the Legal and Technical Commission, ISBA/20/C/31 (2014).

International Seabed Authority, Developing a Regulatory Framework for Mineral Exploitation in the Area: Stakeholder Engagement (February 2014).

International Seabed Authority, Developing a Regulatory Framework for Mineral Exploitation in the Area (March 2015).

IUCN, Comments on ISA Stakeholder Survey, available at: http://www.isa.org.jm/survery/March-2014/stakeholder-responses.

Aline Jaeckel, An Environmental Management Strategy for the International Seabed Authority? The Legal Basis, 30 The International Journal of Marine and Coastal Law 1-27 (2015).

Lockheed Martin press release (14 March 2013) http://www.lockheedmartin.com/uk/news/press-releases/2013-press-releases/uk-government-sponsors-lockheed-martin-uk-subsidiary-for-licence.html

Bonnie J. McKay, The Ocean Commons and Community, 74 Dalhousie Review310 (1994-1995).

Kathryn J. Mengerink, Cindy L. Van Dover, Jeff Ardron, Maria Baker, Elva Escobar-Briones, Kristina Gjerde, J. Anthony Koslow, Eva Ramirez-Llodra, Ana Lara-Lopez, Dale Squires, Tracey Sutton, Andrew K. Sweetman, Lisa A. Levin, A Call for Deep-Ocean Stewardship, 344 Science 696, 697 (2014).

Laurent Godet, Kevin A. Zelnio, and Cindy L. Van Dover, Scientists as Stakeholders in Conservation of Hydrothermal Vents, 25:2 Conservation Biology 214-222 (2011).

Hugo Grotius, The Free Sea (David Armitage, ed., Richard Hakluyt, trans. Liberty Fund: Indianapolis 2004.)

Alexis Khripounoff, Jean-Claude Caprais, Philippe Crassous and Joël Etoubleau, *Geochemical and biological recovery of the disturbed seafloor in polymetallic nodule fields of the Clipperton-Clarion Fracture Zone (CCFZ) at 5,000-m depth*, 51(5) Limnol. Oceanogr., (2006) 2033–2041

Makgill, R. and Linhares, AP., 'Deep Seabed Mining - Key Obligations in the Emerging Regulation of Exploration and Development in the Pacific', in Warner, R. and Kaye, S. (eds.) Routledge Handbook of Maritime Regulation and Enforcement (forthcoming).

MIDAS Comments on ISA Stakeholder Survey, available at: http://www.isa.org.jm/survery/March-2014/stakeholder-responses.

James Nafziger & Tullio Scovazzi, eds, The Cultural Heritage of Mankind (Hague Academy of International Law – Centre for Studies and Research in International Law and International Relations, Brill 2008).

Nautilus Minerals website at: http://www.nautilusminerals.com/s/Clarion-Clipperton.asp.

John E. Noyes, The Common Heritage of Mankind: Past, Present, and Future, 40 DENV. J. INT'L L. & POL'Y 447 (2012).

Elinor Ostrom, A diagnostic approach for going beyond panaceas, PNAS, vol. 104 no. 39, 15181–15187 (2007).

Bernard H. Oxman, The Territorial Temptation: A Siren Song at Sea, 100 Am. J. Int'l L. 830, note 47 (2006).

Arvid Pardo, Thirteenth Statement to the Committee on the Peaceful Uses of the Seabed and the Ocean Floor, 23 March 1971 in The Common Heritage: Selected Papers on Oceans and World Order 1967-1974 (Malta University Press 1975)

Cymie R. Payne, Proceedings of the Annual Meeting (American Society of International Law) Vol. 105, (March 23-26, 2011), pp. 66-66c.

Cymie R. Payne, ICJ Halts Antarctic Whaling – Japan Starts Again, 4:1 Transnational Environmental Law 181-19 (2015).

George (Rock) Pring and Catherine (Kitty) Pring, Greening Justice: Creating and Improving Environmental Courts and Tribunals (2009)

Rockström, J., W. Steffen, K. Noone, Å. Persson, F. S. Chapin, III, E. Lambin, T. M. Lenton, M. Scheffer, C. Folke, H. Schellnhuber, B. Nykvist, C. A. De Wit, T. Hughes, S. van der Leeuw, H. Rodhe, S. Sörlin, P. K. Snyder, R. Costanza, U. Svedin, M. Falkenmark, L. Karlberg, R. W. Corell, V. J. Fabry, J. Hansen, B. Walker, D. Liverman, K. Richardson, P. Crutzen, and J. Foley *Planetary boundaries: exploring the safe operating space for humanity*. Ecology and Society 14(2): 32 (2009), [online] URL: http://www.ecologyandsociety.org/vol14/iss2/art32/; updated by Steffen et al. Planetary Boundaries: Guiding human development on a changing planet. Science, January 2015.

Barry Sadler, International Study of the Effectiveness of Environmental Assessment (Canadian Environmental Assessment Agency & International Association for Impact Assessment,1996).

Peter H. Sand, 'Public Trusteeship for the Oceans', in Tafsir M. Ndiaye & Rüdiger Wolfrum (eds.), Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah (Martinus Nijhoff Publishers 2007)

Peter H. Sand, Environmental Damage Claims from the 1991 Gulf War: State Responsibility and Community Interests in From Bilateralism to Community Interest.

Peter H. Sand, 'Scientific Whaling': Whither Sanctions for Non-Compliance with International Law? 19 Finnish Yearbook of International Law 93-124 (2011)

Philippe Sands, Principles of International Environmental Law 189 (Cambridge 2d ed. 2007).

Carolyn Searce, Hydrothermal Vent Communities, CSA Discovery Guides (CSA 2006), available at: http://www.csa.com/discoveryguides/vent/review.pdf.

John Selden, Mare Clausum: Of the Dominion, or, Ownership of the Sea (Lawbook Exchange ed. 2014).

Yuval Shany, No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary, 20 EJIL 73, 81-81 (2009)

Christian J. Tams, Individual States as Guardians of Community Interests, in From Bilateralism to Community Interest: Essays in Honour of Bruno Simma (U. Fastenrath, R. Geiger, D.-E. Khan, A. Paulus, S. von Schorlemer, and C. Vedder, eds., Oxford 2011).

Mary Turnipseed, Michael C. Blumm, Duncan E.J. Currie, Kristina M. Gjerde, Peter H. Sand, Mary C. Wood, Julie A. Hambrook Berkman, Ryke Longest, Gail Osherenko, Stephen E. Roady, Raphael D. Sagarin, Larry B. Crowder, 'Using the Public Trust Doctrine to Achieve Ocean Stewardship' in, Rule of Law for Nature - New Dimensions and Ideas in Environmental Law (Christina Voigt, (ed.) Cambridge University Press, *forthcoming*).

United Nations Conference on Environment and Development, Rio de Janiero, Brazil, June 3-4, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (August 12, 1992), http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.

UNEP, Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach (2004).

UN General Assembly Resolution 2749 (XXV) of 17 December 1970.

UN General Assembly Resolution 43/53, Protection of global climate for present and future generations of mankind (1988).

US Trade Secrets Act, 18 U.S. Code § 1839(3).

Cindy Lee Van Dover, Tighten Regulations on Deep-Sea Mining, 470 Nature 31-33 (2011).

Cindy Lee Van Dover, Depths of Ignorance, 14:9 Discover 37-39 (1993).

Rudiger Wolfrum, Enforcing Community Interests Through International Dispute Settlement: Reality or Utopia? in From Bilateralism to Community Interest: Essays in Honour of Bruno Simma (2011).

World Wildlife Fund, Comments on ISA Stakeholder Survey, available at: http://www.isa.org.jm/survery/March-2014/stakeholder-responses.

Oran R. Young, Leslie A. King, and Heike Schroeder, 'Summary for Policy Makers,' in Institutions and Environmental Change: Principal Findings, Applications, and Research Frontiers, xiii (MIT Press: Cambridge, MA 2008).

COURT DECISIONS

Gabčikovo-Nagymaros Project (Hung v Slov), 1997 ICJ Rep. 7, sep op Weeramantry.

Fisheries Jurisdiction case (United Kingdom v. Iceland)

Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain) [1970] I.C.J. Rep. 3

Nuclear Tests case (New Zealand v. France), Interim Measures, [1973] I.C.J. Rep. 135

Nuclear Tests (New Zealand v. France), Judgment, [1974] I.C.J. Rep. 457

Pulp Mills on the River Uruguay (Argentina v. Uruguay) Merits, Judgment, I.C.J. Reports 2010

Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening), Judgment, 31 Mar. 2014.

Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening), Judgment, 31 Mar. 2014, Separate Opinion of Judge Cançado Trindade, para. 71, available at: http://www.icj-cij.org/ docket/index.php?p1=3&p2=1&case=148&code=aj&p3=4

Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening), Judgment, 31 Mar. 2014, Separate Opinion of Judge Sebutinde.

Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, Case No. 17, Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, International Tribunal for the Law of the Sea (Feb. 1, 2011).

Appellate Body Report, United States-Import Prohibition on Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Nov. 6, 1998).

Lac Lanoux Arbitration, UNRIAA, vol. XII (Sales No. 63.V.3), pp. 281 et seq. (original French text).

East Timor (Portugal v Australia), ICJ.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (*Advisory Opinion*), ICJ.

US. County of San Diego v. Babbitt, 847 F.Supp. 768, at 777 (US District Court, S.D. California,1994)

TREATIES

Aarhus Convention

Montreal Protocol

Basel Convention

United Nations, The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index, Final Act of the Third United Nations Conference on the Law of the sea, Introductory Material on the Convention and Conference, U.N. Pub. Sales No. E.83.V.5 (1983).

1992 United Nations Framework Convention on Climate Change, preamble.

1972 UNESCO Convention on the Protection of the World Cultural and Natural Heritage.

Agreement Governing the Activities of States on the Moon and Other Celestial Bodies.

1997 Universal Declaration on the Human Genome and Human Rights.

3.2. Strategic Environmental Assessment: The role of the Judiciary in its Implementation

Gustavo Rinaldi y Guillermo Hernán Marchesi

Key Words

Strategic Environmental Assessment. Enforcement. Planning. Role of the Judiciary.

An increase in social and environmental conflicts has been evidenced in recent times.

Certain social groups with greater conscience of the problematic, are increasingly calling upon the Judiciary seeking solutions to the challenges that affect them. Consequently, to a certain degree the Judicial Power is required to broaden its knowledge regarding specific instruments for environmental management.

Judges have a first degree role in enforcement of new instruments that despite having potential for environmental conflict prevention are not duly implemented by political bodies.

The analysis is centered in strategic environmental assessment as a key tool for environmental policy management. The relevance of this instrument lies in its capacity to gather environmental facts and knowledge for the adoption of policies, plans and programs, even when these are not necessarily focused on environmental protection. At the same time, the strategic environmental assessment has virtues or positive attributes in the context of sustainability and improvement of the decision making process, in the early identification and prevention of potential conflict and furthermore for development planning.

Given strategic environmental assessment in essence places limits on the executive power, it is considered that in the majority of cases, within the Republican balance, the judicial powers of the region will face the challenge of granting citizen protections through the effective implementation of this instrument.

Finally, it is important to recall the relevance of this instrument in the management of shared natural resources, by highlighting European Community Law in the framework of the adoption of the Kiev Protocol to the Espoo Convention on strategic environmental assessment on May 21, 2003.

Introduction

The "Inter-American Congress on the Environmental Rule of Law" encouraged us to think carefully about the role played by the judiciary in the effective installation of the instruments that the various environmental regulations establish.

First we will see how, for a while now, great jurists of the world like Antonio Herman Benjamin,[401] Ricardo Lorenzetti,[402] and Nestor Cafferatta,[403] among others, have set their sights on the effective implementation of environmental standards as the principle concern in looking toward the future.

On the other hand, based on the idea that "the expansion of the spaces of indeterminacy in the legal system generates a growing litigiousness and a greater role of the judiciary";[404] we will think about how this greater importance is related to the implementation of standards and environmental instruments.

In line with this, we believe that in the lack of development planning and the disregard for the environmental variable lies the genesis of many of the conflicts and environmental disasters that have beset our region in recent times.

---

401 BENJAMIN, Antonio Herman de Vasconcellos, "O estado teatral e a implementacao do direito ambiental" disponible en http://goo.gl/UYF2gS, último ingreso 23.02.2015.

402 LORENZETTI, Ricardo Luis, Cap. IV: "Teorida de la implementación" y Cap. V: "Cumplimiento obligatorio de las normas ambientales ("Enforcement)", en Teoría del Derecho Ambiental, Pag. 97- 159, Editorial La Ley, Buenos Aires, 2008.

403 CAFFERATTA, Nestor A. ""De la efectividad del derecho ambiental", Diario La Ley 02/10/2007, p. 1, Editorial La Ley, Buenos Aires

404 LORENZETTI, Ricardo L., "La decisión juridical en casos constitucionales", LA LEY 01/11/2010 , 1 • LA LEY 2010-F , 702, Cita Online: AR/DOC/7345/2010

We note that in this part of the world[405] it is difficult in itself to find fully implemented processes for the development of plans, policies or programs, and what is even more complicated is that these few consider the environment and sustainability only as aspects to keep in mind when making a decision.

Strategic Environmental Assessment is a tool that is included within the regulatory systems of many countries of our region to change that reality. It has a great potential for preventing environmental damage and reducing socio-environmental conflicts, although it is still under development, evolution, and definition.

Its intrinsic characteristics related to transparency in decision-making, the expansion of rights, and access to information make its reception by public policy decision-makers not a simple task.

We do not presume they act in poor faith, so we consider that this reluctance is due to ignorance of the positive potential of the instrument.

However, as long as they are not aware of it and until they begin to implement environmental instruments "voluntarily," we have to think about the role of the judiciary in the implementation of the decision-making processes.

1. The effective implementation of environmental law

The maturation of the social, cultural, political, economic and legal changes arising from the emergence of the environmentalism is the opposite of an easy ride, uphill, interrupted, linear and free of conflicts.

We still have not overcome the idea of competition between economic development and environmental protection. In that field, the war of words is uneven, especially in a context colored by capitalist consumerism, with constant cyclical economic crises and many societies marked by structural poverty, with the most basic needs going totally unmet.

The strong efforts made in recent years to study, develop and implement the principle of non-regression in environmental rights,[406] is another sign of the necessary resistance to fluctuations in the levels of recognition of this right, generally linked to economic conditions.

---

405 Sobre la similitud de los procesos de desarrollo, retrocesos y problemas de la cuestiones ambientales recomendamos la lectura del excelente trabajo de Antonio Herman BENJAMIN, "A proteção do meio ambiente nos países menos desenvolvidos: o caso da América Latina" disponible en http://bdjur.stj.jus.br/xmlui/handle/2011/31509, último ingreso 01/03/2015.

406 PRIEUR Michel, "Princípio da proibição de retrocesso ambiental", published in Princípio da proibição de retrocesso ambiental, Edited by Comissão de Meio Ambiente, Defesa do Consumidor e Fiscalização e Controle del Senado Federal de Brasil, Brasília (DF), p. 11.; DE ARAUJO AYALA, Patrick, "Mínimo existencial ecológico e proibicao de retrocesso em matéria ambiental: consideracoes sobre a inconstitucionalidades do Código do Meio Ambiente de Santa Catarina", in Revista de Direito Ambiental, Ed.: Revista dos Tribunais, Sao Paulo, Brasil, 2010, Nº 60, p. 341. SARLET, Ingo Wolfgang, "Breves consideracoes sobre os deberes de protecao do estado e a garantia da proibicao de retrocesso em matéria ambiental", in Revista de Directo Ambiental, Ed.: Revista dos Tribunais, Sao Paulo, Brasil, Nº 58, 2010 p. 41.; BERROS, Valeria, "Construyendo el principio de no regresión en el Derecho argentino", JA, 2011- IV, fasc. N. 13, p. 4.; SOZZO, Gonzalo: "El principio de no regresión del derecho ambiental en el camino de la Conferencia de Río + 20", JA, 2011, IV, fascículo n. 13, p. 58; PEÑA CHACON, Mario, "Desarrollo jurispruden cial del principio de no regresión del derecho ambiental en Costa Rica", available at: www.academia.edu/5880375/Desarrollo_jurisprudencial_del_principio_de_no_regresion_del_derecho_ambiental_en_Costa_Rica, last accessed January 3, 2015; CAFFERATTA, Néstor A. "La reformulación del principio de progresividad" in RDAmb N° 31, Abeledo Perrot, Buenos Aires, 2012.

Reality hits us day after day and shows us that the environmental issue is far from being a principal concern in the states of the countries of the region.

The sirens' song is the possibility of becoming powerful and developed countries, with wealth generated by the exploitation of natural comparative advantages enjoyed by the region, whether that is oil, forests, water, glaciers, biodiversity, etc.

To this we ask the question: How free is a nation to decide rationally and with sovereignty concerning the use of resources when its people are going through extreme poverty and inequality? What freedom of choice will it have in discerning that in conceding to the exploitation of its natural resources, the door is opened to large amounts of foreign exchange that can serve to equalize the disadvantage of its inhabitants?

Is there an advantage to this state of necessity on the part of states which would result in unjustified economic advantages in their favor?

It is clearly an exaggeration on our part trying to translate the theory of subjective damage from the civil sector to this first part of the research project, but, despite being a mere provocation, we do not seem to be too far from what happens in practice.

The truth is we cannot accuse our representatives of not taking into account the necessary intervention of public power to regulate the exploitation of environmental elements. There is a proliferation in all of the states in the region of an immeasurable quantity of regulations that aim to deal with environmental issues.

But that is not enough.

Although we do note that, at the policy level, the recognition of environmental rights, the establishment of praiseworthy protective objectives, and the outline of numerous instruments for prosecution are important steps in the matter, the truth is that it is not enough.

The big step to take in this maturation process towards the establishment of Socio-Environmental State of Law is the transition from mere programmatic declamation and legislative voluntarism toward effective implementation and enjoyment of environmental rights.

2. The role of the judiciary in environmental protection

In the course outlined above, undoubtedly the role of the judiciary is crucial. The first stage of development of the Theory of Environmental Law dedicated some time to the description of the characteristics that the Environmental Justice must possess.[407]

And there we find countless duties and definitions of this new profile of the judge, where current times require the existence of socially engaged judges, justices of support and protection.[408]

In environmental law, the judge's task is more difficult because they must resort to a "prima facie" legal structure that takes precedence over traditional systems of law and the positive local law itself. Thus, judges face a disturbing challenge.[409] In an excellent article, Pablo Lorenzetti makes a very good description of the theories which have been underpinning the performance of judges on environmental issues.

And we decidedly use their expressions for what we try to express as a contribution in this work, in relation to what the role of the judiciary in environmental protection should be.

---

407 CAFFERATTA, Néstor A.: "Daño ambiental colectivo y proceso civil colectivo" Ley 25675", in Revista de Responsabilidad civil y Seguros, Year V, Nº II, March - April 2003, p. 51, Editorial La Ley, Buenos Aires 2003 ; LORENZETTI, Ricardo L., "Reglas de solución de conflictos entre propiedad y medio ambiente", LA LEY 1998-A, 1024, Editorial La Ley, Buenos Aires 1998.

408 The Supreme Court of Justice of Argentina in the "Mendoza" sentencing on sanitation in the Matanza Riachuelo basin indicated: "The Supreme Courty of Justice of the Nation should make use of the instructive powers of Art. 32 of law 25.675, to learn from where the claim originated with the intention of repairing the environment and making up for collective damage—in case, due to the dumping of hazardous waste in the waters of the Matanza-Riachuelo basin—if the demand does not show the court key aspects about the case in question, since it deals with a good belonging to the social sphere—whose improvement or degradation affects the whole population—the judges should act with particular energy to enforce the constitutional mandates related to the matter —Article 41, National Constitution" . (Supreme Court of Justice of the Nation. "Mendoza, Beatriz S. and others c. the State and others." June 20, 2006. Published in: LA LEY 11/07/2006, 4, Fallos Corte: 329:2316.

409 SAUX, EDGARDO y MULLER Enrique. "El Rol del Juez en Materia Ambiental", disponible en http://www.acaderc.org.ar/doctrina/articulos/el-rol-del-juez-en-materia-ambiental, último ingreso 1/03/2015

Quoting the words of SAGER, Pablo Lorenzetti says that

> the author finishes leaning toward the idea of strengthening the capacities of the judge and giving him the ability to interpret constitutional provisions in a free but responsible way, using his own values and applying principles. The author's idea is clear: to give greater responsibility to judges when they complement and render operational the general constitutional provisions. For this to happen, it requires that we necessarily have certain freedoms. The Constitution is not written as a tax code, and is not interpreted as if it were.

It continues in the sense that

> the restraint that the judge must have regarding the letter of the law no longer exists, as in the positivist view, whatever that means. The judge must always comply with the letter of the law and when it respects the constitutional guarantees and basic rights. We are witnessing so-called 'judicial activism.' The judge has broad powers in the environmental case that is presented, but must always be framed within the limits of the Constitution. [410]
>
> However, often constitutional principles play a reverse role.
>
> In this way it allows the sentencing to make up for legislative shortcomings or to diverge from the rigid parameters imposed by the cold letter of the law and innovate solutions in the face of difficult, transcendent and urgent problems, to which we dedicate this work. It is not required that the judge favor one party over another under the pretext of environmental protection. The notion of impartiality means that the judge must appear before the litigants and hear their arguments on an equal plane and then evaluate them regardless of their personal desires.[411]

One can clearly discern the aim of an environmental judge and the role of the judiciary in the materialization of instruments of environmental policy and management.

With these skills, the judiciary will be a sort of "attendant" of environmental institutions, trying to lend justice with its decisions in some cases, and in others complement the will of the legislative or public administrative branch in the adoption of measures and the application of instruments of management available for each of the existing laws.

Without the active role of the judiciary to make up for the voluntary and systematic application of environmental management instruments, we will fall into a glaring inefficiency of such instruments and intolerable vulnerability for all, but especially for those who have the least.

Therefore we found very interesting to quickly note the salient qualities of judges in their role as protectors of the environment.

3. Strategic environmental evaluation

As we mentioned at the beginning of this work, a key instrument in environmental management and natural resource use is the Strategic Environmental Assessment.

Currently one of the most significant and complex tasks is to harmonize or reconcile four very sensitive areas in both private management and public administration.

These areas can be summarized as:

---

410 In this regard it is interesting to note what was indicated by the Argentina Cimero Court: "In cases related to the rebuilding of the damaged environment, the Court has decided that the law-making powers, which are expressly recognized by Article 32 of Law 25.675, must be exercised rigorously, because the fact that actions of this nature have been certain law-abiding principles prevailing in the traditional civil process and, in general, have stretched ritual forms, does not make a suitable foundation to allow this sort of thing in the introduction of petitions and pro posals separating from the essectial procedural rules which, if accepted, would eventually turn the judicial process into a lawless action which would frustrate the jurisdiction of the court and the satisfaction of the rights and interests whose protection is sought. *(Supreme Court of Justice of the Nation. "Provincia de La Pampa c. Provincia de Mendoza". March 17, 2009. Published in: La Ley Online. Cita Fallos Corte: 332:582.*

411 Lorenzetti, Pablo "Particularidades de la Sentencia Ambiental: posibilidad de fallar extra y ultra petita y cosa juzgada erga omnes" SJA 12/22/2010, Editorial La Ley, Buenos Aires, Argentina.

Economic growth
Social equity
Environmental conservation
Institutional Transparency

From a theoretical point of view, this means striving to reach the optimal point, namely, that where it is not possible to achieve improvements in one area without producing worsening effects in any of the others. This law of decision-making, incidentally, can also be applied in the evaluation of actions and public and private policies. It is not easy to transform the concept of sustainable development into actions and operational policies. It is also necessary to keep in mind that expanding the boundaries of each of the four areas that make up sustainable development are dynamic, and that, therefore, the concept of optimization should be understood as a continuously varying point. It is not far from the present reality to propose that sustainable development, at present, is a culture more than a science, something which is inserted into the "political" rather than the technical.[412]

From this we can deduce that the Environmental Impact Assessment, as it is used today, is insufficient, as it only considers the environmental impact of individual projects and does not consider alternatives—whether they be by place or process—it does not addresses the dynamic nature of the interactions between environment and development, and it neglects the cumulative impacts.

It should be noted that in the Minimum Budgets Act in Argentina, the Environmental Impact Assessment has been accepted as one of the Instruments of Management and Environmental Policy with which the federal and provincial governments fulfill their missions of environment and resource protection, but in practice it has been observed that it must be supplemented with global preventive tools, and that it address the problem from a preemptive perspective, from the very beginning, in order that the decisions made are the most successful possible.

In this sense, the Strategic Environmental Assessment has been defined as "the formalized, systematic, and global process to assess the environmental impacts of a policy, plan, or program and its alternatives, including the preparation of a written report on the results of the evaluation and the use thereof for the adoption of public policies to which they must be accountable."[413]

As noted in this definition, we are in the area of preventive instruments, which tend to improve decision-making based on studies, analysis and information.

A smart and effective implementation of the Strategic Environmental Assessment can solve current shortcomings in the classic Environmental Impact Assessment, which by itself is not enough as an environmental management mechanism, particularly in relation to: (1) attention to the indirect, cumulative, and synergistic impacts; (2) delineating the physical space and the timeframes in which a project is implemented; (3) lack of adequate attention to the generation and selection of alternatives; (4) failure to consider global impacts such as climate change, desertification, destruction of the ozone layer, etc.[414]

As shown, the principles and methodologies of the Environmental Impact Assessment and the Strategic Environmental Assessment are the same, what varies is the scope of their applications, ranging from micro to macro.

---

412 Del Favero, Gabriel, Katz, Ricardo "La Evaluación Ambiental Estratégica (EAE) y su aplicación a Políticas, Planes y Programas" Estudios Públicos 64 (primavera 1996).

413 Clark, Brian "Alcances y Objetivos de la Evaluación Ambiental Estratégica" Trabajo presentado en el seminario "Aspectos conceptuales y metodológicos para la Evaluación Ambiental Estratégica" Organizado por el Centro de Estudios Públicos 10 y 11 de junio de 1996.

414 United Nations Environment Programme, UNEP "Environmental Impact Assessment Training Resource Manual" Año 2002

The scope in which the Strategic Environmental Assessment develops and operates is defined mainly by the analysis of environmental issues in the framing of high-level strategies, and is closely related to one of the main features of the instrument: to focus on the decision-making process, which means that we are not focused on a decision-making tool but rather we are predominantly looking at the provision of necessary elements so that a decision is inherently environmentally sustainable.[415]

However, we cannot fail to note the resistance that said instrument tends to meet in the public arena.

The conclusions and evaluation (rating) of a Strategic Environmental Assessment are extraordinarily complicated and are the main cause of problems, depending on the character of the judge and jury who preside. The authority is the author of the plan, and at the same time, the authority is the only person authorized to review or evaluate it. This often results in credibility problems before the public. Moreover, the possibility that supposedly independent third parties qualify the benefits or problems of the plans or public policies makes this methodology not well-liked by governments. Another important limitation for the establishment of the Strategic Environmental Assessment limitation is that the preliminary content of certain policies (such as details of central government budgets), plans and programs, can be considered too sensitive to be released to the public prior to approval.[416]

To this we must add that if in the end broad citizen participation is accepted—as such instruments require—political power runs the risk of facing a deliberate and structured rejection by the public, of the decisions of the authority.

In relation to this last comment we must say that public participation in Strategic Environmental Assessments should not be confused with co-government. As with the Environmental Impact Assessments, which are applied to individual projects, public participation should be considered only as additional input that must be appropriately weighed in the final policy decision made by authorities.

Seen in this way, the positive impact that ample space for participation can provide relates to the social validation of decisions achieved, either by providing greater transparency in the decision-making process to other agents (passive validation) or by sharing decision-making power wholly or partly with stakeholders (active validation).[417]

Turning to the policy level, we should mention that there are several precedents in relation to the use of the Strategic Environmental Assessment as an important decision-making tool.

Under the "Fifth community action program on the environment: toward sustainable development" for the period of 1992-2000, an initiative was launched to complete the European Environmental Assessment System, incorporating the analysis of environmental impacts of plans and programs, resulting in the June 2001 decision by the European Parliament and Council for the "Directive 2001/42/EC on the assessment of the effects of certain plans and programs on the environment."

Member states were obliged to transpose the directive into their jurisdictions before 2004, and in this way the Strategic Environmental Assessment was incorporated into their legal system, either through their own national legislation (regulatory transposition) or by applying the Subsidiary Principle, making it compulsory to strategically evaluate the plans and programs which may have significant effects on the environment.

This involves both the proposal of the plans and programs (without considering policy) and any amendments thereto, provided that they relate to the agriculture, forestry, fishery, energy, industry, transportation, waste management, water management, telecommunications, tourism management, urban and rural planning, or land use sectors, and that they establish a framework for future authorization of projects listed in the Environmental Impact Assessment (EIA) Directive. It also regulates those plans and programs that need to be subjected to an evaluation under Articles 6 and 7 of Directive 92/43/EEC on habitats; and for those that establish a framework for future authorization for the implementation of projects other than those included in

---

415 JORQUERA ASTORGA, Eduardo, "Sistema de Evaluación de Impacto Ambiental y Evaluación Ambiental Estratégica en los modelos latino americanos", Programa regional de capacitación en derecho y políticas ambientales Disponible en: http://www.pnuma.org/deramb/novedades.php?menusup=8&menuinf=5

416 Del Favero y Katz, op.cit.

417 RINALDI Gustavo "La Evaluación Ambiental Estratégica" en obra colectiva "La Evaluación de Impacto Ambiental y su régimen jurídico- Análisis del nuevo Paradigma". Dirección: Mauricio Pinto- Líber Martín. 1° Edición. Buenos Aires. Ed. Lajouane 2012.

the EIA Directive (not limited to the aforementioned sectors) and that the member states consider could have significant effects on the environment. Finally, it will not affect those plans and programs whose sole purpose is to serve the interests of national defense and civil protection, as well as financial or budget plans.

The Strategic Environmental Assessment is also present in some more specific areas, such as the Espoo Convention on Environmental Impact Assessment in the transboundary context of the UNECE (United Nations Economic Commission for Europe) or the Antarctic Treaty.

While the above-mentioned Espoo Convention is oriented only to the European territory, it acquires international significance outside of it because it is a pioneer instrument in the treatment of transboundary environmental impact. In that sense Iza says,

> *The Espoo Convention is a milestone in the evolution of international environmental law in relation to preventive instruments. Along with the community directives, it has contributed to the establishment of a regulatory framework for the EIA in a European context wider than the community and not limited to national issues, but also for those beyond state borders. This can be considered a valid reference model for all those blocs of countries that are aiming for the adoption of uniform rules in this area.*
>
> *It also provides that the parties take appropriate measures to prevent, reduce, and control the adverse transboundary impacts on the environment that any project may have, focusing on activities that may generate them in other countries.*
>
> *On May 21, 2003, during the Espoo Convention, the Protocol on Strategic Environmental Assessment was adopted in Kiev, Ukraine, which seeks to develop a series of procedures connected to an exhaustive list: initial environmental assessment, public participation, consultation, transboundary consultations, monitoring, and the importance and relationship of the Protocol on Strategic Environmental Assessment existing policies and legislation.*[418]

4. The judiciary as a necessary actor in the development of democratizing management and environmental policy tools

In the introduction we mentioned, in the words of Ricardo Lorenzetti, the idea of the "expansion of the spaces of indeterminacy in the legal system generates a growing litigiousness and a greater role of the judiciary."

This has been the beacon that has guided our reflections in this work, and the idea we intend to explain as clearly as possible.

Definitely in this struggle between the demand of an informed society concerned about environmental conflict, and the wiggle room that seems to remain for authorities and decision-makers to voluntarily incorporate such instruments, the judicial branch will play a fundamental role.

It will be the judgments that should limit the public power in some cases, and in others mark the way forward so that the rights of citizens to live in a healthy, fit and balanced environment are respected.

The first part is being implemented.

There have already been several judgments from Latin American courts that have described the shortcomings of some of the classic management tools, such as the Environmental Impact Assessment.

---

418 RINALDI, Gustavo, ob. Cit.

...in the words of Ricardo Lorenzetti, the idea of "the expansion of the spaces of indeterminacy in the legal system generates a growing litigiousness and a greater role of the judiciary." This has been the beacon that has guided our reflections in this work, and the idea that we intend to explain as clearly as possible...

As an example we should mention a resolution of the Supreme Court of Argentina, in a case entitled "Salas, Dino and others vs Salta Province and National State RE Amparo." [419]

In the above action, Argentina's highest court clearly commands complementarity in the use of management tools to make them more effective in obtaining useful results.

The case requested the termination of the clearing of vast areas of the Salta Province in Argentina.

This stripping was occurring prior to the authorization granted by the province itself, and after the province had approved the Environmental Impact Assessment processes to which the areas in question were submitted.

In a decision dated March 26, 2009, the Supreme Court states:

> *In this case it has been clearly demonstrated that permits for logging and deforestation were granted taking into consideration the environmental impact of each one, but no study on the cumulative effect of the authorizations has been made. The logging and clearing of approximately 1 million hectares will have an effect on the environment that cannot be ignored and, in the words of the representative of the Secretariat of Environment and Sustainable Development of the Nation in the public hearing on February 18 of this year, it will surely be negative. May the application of the precautionary principle in this case require that the authorizations for logging and clearing in the four departments be suspended until a cumulative impact study of these processes is made. The aforementioned study shall be conducted by the Province of Salta, jointly with the Ministry of Environment and Sustainable Development of the Nation, which should safeguard the respect of minimum standards in this area. Also, it shall widely involve communities living in the affected area. This study shall focus on the analysis of the cumulative environmental impact of the indicated logging and clearing on the climate, landscape, and the environment in general, as well as on the living conditions of the inhabitants. It should also propose a solution to harmonize environmental asset protection with development based on the costs and benefits involved. In this regard, it shall identify margins of probability for the indicated trends, and assess the relative benefits to the parties involved and future generations.*

The same situation laid out in the Salas case, on the inadequacy of the Environmental Impact Assessment, is present in Costa Rica in the case "Padilla Gutiérrez, Clara Emilia and others, all in their capacity as residents of areas surrounding the Marino Las Baulas National Park of Guanacaste c/ Setena, National Environmental Technical Secretariat"—but in relation to a multitude of construction projects and real estate adjacent to the Las Baulas Marine Park, where a large number of high-level endangered species reside.

The lawsuit focuses on the lack of an assessment involving the cumulative environmental impacts considering the regional development, in short, a strategic environmental evaluation had not been requested.

---

419 Supreme Court of the Nation. "Salas, Dino y otros c. Provincia de Salta y Estado Nacional". December 29, 2008. Published in: Sup. Adm. 2009 (February), 49 - LA LEY 2009-A, 420 - DJ March 18, 2009, 660 - LA LEY May 6, 2009, 10, with a note from Diego A. Dolabjian; Gustavo A. Szarangowicz; LA LEY 2009-C, 256, with a note from Diego A. Dolabjian; Gustavo A. Szarangowicz; LA LEY 20/05/2009, 5, with a note from María Eugenia Di Paola; José Esaín; LA LEY 2009-C, 472, with a note from María Eugenia Di Paola; José Esaín; LLP 2009 (June), 567, with a note from Diego A. Dolabjian; Gustavo A. Szarangowicz; LA LEY November 6, 2009, 5, with a note from Andrea Mendivil; LA LEY 2009-F, 467, with a note from Andrea Mendivil. Cita Fallos Corte: 331:2925.

In this regard, the Constitutional Chamber of the Supreme Court of Costa Rica indicated that the fact that the Environmental Authority has been granting environmental viability to individual projects located not only in the buffer zone of the park, but even within the park, without having first carried out a comprehensive assessment of the area, obviously puts the entire ecosystem of the area at risk; and therefore the court determined that they proceed

> *in coordination with the Ministry of Environment and Energy, the Costa Rican Water and Sanitation Institute and the municipalities of Santa Cruz, Bandayure, Hojancha, Nicoya, and Carrillo to conduct a comprehensive study on the impact the construction and tourism and urban development in the buffer zones of Las Baulas National Marine Park, would have on the environment, and the necessary measures to take, where it is assessed whether it is better to also confiscate the properties there, and which also specifically indicates the impact that the noise, the lights, the use of drinking water, wastewater and sewage, human presence and others factors would produce on the entire ecosystem of the area, especially on the leatherback turtle.*

Finally we cannot fail to mention a recent Spanish Supreme Court resolution dated April 5, 2013.

While this resolution does not integrate the entire group resolution of the Latin American courts, it seemed appropriate to show how, in different regions, the problems ultimately are the same.

The summary of the aforementioned resolution done by Professor Manuela Mora Ruiz highlights that

> *…The judgement examined on this occasion solves the appeal against the of the judgement by the Division of Administrative Litigation of the Superior Court of Justice of Madrid, issued on September 16, 2009, in the administrative appeal filed against the Agreement of the Full Council of San Sebastian de los Reyes, from October 19, 2006, whereby appeal lodged by the Association of owners against the final approval of the Special Plan of Implementation of infrastructure, sewage pipes, treatment systems and sewage output pipes of the streambeds, approved by the city in question is dismissed. The judgment dismissed the administrative appeal, admitting, against what was requested by the association, that the origin of transferring development costs defined in the Plan to the neighbors, faced with the urgent need to treat waste outflows from existing residential areas currently flow directly into the river Jarama; and along with this, the judgment examines the possible infringement upon the environmental regulations by the absence of the environmental assessment report prior to approval of the plan, as provided for in Directive 2001/42 of June 27 on the assessment of the effects of certain plans and programs on the environment, and Article 12 of Law 2/2002, Environmental Assessment of the Community of Madrid, concluding that the examined Special Plan requires no advance or strategic environmental assessment, to the extent that the plan does not affect water resources. The appeal filed by the association raises, among other things, the need for a previous environmental report in accordance with Article 45 CE 2-8 and Annexes I and II Law 9/2006 and Directive 2001/42/CE.* ***The Supreme Court considers this complaint, recognizing the need to submit the contested plan to strategic evaluation (FJ 7), to the extent that the relevant legislation does not apply exclusively to the general planning and its amendments, proceeding from the environmental assessment of special plans...***[420]

Of everything noted, it is easy to extract how the judiciary plays a decisive role in the concrete implementation of the instruments for decision making, in this case the Strategic Environmental Assessment.

Imagine that in addition to its performance, the concrete limit to the exercise of public power determines in a timely manner the breaches in the implementation of the instruments contained in the standards, and protects the right of citizens, often at a disadvantage when it comes time to enforce rights.

---

420 Mora Ruiz, Manuela. Jurisprudencia del Día en “Actualidad Jurídica Ambiental” http://www.actualidadjuridicaambiental.com/jurisprudencia-al-dia-tribunal-supremo-evaluacion-ambiental-estrategica-3/

CONCLUSION

We lose sleep over the effective implementation of environmental rights.

The magnitude of the task tells us that time and spatially isolated pushes are not enough. It is necessary to join efforts in the Latin American and Caribbean region, where the problems are similar, to form a new culture and promote the paradigm shift towards social, economic, and political sustainability.

On the other hand, we think the best way to address environmental problems is through the implementation of various management and environmental policy tools which are present in most regulatory bodies.

Reasonable application of environmental principles, public participation, access to public information, and the prior assessment of environmental impacts, among other things, are tools for the solution of these conflicts.

For the most part, these instruments involve a strong restriction of administrative power, establishing prior procedures for the adoption of decisions.

Generally, the administration is not meek, nor does it accept peaceful barriers to its power, so in the division of powers, in the system of checks and balances of the republican system, the task of enforcing these limits falls on the judiciary and advocating for them falls on all of society.

As we have seen, many of these instruments converge in the Strategic Environmental Assessment, those which are aimed essentially at society's intervention to analyze the environmental impacts of strategic policy decisions.

Therefore, the role of the judiciary increases in the implementation of this instrument, which needs clear intervention—teachers—that outline the essential points for effectiveness.

Because, just as part of the preamble to the Decision No. 1/14 of the Supreme Court of Argentina on the occasion of creating the Office of Environmental Justice states " ... it is vital to have a judiciary and independent courts for the launch, development and application of environmental law, and members of the judiciary, along with those who contribute to the judiciary at the national, regional and global levels, are crucial partners for promoting compliance, implementing, and applying national and international environmental law…" [421]

421 Decision No. 1/14 CSJN, accessible at: http://www.cij.gov.ar/nota-13192-Lorenzetti-present--la-Oficina-de-Justicia-Ambiental-de-la-Corte-Suprema.html

3.3 The Brazilian House of Representatives' Committee on Human Rights and Minorities Pursues Liability and Redress from Global Mining, Smelting and Financial Corporations

Gisela Hathaway

Human rights - Environment - Health - Lead poisoning - Mining - Liability - Redress.

The Brazilian House of Representatives' Committee on Human Rights and Minorities has taken an active role in pursuing liability and redress from global mining, smelting and financial corporations. Investigations unearthed a complex web of Brazilian and foreign-owned companies that for decades have evaded their responsibilities for serious damage to the environment and to the health of thousands of citizens. The settlement or litigation of this strategic international conflict poses a challenge to public and private institutions involved.

The Brazilian House of Representatives has undertaken investigations in the last two years to pursue liability and redress from global mining, smelting and financial corporations. Its Committee on Human Rights and Minorities unearthed a web of Brazilian and foreign-owned corporations that have evaded responsibility for serious damage to the environment and to the health of thousands of Brazilian citizens.

The Committee discovered that the Plumbum/Peñarroya group, active throughout the country, left a tragic wake of liabilities. In cooperation with the Office of Public Prosecutors and with class action and personal injury lawyers, the House is studying the feasibility of out-of-court settlements for the various suits, through civil and labor redress and through compensation to the Brazilian state for its investments in healthcare and environmental restoration.

A resolution to this conflict, with all its social and environmental consequences, now looks feasible. The thousands of tons of cadmium and lead slag dumped haphazardly around Brazilian cities are not just waste or tailings. Today they may have become a valuable resource. The companies ultimately liable for those pollutants now have the technology and means to recycle and reuse them. This fortunate circumstance opens a useful avenue for negotiation.

Brazil's victims of heavy metals poisoning are crying out for redress and for the recognition of the violation of their rights as citizens and workers. They want justice, whether in the form of an out-of-court settlement or through a court order. This strategic international social and environmental litigation demands resolution.

INTRODUCTION[422]

The House of Representatives' Committee on Human Rights and Minorities - CHRM (Brazil, 2015a) approved on December 17, 2013 the Oversight and Control Body 149 of 2013 - PFC 149/2013 (Brazil, 2013d), to investigate and disclose actions and/or omissions of the federal government's direct and indirect bodies and agents not compliant with health, environment, labor and social security norms and regulations. PFC 149/2013 is primarily concerned with the health of victims poisoned by lead and other heavy metals, and with the environmental restoration of degraded areas. As a matter of justice, PFC 149/2013 intends to hold companies linked to Peñarroya Mining and Smelting Society liable for damages caused to the Brazilian environment and society.

---

422 This article would not have been possible without the contributions made by victims of lead and other heavy metals poisoning, their lawyers, public prosecutors, government officials, researchers and social and environmental advocates. It draws on a series of studies and reports com missioned by Representative Roberto de Lucena (Green Party, São Paulo - PV/SP), former Rapporteur both of the Working Group on Lead Contamination and of the Oversight and Control Body 149 of 2013. The author acknowledges his support and guidance, while taking full responsibility for the opinions and views expressed herein. The author thanks Eduardo F. Silva, Director of the House's Office of Legislative Research and Consultancy (CONLE) and Alexandre Sankievicz, Coordinator of the Civil Law and Procedure and Private International Law Division for their collaboration. The author is also grateful to the staff of the Secretariat of the House's Committee on Human Rights and Minorities, and thanks them in the persons of former Secretary Marcos F. de Almeida and of Secretary Márcio M. de Araújo. On a personal note, the author is thankful for the rich exchanges of views with Lucas de Alencar and C. A. Fischer Dias, partners at Hathaway, Alencar & Fischer Law, and for the invaluable help of David L. Hathaway in translating, editing and discussing this document and so many others.

This initiative by the House of Representatives came in response to calls voiced at a Public Hearing on March 27, 2013 called to diagnose and propose solutions to the grave situation of victims poisoned by lead and other heavy metals, in Santo Amaro, Bahia. The city's unofficial name is Santo Amaro da Purificação, homage to its patron Our Lady of Purification.[423] A cultural, religious and historical coincidence uses the name pure for one of the most polluted places in the world, known as a Brazilian Chernobyl.[424]

A pungent description of the horrors lived by the population of Santo Amaro comes from the testimony by Adailson P. Moura, President of the Association of Victims of Lead, Cadmium, Mercury and other Chemical Elements (AVICCA, 2015) at that hearing (Brazil, 2013a):

Mr. Adailson P. Moura - My greetings to the authorities, through Representative Roberto de Lucena. Good afternoon. The people of Santo Amaro thank you for calling this hearing with the victims of lead.

I am a worker, and excuse me but my emotions still get me. It is hard to know there is lead in your blood and that you are going to die. (Crying) I do not know when, but I know my time is coming because I have already buried 940 brothers. We have 940 widows in Santo Amaro. If you stop and look, you see how many families, how many children are suffering. My granddaughter was born contaminated with lead and I do not accept that! (Crying) I would give my life. I said I would never come back to Brasília, ever again, because I did not believe in anything anymore, when you leave it to the courts, the Senate, the Congress. However, after my granddaughter was born, I said – "I am back in the fight!" (Crying)

We have a brother sitting over here. Breaking with protocol, stand up. He is another victim of lead like me, who has always fought and is still fighting in Santo Amaro.

You saw it all there (video: I. Neves et al., 2012.). I see it right there, they come into my home, 24 hours a day – and they know I am not exaggerating, because the Association has its office on the upper floor of my home, since I have trouble moving around.

Today, to come to Brasília, only I know how I am suffering. Imagine those children who are losing their human rights inside their mothers' wombs, because they already come out contaminated with lead! Imagine a mother, all her effort to carry a baby for nine months and see how it comes out, as you saw yourselves (in the video)! There is no way to pay someone (for his or her suffering) who says – "I'm a victim of lead, Representative!"

I wish I could be born again – I am 52 years old – to not be here contaminated with lead, because it is so painful. It is 24 hours a day of pain: your knee hurts, your arm, your neck, and you are impotent. When a man says he is impotent, he is no longer a man. He has lost his virility; he is no longer a man. Most of my

---

423 World-renowned Brazilian artist and singer Caetano Veloso, born in Santo Amaro, recognizes his own lack of political participation to change this situation (C. Veloso, 2012). Nonetheless, Caetano's famous song about the purification of the Subaé River is an outstanding symbol of the victims' fight, as its lyrics state: "To purify the Subaé / Send the dammed away / Who owns the fresh water? / Golden lady queen / Refuge of the Sergimirim (River) / Rosary of the water filters / Of the rivers that flow into me / My essential spring / The risks that these tanned people run / The horror of empty progress / Killing the river's shellfish and fish / Filling my song / With rage and sorrow" (C. Veloso, 1981).

424 The permanent and fatal consequences of lead and other heavy metals contamination in Santo Amaro is often compared to the catastrophic aftermath of the 1986 disaster at the Chernobyl Nuclear Power Plant in Ukraine. "The Brazilian Chernobyl" is actually the title of a novel that mixes fact and fiction to narrate the tragedy of Santo Amaro, Bahia (C. SantAna, 2012). Not surprisingly, the same comparison is also common in relation to Adrianópolis (Paraná on Air, 2013a & 2013b).

brothers are no longer men, because they have lost their manliness.There is a massacre of the population of Santo Amaro going on. Human Rights (Committee) should move out of this room, Representative, and go to the city of Santo Amaro. The population wants you to be present in Santo Amaro. That is the only way we will have a little more dignity to fight. Because today, if someone knocks on the door, people just look, shake their heads and say – "I don't believe in anything anymore," after they see a court force a worker to take just R$1,800 (roughly US$600), under orders from some judge who is supposed to be there to support the weaker side.

The lead industry contaminated the population, the smelting plant contaminated the workers, but they already knew this would happen. This is no fairy tale. When they built the plant in 1960, people already knew about lead contamination in France. Why Brazil? Why my country? Why our country? Maybe because of fragilities and facilities?

Moreover, would it not be possible to make a law now in this House for redress, so the whole population of Santo Amaro can have a good hospital to take care of the children? Because in my case, it (the lead) will never come out of my blood, my bones or my nerves. The toxicologist over here knows. Yet I do not want my fifth, sixth and sevenths generations to suffer what I am suffering today.

1. Mining and smelting activities in Brazil: broadening the scope of the inquiry

Initially, CHRM created the Working Group on Lead Contamination[425] to gather in-depth information about contamination by lead and other heavy metals (mainly cadmium and mercury, in addition to arsenic) affecting the population of the city of Santo Amaro, in the State of Bahia, Northeastern Brazil.

In a smelting plant built in 1960 in Santo Amaro, the Brazilian Lead Company - COBRAC processed minerals extracted from the Boquira lead mine, in the municipality of Macaúbas, also in Bahia. In 1993, COBRAC shut down its operations in Bahia without taking even minimal responsibilities for the health of its employees and their families, or for environmental decontamination and restoration. Official records of related suits tried in courts demonstrate serious violations of environmental, urban, health, labor and social security laws.

A survey conducted by the Lead WG found that the mining and smelting company liable for social and environmental damages in Bahia is still active in Brazil, following a series of corporate mergers and successions. Plumbum took over COBRAC, which in turn later became part of the Porto Alegre-based Trevisa Investments, known in the past as Trevo Group and Luxma Group.

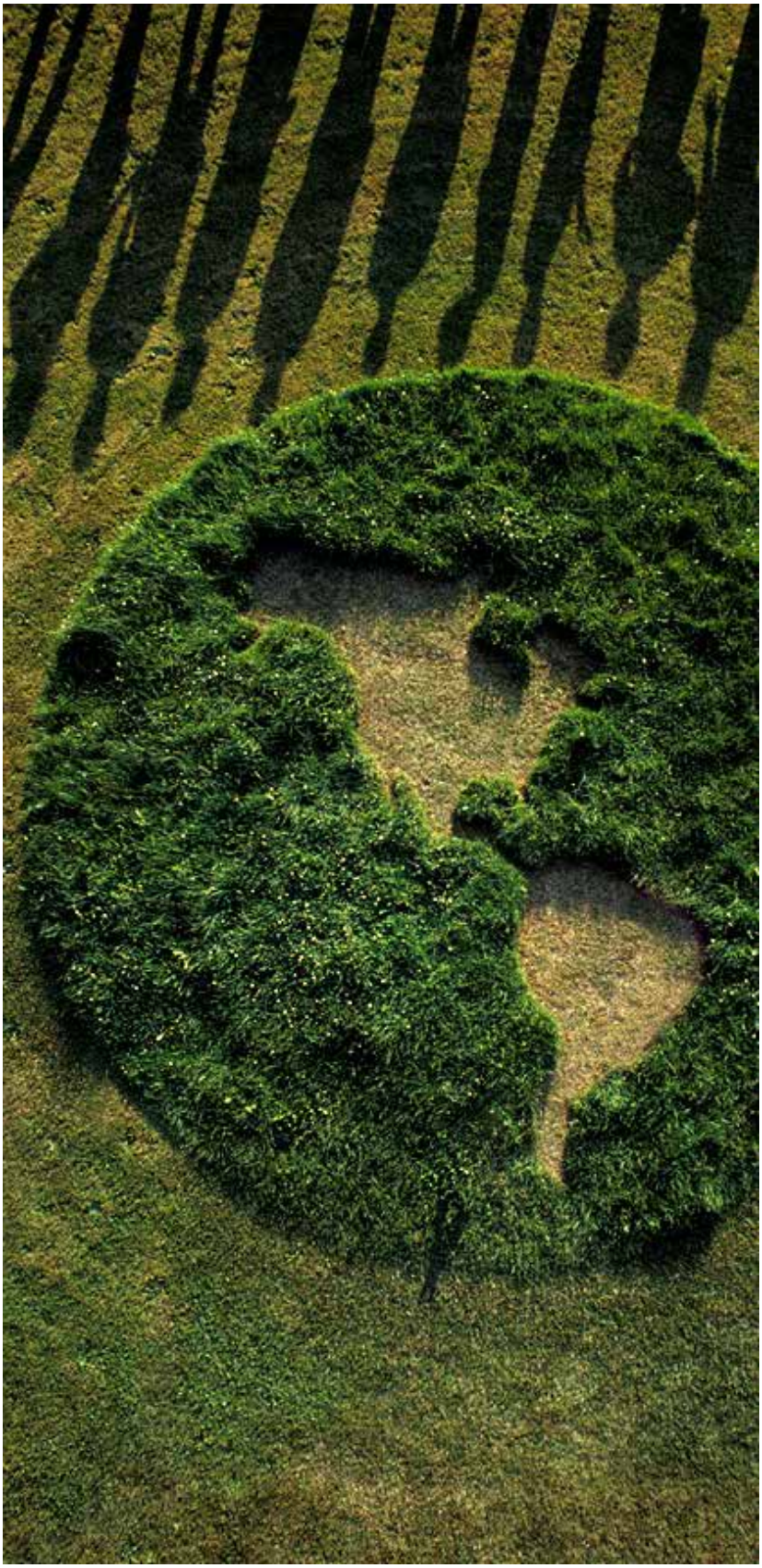
The situation in Bahia, however, is not unique, since the Plumbum/COBRAC group is also active in other regions of Brazil. Environmental degradation and health risks posed by lead and other heavy metals mining and smelting operations have affected historic cities in Brazil's Northeastern, Southeastern and Southern regions. They pose serious threats to the livelihoods of communities living on the shores of the Subaé River, in Bahia, and the Ribeira do Iguape River[426], on the border between São Paulo and Paraná. The victims include Afro-Brazilian communities descended from migrants who left sugarcane plantations to become miners and metalworkers, in Bahia, as well as indigenous, fisher folk and Maroon communities in the Ribeira River Valley.

Therefore, aside from Bahia's Recôncavo[427] region, the other most seriously affected region is the Ribeira River Valley,[428] a hotspot of biological e cultural diversity and, like Santo Amaro, part of Brazil's historic heritage.[429] The Ribeira River Valley's porous soil makes it even more vulnerable to contamination by lead and other heavy metals, further aggravating social and environmental liabilities in the region.

---

425 Referred to as Lead WG, or GT Chumbo, in Portuguese (Brazil, 2013b). Along with this article's author, herself a Consultant on Private Law and Procedure and Private International Law, the following Legislative Consultants participated in the Lead WG: Davi R. de Oliveira Júnior, on Labor Law and Procedure; Maurício Schneider, on Environment, Environmental Law, Territorial Organization, Urban and Regional Development; Cláudio V. de Carvalho, on Public Health and Sanitation; and Walter Oda, on Social Security Administration and Law. The author thanks each of them for their insights and contributions, and Bárbara T. Vitor, Analyst at CONLE's Text Editing Section, for her assistance.

426 "The Atlantic Forest South-East Reserves, in the states of Paraná and São Paulo, contain some of the best and most extensive examples of Atlantic forest in Brazil. The 25 protected areas that make up the site (some 470,000 ha in total) display the biological wealth and evolutionary history of the last remaining Atlantic forests. From mountains covered by dense forests, down to wetlands, coastal islands with isolated mountains and dunes, the area comprises a rich natural environment of great scenic beauty." (UNESCO, 1999).



The House's CHRM thus had to broaden the scope of the inquiry from Bahia to São Paulo and Paraná – actually to Brazil as a whole –, in order to consider the apparently separate processes of natural resource exploitation leading to environmental degradation and damage to health as interconnected operations, run by the same corporate partners.

2. Lead pollution liability as a human rights concern in the House of Representatives

For the House's CHRM, it is vital to identify the chain of corporate accountability for social and environmental liabilities being challenged in Brazil and worldwide, in order to produce a final solution to a conflict that has been dragging through courts for decades.

In addition to gathering historical, economic, legal and documentary evidence, the Representatives' inquiry into this situation included a trip to Bahia for a public hearing with hundreds of victims and their relatives, lawyers and public officials.[430] It also visited the decommissioned smelting plant and held a working meeting with city officials in the historical city of Santo Amaro, on September 2, 2013.

During the visit to Bahia, Representative Roberto de Lucena, along with the Federal Prosecutor for the Federal District, Peterson de P. Pereira (representing the General Prosecutor of the Republic), met with locally-based Federal, State and Labor public prosecutors and with the Attorney General of the City of Santo Amaro, at the Federal Prosecutor's Office in Salvador, on September 3, 2013. They discussed further legal action regarding this conflict and drew up common goals for inter-institutional cooperation.

On April 30, 2014, the Oversight and Control Body 149 of 2013 convened a Public Hearing[431] to discuss lead and other heavy metals pollution in the Ribeira River Valley. Invited participants were Dr. Alessandra Galli, victims' moral damages

---

427 Portuguese name for 'bay area', which is also the meaning of the State's name, Bahia.
428 M. Costa (2009) presents a series of aerial pictures of the Ribeira do Iguape River, including the region affected by mining and smelting activities.
429 In the Ribeira River Valley, the cities of Cananéia and Iguape, in São Paulo, are among Brazil's first urban settlements, founded in 1531 and 1538, respectively (R. Sales & A. Moreira, 1996: 37). The city of Santo Amaro, Bahia, is from 1557 (IBGE, 1984).
430 The General Workers' Union produced a video about the Lead WG's visit to Santo Amaro (UGT, 2013).

lawyer,[432] Professor at the Paraná School of Magistrates and the Curitiba University Center; Zuleica Nycz, Director, Toxisphera - Environmental Health Association, in Curitiba, Paraná, on behalf of Rafael F. Filippin, Lawyer, Environmental League: environmental justice, economics and energy politics; Dr. Mônica M. B. Paoliello, Professor at Londrina State University, in Paraná; Dr. Edson F. Mello, Director, Department of Sustainable Mining Development, Ministry of Mines and Energy; and Peterson de P. Pereira, Federal Prosecutor for the Federal District.

The Ribeira River Valley Public Hearing on April 30, 2014 surpassed the participants' expectations. It was soon very clear that there was a pattern – a criminal *modus operandi* – that dissipated whatever doubts anyone might still entertain regarding the unified command of Peñarroya.[433] That meeting galvanized the legal practitioners, politicians, physicians, geologists and activists' comprehension that the tale of two cities cannot and shall not be told separately, if we ever hope to bring closure to this humanitarian drama.

We must bear in mind that 2014 was a short year in the Brazilian National Congress due to the electoral agenda. General elections for the Presidency of the Republic, State Governors (26 States and 1 Federal District), 1/3 of the Senators (27 from a total of 81, or 3 per Federal Unit), and all 513 Representatives, took place on October 5, with run-offs on October 26. These circumstances tightened the CHRM's Oversight and Control Body 149/2013 schedule, narrowing its agenda basically to making recommendations to the government and filing access to information requests to several federal agencies.

On the subjects of healthcare, social security benefits, labor compensation, identification of contaminated sites and environmental restauration, there has been little progress since the House started this work. Federal Ministries of Health, Social Security, Social Development, Labor and the Environment, despite reiterated requests from the Congressional bodies, responded with either vague excuses or placing the blame on State or local authorities and on other regulatory bodies.

In February 2015, the newly elected legislature took office and began its process of electing its Speaker and officers, and nominating the members and chairs of standing committees, including the Committee on Human Rights and Minorities. The rapporteur of the Lead WG and the Oversight and Control Body 149 of 2013 was re-elected but is on indefinite leave, as Secretary of Tourism for the government of the State of São Paulo. The newly elected Chairman of the CHRM will soon name another Representative to take over the outstanding work on lead pollution. Meanwhile, CHRM has just published its 2014 report, with emphasis on its quest for liability and redress for the damages caused by global mining, smelting and financing corporations in Brazil (Brazil, 2015b: 132-133).

3. Identification of national and international liability chains

There is a clear international dimension to this Brazilian social and environmental tragedy. Historical research going back to the late 19th Century, in Europe, and to the early 20th Century, in Brazil, shows us a single company that has managed to survive world wars and financial storms, reinventing itself at the cost of an outrageous trail of human rights violations and environmental destruction.

Founded in France in 1881, Peñarroya Mining and Smelting Society was an icon of European industrialization. This French company has a Spanish name[434] in reference to the region of Spain where the Belmez Coal Mining and Smelting Company exploited the El Terrible mine since 1869, from which the Rothschild Brothers founded Peñarroya (M. López-Morell & J. O'Kean, 2010).

Early in the following century, Peñarroya became partners in Brazil with the Portuguese industrialist Adriano Fagundes Seabra. Since late 1930s, Adriano Seabra's Plumbum of Brazil Ltd mined and smelted lead

---

431 A full record of the Ribeira River Valley Public Hearing (audio, video and transcripts) is available at the House's website (Brazil, 2014).

432 Dr. Galli's Firm, based in Curitiba, capital of Paraná, had to come up with a toll-free phone number (0800 603 0868) to communicate with the Adrianópolis case plaintiffs. This demonstrates how precarious their social and economic situation is, since they cannot even afford to make long distance phone calls in order to get lawsuit updates (Galli et al., 2014).

433 Dr. Galli brought a DVD of a documentary series presented by TV Record in 2012: "The lead heirs: Adrianópolis" (Paraná on Air, 2012a). Four out of the five episodes can also be watched on the internet (Paraná on Air, 2012b, 2012c, 2012d & 2012e). Follow up news programs update the situation (Paraná on Air, 2012f, 2013a & 2013b).

434 The name Peñarroya refers to the Castle of Peñarroya, an ancient Spanish fortress. Royal Decree 1727, of December 28, 1990 recognized the Castle of Peñarroya as Spain's historic and cultural monument. It is located in the Ciudad Real province, adjacent to the Peñarroya-Pueblo Nuevo province – until 1886, part of the Belmez province, in the region of Andalucía, in Córdoba (Spain, 1991). The combination of the Spanish words peña (rock) and roya (red) "is a reference to the colour of the huge rock at whose feet the village lies" (This is Andalucía, 2015).

and other minerals in the Ribeira River Valley. At the time, he was particularly interested in working the Panelas Mine, on the border between the States of Paraná and São Paulo, in a city that would later be renamed Adrianópolis, in his honor. In late 1950s, Adriano Seabra also joined Peñarroya to work the Boquira Mine, in Bahia, as well as to run the smelting plant in the city of Santo Amaro, closer to the mineral port in Salvador. In Bahia, the company adopted the name Brazilian Lead Company - COBRAC.

Right at the end of Getúlio Vargas' era, Presidential Decree 35,930 of July 29, 1954[435] authorized the Société Minière et Métallurgique de Peñarroya to operate in Brazil. An English translation of its substantive clauses follows.

> The President of the Republic, under the powers bestowed by article 87/I of the Constitution and in compliance with Decree-Law 2,627 of September 26, 1940, decrees:
>
> Single Article - The "Société Minière & Métallurgique de Peñarroya", headquartered in Paris, France, is hereby authorized to operate in the Republic, under the Articles of Incorporation filed by that company, and with capital for its commercial operations in Brazil of Cr$10,000,000.00 (ten million cruzeiros), in accordance with resolutions approved at the Ordinary General Assembly of shareholders and the Session of its Board of Administration, held respectively on July 4, 1952 and January 29, 1954, in the form of the clauses appended hereto signed by the Federal Ministry of Labor, Industry and Commercial Affairs, recognizing its obligation to fully obey the laws and regulations in force, or that may come into force, regarding the object of this authorization.
>
> Rio de Janeiro, July 29, 1954; 133rd Year of Independence and 66th Year of the Republic.
>
> - Getúlio Vargas.
> - Hugo de Araújo Faria.

The following clauses appended to that Decree contain the obligations agreed to by Peñarroya and the Brazilian government:

> I. The Société Minière & Métallurgique de Peñarroya is obliged to have a general representative in Brazil permanently, with full and unlimited powers to deal with and definitively resolve matters that may arise with regards either to the Government or to individuals, and who may be sued and receive initial notice for that company.
> II. All acts practiced in Brazil shall be subject solely to the respective laws, regulations, and jurisdiction of its judicial or administrative courts and at no time may such company claim any exception, based in its Articles of Incorporation, whose provisions may not be grounds for any claim concerning the execution of works or services to which they refer.
> III. The company may not perform any activities set forth in its Articles of Incorporation in Brazil that are not allowed to foreign companies, and it may only exercise those requiring prior government permission after such approval has been obtained and under whatever conditions are established by that approval.
> IV. Any change that the company needs to make to its respective Articles of Incorporation shall depend on authorization by the government. Its authorization to operate in the Republic shall be revoked if it breaches this clause.
> V. It is understood that the authorization is granted without prejudice to the principle that the company is subject to legal provisions governing corporations.
> VI. Infringement of any provision for which no specific penalty has been set shall be punished by a fine of one thousand cruzeiros (Cr$1,000.00) to five thousand cruzeiros (Cr$5,000.00) and, in case of recidivism, the authorization granted by the decree governing these clauses shall be revoked.

An unnumbered Decree dated May 10, 1991 (Brazil, 1991) revoked Presidential Decree 35,930 of July 29, 1954 along with thousands of other executive regulations, in an effort purportedly to prune old, irrelevant legislation. Nonetheless, Decree 35,930 remained in force from 1954 until 1991, the period when Peñarroya, its partners and successors caused most of the damage in Brazil.

Although Decree 33,9309/54 is no longer in force, its provisions affect Peñarroya and its corporate line of succession as of today, because they clearly define the line of responsibility. In fact, the body, the clauses and the documents appended to Decree 33,9309/54 all establish Peñarroya's liability for damages caused

435 Annex to the Lead WG's Final Report approved by CHRM on October 16, 2013 (Brazil, 1954; Brazil, 2013a), the retyped version of the norm was 51 pages long with around 16 thousand words.

by mining and metallurgical activities carried out in its name or to its benefit, in Brazil. Those clauses, which hold the company liable, subject it to Brazilian law and courts and establish other conditions for application of the authorization signed by President Getúlio Vargas just days before his death,[436] bear witness to the precaution and the long-term outlook of members of the Brazilian government.

Had the government in 1991 been aware of the importance of this decree, no doubt it would not have been interred in the common grave of countless outdated decrees and norms. However, since the smelting plants closed down in Santo Amaro in 1993 and in Adrianópolis in 1995, by 1991 the bulk of the damage to the local communities and environments, for which those corporations are liable, had already happened. Those damages are cumulative and chronic, meaning that their effects continue to be felt today. Since the companies did not provide health care to the victims, clean or restore the environment, the problems only worsened in the succeeding years.

Sixty years after its publication Decree 33,9309/54 provides all the information needed to understand the intricate web of interests linking Peñarroya to its subsidiaries in Brazil and abroad. That Decree's historical relevance – whatever its legal status – is sufficient grounds for the Brazilian state, today, to hold Peñarroya liable, together with its successors and subsidiaries, worldwide, for social and environmental liabilities incurred in Brazil.

By binding Peñarroya's "authorization to operate in the Republic" to a number of commitments to be liable for public or private damages, to accept Brazilian courts for dispute settlement and to obey the laws in force at that time and in the future, the Brazilian government established permanent conditions for Peñarroya's activities in Brazil. That joint governmental and corporate accord was an arrangement that assured the Brazilian Union's constitutional domain over the country's mineral resources, while sharing both the high costs and the high profits of those activities with private foreign investors.

The House's study[437] identified the Brazilian companies, such as Plumbum Brazilian Mining Industry, and later the Brazilian Lead Company, and the Furnas Argentiferous Company, that were responsible for mining and metallurgical activities as partners of Peñarroya, respectively at the Panelas mine in Paraná, the Boquira mine in Bahia and the Furnas and Lageado mines in São Paulo. Corporations set up by Peñarroya's representatives in Brazil include the Paulista Metals Society, established in São Paulo in 1941, the Mining Companies Business Assistant, established in Salvador, Bahia in the 1960s and the Mining and Financial Shares Ltd, established in Uruguay, probably in the 1970s. Peñarroya, meanwhile, exercised full corporate control, through these companies, over all the mining and smelting processes, along with their operating and financial assistance in Brazil.[438]

Globally, Peñarroya went through hard times in the 1980s and in 1988 had to merge with the German Preussag and another Rothschild Brothers' subsidiary – French-owned Imetal – to come out of that decade alive, at the time as Metaleurop (C. Costa & F. Fernandes, 2012). The outcome of the merger was a success, as the company started specializing in recycling heavy metals, partly due to the exhaustion of global reserves and partly due to hefty profits garnered from recycling "never ending materials…"[439] As accommodations in the global mining and metals sector continued, the Rothschild Group also soon proceeded to restructure two of its other major European corporations, Imerys (in 1991) and Eramet (in 2008).

In 2007, Metaleurop came out of an internal remake as Recylex, Europe's third largest lead manufacturer. It now recycles heavy metals found in industrial and automobile batteries. It also recycles plastics and produces sophisticated metals for equipment used by the IT industry. Glencore holds 33% of Recylex's stock.

Glencore became the world's fourth largest corporation after the merger on May 2, 2013 between the British Glencore International with the Swiss Xstrata.[440] Those renowned negotiations pulled the six top executives that ran them into the privileged status of billionaires. The merger agreement itself concerned more than

---

437 The following analysis comprises primary research of commercial information published in official gazettes, major newspapers and corporate reports and bulletins. The complete study has not yet been published, though its results are translated and synthetized in this session.

438 Companies' original names in Portuguese and Spanish: PLUMBUM S.A. Indústria Brasileira de Mineração; Companhia Brasileira de Chumbo - COBRAC; Companhia Argentífera Furnas Mineração Ind. e Com. Ltda. - CAF; Sociedade Paulista de Metais Ltda. - SPM; Auxiliar de Empresas de Mineração S.A.- AEMSA; e Participaciones Mineras y Financieras - Parmifi Ltda.

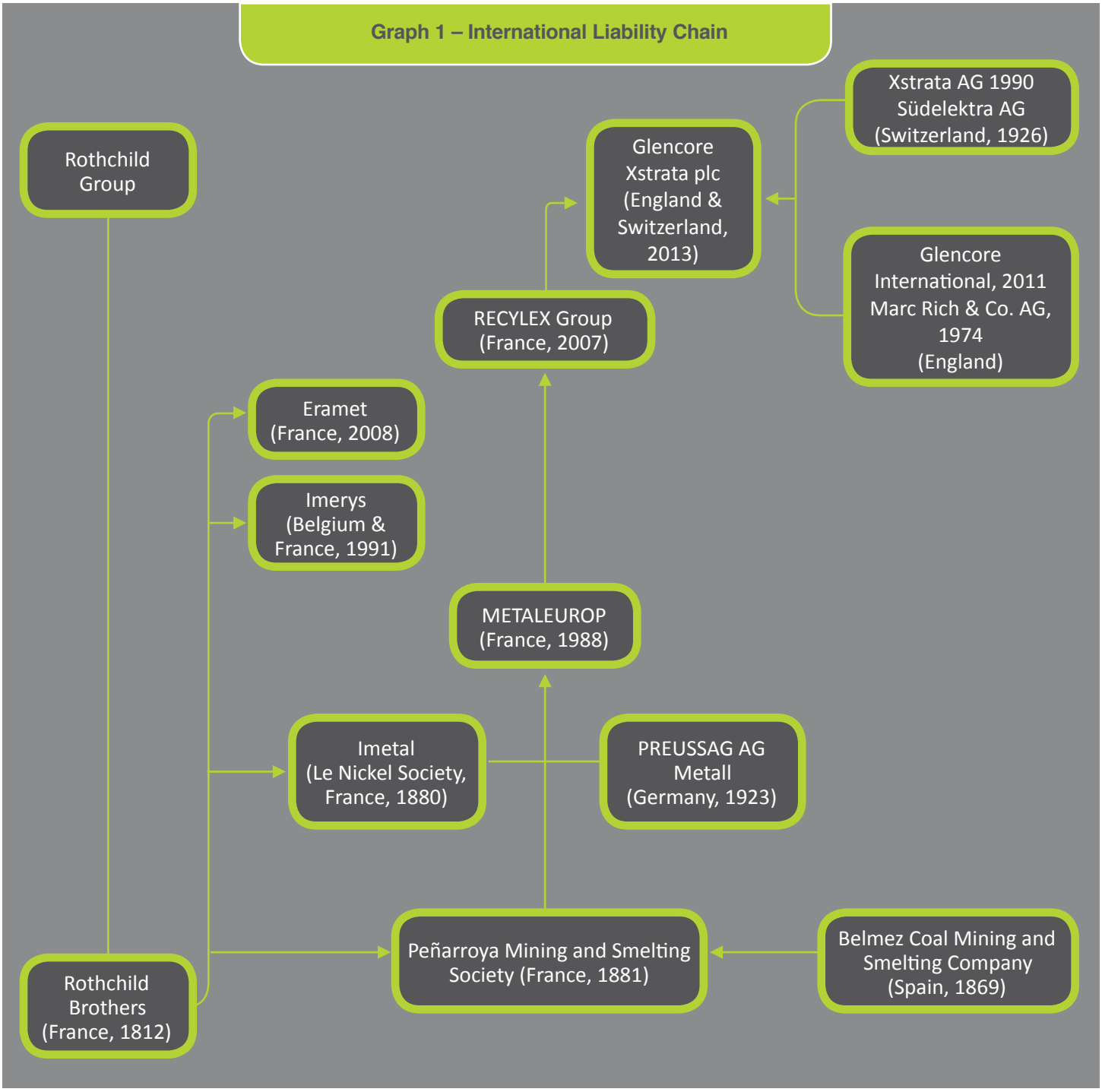
439 Marketing phrase used by Metaleurop's successor, Recylex, as a reference to a line of business that, for instance, recycles 80% of the lead from car batteries into new batteries (Recylex, 2015). Unfortunately, this is also true for the damage caused by lead and other heavy metals

440 The merger company's identity was first "Glencore Xstrata". The conglomerate's name has recently moved back to "Glencore".

forty billion dollars.[441] Glencore today is a corporation with assets estimated at sixty billion dollars . The market is beginning to know it as “the biggest company you never heard of” (E. Onstad et al., 2011).

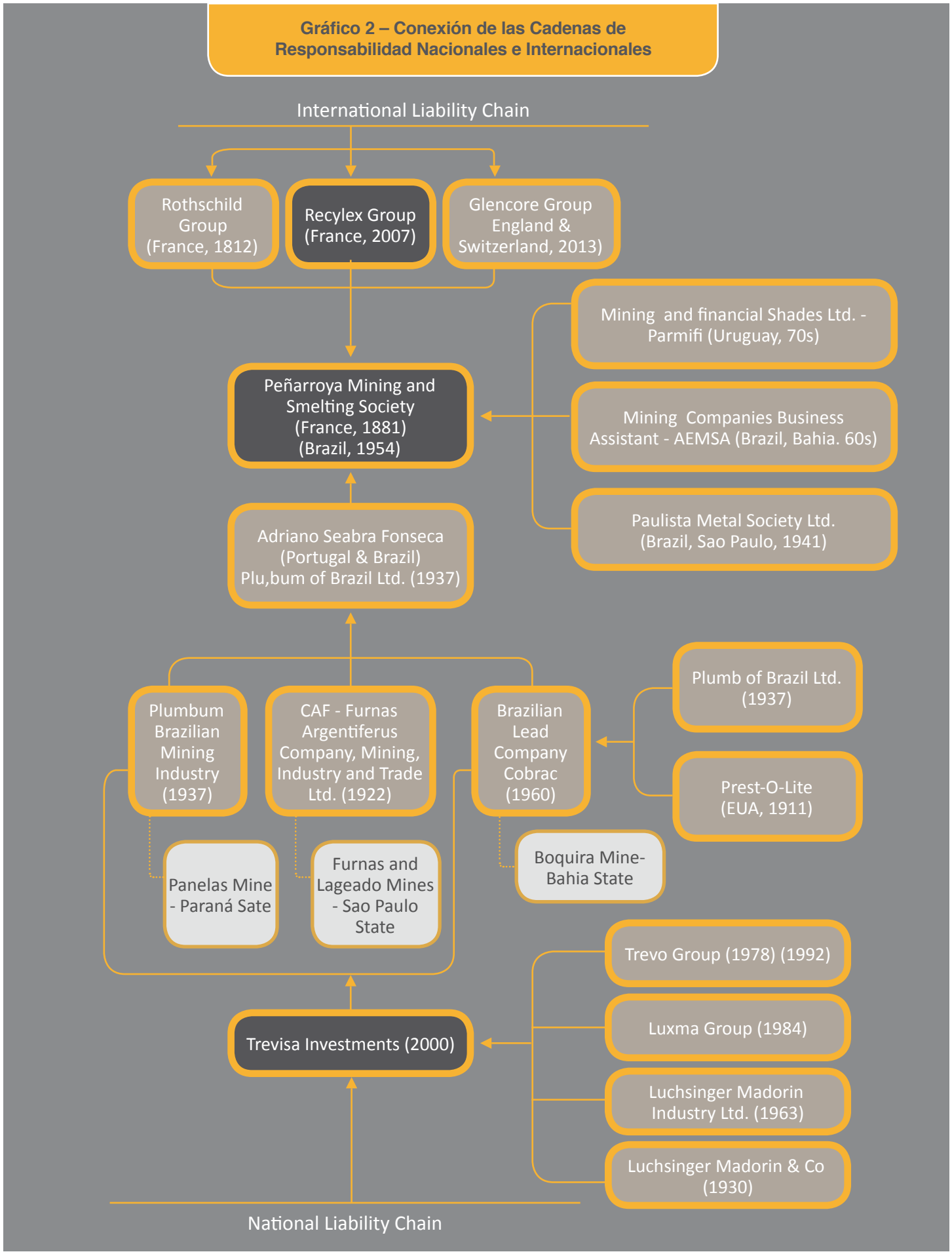
The following graphs illustrate the intricate web of corporate liability just described up to the point the House discovery process was able to identify its main components. Graph 1 details the international links of control and succession, while Graph 2 provides us with links into the Brazilian corporate scenario.

Graph 1 – International Liability Chain



441 Glencore Group’s presentation is as follows: “We are one of the world’s largest global diversified natural resource companies and a major pro ducer and marketer of more than 90 commodities. Our operations comprise of over 150 mining and metallurgical sites, oil production assets and agricultural facilities. With a strong footprint in both established and emerging regions for natural resources, our industrial and marketing activities are supported by a global network of more than 90 offices located in over 50 countries. Our customers are industrial consumers, such as those in the automotive, steel, power generation, oil and food processing. We also provide financing, logistics and other services to producers and consumers of commodities. We employ around 181,000 people. Glencore is proud to be a member of the Voluntary Principles on Security and Human Rights and the International Council on Mining and Metals. We are an active participant in the Extractive Industries Transparency Initiative.” (Glencore, 2015).

Gráfico 2 – Conexión de las Cadenas de Responsabilidad Nacionales e Internacionales



4. International strategic conflict: resolution in the making.

Identifying the domestic and international chains of corporate liability for social and environmental damage in Brazil is a key step towards the settlement of disputes that have been dragging through courts for decades. Those disputes do not only involve the directly affected communities, but all Brazilians. The state carries significant responsibility for the entire process, and Decree 35,930/54, sixty years later, still provides legal grounds for accusations against polluters that have cost Brazilian citizens so dearly.

It is indeed also crucial to establish public-sector liabilities for these social and environmental damages, to assure that authorities too will mend their ways. Through this institutional learning experience, public agencies must show that they can transform their administrative methods to prevent future conflicts, avoid environmental damage and, above all, save lives.

Liability for social and environmental damage caused by the mining and smelting of lead and other heavy metals in Bahia, Paraná and São Paulo lies with the business conglomerate represented in Brazil by Trevisa Investments, formerly Plumbum and COBRAC. Outside Brazil, that liability lies with the corporations that have succeeded the Peñarroya Mining and Smelting Society: the Recylex Group and the Rothschild Group, headquartered in Paris, France, and the Anglo-Swiss Glencore.

The next step will be to work together with the office of the General Prosecutor of the Republic and with class action and private injury lawyers to analyze the feasibility of out-of-court negotiations to settle the thousands of suits presently in courts in Bahia, Paraná and São Paulo States. Lawsuits concern either civil or labor redress to the victims and/or means of payment to the Brazilian state in compensation for its past, present and future expenditures to care for the environment and the people poisoned by lead and other heavy metals.

The Brazilian Constitution (article 49-X) actually gives the Congress exclusive powers to directly oversee and control the acts of the executive branch of government. The National Congress, therefore, shall continue to participate in all initiatives coordinated by the General Prosecutor of the Republic to establish the civil, criminal and administrative liabilities of the polluters and of public authorities. Their acts or their omissions have countenanced the degradation of the environment and of the health of Brazilian citizens, through the permanent and cumulative effects of exposure to lead and other heavy metals.

To that end, it is essential to quantify the damage already done to individual citizens, the population as a whole and the government. It is equally important to make a comparative analysis of many suits that have already been settled in Brazil and in international courts regarding redress for damages caused by polluting activities, whether officially licensed or not. Asbestos litigation also offers valuable insights for heavy metals contamination cases (TST, 2014).

The international scope of this case, which includes violations of the human rights of workers and communities affected by mining and smelting operations in Brazil by transnational corporations headquartered in Europe, still demands further initiatives and extensive international cooperation.

These violations, by their very scale, are tantamount to crimes against humanity.[442] In addition to an unestablished number of miscarriages, fetal malformations and stillborn babies, 948 workers[443] at a single smelting plant in Santo Amaro, Bahia have died from occupational exposure to lead and other metallic toxins. According to Marcos M. de Mendonça, AVICCA's lawyer, the victims' association in the State of Bahia has 1,136 plaintiffs. According to Paraná based lawyers, Alessandra Galli and Rafael F. Filippin, there are over 5,000 plaintiffs with suits in courts at the States of Paraná and São Paulo. In the city of Santo Amaro, 642 children were contaminated. More than 1,200 families have never received compensation for their lost ones or for the poisoning, for example, of wives contaminated when washing their husbands' uniforms (L. Giraldo & D. Silvestre, 2006).

One can gauge the environmental impact in Santo Amaro by the 490,000 tons of toxic lead and cadmium slag still stored on the plant premises; and 58,000 cubic meters of that slag spread around the city's

---

442 On the United Nations basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violation of international humanitarian law, as well as on the litigation in international and regional courts regarding these rights see T. van Boven, 2009, 2010a & 2010b; ICJ, 2006; FIDH 2007 & 2013; UN 2003, 2006 & 2006b.

443 More conservative estimates on the situation in Santo Amaro, have put the number of deaths at 214 (L. Giraldo & D. Silvestre, 2006) or 619 workers (AVICCA apud Secretary of Health, 2010). In the absence of any official statistics at all on an issue of such great concern, we have relied on the figures from the victims' association. They have counted death certificates and buried their husbands, colleagues and neighbors. Adailson P. Moura, AVICCA's President, presented the latest figure of 940 fatal victims, as quoted before (Brazil, 2013a). By the time the Lead WG visited Santo Amaro, that number was already 948 (UGT, 2013).

streets and walls, as "recycled" construction material "donated" by the plant's proprietors. Used filters from the smelting process were also cut up and given to families as playground mats for their children.[444] From 1960 until the smelting plant shut down in 1993, Peñarroya's operation in Santo Amaro generated 900,000 tons of lead ingots, aside from the never-accounted-for volume of gold and silver "by-products". The accounted-for production of lead during those three decades suggests revenues of US$ 450 million dollars – not adjusted for inflation (Map of conflicts, 2014a).

In the Ribeira River Valley, where Plumbum operated its lead mines and its Adrianópolis smelting plant from 1937-1995, the company officially reported the production of 210,000 tons of lead ingots and 240,000 tons of silver ingots. There is no estimate available of corporate turnover or income related to that production. The latest estimates report that 18,000 people were poisoned by lead, 2,000 workers had sued the company in labor courts for lead-related occupational health problems and the company dumped 350,000 tons of lead and cadmium slag onto the shores of the Ribeira do Iguape River (Map of conflicts, 2014b).

Private corporate interests have condemned entire geographical areas and thousands of people to death or to lives with serious neurological, internal, mobility and mental impairments. Children have suffered permanent damage to their physical and mental development.[445] Even those fortunate enough to be able to work remain unemployable, because no potential employers are willing to hire anyone known to be future victims of costly, incurable, long-term disabilities.

The Secretary for International Legal Cooperation at the Office of the General Prosecutor of the Union has expressed the Office's interest in opening the country's first case in international cooperation that is not related to financial crimes or crimes against the public administration, but which involves the violation of core human rights treaties and of the Brazilian Constitution and related legal framework on the fundamental rights to work, health, social security and to a balanced environment (Brazil, 2014).

Since Brazil is an active member of human-rights related international institutions (Table 1), the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights (IACHR)[446] and the International Criminal Court (ICC) are all eligible fora for this litigation to take place. [447]

There is a common feeling amongst legal practitioners involved in this matter, however, that this might be a propitious moment for Brazilian institutions to approach the liable global corporations to pursue an understanding on the magnitude of damages and on the certainty of their responsibility for compensation and reparation to all victims.

These high profile transnational corporations do have a reputation to keep (G. Hathaway, 2005). Although we are not comparing those who lost their lives and livelihoods due to heavy metals poisoning to company shareholders who stand to lose, we certainly acknowledge that well prepared international litigation in the name of the thousands of victims and of the Brazilian state has the potential to damage these companies' assets and future prospects.

CONCLUSION

Achieving a resolution to this conflict, with such alarming social and environmental consequences, now looks like a feasible objective. The thousands of tons of lead slag that Plumbum – in association with Peñarroya and its successors – dumped haphazardly around Brazilian cities are apparently no longer just waste or tailings. Today they seem to have become a valuable resource.

The companies ultimately liable for that pollution, through their various national and international personae, now have the financial strength, the technology and the wherewithal to recycle and reuse those pollutants. This hopeful circumstance opens up a useful avenue for negotiation.

Much more than convictions, Brazil's victims of poisoning by lead and other heavy metals are crying out for redress and for the recognition of the violation of their rights as citizens and workers. These victims

---

444 This kind of "charity" also happened in Adrianópolis, Paraná (Brazil, 2014).

445 Child victims of crime are recognized by the United Nations as deserving special treatment of rule of law institutions (ECOSOC, 2005 & UN 2009). For a clear description of the human rights of children as age group minorities see J. Nickel, 2007.

446 A preliminary report on the lead contamination issue has already been discussed at the Inter-American Commission on Human Rights (Plataforma DhESCA Brasil, 2006).

447 For an updated review of human rights regimes in the Americas, progress and challenges ahead see M. Serrano, 2010: 1-20 and N. Turner & V. Popovski, 2010: 228-243.

want justice, whether the settlement is in or out of court.

The House's CHRM, in partnership with the Office of Public Prosecutors and with class action and personal injury lawyers, has reason to believe that broad-based international cooperation among various institutions can convince these global corporations – giants who have left gigantic footprints – to materialize in Brazil the justice long awaited for victims of contamination by lead and other heavy metals.

Table 1. Brazil's Membership in Core Human-Rights International Institutions

Regime and Institution	Instrument	Adoption	Entry into Force	Signatories and Parties	Brazil's Status	Congressional Approval	Promulgation
Inter-American System of Human Rights **Inter-American Commission on Human Rights (IACHR)** **Organization of American States (OAS)**	**American Convention on Human Rights - Pact of San José (1969)**	San José, Costa Rica 22 November 1969	International 18 July 1978 National 7 October 1992	19 Signatories 25 Parties	Accession 9 July 1992	Legislative Decree 27 26 May 1992	Executive Decree 678 6 November 1992
	Inter-American Court of Human Rights (1969)		International 18 July 1978 National 10 December 1998	22 Parties	Acceptance of competence 10 December 1998	Legislative Decree 89 3 December 1998	Executive Decree 4,463 8 November 2002
Estado de Derecho Internacional **Naciones Unidas (ONU)**	**Vienna Convention on the Law of the Treaties (1969)**	Vienna, Austria 23 May 1969	International 27 January 1980 National 27 October 2009	45 Signatories 114 Parties	Signature 23 May 1969 Ratification 27 September 2009	Legislative Decree 496 17 July 2009	Executive Decree 7,030 14 December 2009
Human Rights, International Criminal Law and Procedure **United Nations (UN)**	**International Covenant on Economic, Social and Cultural Rights (1966)**	New York, United States of America 16 December 1966	International 3 January 1976 National 24 April 1992	70 Signatories 164 Parties	Accession 24 January 1992	Legislative Decree 226 12 December 1991	Executive Decree 591 6 July 1992
	International Covenant on Civil and Political Rights (1966)		International 23 March 1976 National 24 April 1992	74 Signatories 168 Parties			Executive Decree 592 6 July 1992
	Rome Statute of the International Criminal Court (1998)	Rome, Italy 17 July 1998	International and national 1 July 2002	139 Signatories 122 Parties	Signature 7 February 2000 Ratification 20 June 2002	Legislative Decree 112 6 July 2002	Executive Decree 4,388 25 September 2002
	Agreement on the Privileges and Immunities of the International Criminal Court (2002)	New York, United States of America 9 September 2002	International 22 July 2004 National 11 January 2012	62 Signatories 73 Parties	Signature 17 May 2004 Ratification 12 December 2011	Legislative Decree 291 22 September 2011	---

Sources: *International institutions' databases (United Nations, Organization of American States, Inter-American Commission on Human Rights, and International Criminal Court); LexML - Legislative and legal information network (Brazil).*

BIBLIOGRAPHICAL REFERENCES

AVICCA - Association of the Victims of Lead, Cadmium, Mercury and other Chemical Elements, Facebook Page (2015), available at <https://www.facebook.com/pages/Associa%C3%A7%C3%A3o-das-vitimas-do-chumbo-da-bahia/270138963150116?pnref=story>, accessed March 13 2015.

Brazil, Decree 36,930 of July 29 1954 authorizes the "Société Minière & Métallurgique de Peñarroya" to function in the Republic. Official Gazette of the Union, Section 1, Year 53, n. 183, August 11 1954, p. 13905 to 13916 (1954), available at <http://www.jusbrasil.com.br/diarios/2693077/pg-1-secao-1-diario-oficial-da-uniao-dou-de-11-08-1954/pdfView>, accessed March 20 2015.

Brazil, Decree of May 10 1991 safeguards the legal effects of declaratory acts of social interest or public utility with the purpose of expropriation or institution of administrative easement, upholds authorizations for the operation of companies on Sundays and holidays, and revokes the mentioned decrees, Official Gazette of the Union, Section 1, May 13 1991, p. 8938 (1991), available at <http://www2.camara.leg.br/legin/fed/decret_sn/1991/decreto-546-10-maio-1991-497253-norma-pe.html>, accessed March 20 2015.

Brazil, National Congress, House of Representatives, Committee on Human Rights and Minorities, Oversight and Control Body 149 of 2013, Public Hearing on April 30 2014 to discuss lead and other heavy metals pollution in the Ribeira River Valley (2014), available at <http://www.camara.leg.br/internet/ordemdodia/ordemDetalheReuniaoCom.asp?codReuniao=35997>, accessed March 15 2015.

Brazil, National Congress, House of Representatives, Committee on Human Rights and Minorities' website (2015a), available at <http://www2.camara.leg.br/atividade-legislativa/comissoes/comissoes-permanentes/cdhm>, accessed January 26 2015.

Brazil, National Congress, House of Representatives, Committee on Human Rights and Minorities, Oversight and Control Body 149 of 2013 proceedings' information page (2013d) available at <http://www2.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=601096>, accessed January 26 2015.

Brazil, National Congress, House of Representatives, Committee on Human Rights and Minorities, Official Transcript of Public Hearing on March 27 2013 about lead contamination in Santo Amaro, Bahia (2013a), available at <http://www.camara.leg.br/internet/sitaqweb/TextoHTML.asp?etapa=11&nuSessao=0193/13>, accessed January 26 2015.

Brazil, National Congress, House of Representatives, Committee on Human Rights and Minorities, Ordinary Session of April 3 2014. Creation of the Working Group on Lead Contamination (Lead WG), upon approval of Request 18/2013 by Representative Roberto de Lucena, "which calls for the creation of a Working Group, under the Committee on Human Rights and Minorities, composed of members of Congress and civil society representatives, with the purpose of compiling diagnostics and studies on the grave situation of lead contamination in Santo Amaro da Purificação, Bahia" (2013b), available at <http://www.camara.leg.br/internet/ordemdodia/integras/1073233.htm>, accessed January 26 2015.

Brazil, National Congress, House of Representatives, Committee on Human Rights and Minorities, Ordinary Session of October 16 2013, Approval of the Final Report of the Working Group on Lead Contamination (2013c), available at <http://www.camara.leg.br/internet/ordemdodia/ordemDetalheReuniaoCom.asp?codReuniao=34064>, accessed January 26 2015.

Brazil, National Congress, House of Representatives, Human rights in the House of Representatives in 2014, Report of the Committee on Human Rights and Minorities (2015b), available at <http://www2.camara.leg.br/atividade-legislativa/comissoes/comissoes-permanentes/cdhm/noticias/direitos-humanos-na-camara-dos-deputados-em-2014>, accessed March 17 2015.

Brazilian Institute of Geography and Statistics, Cities, Santo Amaro, Bahia, infographics: history, IBGE (1984), available at <http://cod.ibge.gov.br/1320>, accessed January 28 2015.

Caetano Veloso, Heavy metal, Universal Music Brazil (2012), available at <http://caetanoveloso.com.br/blog_post.php?post_id=1194>, accessed March 20 2015.

Caetano Veloso, Purificar o Subaé (1981), available at <http://letras.mus.br/caetano-veloso/568986/>, accessed March 20 2015.

Carla G. Costa & Francisco R. C. Fernandes, Governação e responsabilidade social empresarial: a necessária convivência, p. 42-63, Francisco R. C. Fernandes, Luiz Carlos Bertolino & Silvia G. Egler (Ed.), Projeto Santo Amaro - Bahia: aglutinando ideias, construindo soluções, Série Diagnósticos, 2. ed., Centro de Tecnologia Mineral & Ministério da Ciência, Tecnologia e Inovação (2012), available at <http://www.cetem.gov.br/santo_amaro/pdf/livrocompleto.pdf>, accessed January 23 2015.

Cristiane G. SantAna, A Chernobyl brasileira, Kindle (2012), available at <http://www.amazon.com.br/Chernobyl-brasileira-Cristiane-Sant-Ana-ebook/dp/B00893DMZ0>, accessed January 28 2015.

Eric Onstad, Laura Macinnis & Quentin Webb, Special report: The biggest company you never heard of, Reuters (2011), available at <http://www.reuters.com/article/2011/02/25/us-glencore-idUSTRE71O1DC20110225>, accessed March 20 2015.

Galli Marchiori Slongo Socio-environmental Consultancy and Law Firm (2014), available at <https://gmsadvocacia.wordpress.com/>, accessed January 28 2015.

General Workers' Union - UGT, Santo Amaro da Purificação - Bahia, Chumbo, video documentary, UGT (2013), available at <https://youtu.be/fYFvRb3OYIQ>, accessed January 27 2015.

Gisela S. de A. Hathaway, Compromissos corporativos globais para o desenvolvimento sustentável: um pano de fundo para o engajamento de instituições financeiras com a proteção ambiental, p. 249-280, Clélia Parreira & Héctor Alimonda (Org.), As instituições financeiras públicas e o meio ambiente no Brasil e na América Latina, Faculdade Latino-americana de Ciências Sociais, Flacso-Brasil (2005), available at <http://www.flacsoandes.edu.ec/biblio/catalog/resGet.php?resId=23322>, accessed August 15 2014.

Gisela S. de A. Hathaway, O Brasil no regime internacional dos direitos humanos de crianças, adolescentes e jovens: comparação de parâmetros de justiça juvenil, Consultoria Legislativa, Câmara dos Deputados, Estudos das Consultorias (2015), available at <http://bd.camara.gov.br/bd/handle/bdcamara/21960>, accessed April 30 2015. Glencore, Who we are, The Group (2015), available at <http://www.glencore.com/who-we-are/the-group/>, accessed March 20 2015.

International Commission of Jurists, The right to a remedy and to reparation for gross human rights violations: a practitioners' guide, Practitioners' guide series, n. 2, ICJ (2006), available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/08/right-to-remedy-and-reparations-practitioners-guide-2006-eng.pdf>, accessed January 19 2015.

International Federation for Human Rights, Enhancing victims' rights before the ICC: a view from situation countries on victims' rights at the International Criminal Court, FIDH (2013), available at <https://www.fidh.org/IMG/pdf/fidh_victimsrights_621a_nov2013_ld.pdf>, accessed January 19 2015.

International Federation for Human Rights, Victims' rights before the International Criminal Court: a guide for victims, their legal representatives and NGOs, FIDH (2007), available at <https://www.fidh.org/International-Federation-for-Human-Rights/international-justice/international-criminal-court-icc/Victims-Rights-Before-the>, accessed January 19 2015.

Itanor Neves, Arthur Hendler & Coletivo Avocare, Chumbados, video documentary (2012), available at <https://youtu.be/AW2Nd437sTA>, accessed January 27 2015.

James W. Nickel, Making sense of human rights, 2. ed., Malden, Blackwell (2007).

Lia Giraldo da S. Augusto & Daniel R. Silvestre, Missão em Santo Amaro da Purificação, BA, 20-21 de outubro de 2005, Relatoria Nacional para o Direito Humano ao Meio Ambiente, p. 65-76, Maria Elena Rodriguez (Org.), Plataforma Brasileira de Direitos Humanos Econômicos, Sociais e Culturais. Relatores Nacionais em Direitos Econômicos, Sociais, Culturais e Ambientais, Rio de Janeiro, Plataforma DhESCA Brasil (2006), available at <http://www.dhnet.org.br/dados/relatorios/r_dhescas_br/informe_relatores_dhesc_2005.pdf>, accessed January 23 2015.

Map of conflicts involving environmental injustice and health in Brazil, Paraná, After "prosperity" lead and silver exploitation in Adrianópolis and neighboring areas cause liability for environmental pollution and health poisoning, Oswaldo Cruz Foundation - Fiocruz, Federation of Organizations for Social and Educational Assistance - FASE & Department of Environmental Health and Workers' Health of the Ministry of Health (2014b), available

at <http://www.conflitoambiental.icict.fiocruz.br/index.php?pag=ficha&cod=166>, accessed January 23 2015.

Map of conflicts involving environmental injustice and health in Brazil, Bahia, Mining and smelting industry pollute water, soil, affect agricultural productivity, health and the quality of life of the population of Santo Amaro da Purificação, Oswaldo Cruz Foundation - Fiocruz, Federation of Organizations for Social and Educational Assistance - FASE & Department of Environmental Health and Workers' Health of the Ministry of Health (2014a), available at <http://www.conflitoambiental.icict.fiocruz.br/index.php?pag=ficha&cod=28>, accessed January 23 2015.

Mário Costa, Ribeira de Iguape River, from headwater to river mouth, an edition of pictures by Gérard & Margi Moss from the Waters of Brazil Project's Seven Rivers feature (2009), available at <https://youtu.be/WtuA-eok1R0>, accessed January 28 2015.

Miguel A. López-Morell & José M. O'Kean, Seeking out and building monopolies, Rothschild strategies in non ferrous metals international markets (1830-1940), Universidad de Murcia & Universidad Pablo de Olavide & IE Business School (2010), available at <http://www.um.es/mlmorell/PAPER%20Glasgow.pdf>, accessed March 10 2015.

Mónica Serrano, The human rights regime in the Americas: theory and reality, p. 1-28, Mónica Serrano & Vesselin Popovski (Ed.), Human rights regimes in the Americas, UNU Press (2010).

Nicholas Turner & Vesselin Popovski, Human rights in the Americas: progress, challenges and prospects, p. 228-243, Mónica Serrano & Vesselin Popovski (Ed.), Human rights regimes in the Americas, UNU Press (2010).

Office of the High Commissioner for Human Rights in cooperation with the International Bar Association, Human Rights in the administration of justice: a manual on human rights for judges, prosecutors and lawyers, Professional training series n. 9, United Nations (2003), available at <http://www.ohchr.org/Documents/Publications/training9Titleen.pdf>, accessed January 15 2015.

Paraná on Air, Adrianópolis dwellers still suffer the consequences of lead exploitation, December 28 2012, RIC Group Paraná (2012f), available at <https://youtu.be/i9KXZ43KexM>, accessed December 15 2014.

Paraná on Air, Expert opinion confirms lead contamination in Adrianópolis, January 14 2013, RIC Paraná Plus (2013a), available at <http://pr.ricmais.com.br/parana-no-ar/videos/laudo-confirma-contaminacao-por-chumbo-em-adrianopolis/>, accessible on December 15 2014.

Paraná on Air, Mining company closed for more than 20 years still causes damages to Adrianópolis dwellers, August 22 2013, RIC Paraná Plus (2013b), available at <http://pr.ricmais.com.br/parana-no-ar/videos/mineradora-fechada-ha-20-anos-causa-danos-a-moradores-de-adrianopolis/>, accessed December 15 2014.

Paraná on Air, The lead heirs: Adrianópolis, April 30 2012, Episode 1, The history of lead in Adrianópolis, RIC Group Paraná (2012b) available at <http://youtu.be/XPAqVVmWKus>, accessed December 15 2014.

Paraná on Air, The lead heirs: Adrianópolis, May 1 2012, Episode 2, Lead contamination of soil and livestock in Adrianópolis, RIC Group Paraná (2012c) available at <https://youtu.be/9TiStESaJwU>, accessed December 15 2014.

Paraná on Air, The lead heirs: Adrianópolis, May 2 2012, Episode 3, Consequences of lead poisoning to the health of Adrianópolis, RIC Group Paraná (2012d) available at <http://youtu.be/XyVLCQg8qVg>, accessed December 15 2014.

Paraná on Air, The lead heirs: Adrianópolis, May 7 2012, Episode 5, Lead is harmful to the health of city dwellers, RIC Group Paraná (2012e), available at <http://youtu.be/OEXN_1ZF6mo>, accessed December 15 2014.

Paraná on Air, The lead heirs: Adrianópolis, Special Series, RIC Group Paraná, TV Record - DVD (2012a).

Plataforma Brasileira de Direitos Humanos Econômicos, Sociais e Culturais, Audiência sobre a Situação dos Direitos Humanos Econômicos, Sociais, Culturais e Ambientais no Brasil, 124º Período Ordinário de Sessões da Comissão Interamericana de Direitos Humanos, 13 de março de 2006, Washington DC, U.S.A., Plataforma DhESCA Brasil (2006), available at <http://justicaambiental.org.br/projetos/clientes/noar/noar/UserFiles/30/File/Documento%20Audiencia.pdf>, accessed January 23 2015.

Recylex, The group, Presentation (2015), available at <http://www.recylex.fr/en,group,presentation.html>, accessed January 15 2015.

Renato J. R. de Sales & André de C. C. Moreira, Reservas Extrativistas no Complexo Estuarino-Lagunar de Iguape e Cananéia - Domínio Mata Atlântica, Núcleo de Apoio à Pesquisa sobre Populações Humanas e Áreas Úmidas Brasileiras, Universidade de São Paulo (1996), available at <http://nupaub.fflch.usp.br/sites/nupaub.fflch.usp.br/files/color/rema.pdf>, accessed January 28 2015.

Secretary of Health of the State of Bahia, Population exposed to heavy metals in Santo Amaro gets healthcare protocol, April 28 2010, Social Communication Service (2010), available at <http://www1.saude.ba.gov.br/noticias/noticia.asp?NOTICIA=11555>, accessed December 14 2014.

Spain, Royal Decree 1727 of December 28 1990 declares the Peñarroya Castle, in the municipality of Argamasilla de Alba, in Peñarroya (Ciudad Real), a Monument of cultural interest, Official Gazette of the State, January 4, 1991, n. 4, VLEX-228999303 (1991).

Superior Labor Court, Eternit is condemned in R$ 1 million for the death of worker in contact with asbestos, TST (2014), available at <http://www.tst.jus.br/noticias/-/asset_publisher/89Dk/content/eternit-e-condenada-em-r-1-milhao-por-morte-de-trabalhador-por-contato-com-amianto>, accessed December 9 2014.

Theo van Boven, Estudo sobre o direito de restituição, indenização e reabilitação de vítimas de violações graves aos direitos humanos e liberdades fundamentais, p. 354-425, Revista Anistia Política e Justiça de Transição, n. 3, jan./jun. 2010, Ministério da Justiça (2010a), available at <http://portal.mj.gov.br/main.asp?Team=%7B67064208-D044-437B-9F24-96E0B26CB372%7D>, accessed January 19 2015.

Theo van Boven, The United Nations basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law, United Nations Audiovisual Library of International Law (2010b), available at <http://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf>, accessed January 19 2015.

Theo van Boven, Victims' rights to a remedy and reparation: the new United Nations principles and guidelines, p. 19-40, Carla Ferstman, Mariana Goetz & Alan Stephens (Eds.), Reparation for victims of genocide, war crimes and crimes against humanity: systems in place and systems in the making, Koninklijke Brill NV (2009), available at <http://www.corteidh.or.cr/tablas/r26214.pdf>, accessed January 19 2015.

This is Andalucía, Córdoba, Municipality, Peñarroya-Pueblonuevo, History, available at <http://www.andalucia.org/en/destinations/provinces/cordoba/municipalities/penarroya-pueblonuevo/history/>, accessed January 15 2015.

United Nations Economic and Social Council, Guidelines on justice in matters involving child victims and witnesses of crime, ECOSOC Resolution 2005/20 of July 22 2005, United Nations (2005), available at <http://www.un.org/en/pseataskforce/docs/guidelines_on_justice_in_matters_involving_child_victims_and.pdf>, accessed January 21 2015.

United Nations Educational, Scientific and Cultural Organization, World Heritage List, Atlantic Forest South-East Reserves, Brazil, Atlantic coast, states of Paraná and São Paulo, UNESCO (1999), available at <http://whc.unesco.org/en/list/893>, accessed January 28 2015.

United Nations General Assembly, Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law, Resolution 60/147 of December 16 2005, United Nations (2006a), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement>, accessed January 19 2015.

United Nations Office on Drugs and Crime, Compendium of United Nations standards and norms in crime prevention and criminal justice, United Nations (2006b), available at <http://www.unodc.org/pdf/criminal_justice/Compendium_UN_Standards_and_Norms_CP_and_CJ_English.pdf>, accessed January 21 2015.

United Nations Office on Drugs and Crime, Justice in matters involving child victims and witnesses of crime: model law and related commentary, United Nations (2009), available at <http://www.unodc.org/documents/justice-and-prison-reform/UNODC_UNICEF_Model_Law_on_Children.pdf>, accessed January 21 2015.

3.4 Sustainable development: Linking the environmental and humans rights protection with mining projects in developing countries

Lina Muñoz-Ávila

Sustainable development, mining, environmental conflicts, human rights, environmental law.

The proposed paper seeks to present the main advances in a doctoral thesis research on the subject of Environmental Sustainability, Human Rights and Large Scale Gold Mining projects in developing countries like Colombia and Brazil. I have selected two gold mines as study cases, one in Colombia and the other one in Brazil, both executed by the same mining company in similar geographical and environmental conditions. The aim was to make a comparative study of the different environmental and mining legislations, institutions, national politics and human rights protection of the communities impacted by the mining projects in each country.

The methodology consists in reviewing the literature available in Spanish, English and Portuguese, doing fieldwork in each of the selected mines, interviewing experts in both countries, working with environmental authorities and finally, analysing the different speeches of the government, the company, the community and the NGO´s about environmental mining conflicts and protection of human rights.

Some of the research conclusions to guarantee the effectiveness of environmental law and sustainable development in mining projects indicate the need to:

- *Strengthen the national environmental legislation and legal institutions.*
- *Strengthen the capacity of public prosecutors and judges to decide on environmental cases.*
- *Recognize the key role of the procedural environmental rights to resolve environmental conflicts: The empowerment of communities with quality information, effective participation mechanisms and environmental justice for the adequate protection of collective rights.*
- *Incorporate the rights-based approaches in environmental management.*

INTRODUCTION

The advancements in doctoral research presented in this document are approached from the disciplinary framework of law. Public law was used primarily as a research field, and in this research draws on three main areas: human rights, environmental law, and mining law. Notwithstanding, constitutional law and international law were also used as areas of support.

This doctoral research has a spatial boundary. The countries in which the analysis is concentrated are Colombia and Brazil. There are several reasons for this demarcation: the two countries form part of the group of countries richest in biodiversity in the world; they have great ethnic and cultural diversity represented by indigenous tribes, communities of African heritage, and rural communities; their production activities have historically focused on agriculture, fisheries, livestock, and the exploitation of natural resources; they are rich in mineral resources such as gold, and because of this they have incorporated their extraction and sale into their economic and development policies; and they both, paradoxically, have high rates of inequality and poverty.

The studied time period is from the Rio Summit on Sustainable Development in 1992 through the Rio+20 Summit held in 2012 and subsequent developments until 2014. In this range of 22 years, the Latin American region — in order to increase the wealth of its nations to satisfy the basic needs of its inhabitants — has generated an increase in pressure on the ecological sublayer of the economies of the region. A considerable increase can be observed in the number of economic development projects that are based on the re-priming and extraction of natural resources, such as mining.

Based on the above, the following research problem is defined: Do open-pit gold mining projects for economic growth in Colombia and Brazil apply the concept of sustainable development and protect the right to a healthy environment and the human rights of the communities involved?

In addition, an ancillary research question is determined: In practice, does the economic component weigh more in decision-making for sustainable development than the environmental and social components?

The above leads to the working hypothesis that strengthening environmental law and institutions is a prerequisite for strengthening the environmental pillar of sustainable development and achieving its efficacy in Colombia and Brazil. This is reflected in a legal system that guarantees the protection of a healthy environment through its institutions, laws, and policies in the face of million-dollar economic projects such as mining, where the protection of the human rights of the communities and the environment are threatened. In the same way, this hypothesis is reflected in the effectiveness of environmental human rights, such as the guarantee to effective participation, access to information, and environmental justice for impacted communities.

The overall objective of this research is to study the relationship between mining and sustainable development in order to address the tensions that large open-pit gold mining projects generate for effective sustainable development and the enjoyment of human rights, based on theoretical, regulatory, and legal links between human rights, a healthy environment, and sustainable development.

There are four more specific objectives: (1) To confirm in two cases the effective application of the concept of sustainable development; (2) To identify the difficulties in implementing the concept of sustainable development in mining development projects; (3) To identify the role of local rural communities in Colombia and Brazil and their opportunities to participate in the face of development projects that impact them; (4) To put forth a legislative proposal toward the effectiveness of sustainable development in open-pit gold mining projects which integrates the protection of human and environmental rights in Colombia and Brazil.

In order to comply with the objectives of the study and verify the hypothesis, a qualitative methodology with and comparative law work was used.

The qualitative research techniques used were the following: (a) Observation: as a participant in the events parallel to the Rio+20 Earth Summit; (b) Interviews with key stakeholders (academics, public officials, businesspeople) with whom prior contact had already been established from previous doctoral work with environmental authorities, communities, and businesses; (c) Comparative law analysis of environmental mining laws of the two countries; (d) Case studies: in order to verify the hypothesis through field work in the cities of Ibague and Belo Horizonte and the municipalities of Cajamarca and Santa Barbara.

This will be accomplished using three levels of analysis: first, of the existing theory and doctrine and the corresponding legal-regulatory systems; second, of the particular analysis of two cases; and thirdly, of the construction of a proposal. The review conducted here is done based on the analysis of national and international standards, the relevant case law on the subject, and the study of primary and secondary sources from a legal perspective. The dogmatic review will be conducted through the most important authors in the area of study, which will be examined regressively and their principles analyzed in light of the case studies.

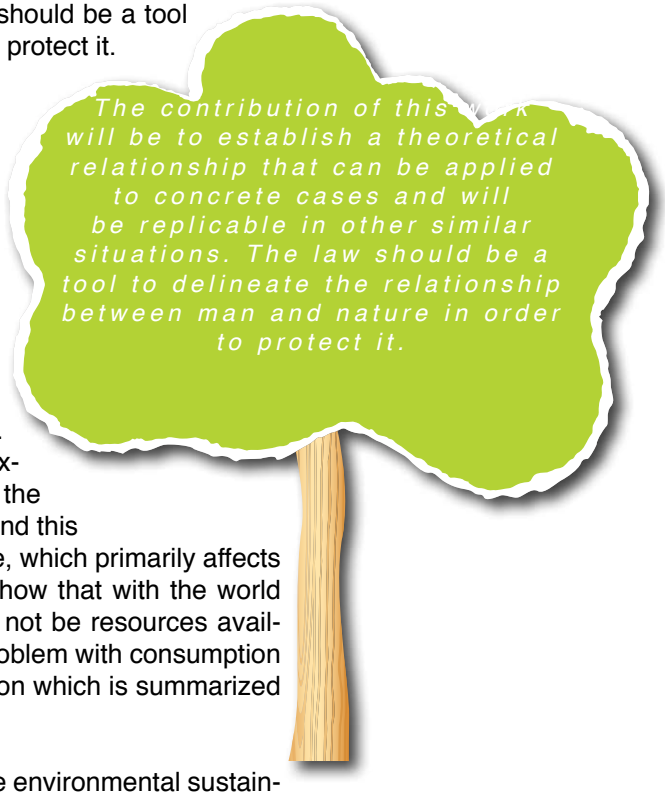
The selection of the cases that constitute the sample will be guided by the criteria of theoretical samples, whereby one seeks to represent a theoretical problem by selecting observable social situations that provide categories of analysis under two fundamental premises: (1) To minimize the differences between the cases in order to bring out the basic properties of a particular category and (2) Subsequently, to maximize the differences between the cases in order to increase the categories and limit the incidence of the theory.

Based on this theory, the following criteria were established: (a) Common economic development sector between Colombia and Brazil (large scale mining); (b) Type of mining that takes place (gold); (c) Mineral extraction method (open-pit); (d) Magnitude of the project in physical terms and production capacity; (e) Type of population impacted by the project; (f) Possible impacts on the geography of the region; (g) Economic activities that can be impacted by the project; (h) Company running the projects.

1. Why is it necessary to research these issues?

1.1. In academic terms:

Considering the great environmental problems, poverty and unequal distribution of resources that the world is facing, studies conducted on the human relationship to nature from a legal perspective should promote dialogue between the reality and the regulations in order to collect empirical evidence on their effectiveness and determine the policy and institutional challenges in order to improve upon them. The contribution of this work will be to establish a theoretical relationship that can be applied to concrete cases and will be replicable in other similar situations. The law should be a tool to delineate the relationship between man and nature in order to protect it.



1.2. In sustainable development terms:

The term *sustainable development* became popular in the '90s, in particular after the creation of the Brundlant Report and the 1992 Rio Conference. The term theoretically broke the deadlock between environmental protection, economic development, and social inclusion (called the three pillars of sustainable development), offering the possibility that the three could be united (Ramlogan, 2011).

However, this has not always been achieved in practice. Environmental concerns have increased and there are good examples to illustrate sustainable development practices around the globe. The world has become increasingly more unsustainable and this is reflected in areas such as biodiversity loss and climate change, which primarily affects the most vulnerable populations. In addition to this, statistics show that with the world population growth expected in the next twenty years, there will not be resources available for all (United Nations, 2010). Likewise there is a serious problem with consumption patterns: a confrontation between demographics and consumption which is summarized in Principle 8 of the Rio Declaration.

This raises the very important question of how to achieve environmental sustainability with reasonable economic growth will lead to poverty alleviation and social inclusion at all levels (local, national, and global). The main problem facing this question has been to translate the concept of sustainable development into reality.

Twenty years after Rio-92, in June 2012, the Rio+20 Earth Summit was held, which sought to review the progress and setbacks of global development in terms of sustainability, focusing on three topics: (1) Strengthening political commitments in favor of sustainable development; (2) Balancing the advances and the setbacks associated with their implementation and; (3) The response to the emerging challenges of society. Two closely related questions constituted the main focus of the Summit: (1) A green economy with a view of sustainability and poverty eradication; (2) The creation of an institutional framework for sustainable development (United Nations, 2011).

In practice today, the economic development projects that aim to boost growth in countries have led to serious human rights violations and environmental degradation and have not managed to integrate the principles of sustainable development, generating extensive debate and reaction from stakeholders along the length and breadth of the continent. Therefore, the evolution of the concept of sustainable development in a comprehensive framework of economic, social and ecological aspects are the basis for the potential recognition of a right to the environment which is distinct from its correlated substantive environmental rights (UNDP, 2011).

1.3. In political terms:

Because of the issues described above and after Rio+20 it is necessary to revise the standards of enforceability of the right to environment in order to create a common approach and a framework for policy development. From there, one of the main contributions—and at the same time, one of the main challeng-

es—in the field of human rights in relation to regional problems caused by the exclusion and environmental degradation, is the *ability to guide using standards and principles the actions of democratic sates in specific situations*, as much in the jurisprudence of national courts as in international courts, to determine the scope of rights, as in the formulation of public policies, thereby contributing to the strengthening of institutional and social guarantees to these rights in different national spheres (Abramovich, 2011).

In terms of enforcement of rights the following problems appear: (a) The traditional mechanisms of protection of human rights protect individuals based on an anthropocentric view of law; (b) In practice it is very difficult to prove the causal link between environmental damage, human life, health, and quality of life; (c) It is not simple to invoke human rights to defend the rights of future generations, and it is even more problematic to defend the non-anthropocentric interests such as the preservation of species and ecosystems; and (d) International standards for environmental protection are not binding (Hajjar, 2011).

Therefore, to serve the theory of human rights and international law of human rights, the content of environmental law can contribute to the realization of sustainable development from a legal perspective.

1.4. In terms of regional impact, the Latin American context:

Latin America is a region of great contrast between wealth and hardship. Taking stock of the last 20 years in terms of sustainable development for the region, there are important breakthroughs, but also setbacks and difficulties. In the social sphere, according to the United Nations, since the early twentieth century the levels of poverty and destitution have been reduced. By 2010, the percentage of people living in extreme poverty decreased by 32 percent, so there are now about 20 million fewer people in poverty in the region. Also, death rates from malnutrition and food security have been reduced, which shows significant improvement.

Latin America is a region of great contrast between wealth and hardship. Taking stock of the last 20 years in terms of sustainable development for the region, there are important breakthroughs, but also setbacks and difficulties.

In the economic sphere, since 1992 the region has reported a relatively high growth rate after overcoming various economic crises. Likewise, it has managed to control inflation, the volume of exports have increased significantly and the productivity gap with developed countries got wider. Moreover, the employment rate continued to grow, along with a decrease in unemployment rates.

In terms of environmental issues, the creation and strengthening of laws, policies and institutions in the environmental portfolio has been observed since the early '90s, in addition to the increase in natural protected areas.

Therefore, it could be argued that the outlook is quite encouraging, however, on the other side of the coin, there are deep-rooted problems that have not been resolved and about which there is a long journey ahead. Latin America is the most unequal region on the planet. Such inequality is reflected in the lack of access to basic public services and housing, weak health systems and fragmented education. This is also related to the uncontrolled urban sprawl which many principle Latin American cities are facing, which results in weak urban planning and management.

In economic terms, despite the increase in formal employment, they still have not been able to provide citizens with quality jobs with the guarantee of full labor rights. Moreover, the production structure is focused on natural resource extraction, which puts great pressure on soil, water resources, and air.

Added to this, in environmental terms, the reduction of greenhouse gases is not sufficient to effectively combat climate change; a large percentage of land is in the process of desertification, water distribution is uneven, waste management of all kinds is inadequate and highly polluting, and there is overfishing and depletion of fish stock.

Faced with the above, the need for studies that contribute to the eradication of these problems—or at least to their significant reduction—beginning with the effectiveness of sustainable development within the framework of human rights is evident.

1.5. A significant example, Brazil and Colombia:

In this regional context, it should be noted that Brazil and Colombia are wrapped up in the same strengths and challenges posed above, and in this case, have very different characteristics. Brazil is the largest economy in Latin America and second-largest on the continent, behind the United States; it is the world's sixth largest economy by GDP and the first in geographic area. In environmental terms, it is the seat of the most important Summit on sustainable development in the world called the United Nations Summit on Sustainable Development, held every ten years.

At the same time, Colombia is the fourth largest nation in geographic area in South America, and has the third largest population in Latin America, after Brazil and Mexico. Colombia is the second most biodiverse country in the world, and one of the principal economic centers of Spanish-speaking America.

The things that these two nations have in common besides a border are numerous, diverse, and very important. On one hand, both are among the countries with the highest levels of biodiversity in the world, for which they are considered mega-diverse. This diversity is reflected in the presence of a wide variety of ecosystems and multiple forms of both plant and animal life, which is helped by its tropical climate and its privileged geographic locations.

On the other hand, they have a great ethnic and cultural diversity represented by indigenous, Afro-descendant and rural peasant populations, among others.

In economic terms, their productive activities have historically focused on agriculture, fisheries, livestock, and wood. Moreover, these two countries are rich in mineral resources such as gold, and because of this resource extraction and commercialization has been incorporated into their economic and development policies.

From a social perspective, unfortunately these countries have high rates of inequality and poverty. Added to this, there is a high concentration of ownership in too few hands, and the satisfaction of the population's fundamental rights are very far from reaching desirable levels. Clear examples of this are poor access to drinking water and basic public services, people living in slums without adequate housing, and limited access to education and healthcare.

Based on these things, it can be said that in all of Latin America, just as in Brazil and Colombia, efforts should be much more focused and intense in order to make progress toward sustainable development. In this sense, it is important to achieve—from the analysis of the impacts of the economic development projects that are executed in these countries and their impact on quality of life, rights and the environments of local communities¬—progress in interdisciplinary studies that promote the comprehensive and effective protection of human rights.

2. Principle theoretical discussions

2.1. The concept of sustainable development, its critiques and perspectives.

Studies on the role of sustainable development indicate that this plays the role of both facilitator and inhibitor of the recognition and protection of human rights. Since the Bruntland Report of the United Nations World Commission on Environment and Development in 1987, the rhetoric of sustainable development has addressed the field of environmental law becoming a structural principle, but the flexibility of the concept has created a degree of ambiguity with respect to its application (Barboza, 2011). Picking up this principle and focusing on sustainability, the Rio Declaration of 1992 gave new guidelines for the structuring of environmental law at the national and international levels. This issue and its emerging legal foundations have been considered the new paradigm for global, regional, national, and local development (Garrido, 2007).

The concept has been widely criticized. Because of this, it has been said that "There is no doubt that the Brundtland and Solow approach have contributed to development ethics, but they have a weakness: to consider people as patients whose needs have to be met and whose living standards must be preserved instead of seeing them as rational agents whose judgments and values and freedoms are important on their own." Sen argues that "having sustainable livelihoods is not the same thing as sustaining the freedoms of the people, what they value and deem important, their concept of development refers to a process of expanding the real freedoms that individuals enjoy."

In this context, it is clear that:

> … even though the goods and services are valuable, they are not that way by themselves. Their value lies in what they can do for people, or rather, what people can do with them. So instead of looking at the means, development as freedom focuses on the ends: the freedom to achieve the goals in life that a person chooses with their reasoning. This is the change of approach that involves moving from development as economic growth to development as freedom.

2.2. Effective regulation of environmental law.

The problem with environmental law does not lie in making policy decisions, but rather in implementing the ones that already exist. In the last twenty years, 500 multilateral agreements have been created, which demonstrates the human capacity to make decisions, but the difficulty in implementing them is attributed to the lack of political will (Guimarães, 2001). This phenomenon is observed throughout Latin America, and particularly clearly in Colombia and Brazil. The flexibility and weakness of environmental standards generates unsustainability.

2.3. The main debates and new approaches to extractive development models.

Environmental issues are now also transnational issues because they represent interdependencies based on natural characteristics that go beyond the political and geographical (World Bank, 2010). Global warming, pollution, large-scale deforestation, illegal dumping of toxic waste, and oil spills in rivers and seas, among others, have effects that transcend borders and should be managed on the international stage through national regulations (UNAM, 2007). These problems are an example of the complexity of global environmental threats that must be addressed through different channels. They are working so that phenomena like the global market, economic development projects, integration initiatives, and sovereignty barriers are addressed, among other strategies, by the law via an environmentalist approach that progresses toward the sphere of human rights (Sen, 2007). National economies in the region are currently being propelled by development projects based on extraction of natural resources in order to generate profits to satisfy the needs of the population. However, this does not consider the capacity of an over-exploited environment to provide to society the environmental services essential for quality of life, such as biodiversity or climate stability.

3. Mining and its regulation through national environmental mining legal frameworks.

Mining activity has been heavily promoted in recent decades in Latin America as a matter of strategic national policy, as an engine to boost economies and in turn, as a trigger for environmental conflicts. While it is true that mining has been taking place in the region for hundreds of years, and specifically in countries like Brazil and Colombia, it is equally important to note that the discovery of large quantities of minerals in the late nineteenth century and early twentieth century have characterized new strip mining techniques with different practices from the mining processes that were previously being carried out.

The complexity of the current mining situation has been determined by several factors, among which are emphasized the legal and legislative processes of the states that overwhelmingly promote mining activity, the standards that companies implement to develop projects, the new actors that shape them, the complex relationships that exist in the state-company-community trilogy, and the roles that these actors take against forms of extractive development in rural areas.

The most recent analyses carried out in this respect have created significant questions around the capacity of states to exercise controls over the "mining giants," mostly countries from the global North who perform mining projects by invitation from the countries in the global South. Particularly in the cases of Colombia and Brazil, government plans by both Juan Manual Santos as Dilma Rousseff in their two presidential terms have left environmental protection on paper to prioritize the interests of industry over environmental protection. As proof, the designated engines of development in Colombia and the reform of the Forest Code of 2012 in Brazil are actions that have been highly questioned by environmentalists upon observing their negative impact on the environment.

It is at this stage where many have questioned the ability of states to effectively monitor to whom they offer privileges for exploitation and of whom they anticipate large investments and profits by means of exploitation to boost economic growth.

In the framework of these relationships of dependency, the following questions arise: Is the legal framework of both countries sufficient and appropriate? Can the environmental and social controls on world-class corporations seeking to execute their projects under convenient operational and financial conditions be verified?

Here the laws begin to play a key role, because they are the environment-mining regulations and the standards that guarantee human rights, they define the path for companies to follow, the procedures for completing the undertakings and the consequences for breach of obligation. This confirms that only through compliance with environment-mining regulations with high standards and through demanding monitoring processes the implementation of sustainable development and protection of the right to a healthy environment and other human rights of communities involved in the processes of extraction of natural resources can be achieved. Therefore, the regulations that guide mining projects are determinants and a prerequisite for sustainable development.

In order to elaborate on the points raised above, many propose establishing the legal framework governing the mining enterprises of large-scale gold industry in Colombia and Brazil from a comparative law perspective, in order to determine the theoretical scenario that any company interested in extracting gold in these two countries should follow. The description and correlation between the legal systems of Colombia and Brazil allows for an examination of similarities and differences between environmental mining standards in both countries, the identification of possibilities for Brazilian legislation to contribute to Colombian law, and finally, the understanding of corporate practices from the study of two real mega mining cases carried out in these countries by the same mining company in similar geographic and demographic contexts.

The comparative analysis does not intend to create a proposal for Brazil, but rather to make a point of reference for the processes that take place in this country, considering that the Brazilian experience in mega mining is much greater than the Colombian experience, that they have carried out large-scale mining activities for decades unlike in Colombia, and that AngloGold Ashanti, hereinafter AGA, has this sort of gold-mining operation in both countries. The relevance of this selection is based on the fact that they are currently carrying out early exploration of what in the near future will be the beginning of the era of the great gold-mining projects in Colombia.

The proposed methodology for the analysis of this aspect particularly addresses the case of mega gold mining in an analytical-descriptive way, using comparative law tools. Regulatory requirements and current large-scale mining regulations in Colombia and Brazil are studied because in neither of the two countries are there special provisions for gold mining, despite the fact that the application is particularly highlighted for this type of mining. This research only addresses the regulatory framework for large-scale mining projects and not the medium, small or illegal projects because large-scale mining is the method used in selected case studies.

To do so, the administrative procedure contained in the environmental mining legal framework overseen by various state institutions in the face of companies that develop mega mining projects is evaluated. This methodological choice is based on the fact that these are the two legally regulated processes to begin a mining project and they represent the main requirements and procedures that all companies should abide by upon arrival in these countries. In this context, it is suggested that the structural flaws of the authorization processes of large-scale mining projects are generating environmental conflicts.

In the Brazilian case, this research reviews the current federal laws governing the general beginnings of the mining cycle, and later the special provisions governing the state of Minas Gerais, as the largest state

producer of minerals in Brazil, as well as the fact that the selected case study being carried out by AGA is located there. In the Colombian case, the laws at national level will be analyzed.

This analysis is presented in several stages. First, an introduction to the context of large-scale gold mining and its presence in the two countries; Second, the existing legal frameworks are reviewed from the perspective of the mining process and the environmental process understood as the legal requirements for starting any mining operation; Thirdly, the actors involved and the lessons learned are determined from the comparative law perspective and; Finally the impacts of mining are determined from a human rights approach.

Although the state model and the procedure for obtaining authorization for major mining projects varies and is unique in each country, from the process of doctoral research it can be concluded first, that although it is clear that between the two countries there are differences between the state models, the size and scale of mineral production, it can be said that there are several similarities between the institutional and regulatory processes, as well as lessons to be learned for the Colombian case. Secondly, there are common challenges and difficulties to overcome. In the same way, it can be observed that the Brazilian legislation and institutions stronger and more demanding that the Colombian ones, which does not necessarily mean that their model is perfect and has no problems.[448]

In sum, some of the common aspects of the large-scale gold mining framework in Colombia and Brazil are: (1) National policies to boost mining activity; (2) Environmental mining rights required for mining operations; and (3) Institutional and regulatory reforms to facilitate the extraction of natural resources.

Moreover, from the analysis in this section, it can be said that the processes both for mining and environmental licensing in Colombia have both structural and implementation failures, which means that considering the current legal conditions sustainable mega mining for gold in Colombia is impossible (Salgado and Ñañez in Garay, 2014).

4. Two mining projects, two different countries, just one company.

AngloGold Ashanti is one of the largest and most powerful gold-mining companies in the world. It conducts all kinds of gold mining operations on all four continents, and from the Latin American perspective and for purposes of this article, it has presence in Brazil with exploration and development projects, and in Colombia—for now—just exploration projects. From the study of the Córrego do Sítio and La Colosa cases selected for this research, it is possible to analyze their behavior in similar geographical contexts and populated rural areas.

La Colosa will be the first major open-pit gold mine to open in Colombia, and since its proposal it has generated much debate and criticism, while Brazil has had multiple experiences with openings and closures of large gold-mining sites, and with the implementation of recovery plans in the exploited areas. Why were La Colosa and Córrego do Sítio selected? On the one hand, AGA presented the mine at Córrego do Sítio I in Colombia as a successful model of sustainable mining and an example to follow.

On the other hand, gold mining is an industry that has not been widely studied from a legal perspective in Colombia, and there have been no in-depth analyses as in other sectors such as coal mining. In addition, given AGA's intentions with La Colosa, which would make it the largest gold mine in Colombia and one of the largest in Latin America, it is important to understand AGA's behavior in another legislative context in the region, like Brazil.

In the face of this scenario, this section seeks to understand from a case study analysis the development of two mining projects run by the same company in different countries with different legal and institutional

448 Industries encounter fewer regulatory difficulties to carry out their operations in Latin American countries. For example, the United States, Canada, and Europe have implemented PRTR, and in Latin America only Mexico and Chile have implemented these tools, which in the case of mining obligates them to declare the quantity of mercury and cyanide used, waste generated, and the amount of water affected.

frameworks. The legal analysis also includes the administrative and judicial environmental protection mechanisms that exist in the two cases against AGA. To do so, the administrative processes undertaken by the attorney general in the case of Córrego do Sítio and judicial proceedings initiated by the communities in the case of La Colosa were selected. This analysis considers all actions in the two selected cases from conception to the investigation's cutoff date, December 2014. In the case of La Colosa, the selected judicial process was a class-action suit because at the conclusion of the research the administrative process of environmental licensing had not yet been initiated, and because in Colombia, this is the quintessential legal action to defend collective rights and interests.

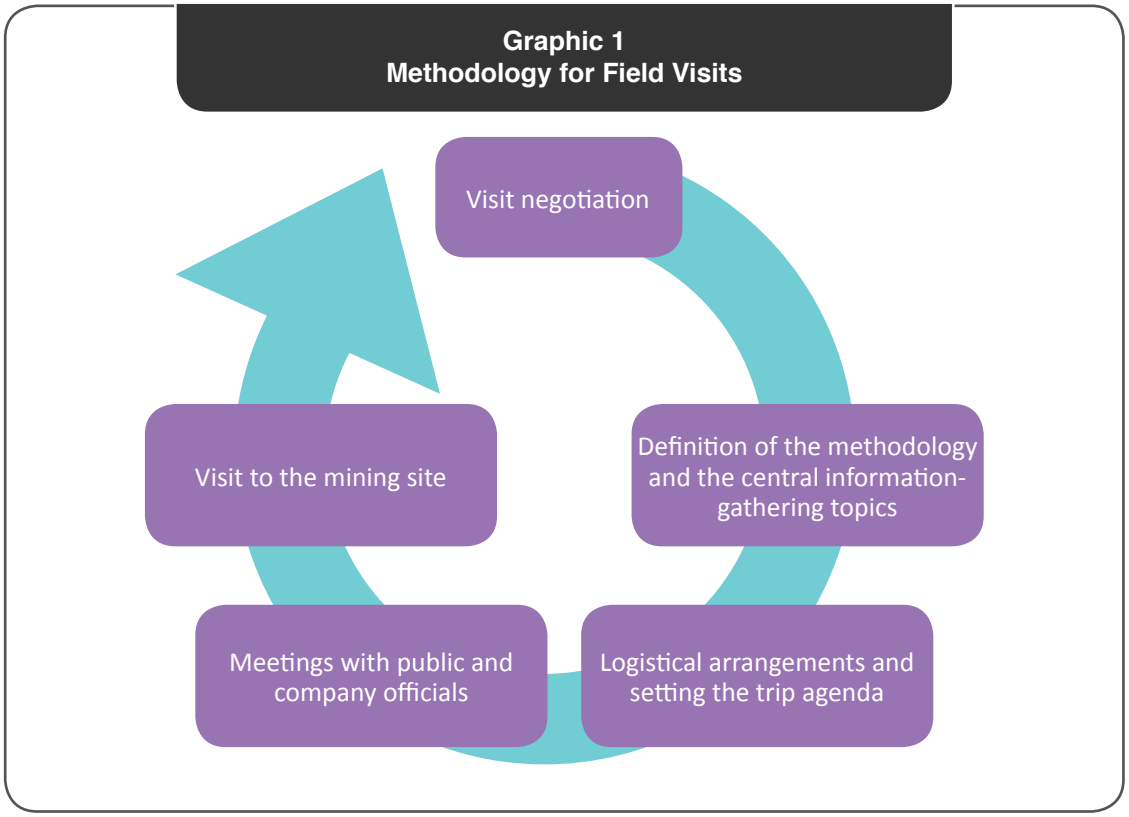
Two specific investigative methodologies were constructed in order to achieve the objectives of this study: a methodology for the selection of the cases and a methodology the field visits to the projects.

In 2011, the first case selected was the La Colosa mining project for several reasons. First—due to the work of the doctoral student as a member of the legal clinic Public Action Group (PAG- Universidad del Rosario)—there was access to extensive information on the case. Secondly, as part of the research, the doctoral student personally followed the entire legal process from the beginning, attended the hearings, and did procedural follow-up. Finally, within the above-described work, the student met and worked with local and national communities involved in the process and monitored the media coverage of the case in order to identify the different positions on the matter.

In 2013, following the identification of the characteristics of the La Colosa project and thanks to the support of the co-director of the thesis during a doctoral internship in Brazil, several possible cases of AGA's large-scale gold mining in the country was studied until the Córrego do Sítio I case was selected thanks to the ability to access information about the case and the company.

Once the components of the cases were identified, the same methodology for the two field visits was developed and in five stages:

Graphic 1
Methodology for Field Visits



Source: La autora (2015).

1. Identification of contacts and initial approach to agree with the company on a date for the visit.

2. Definition of the methodology and the three central information-gathering topics: the company and its operations; management and environmental mining regulatory compliance; and social management and community relations.

3. Coordination of the logistical arrangements and the work agenda for the respective trips to Belo Horizonte and Ibagué.

4. Once in the capital cities, made the trips to the company's offices in Nova Lima and Cajamarca for meetings with officials in the legal, community management, and media departments. In both cases obtained a presentation on the company's operations in the country, on the project by the officials, and on the security protocol. It was also possible to arrange meetings with public officials involved in both cases.

5. Next, set out on the trips to the municipality of Santa Barbara (Brazil) and to the village of La Luisa (Colombia) where the sites, camps y different areas of the mine and the project were visited.

From the research presented in this section, it can be concluded that the geographic and environmental context for the development of mining activities in Brazil, particularly in Minas Gerais, is not very different from the context of the Colombian department of Tolima. The richness of biodiversity and population characteristics are elements common to the two case studies. Also, attention is called to the way in which the company operates in the two countries, the codes of institutional perception and regulations and codes of community relations adhere to repeated international protocols and standards regardless of the country.

In both countries, the way visits were structured, the officials who accompanied them, and the methods used were very similar, even though the company did not know in detail the subject of the doctoral research nor the objective of the visits to both mining projects. It is very interesting to note that the AGA speech in Brazil and Colombia is the same.

From a policy perspective, in Brazil the behavior of the company could be better because the environmental licensing—despite its flaws—is more complex and more demanding. To put it another way, the environmental licensing in Colombia is simpler and the requirements are more lax. It is more difficult legally in Brazil, but easier from the social perspective because there is less opposition.

From a legal viewpoint, there are aspects to highlight and to criticize concerning the company's performance. While the company does "legal" mining by sticking to the parameters that the national regulations require, this does not necessarily mean that they are conducting sustainable mining.

It is important to highlight that the AGA was found to guarantee broad access to project and corporate information, access to mine facilities without any restrictions, ongoing dialogue with the communities, the generation of employment in the region, and the support of economic and social projects in the region. This begs the question of whether the projects are generating positive social impacts, and unfortunately, making up for the absence of the state through its projects on issues such as coverage of public services and the guarantee of fundamental rights.

From an operational point of view, it must be recognized that the company has developed a broad CSR plan. However, it is important to remember that "the environmental and geological features of the region mean that any mining operation has a high environmental cost" (BM Colombia Solidarity Campaign, 2013).

On the other hand, to reproach, one must keep in mind that receiving mining permits in protected areas, beginning exploration activities without carrying out proper removal of the forest reserve, and limiting the operation to the requirements of the law in the face of parameters against mine closure is not conducting sustainable mining nor guaranteeing the protection of a healthy environment. From a social perspective, it is also necessary to bring up the issue of social division that is generated in communities, between those who are "pro mining" and those who are against the mine.

From the institutional point of view, it is essential to acknowledge the key role of the environmental public prosecutors both in Brazil and in Colombia, as this figure provides communities with a great ally. In Colom-

bia, this role is weaker and is heavily influenced by political factors, but depending on the time, in the case of La Colosa, it has played an important role in the judicial process by submitting environmental protection arguments.

On the other hand, it is important to mention that the attorney general of Minas Gerais is recognized as one of the strongest and most transparent institutions in Brazil. It is very difficult to permeate this institution because they have a series of guarantees and privileges granted by both the Constitution and the law that do not make it an easy point of corruption. Its officials have extensive labor guarantees and benefits, as well as lifetime tenure. To work in this institution, one must go through a lengthy and complex process that guarantees the suitability of officials (Capelli, n.d.).

SOME PRELIMINARY CONCLUSIONS

From the study of the selected cases it is possible to observe that the communities' interest in or opposition to the projects presents several positive aspects. First, to the extent that people can approach mining projects open up new participatory scenarios that can be manifested in different ways. It is important to highlight that participation should take place before decision-making. Some mechanisms are presented informally by the state, others by request from the communities through different channels, and others by the company initiative. The latter, more participatory mechanisms, can be considered social spaces of socializing the community to company information.

Secondly, a common element between the two cases is that the company has a wealth of information available to the public, which is an essential element for the effectiveness of the participatory processes outlined previously.

Likewise, the research concludes that there are certain elements that must exist in the judicial processes of mining projects. In this regard, at least three types of resources should be ensured to achieve court decisions that ensure the protection of human and environmental rights in mining projects. The first is the human resource, that is judges and magistrates, specialized and knowledgeable about environmental law are key to understanding the legal problems presented in their offices. To this end, the laws of Colombia and Brazil should move toward the establishment of specific courts like environmental courts and tribunals. The second is the time resource, which is a fundamental premise for environmental decision-making, as the process should be conducted swiftly and nimbly so that decisions are appropriate and don't drag out when environmental damage has already been done. Therefore, the adoption of precautionary measures at the beginning of administrative or judicial processes is essential to prevent the creation of environmental degradation.

The third is the financial resource which is necessary to cover the high cost of expert testing and opinion, and the fees for the participation of specialists or experts from different disciplines such as biology, geology, or engineering.

Finally, the analysis of the Brazilian experience allows for the review of many discussions that are taking place right now in Colombia, that already happened in Brazil some time ago. This also permits Colombia to understand that there are higher and more demanding environment and mining standards for companies in the region than those which the country currently employs. Somehow it can be said that while companies have full responsibility for the violation of human and environmental rights, it is also true that states generate scenarios in which companies are held to lower standards and laxer regulatory requirements to practice their activities. Added to this, there are no controls or harsh sanctions that prevent multinational organizations from adjusting their behaviors, instead the state allows, invites and creates an ideal environment for investors. The big problem then is that what is "legal" is insufficient to carry out "sustainable mining."

Some research findings indicate that certain steps are required to ensure the effectiveness of environmental law, sustainable development, and human rights in large mining projects:

- To strengthen mining and environmental laws and institutions.
- To strengthen the capacity of public prosecutors and judges involved in deciding environmental cases.
- To recognize the key role of environmental procedural rights to resolve environmental conflicts, that is, the empowerment of communities with quality information and effective participatory and environmental justice mechanisms for the adequate protection of collective rights.
- To incorporate a human rights focus into environmental management.

BIBLIOGRAPHY

Abramovich Víctor, *Dilemas actuales en la resolución de la pobreza, El aporte del enfoque de derechos,* Unesco (2006).

Banco Mundia*l, Informe sobre desarrollo*, Banco Mundial (2010).

Barboza, Julio. *The Environment, Risk and Liability in International Law.* Martinus Nijhoff Publishers (2011).

BM Colombia Solidarity Campaign*, La Colosa: Una Muerte Anunciada Informe Alternativo acerca del proyecto de Minería de Oro de AngloGold Ashanti en Cajamarca, Tolima, Colombia,* Recuperado de: http://www.colombiasolidarity.org.uk/attachments/article/610/LA%20COLOSA_Una%20Muerte%20Anunciada.pdf. (2013).

Capelli, Silvia, *O Ministério Público e os Instrumentos de Proteção ao Meio Ambiente*
Recuperado de http://www.mprs.mp.br/ambiente/doutrina (s. f.).

Garay, Luis Jorge*, Minería en Colombia, Control Público, Memoria y justicia socio-ecológica, movimientos sociales y posconflicto.* Contraloría General de la República (2014).

Garrido, Francisco (Ed.)*, El paradigma ecológico en las ciencias sociales,* Icaria (2007).

Guimarães, Roberto, La sostenibilidad del desarrollo entre Río-92 y Johannesburgo 2002: Éramos felices y no sabíamos*, Ambiente y Sociedade,* 9 (2) (2001).

_____, La ética de la sustentabilidad y la formulación de políticas de desarrollo, *Ecología Política. Naturaleza, sociedad y utopía* (2001b).

Hajjar, Linda, Human Rights an the Environment, Philosophical and Legal Perspectives, Martinus Nijhoff Publishers (2011).

Organización de Naciones Unidas, *Informe 2011 sobre Objetivos de Desarrollo del Milenio*, ONU (2011).

PNUMA, *Informe sobre Desarrollo Humano 2011: Sostenibilidad y equidad: un mejor futuro para todos*, ONU (2011).

Ramlogan, Rajendra, *Sustainable Development: Towards a Judicial Interpretation*, Martinus Nijhoff Publishers (2011).

Sen Amartya, *Desenvolvimento como liberdade*, Companhia das Letras (2010).
_____, Human Rights and Development. En A. Bard & S. Marks (Eds.). *Development as a Human Right: Legal, Political, and Economic Dimensions.* Londres, Inglaterra.: Harvard School of Public Health (2006).
_____*, Primero la gente. Una mirada desde la ética del desarrollo a los principales problemas del mundo globalizado*, Ediciones Deusto (2007).

_____*, The Materials of Justice en The Idea of Justice*. Cambridge: The Belknap press of Harvard University Press (2009).

UNAM, Problemas del desarrollo. *Revista Latinoamericana de Economía, 2* (4) (2007).

IV. ENVIRONMENTAL ENFORCEMENT

One of the main challenges in the Americas is effective enforcement of the vast legal and institutional framework to guarantee the rule of law. Trends and emerging issues in enforcement are addressed by abstracts under this sub-theme.

4.1 Applying the Principle In Dubio Pro Natura for Enforcement of Environmental Law

Prof. Nicholas Bryner

In dubio pro natura; judiciary; enforcement; precautionary principle; environmental rule of law.

Recognition of the emerging environmental law principle in dubio pro natura, under which uncertainties are resolved in favor of that which will lead to greater protection of the environment, is a key step toward incorporating an ethic of environmental sustainability into a legal system and strengthening environmental rule of law. Several countries in the Inter-American region have begun applying this principle in statutory interpretation, shifting the burden of proof, and in other ways to give environmental laws greater effectiveness.

One of the fundamental duties of governments is to protect and safeguard the rights and interests of vulnerable parties and minorities. The environmental rule of law holds that this duty and related principles apply with full force in matters related to the environment. Several States in the Inter-American region have incorporated and developed an emerging principle of law, in dubio pro natura, in which uncertainties are resolved in favor of a result that will lead to more robust protection or conservation of nature. This principle is analogous to the civil law principle in dubio pro reo in the context of criminal law and common law presumptions of innocence, as well as the principle in dubio pro homine in human rights law.

Recognizing the principle in dubio pro natura can be a critical element in establishing the environmental rule of law. For example, judiciaries have applied the principle in interpreting constitutional and statutory provisions, and have also applied it to shift the burden of proof in environmental disputes, in order to give environmental laws greater effectiveness in preserving the environment. This paper discusses how the principle has been applied in the Inter-American region, including judicial decisions in Brazil and Costa Rica, as well as constitutional provisions in Ecuador. It then suggests further applications for the principle toward ensuring effective enforcement and the environmental rule of law.

INTRODUCTION

The fundamental essence of the rule of law is the idea that societies should be governed by a set of fair rules and standards that applies to everyone equally. To this end, the rule of law incorporates principles such as justice, accountability, impartiality, and equity, among others.

If the rule of law is so defined, the *environmental rule of law* is the modest, but straightforward, idea that these same principles apply with full force in matters related to the environment. In other words, no one and no organization is above environmental laws. Similarly, rights and duties related to the environment are on equal footing with other rights and responsibilities. In order to fully realize the environmental rule of law, we need not only a legal framework that defines the rules and standards, but also mechanisms for effective compliance and enforcement.

An effective legal framework and compliance and enforcement system will only become such if built on an ethical foundation that leads to changes in behavior throughout society. If the rule of law depends on respect for the legal system (which, in turn, depends on trust in the principles underpinning that system and in its fairness and equity), the environmental rule of law depends also on respect for environmental concerns. Building this foundation requires dedication to an ethic of sustainability—an ethic that recognizes our own limits, our mortality, and the finite nature of resources, and that recognizes humans as interconnected with the ecosystems in which we live.

Aldo Leopold famously wrote about the need for a "land ethic" in *A Sand County Almanac*.[449] Leopold saw environmental concerns as a logical extension of ethics, the next step in an evolution of human-centered

449 Aldo Leopold, A Sand County Almanac (1949).

norms, from a focus on relationships between individuals (which had grown, for example, to reject subjugation of other individuals to slavery), to those of individuals with society, and eventually to the interactions of humans with land, animals, plants, and the rest of the natural environment.[450]

As part of the rule of law, we generally recognize that one of the central duties of governments is to protect and safeguard the rights and interests of vulnerable parties and minorities. By analogy to Leopold's land ethic, this duty ought to extend to the environment as well; ecosystems hold valuable, yet vulnerable interests that are inadequately represented in the legislative process or in administrative decision-making.

One key step in incorporating an ethic of environmental sustainability into a legal system is the application of an emerging principle of law, *in dubio pro natura*, in which uncertainties are resolved in favor of a result that will lead to more robust protection or conservation of nature. *In dubio pro natura,* as a "pro-nature" principle, is generally applicable and extends the ethical foundations of the rule of law and of human rights to an environmental context. It is analogous to the civil law principle *in dubio pro reo* (when in doubt, for the accused) or common law presumptions of innocence in the area of criminal law, as well as the principle *in dubio pro homine* in human rights law.[451]

Several States in the Inter-American region have employed the principle *in dubio pro natura* in judicial decision and in constitutional or legislative provisions. For example, judiciaries have applied the principle in interpreting constitutional and statutory provisions, and have also applied it to shift the burden of proof in environmental disputes, in order to give environmental laws greater effectiveness in preserving the environment.

This paper first traces a justification for and definition of the principle *in dubio pro natura*, with reference to similar concepts in other areas of law and to other principles of environmental law. It then analyzes specific cases in which *in dubio pro natura* has been applied in the Western Hemisphere, including judicial decisions in Brazil and Costa Rica, as well as constitutional provisions in Ecuador. It concludes with recommendations for further applications for the principle toward ensuring effective environmental rule of law.

1. *In dubio pro natura*: defining the principle

1.1. Justification

By its simple terms, *in dubio pro natura* is a broad principle: in case of doubt or uncertainty, we resolve that uncertainty in favor of that which affords greater protection or conservation of nature. It can have application in all forms of decision-making related to the environment. For an administrative agency, *in dubio pro natura* signifies a preference for making decisions that favor greater protection of, or less impact on, biodiversity, habitat, ecosystem processes, air and water quality, and so forth. For adjudicative interpretation of complex matters, it gives weight toward interpreting constitutional provisions, laws, policies, and norms in favor of that which will give greater environmental protection.

The formulation of the principle is drawn by analogy to other areas of law, especially the principle *in dubio pro reo* in criminal law. The Supreme Court of Costa Rica, in first citing the principle in 1995, illustrated its roots:

> *"[F]or the protection of our natural resources, there should be an attitude of prevention, which is to say, if we should minimize degradation and deterioration, precaution and prevention must be the dominant principles, which leads us to the need to set forth the principle "in dubio pro natura" which can be derived, analogically, from other areas of law and is, as a whole, in harmony with nature."* [452]

In criminal law, ambiguities in a legal system can create a risk of irreversible harm to the human right to liberty and due process of law. In order to avoid this risk, the principle in dubio pro reo is a legal tool for tipping the balance in favor of the accused. This can be applied both in terms of statutory interpretation and construction as well as the weighing of evidence and burden of legal proof. In the former case, if the criminal law

---

450 Ibid.

451 *See, e.g.*, J. Russo & R.O. Russo, In Dubio pro Natura: Un Principio de Precaución y Prevención a Favor de los Recursos Naturales, 5(1) Tierra Tropical 73, 75 (2009). Russo & Russo list several analogous principles: in dubio pro reo in criminal law; *favor debitoris* in civil law; *in dubio pro operario* in labor law; and pro *homine* in human rights. Ibid.

452 Corte Suprema de Justicia de Costa Rica, Sala Constitucional, Sentencia 5893, de 27.10.1995

provision is unclear as to whether or how it applies, employing the principle means interpreting the law more favorably for the accused; this ensures that governments must clearly and deliberately define what conduct is criminally prohibited. As for the latter, a strong burden of proof is required to convict an accused criminal so as to reduce the risk of error in mistakenly judging those who may be innocent and to reduce the potential for abuses of the judicial system for political motivations or against vulnerable persons.

In environmental law, we need an analogous principle that protects the human right to a healthy environment, or rights of nature where they are recognized. Misapplication or lack of environmental law can create a risk of irreversible harm to the environment. In dubio pro natura is a response to this risk, and a necessary remedial principle for a system in which economic interests have generally been reinforced at the expense of social, cultural, and environmental interests. Thus, the principle guides administrative agencies and judiciaries to avoid actions or decisions that may lead to environmental harm. In other words, laws or decisions that purport to allow activity that may damage the environment must be unambiguous, so as to ensure proper deliberation, transparency, and accountability. The intended deterrent effect is that those engaging in action with a risk of environmental harm are on notice that norms in the environmental context will likely be construed broadly against them.

Misapplication or lack of environmental law can create a risk of irreversible harm to the environment. In dubio pro natura—resolving legal uncertainty in favor of greater environmental protection—is a response to this risk, and a necessary remedial principle for a system in which economic interests have generally been reinforced at the expense of social, cultural, and environmental interests.

1.2. Relationship to other principles of environmental law

To resolve uncertainties in favor of nature—the essence of the principle in dubio pro natura—is complementary to, but distinguished from other principles and concepts in environmental law, including rights of nature, rights to a healthy environment, public trust concepts, and principles of prevention and of precaution.

In a legal system that recognizes rights of nature, such as Bolivia[453] or Ecuador, Bolivia[454] the right should logically compel the application of in dubio pro natura in order to protect the rights of nature in the same manner as the rights of other recognized persons. In this sense, the principle should be seen as a necessary part of a legal system for guaranteeing such rights. However, application of the principle is not dependent on such rights of nature; a human right to a healthy environment also implies a legal principle for deference to environmental interests that impact the enjoyment of the right.Bolivia[455] In Brazil, for example, the combination of a human right to an "ecologically balanced environment" with the corresponding duty of the State and the community "to defend and preserve it"Bolivia[456] leads to a responsibility to consider the potential environmental impact of any decision or action at least on par with the impacts on any other fundamental right. Legal systems without any "environmental rights" can still employ the principle in giving effect to environmental laws and in interpreting mandates for decision-making that affects environmental interests.

The principle in dubio pro natura is linked with and complementary to precautionary norms, expressed as the precautionary principle or precautionary approach in international and domestic environmental law, as well as a preference for prevention of environmental harm rather than remediation after the fact. In dubio pro natura can and should be distinguished in its applicability from the precautionary principle in that it provides guidance on resolving legal uncertainty rather than a focus on scientific uncertainty.

Scholars have discussed various versions or interpretations or formulations of a precautionary principle.[457] The idea of a precautionary approach implies uncertainty in making decisions that can have a present

---

453 Ley Marco de Madre Tierra y Desarrollo Integral para Vivir Bien, Ley No. 300, de 15 de octubre de 2012 (Bolivia); Ley de Derechos de la Madre Tierra, Ley No. 71, de 21 de diciembre de 2010 (Bolivia).

454 Constitución de la República del Ecuador, art. 71.

455 *See, e.g.,* Nicholas A. Robinson, Fundamental Principles of Law for the Anthropocene?, 44(1-2) Envtl. Pol'y & L. 13, 16 (2014) (promoting *in dubio pro natura* in the context of implementing environmental rights).

457 Constituição da República Federativa do Brasil de 1988, art. 225.

or future impact on environmental quality. It is about exercising caution and providing a margin of safety so as to (hopefully) avoid unacceptable levels of environmental damage. In the most recognized articulation at the global level, Principle 15 of the Rio Declaration on the Environment and Development states:

> *"In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."* [458]

The critical distinction for the purposes of this present discussion is that the precautionary principle or approach, as described in Principle 15, is based on *scientific* uncertainty. In essence, the principle alters the burden of proof *in ex ante* policymaking.[459] In a stronger articulation of the precautionary principle, scientific uncertainty is not only a justification for action, but creates an obligation; [460] this burden-shifting means that a person proposing an activity with potential to cause environmental damage has the affirmative responsibility to demonstrate that the risk is low before the activity will be permitted.

1.3. Applicability

The principle *in dubio pro natura* calls for resolving uncertainties in favor of nature. To get from this general idea to how the principle should apply in practice, we must define the scope or applicability, or in other words, articulate what type of "uncertainties" the principle covers. The precautionary principle is a useful tool for policymaking decisions; it is "inherent in the concept of sustainable development"[461] and intergenerational equity because without this forward-looking risk analysis, there would be no way to balance current needs "without compromising the ability of future generations to meet their own needs."[462] But this alone does not go to the heart of shaping a legal system that promotes environmental sustainability. For legal analysis, *in dubio pro natura* is different; it overlaps with but goes beyond the focus on scientific uncertainty to address, instead, legal uncertainty.

One application of the principle *in dubio pro natura* in this sense is in statutory interpretation. If there is some uncertainty as to what the statute means or to what extent it applies, the judiciary should render a decision that resolves ambiguities in favor of an interpretation that best promotes environmental protection or the enjoyment of rights related to the environment.[463] For laws or norms that are not "environmental law" *per se*, the principle applies when there is uncertainty as to how those laws should affect the environment or natural resources.

Judges may also apply the principle in the evaluation of evidence against legal standards in a judicial proceeding. When there is legal uncertainty or ambiguity as to whether a legal standard has been met, that uncertainty is resolved in favor of protecting nature. Thus, as Professor Nicholas Robinson notes, "when a matter may be unsure or the equities appear evenly balanced," *in dubio pro natura* compels "a decision that best protects nature."[464] This principle addresses some of the difficulties in litigation of environmental matters, including the challenge of showing causation in cases where the environmental impacts are diffuse and when harms are difficult to trace, caused by many parties or appearing only after a long period of latency (as is the case with many environmental and human health issues related to hazardous waste or pollution).

Legal uncertainty also applies to other actors in addition to judiciaries. For administrative agencies, *in dubio pro natura* can resolve ambiguities about an agency's mandate or about the criteria it should use in determining whether to take or issue a permit for a given activity. It should also establish a standard for making decisions in connection with requirements for environmental impact assessment. This promotes environmental interests by broadening the scope of bureaucratic authority to protect environmental rights while limiting discretion to approve actions that would negatively impact the environment.

---

458 Report of the United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, Principle 15, A/CONF.151/26 (Vol. I) (1992), available at http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163.

459 Scholars have described different versions or interpretations of the precautionary principle, including three formulations: 'uncertainty does not justify inaction;' 'uncertainty justifies action" and 'shifting the burden of proof.' See Ambrus, supra note 457, at 261.

460 Ibid. 262.

461 David A. Wirth, The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?, 29 Ga. L. Rev. 599, 634 (1995).

462 World Commission on Environment and Development (Brundtland Commission), Our Common Future, ch. 2, para. 1 (1987).

463 See discussion infra regarding the application of the principle in this context in Brazil.

464 Robinson, supra note 455, at 16.

In short, *in dubio pro natura* is a logical extension of similar concepts in other areas of law that are designed to safeguard vulnerable or underrepresented interests. It complements other environmental law principles by providing a reference for addressing legal uncertainties in interpreting laws or in environmental decision-making.

2. ANALYSIS

2.1. Costa Rica

Courts in Costa Rica have been at the forefront in recognizing the principle *in dubio pro natura* and in justifying the application of a pro-nature principle by analogy to other areas of law. These court decisions, however, overlap with the concept of the precautionary principle. This limits the applicability of *in dubio pro natura* and does not allow for its broader use with regard to legal uncertainties.

The Constitutional Chamber of Costa Rica's Supreme Court first established the principle *in dubio pro natura* in a decision in 1995.[465] In that case, the Court upheld Costa Rica's Forest Act and a related executive decree against a claim that some of the provisions were unconstitutional as a violation of private property rights. The Court cited the precautionary principle in the Rio Declaration (Principle 15) and drew the connection between environmental law and other areas of law intended to safeguard underrepresented, minority, or vulnerable interests.[466] Based on this justification for a principle *in dubio pro natura*, the court rejected a "rigid" interpretation of property rights and upheld the law in question as a reasonable restriction on private property.[467]

As of 2013, this leading decision has been cited by 27 subsequent cases in the Costa Rican Constitutional Court. Most of these are references to portions of the decision on the scope of environmental law on the responsibility of the government to undertake EIAs, based on the precautionary principle. Many Costa Rican cases use "*in dubio pro natura*" and "*el principio precautorio*" interchangeably.[468] This is also present in Costa Rican legislation, such as the Biodiversity Act, which provides a formulation of the Rio Declaration precautionary principle. No. 7788 of 1998 does the same thing; Article 11 is essential a formulation of the Rio Declaration precautionary principle.

This jurisprudence is important in solidifying the legal basis for an *in dubio pro nature* principle that safeguards vulnerable environmental interests. However, it should be expanded to apply more broadly in cases of legal uncertainty.

2.2. Brazil

Brazil's National High Court (*Superior Tribunal de Justiça or STJ*) has taken the lead in articulating the principle in *dubio pro natura* as it applies to statutory interpretation. The Court set out a leading decision on the issue in 2012, in a case initiated by the Public Prosecutors of the State of Minas Gerais against a landowner for environmental damage caused by illegal deforestation of native vegetation in the Cerrado biome.[470] The case was brought as a "public civil action" (*ação civil pública*), a special class of lawsuit created by a 1985 statute that authorizes public prosecutors or citizens to litigate matters of public interest (including environmental interests).[471]

The question on appeal to the STJ was an issue of statutory interpretation: how to read the Public Civil Action Act of 1985. Article 3 of the Act states that a public civil action may seek a judgment of monetary damages "or" injunctive relief.[472] The trial court and state supreme court, following earlier precedents, held that the word "or" was exclusive and meant that the plaintiff or prosecutor could only bring a claim for one or the other: damages or injunction.[473] The Second Panel of the STJ reversed, reasoning that laws intended to guarantee the protection of "vulnerable parties and diffuse, collective interests" must be inter-

---

465 Corte Suprema de Justicia de Costa Rica, Sala Constitucional, Sentencia 5893, 27.10.1995.
466 Ibid.; *ver supra nota* 451 y el texto que le sigue.
467 Ibid.
468 E.g., Sentencia 18855 of 2010, 12.11.2010.
469 Ley de Biodiversidad, No. 7788 de 1998 (Costa Rica).
470 Superior Tribunal de Justiça (Brazil), REsp 1.145.083/MG, DJe 04.09.2012 (2a Turma, Rel. Min. Herman Benjamin).
471 Lei da Ação Civil Pública, No. 7.347, de 24 de julho de 1985 (Brazil).
472 Ibid., art. 3.
473 REsp 1.145.083/MG at 5-6.

preted so as to give them greatest effect in furthering their purpose.[474] Therefore, the court's interpretation of environmental law is governed by the in dubio pro natura principle.[475]

Applied to this case, it is clear that the availability of only one or the other—damages or injunction—would not be sufficient to fulfill the purpose of the statute, which was to create an effective remedy for and deter actions that violate public interests. On the contrary, interpreting the statute to allow a court to assessing monetary damages for environmental harm, together with an accompanying obligation of environmental restoration, would be much more likely to lead to better environmental outcomes and future compliance. The statute's use of "or" may be ambiguous; under the *in dubio pro natura* principle, the court resolves any uncertainty in the statute in favor of greater environmental protection.

As the STJ pronounced in a similar case, "[e]nvironmental norms must fulfill their intended social ends; in other words, they must be interpreted and integrated in accordance with the hermeneutic principle, *in dubio pro natura*." [476]

The reasoning behind the STJ's line of cases also compels burden-shifting in complex environmental cases. Given the ethical, ecological, intergenerational, and cultural dimensions of environmental harms, civil liability is "more rigorous" from the perspective of those violating environmental norms and "more committed" to making aggrieved parties or interests whole.[477] This means changing the tort law paradigm based on traditional understandings of injury, duty of care, and causation.[478]

2.3. Ecuador

In Ecuador, a pro-nature principle of statutory construction is written into the country's 2008 constitution. Article 395 reads, in part: "In case of uncertainty regarding the reach of legal provisions on environmental matters, such provisions shall be applied in the sense most favorable to the protection of nature."

Other provisions in the constitution address the rights of nature (as cited above) and the operation of the precautionary principle in that context: "The State shall implement measures of precaution and restriction of activities that may lead to species extinction, ecosystem destruction, or the permanent alteration of natural cycles..."[480]

The constitutional interpretation provision in Article 395 creates a very strong legal foundation for enhancing the protection of the rights of nature. It makes it easier for judges to address potential gaps or ambiguities, compelling an interpretation that recognizes and furthers the purpose of environmental provisions in implementing and supporting rights of nature and the human right to live in a healthy environment.[481] Jurisprudence on the rights of nature and related concepts in Ecuador's constitution, however, including the constitutional articulation of *in dubio pro natura*, is still in its initial stages.

In 2011, a provincial court in the country recognized, for the first time, a lawsuit brought on behalf of the rights of nature.[482] The case involved the pollution of the Vilcabamba River from the illicit disposal of excavation materials from a road-widening project, which also lacked the necessary permits and environmental impact assessment.[483] The case crates a framework and precedent on which advocates can build; however, implementation challenges remain. Courts in the country should look to the *in dubio pro natura* principle for guidance as needed in interpreting and giving full effect to environmental rights.

---

474 Ibid. at 15.
475 Ibid. at 16.
476 Superior Tribunal de Justiça (Brazil), REsp 1.367.923/RJ, DJe 06.09.13 (2a Turma, Rel. Min. Humberto Martins) (author translation).
477 REsp 1.145.083/MG at 14.
478 Ibid.
479 Constitución de la República del Ecuador, art. 395, para. 4 (author translation).
480 Ibid. art. 73.
481 Ibid. art. 14.
482 Sala Penal de la Corte Provincial de Loja, Sentencia No. 11121-2011-0010, de 30.03.2011. For a history and analysis of the case, see, for example, Sofia Suárez, Defendiendo la naturaleza: Retos y obstáculos en la implementación de los derechos de la naturaleza Caso río Vilcabamba, Friedrich-Ebert-Stiftung (FES) Energía y Clima (Aug. 2013), available at http://www.ceda.org.ec/wp-content/uploads/2014/05/LIBRO_defendiendo_a_la_naturaleza.pdf (accessed 23 May 2015).
483 Ibid.

CONCLUSIONS

The principle *in dubio pro natura* has great promise for driving current legal systems toward effective environmental rule of law. It has been applied as a valuable principle for implementing environmental rights and for reconciling legal mandates with modern scientific understanding of human impacts on the environment. As an emerging principle, it has begun to gain recognition in international contexts, highlighting the need to establish a coherent theoretical foundation for the principle and to broadly define the situations in which it can be applied.

Expanding the application of the principle in additional countries and contexts raises several challenges. However, these do not undermine its value and potential for promoting substantial shifts in behavior.

For example, how can judges decide cases in which *in dubio pro natura* clashes with other rights and principles, e.g., the right to development, right to self-determination, right to property, or *in dubio pro reo* in criminal environmental law? In general, judges are well-equipped to make this evaluation; the balancing of equities that tilt in various directions is not unique to environmental matters, and while not simple, is part of the judge's central function. As a starting point it is important that we recognize this principle, *in dubio pro natura,* precisely so that judges will have a reason to engage with these issues; otherwise, environmental considerations may be left aside or trumped by other interests.

Judges are well-equipped to evaluate clashes between environmental principles, such as in dubio pro natura, and other rights and principles. As a starting point it is important that we recognize in dubio pro natura, precisely so that judges will have a reason to engage with these issues; otherwise, environmental considerations may be left aside or trumped by other interests.

A further challenge to applying the principle is that we cannot always identify what is "better" for nature. Who decides what favors nature or environmental protection? While this concern cannot and should be diminished, at this stage, it is a false challenge. Our problem as a society is not an inability to decide between two ambiguously "good" or "bad" environmental outcomes. Those conflicts do exist. But they are dwarfed by the concerns about what happens when we do not consider environmental impacts at all or consider them to be much less significant than economic concerns or other competing short-term individual and societal interests.

In conclusion, recognizing the principle *in dubio pro natura* can be a critical element in establishing the environmental rule of law. On its surface, it is a modest principle—it does not guarantee that the environment always "wins," but creates a pro-nature preference. This is rooted in an understanding of law—consistent with the rule of law—in safeguarding rights and interests that are underrepresented. It does not mean that there will never be any activity or action that damages the environment, but rather that we must make sure we are considering environmental interests and giving them needed deference and priority.

For the judiciary, *in dubio pro natura* is a principle that encourages the judge, representing the final step in the compliance and enforcement cycle, to put the environment on the same platform with private rights and economic interests. For too long in modern societies, the environment was not at the table. We need a strong push toward building this ethical foundation in our way of thinking. With this principle, the ideal result will be that we as citizens will better promote and strengthen environmental rule of law.

BIBLIOGRAFÍA

Books and Articles:

Monika Ambrus, *The Precautionary Principle and a Fair Allocation of the Burden of Proof in International Environmental Law,* 21 Rev. Eur. Comm. & Int'l. Envtl. L. 259, 261 (2012).

Aldo Leopold, *A Sand County Almanac* (1949).

Russell Powell, *What's the Harm? An Evolutionary Theoretical*

Critique of the Precautionary Principle, 20 Kennedy Institute of Ethics J., no. 2, at 181-206 (2010).

Nicholas A. Robinson, *Fundamental Principles of Law for the Anthropocene?,* 44(1-2) Envtl. Pol'y & L. 13 (2014).

J. Russo & R.O. Russo, In Dubio pro Natura*: Un Principio de Precaución y Prevención a Favor de los Recursos Naturales,* 5(1) Tierra Tropical 73, 75 (2009).

Sofia Suárez, *Defendiendo la naturaleza: Retos y obstáculos en la implementación de los derechos de la naturaleza Caso río Vilcabamba,* Friedrich-Ebert-Stiftung (FES) Energía y Clima (Aug. 2013).

David A. Wirth, *The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?,* 29 Ga. L. Rev. 599, 634 (1995).

Constitutions, Legislation, and International Materials:

Constitución de la República del Ecuador (2008).

Constituição da República Federativa do Brasil (1988).

Lei da Ação Civil Pública, No. 7.347, de 24 de julho de 1985 (Brazil).

Ley de Biodiversidad, No. 7788 de 1998 (Costa Rica).

Ley de Derechos de la Madre Tierra, Ley No. 71, de 21 de diciembre de 2010 (Bolivia).

Ley Marco de Madre Tierra y Desarrollo Integral para Vivir Bien, Ley No. 300, de 15 de octubre de 2012 (Bolivia).

Informe de la Conferencia de las Naciones Unidas sobre el Medio Ambiente y el Desarrollo, la Declaración de Río sobre el Medio Ambiente y el Desarrollo , el Principio 15, A/CONF.151/26 (Vol. I) (1992).World Commission on Environment and Development (Brundtland Commission), Our Common Future (1987).

Cases:

Corte Suprema de Justicia de Costa Rica, Sala Constitucional, Sentencia 5893, de 27.10.1995.

Sala Penal de la Corte Provincial de Loja, Sentencia No. 11121-2011-0010, de 30.03.2011 (Ecuador).

Superior Tribunal de Justiça (Brazil), REsp 1.145.083/MG, DJe 04.09.2012 (2a Turma, Rel. Min. Herman Benjamin).

Superior Tribunal de Justiça (Brazil), REsp 1.367.923/RJ, DJe 06.09.13 (2a Turma, Rel. Min. Humberto Martins).

4.2. The challenges of enforcing nature rights and other regulatory advances in Ecuador

María Amparo Albán

Rights of nature, enforcement, environmental law, effectiveness, legal standing

Ecuador has spent several policy and institutional arenas for more than forty years ago, towards the implementation of environmental law. While there are important advances, there are also setbacks and challenges to overcome. Despite significant constitutional advances, weak institutions, problems of legitimacy, lack of training and knowledge of the subject in judicial officers and officials, as well as problems of interpretation in the implementation of these rights, indicate that having appropriate regulatory frameworks on environmental issues, is just the beginning.

At the regional level it is known that in 2008 Ecuador adopted a new constitution. In it a series of new rights for the environment were introduced as well as procedural rules which had no visibility in any previous regime. This undoubtedly accounts for a significant doctrinal evolution and involves great challenges for implementation as well as in reconciling an existing legal regime with the expectations of implementing these new guarantees, in an economic environment that is strongly oriented to the extraction of natural resources.

While no one can detract merits to a legal system that innovates by introducing additional protections to commonly existing constitutional regimes such as the right to a healthy and ecologically balanced environment, it is necessary to analyze this forward looking development in the context of sustainable development policies and the coherence that must exist amongst a legal system and the effectiveness of the application of justice.

The article proposes a proper understanding of the proposed normative architecture -unique in the Inter-American system -, which has introduced several new rights such as the rights of nature and the human right to water. In addition to a strict liability regime on environmental issues, procedural rules such as non-statute of limitation with regards to environmental damage and the In dubio pro Natura principle, among others. All this will be analyzed in the philosophical framework of sustainable development and the "good life" the latter extracted from the indigenous worldview, which preaches harmony with our surroundings.

It's easy to be tempted into thinking that in a crowded system with environmental guarantees; any cause for the rights of nature would have prevalence over economic or social rights. However this has not proven to be the case. The constitutional scaffolding itself establishes a weighting system of rights and in case of conflict only the judge will be called upon to resolve the priority issues based on the application of rights and constitutional principles and among which is the right to development.

The article will illustrate that regulatory environmental progress must go hand in hand with the effective implementation of justice and the correct interpretation of the objectives of sustainable development.

1. Origins of environmental law in Ecuador

The consolidation of environmental law in Ecuador has gone through several stages. These have not always been smooth linear or progressive course. However, we can say that the 2015 Ecuador is a country with great progress conceptually; however, it's going through complex but interesting challenges in implementation, which makes the Ecuadorian environmental legal scenario a favorable scenario for the analysis of legal, institutional and political factors that affect the implementation and development of environmental law.

The country experiences of regulation on environmental protection did not start early, but by the early twentieth (the May 14, 1936) century, awareness of the need to safeguard certain areas was taken, and the

---

482 Decreto Supremo 374, Publicado en el Registro Oficial 97 de 31 de Mayo de 1976.

declaration is issued Galapagos National Park, declaring the Galapagos Archipelago as emblematic area of protection. In that declaration they were followed by several in various regions of the country, which contained a high political intentions, but could not become compulsory standards with clear mechanisms of strict compliance and protection until the end of the twentieth century and even well into the twenty-first century.

While the tasks of conservation and environmental preservation of the territory were previously recognized declaring nature reserves, however, in the prevention of pollution it is not until 1976, with the so-called Law on Prevention and Control of Environmental Pollution that enters a regulatory framework.[484] And a regulatory framework for the conservation of forest resources and wildlife itself only come until 1987 with the issuance of the Forestry Law, natural areas and wildlife, which run by the Ministry of Agriculture had also related to forestry production activities although established categories of environmental management.[485]

These rules were undoubtedly the start of the regulatory task that does not end here, in which the Stockholm Declaration of 1974 and Rio Declaration of 1992 marked different starting points. (Albán et al, 2011)[486]

However these two laws mentioned above, had in common the lack of a clear system of sanctions in environmental matters; the first one made more references to forestry activities under the Ministry of Agriculture, and the second one, aimed at avoiding contamination from the perspective of public health, and was managed by the Ministry of Health. The prevention approach prevailed in the rules.

2. The Constitution of 1998 and the Law on Environmental Management

It is not until the 1992 Rio Summit and the visible regulatory effect produced in the region by countless initiatives from international environmental cooperation, that various policies and environmental norms begin to develop, at the time of the implementation of recently signed international agreements, that aimed to strengthen national institutional frameworks, which become stronger with the establishment in several countries of a ministry of Environment.

A timid institutional architecture that is tested in 1993 with the creation of an environmental advisory committee under the Presidency of the Republic,[487] but that is consolidated in late 1996 with the creation in Ecuador's Ministry of Environment.[488] This undertakes the challenge to enact various environmental policies and regulations, including environmental framework law in the country, called Environmental Management Act and published in 1999.[489]

Although the standards contained in the Environmental Management Act provide a general framework for environmental compliance, it does not adequately address the issue of legal standing, establishing a closed or incomplete legitimacy, ie the possibility of suing environmental damage only to those directly affected by a harmful effect on the environment and linked by a common interest.[490]

The rule confuses the action of environmental damage with the action for damages, finding that the actions of environmental damage could be in progress when it came to compensatory damages for damages incurred on the environment. That is, an action is not created by that actual environmental harm, if not rather extrapolated civil law action for damages, creating an environmental civil action.

---

483 Decreto Ejecutivo N° 2804 de abril 8 de 1987

484 Albán, MA., Barragán, D. Bedón, R., Crespo, R. Echeverría, H. Hidalgo. Ma. Muñoz, G. y Suárez S. "Ecuador Ambiental, un recorrido propositivo" CEDA, Mayo 2011 Quito –Ecuador.

485 Ecuador ratificó el Convenio sobre la Diversidad Biológica, según consta en los Registros Oficiales No. 109 del 18 de enero de 1993 y el 146 del 16 de marzo de 1993. Y ratificó en Convenio Marco sobre Cambio Climático, en Registro Oficial 562 del 7 de noviembre de 1994.

486 Decreto Ejecutivo 1107, Registro Oficial 283 del 24 de Septiembre de 1993.

487 Publicado en el Registro Oficial No. 40 del 4 de Octubre de 1996.

488 Ley No. 37. RO/ 245 de 30 de Julio de 1999.

489 Art. 43 Ley de Gestión Ambiental: " Las personas naturales, jurídicas o grupos humanos, vinculados por un interés común y afectados directamente por la acción u omisión dañosa podrán interponer ante el juez competente, acciones por daos y perjuicios y por el deterioro causado a la salud o al medio ambiente incluyendo la biodiversidad con sus elementos constitutivos."

490 Art. 43 Environmental Management Law (Ley de Gestión Ambiental): "Natural persons, legal persons or groups of people linked by a common interest and directly affected by the harmful act or omission may be brought before the competent court for damages and damage actions and the damage caused to health or the environment, including biodiversity with its constituents."

For several years subsequent to the enactment of the 1998 Constitution, even though the state supreme rule established collective action for environmental damage in practice could only claim those directly affected and linked by a common interest and for environmental damage to the patrimony.

This is particularly ironic, because a year before, in 1998 a new Constitution was being approved in Ecuador in which the conceptual and language influence of the 1992 Rio Summit and the whole doctrine of sustainable development, was evident in a specific section on environment, which even contained the materialization of the collective right to a healthy and ecologically balanced environment.[491]

For several years subsequent to the enactment of the 1998 Constitution, even though the state supreme rule established collective action for environmental damage in practice could only claim those directly affected and linked by a common interest and for environmental damage to the patrimony. This in turn not only limited the causes and possible promoters, but also led to compensations particularly in the oil industry where the right of way or pipeline frequently caused damages to the owners of the premises, but often no environmental remediation was pursued, but the compensation or payment for environmental damages.

This was evident in the case Leonardo Cabezas Miranda vs. Alberta Energy LTD., in which the plaintiff claimed the destruction of their property, "causing not only material damage, but also environmental and ecological damage to their land." However the Second Chamber of the former Supreme Court ruled that "since it has been properly proved and on the record, the actual environmental damage caused to the actor by the defendant for violating express constitutional norms." This sentence is a clear evidence of the confusion of the Court, since it does not distinguish between environmental damage per se and civil environmental damage; but it provides some order in the payment of damages for environmental harm filed by a particular person, but not to restore or compensate the nature from the damage caused.[492]

Similarly, BEDON GARZÓN analyzed the sentence of the case *Marcelo Franco Benalcázar vs. Oleoducto de Crudos Pesados (OCP) Ecuador S.A.,*[493] stating that "this process was raised by the actors for damages to their properties with the construction of the heavy crude oil pipeline. The sentence determines the following regarding environmental issues: "The lack of right of actors has been claimed as one of the exceptions in this process claim compensation for environmental damage; it has to be emphasized that this is not an environmental process, therefore, it was never processed in this way, let alone, in the verbal summary established in Article 43 of the Environmental Management Act nor before the then President of the Superior Court as contemplated by Article 42 of the Environmental Management Act. Neither the plaintiff seeks compensation for damages to environmental goods, but for what would be alleged declines in patrimony caused by the construction of the heavy crude oil pipeline on their property, all of which demonstrates that we are facing a civil claim and not an environmental claim ... "This analysis is important for the judge that provides a resolution to this case since it makes a distinction between civil and environmental actions, stating that the former should be known in ordinary proceedings by a civil law judge and the environmental actions via verbal summary to the President of the Provincial Court where the event took place." (Bedón Garzón, 2011)

---

491 1998 Ecuadorian Constitution. Art. 86 The state protects the right of people to live in a healthy and ecologically balanced environment that guarantees sustainable development. It shall ensure that this right is not affected and ensure the preservation of nature. They are declared of public interest and shall be regulated under the law: 1. The preservation of the environment, conservation of ecosystems, biodiversity and the integrity of the genetic heritage. 2. The prevention of environmental pollution, recovery of degraded natural areas, sustainable management of natural resources and requirements for these purposes must comply with the public and private activities. 3. The establishment of a national system of protected areas, ensuring the conservation of biodiversity and maintenance of ecosystem services, in accordance with international conventions and treaties.

492 Second Chamber for Civil and Commercial Law of the Supreme Court in the resolution of the appeal of cassation issued October 31, 2007, in the trial followed by Leonardo Cabezas 53-2007 Miranda against Alberta Energy Ltd..

493 Ruling delivered on 26 January 2010 by the Twenty-Second Judge Civil de Pichincha.

Many treatise writers have emphasized precisely the different nature of the two damages in question. BIBILONI says that environmental damage "are those that because an environmental impact result in damage to persons or individual goods" (Bibiloni, 2005).

Likewise, CONDE ANTEQUERA explains: "An environmental damage will be the one that it is caused to goods, elements or resources that are integrated in the environment as a collective legal good, lacking a specific holder. And (...) those that occur on particular patrimonial assets that are part of the environment due to their nature and their role and that they are still environmental goods and natural resources for the sake of ownership corresponds to a particular "(Antequera, 2004).

However it is LORENZETTI who produces a thorough interpretation of the types of actions involved these various damages, stating at the outset that in the wrongful damage to the environment "the collective good is affected and can trigger the extraordinary legitimates (...) who hold diffuse, collective or public interests, but do not own the good" and hence two situations may occur: " the wrongful act of individual rights: as a result of the involvement of the collective good, may result in effects to life, health or patrimony of the people ".

And so, this author continues stating that in this case may trigger holders in the event of damage to individual rights with effects on the environment by stating that "this case is the opposite to the previous one runs. From restrictions on the enjoyment of the property, you can reach the public nuisance, which is a type of offense that obstructs and causes public damages to a class or group of persons in the exercise of their rights ". Finally, the author states that when acting in defense of the common good, prevention should be noted, which aims to stop the threat of damage, the restructuring that implies there is already a damage and things go back to the previous state, and repair that assumes that there is already a damage, that things can not go back to the previous state and a monetary compensation takes place. (Lorenzetti, 2011)

These differentiating visions were absent for a long time from the mind of Ecuadorean judges, confusing the two types of damage. Furthermore, at the administrative level, the State mandate from the 1998 Constitution was not fulfilled. Besides what was established in Article 86, Article 87 specified that the law would typify law violations and determine the procedures for establishing administrative, civil and criminal liability for acts or omissions against the rules of environmental protection; [494] actions by environmental damage did not have immediate recourse.

This took place because at the administrative level is not until 2003[495] that a high environmental standard was put in place, comprising all environmental regulations, which put into effect the permissible limits of environmental pollution and a regime of sanctions, that in practice, for most of those being regulated became effective until years later, when a grace period of four years expired, so almost ten years passed since the constitutional provision until an environmental penalty system was put into effect.

Moreover, prosecutions were established through the penal reform of the year 2000, and introduced some open types of prosecutions, but operated in a restricted way, however, some favorable rulings to the environment were obtained.[496]

Thus almost ten years went by from the validation of a recent constitution which introduced the right of people to a healthy and ecologically balanced environment, and yet the effective implementation was not possible due to structural factors worth going over:

2.1. Late transition from the policy to the legal framework.

The particular genesis of Environmental Law in Ecuador, include normative moments closely linked to the international commitments acquired by the country. You can notice the poor start from the 1972 Stockholm Summit with the first rule on pollution mentioned in 1996, and then a second step after the 1992 Rio Summit with many policies and regulations. This also has to do with the provision of financial resources to implement cooperative national and regional policy frameworks in the interests of legislative harmonization sought by these international agreements.

---

494 Ibid, Art. 87
495 Official record March 2 -31, 2003.
496 You can count the time until several criminal cases sanctioned under the previous constitutional regime on wildlife trafficking fundamentally, but there are cases of poaching. forest clearance, pollution of rivers and others.

This fact was recognized by several at the time by the following statement, “the importance of the adoption of appropriate environmental legislation is now generally recognized and has transcended international agencies themselves, who recommended the provision of technical assistance to developing countries to promote this type of legislation.” (Martín Mateo, 1991)

The fact that national policies and rules to apply them were born from the international political imperative born instead of the necessity and national legal reflection, contributed to these initiatives to aim to meet a “check list” policy, quickly invoking materials from biological or chemical science that had no visibility and dissemination to reach the national public agendas until then, but were pushed into the public agenda from the hands of important cooperation agreements that involved increasing the public debt.[497]

Therefore they were not endemic processes that obeyed wide recognized social needs and whose implementation was demanded at a time of institutional maturity. On the contrary, these started from the need to keep pace with international commitments and to create the necessary policy frameworks, where the preventive nature of environmental law prevailed which prompted highly rhetorical languages and formulations, more related to international law than command and control measures and where neither implementation mechanisms were quickly envisioned nor support strategies for the administration of justice and the institutions responsible for its implementation were drafted. In short, the country received extensive cooperation for the development of policy frameworks to put in place processes to implement the recently signed international agreements, but not reaching to strengthen operators such implementation.

2.2. Scarce environmental litigious praxis

One feature of the Ecuadorian environmental law, is its poor prosecution. The preventive emphasis of the first environmental standards permeated an atmosphere of optimism and relaxation, but most of all, estrangement with the results of the specific application of the rules of nature preservation. As mentioned above, national frameworks inherited soft law and the standards of prevention from international regulations, since these conventions and declarations had bequeathed political commitments and not concrete and enforceable legal obligations. In this context the enforcement mechanisms were not clear for the neophyte country on this subject, and as the policy-making and regulating behaviors that established maximum permissible parameters did not exist, the country took in generating processes of environmental compliance through civil, administrative and constitutional processes.

For several years the only reference to it was the action by environmental damage of the Environmental Management Act discussed above, which due to its limited legitimacy inhibited some initiatives. The Ecuadorian culture and legal tradition in environmental matters, has shown that it is not prone to air their disputes through court proceedings.

Added to the lack of praxis and distrust in the system was the poor training of judicial officers who did not know in detail the doctrine or have clear parameters for compliance. They were often inhibited to know environmental causes or did not give proper course to environmental demands.

In the ten-year period between the previous constitution (1998) and the current one (2008), a significant number of environmental decisions were not registered. Only one Supreme Court ruling is registered during this period[498] and some civil cases already mentioned, as well as some constitutional protections on environmental issues, some of these denied the protection requested.[499] But in the view of some, the period was not entirely fruitless since in these protections gave way to the open procedural legitimization at the constitutional level.

Thus PEREZ CAMACHO states that “legitimation was restricted to” natural persons, legal persons or groups of people linked by a common interest and directly affected by the action or harmful omission... “, which clearly does not include “any person” or “group of people”. But in the protection measures introduced in the 1998 Constitution, the Constitutional Court accepted without limitation lawsuits filed by anyone, in environmental issues, by their nature of diffuse rights, without the need to demonstrate any interest or linkage. (Pérez Camacho)

---

497 See Executive Order 4023 published in Official Gazette 998 of July 29, 1996, which authorizes the Ministry of Finance to obtain a loan of USD 15 million with the IBRD with a term of nine years with 3 years of grace for the project technical assistance for the management of the environment PATRA, whose executing agency was the Environmental Advisory Commission CAAM.

498 See the ruling in Case Delfina Torres Judicial Gazette 10 of October 29, 2002.

499 There are several that can be mentioned, including several in hydrocarbon matter, which denied the requested protection.

Finally, the lack of environmental litigation resulted in the lack of jurisprudential development, that did not help the development of legal doctrine, in a matter that needed more clarity. If the laws proved before the courts, the absence of this fundamental step, it only resulted in an immature and gestational law that is not yet completely defined.

2.3. Misunderstanding of the exercise of protection to the collective right to a healthy environment

This lack of understanding not only came from those in charge of the administration of justice in Ecuador, but it was also common among national institutions whose actions are related to the environment. Forestry issues that for a long time were the responsibility of the Ministry of Agriculture left to the Ministry of Environment a legacy of forestry technicians – with background in forest exploitation, in charge of the implementation of the Convention on Biological Diversity, who with a productive vision, regulated forest resources from exploitation and who in some cases had difficulty visualizing the intangibility of forest areas and collective ownership of the areas of environmental protection known as natural protected areas.[500]

Thus the regulatory approach on biodiversity and forest resources issues focused more on permit compliance and administrative red tape on cutting and logging, than promotion of legal actions to curb deforestation and degradation of protected areas or buffer zones.

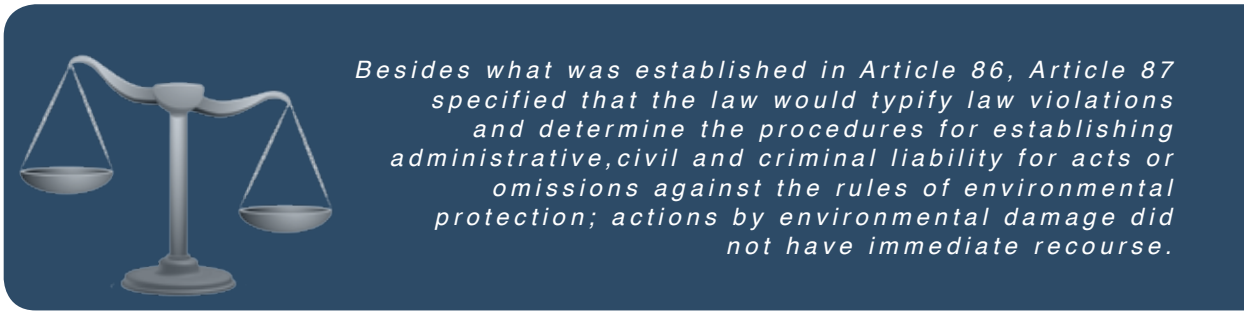
On the other hand "green issues" that capture the attention of international cooperation for the definition of conservation strategies and policies, took the place of "brown issues" dealing with environmental pollution, which determined that soft regulation visions of old standards such as the 1976 Control and Prevention of Environmental Pollution 1976 remained in effect into the 21st century, which added to the lack of permissible limits did not allow effective implementation of the right to live in a healthy and ecologically balanced environment.

2.4. Poor regulation adjustment.

If the laws do not conform to constitutional principles or standards establishing appropriate regulatory tools for the implementation of rights protected by constitutional norm, even though when invoking constitutional supremacy, these rules end up becoming ineffective and unenforceable mandates.

The lack of legal standing, and the absence of regulations to clearly establish behaviors and corresponding sanctions, determine a disparity and implementation of command and control measures. Added to this, the lack of political relevance at a time when the country suffered institutional crises that ended with large demonstrations and new elections produced a systematic lack of enforcement of environmental law, which until then it was thought, meant major policy achievements, on paper.

The enforcement of environmental legislation did not reached a period of maturity in that period, as mentioned by LORENZETTI, it required "that subjects comply with the rules on a regular basis, spontaneous, without going to the sanction. This demands institutions to regulate so incentives are appropriate to generate positive externalities for the environment to encourage voluntary compliance. It is necessary to use programs for law enforcement, including guidelines of ethical conduct, educational campaigns, and environmental quality standards." (Lorenzetti, 2011). La voluntad política y la capacidad institucional estuvieron ausentes por largo periodo. The political will and institutional capacity were absent for a long period.



500 See the creation of the Ecuadorian Forestry Institute of Natural Areas and Wildlife, INEFAN, months after the Rio Summit 92, the September 16, 1992 and its subsequent merger with the Ministry of Environment on 28 January 1999. Executive Decree 505, Official Record 118.

3. Ineffective regulations

The approach to the post-1998 Constitution period in Ecuador, serves to illustrate what is called Ineffective Law. While there were a good number of rules enacted, ecosystems and different animal species, continued to suffer predation. Cities and the countryside slowly began to witness the deterioration of their quality of life, as rivers became sick and soils contaminated, inevitably assuming the cost of development. Civil society organizations have not yet glimpsed legal strategies to demand higher levels of implementation.

It is clear in the words of some treatise writers that "environmental protection is achieved not only with the enactment of a law. In this theme, as in others, we can observe the distinction between the existing standard and effective regulation, among the mere existence of a precept and its enforcement. For different reasons, cultural, educational, social grasp, the effectiveness of protection rules is minimal." (Mosset, Hutchinson, Donna, 2011)

For a long period of time, the seductive dogma of sustainable development, society kept unraveling concepts, testing and qualifying components - social, environmental and economic -, until the institutional political setting took pace with rules laying down pathways for effective compliance. Administrative law in environmental matters was absent for too long, its development starts only in 2003.

On this, PIGRETTI reflection is interesting: "It is very well known to law specialists that in many respects the legislation achieves better results, being thought of as a set of preventive rules, establishing guidelines and procedures, rather than as a purely repressive provision. Frequently, in pure repression, once it is violated, even in a very small measure, a standard, a reiteration of default becomes the norm, with serious demerit to the law." (Pigretti, 2000)

This was evident in the case of Ecuador. The environmental protection provisions of the Constitution of 1998 could not contribute to the effectiveness of environmental law, however between 1998 and 2008 we lived a fruitful period in the development and promulgation of environmental policies and standards.

4. Social unrest and new political charter

After years of political instability the country voted in a 2006 presidential proposal proposing a constituent assembly, which came to power and install a Constituent Assembly. After months of work, the product delivered in 2008 for approval referendum, went beyond conventional legal barriers, not only in constitutional technique, but in content and form. But its most notable feature is not only its abundant text and regulatory air, it highlights especially its paradigmatic view.

The constitution of 2008, abundant in environmental standards, established social forms and new concepts. As some treatise writers state, after the "rhetoric" and "analytical" phase of environmental law we are entering a "paradigmatic" phase because what is changing is the way to see the problems and the solutions provided by our culture. So we are not only in front of a new discipline, as was thought in the earlier phases, already the challenge in this case is much higher, we are attending to "an issue that affects the approach period of the hypotheses, and it is fundamentally a epistemological move." (Lorenzetti, 2011)

This epistemological move referenced by LORENZETTI becomes evident when looking at the various discussions, workshops, and seminars that took place in Ecuador during the installation of the various thematic discussion tables during the Constituent Assembly in 2007, where in almost all tables a large number of sociologists, anthropologists, biologists, political scientists could be seen, among others, but fewer lawyers. To achieve a paradigm shift a different approach was needed from the traditional focus, fueling legal discussions with evidence from political, social and biological sciences, rather than legal science as such.

Whatever the method used, the result was a state based design paradigm called "good living" or Sumak Kawsay in the vernacular. A welfare state that applies the indigenous worldview of harmony with "Mother Earth" where not only the state guarantees are substantially expanded at a personal and collective level, but it also tested new rights. The rights of nature, among them.

4.1 The rights of nature in the 2008 Constitution.

This single constitutional inclusion caused and continues to cause all sorts of comments, analysis and elaborations on its benefits, success or aspirations even pushing the analysis far beyond what the legislators expected when they were included. And it is clear that its statement is only the preamble since the most important task still remains, unraveling its true scope and meaning. As discussed by some Ecuadorian scholars, such as Narvaez, "the environmental constitutional provisions, despite their conceptual and practical development, require greater depth on the basis of the debate initiated by the Constituent Assembly of Montecristi and international law. (Narváez, 2012)

"The Ecuadorian constitution has been widely disseminated internationally because of its particular treatment of environmental rights; and it is not simply a set of fundamental principles that are intended to protect the ecological heritage as guarantors of the survival of the human community, with a clear anthropocentric approach rather common in several key systems of the world; Ecuador's constitution points to an integrated environmental management with a specific purpose of protecting natural ecosystems, conservation of endangered species, and pollution prevention within the framework of environmental justice and public participation. The naturalist ethos, goes so far as to declare nature as a subject of rights and procedural legitimacy. " (Molina Roa, 2014)

But beyond the analysis of the mutation of Ecuadorian law from anthropocentrism towards ecocentrism or even biocentrism, it is clear that the rights of nature burst into a legal system that was not prepared to receive them. The civil rights of Bello,[501] still does not explain the singular exception decanted into this strange legal relationship in which nature becomes subject and object of the law at the same time. However, the analysis of their opponents could not extinguish the enthusiasm unleashed social movements, NGOs and several academic sectors.

4.2 The enforcement of the rights of nature

No doubt the announcement of a guarantor constitution that not only recognized the collective right to the environment was recognized, but also contained more than fifteen articles on the environment, was more than hopeful and made you think that all this change of visions and paradigms, coupled to a determined and courageous state tutelage, was what was needed to start without delay or remedy a system aimed at strict compliance with environmental standards and an emphatic respect for nature.

So among all the legal innovations that are included in this Constitution, the inclusion of the rights of nature is very interesting, for the audacity, causing significant shakeup in conventional Ecuadorian legal system and opening a bar of expectation on how they would be implemented and its scope over other rights.

Many quickly anticipated to say that the right to nature came to reinforce the human and collective right to live in a healthy and ecologically balanced environment that invoked the previous constitution of 98 and picks it up again the 2008 Constitution,[502] which in my opinion was not tested and defended well enough to be labeled insufficient.

However, the law of nature is not an environmental law "per se", it was also established as an evolutionary test for contemporary society and a goal to a right as Amartya Sen has described the goal rights. As explained by ARANGO, "the concept, right-goal brings the novelty of articulating the content of each social right with the possibility of requiring the progressive realization of the same through public policies, Sen takes into account the context of developing countries where the material conditions impedes immediate guarantee of social rights. For Sen the category of goal-rights refers to the right of citizens to have a clear public policy on the right that the state has agreed to make ". It is not a right to X, but a right to have public policies that guarantee X. " (Arango, 2014)

This is why the exercise of the rights of nature do not end with a legal act of specific protection of unique character, its biggest test will be in its effectiveness against public policy that violate nature over time.

---

501 Andres Bello, philosopher, translator, scholar, educator, politician, diplomat and Venezuelan jurist of the pre Republican era. Considered one of the most important humanists of America, the main promoter and drafter of the Civil Code, one of the most innovative and influential American legal works of the 19th century that lasts until today.

502 Art. 14 The right of people to live in a healthy and ecologically balanced environment that guarantees sustainability and good living, sumak kawsay. Ecuadorian Constitution of 2008.

However, what is really significant for the legal scenario beyond postmaterialist symbolism and the rhetoric that has been raised, are specifically the three components in which this right is split: the right to (i) fully respect their existence, maintenance and regeneration of its vital cycles, structure, functions and evolutionary processes, (ii) the right to restoration, independent of the obligation of the State and natural or legal persons to compensate individuals and groups that depend on natural systems affected; and (iii) the enforcement of precautionary and restrictive measures for activities that could lead to the extinction of species, destruction of ecosystems or the permanent alteration of natural cycles.[503]

These three components of the rights of nature, effectively guide the ward of the state of nature by nature, while generating a tool for the effective enforcement of the right to a healthy and ecologically balanced environment.

But the "proof of life" of the rights of nature will not come from common judgments for the defense of environmental rights judgments, they can be obtained with the invocation of the collective right to a healthy and ecologically balanced environment, since its object it's not to dispute, compete, or add to it.

The proof of its systemic validity will come from the decisions in which the State, applying a mature right, with strong regulatory institutions, direct its public decisions to the essential respect of its existence, maintenance and regeneration of vital cycles, functions and evolutionary processes, and ensure its restoration. That is, the full validity of the rights of nature will take place when the political and institutional has been subjected to a mainly intergenerational legislation.

So far the plea of the rights of nature has served mainly to join the list of considerations in administrative decisions granting environmental permits and approvals or serve as a preamble to the enactment of any administrative act or environmental regulation, and its enforcement in decisions is still limited, although it is worth commenting on a couple of rulings, including the first decision in 2011 explaining the schematic and didactic analysis of MELO, where you can clearly see the elements of this ruling. (Melo, 2011)

4.2.1. Frederick Wheeler vs. Provincial Council of the Province of Loja.

This ruling takes place in the Provincial Court of Loja, in March 2011, when the second and final instance rules the Protective Action, filed by Richard Frederick Wheeler and Eleanor Geer Huddle in favor of Nature, particularly in favor of the river Vilcabamba and against the Provincial Government of Loja.[504]

These two foreign citizens invoke the rights of nature contained in the 2008 Constitution, Article 71 which states that "every individual, community, people or nationality may require the public authority to enforce the rights of nature." This action is filed because a road expansion was built without permits and environmental studies; moreover, construction rubble was thrown into the river causing environmental damage to the Vilcabamba river. Judges resolve the constitutional action based on the following reasoning:

4.2.1.1 The protective action, only appropriate way to safeguard the rights of Nature

Article 40.3 of the Constitutional Organic Law establishes as a requirement interposing a protective action, when there is no other legal defense mechanism that is appropriate and effective in protecting the injured right. The Chamber resolves that "Given the indisputable, elementary and indispensable importance of Nature, and taking into account as evident or obvious fact its degradation process, the protective action is the only appropriate and effective way to end and remedy immediately a focused environmental damage."

4.2.1.2. Application of the Precautionary Principle

The ruling applies a coherent use of the precautionary principle of Article 73 of the Constitution to the scope of the rights of nature, which as mentioned above, orders the State to implement precautions and restrictions for activities that may lead to the extinction of species, destruction of ecosystems or the permanent alteration of natural cycles as stated in Article 396 of the Constitution on environmental impacts.

503 Articles 71, 72 and 73 of the Ecuadorian Constitution of 2008.
504 Ruling Loja Provincial Court. Criminal Chamber. March 31, 2011.

4.2.1.3. Damage to nature are generational damage

The court introduces the intergenerationality criteria to show that the damage to the rights of Nature are such that the negative effects affect future generations. The court stresses that "The importance of nature is so obvious and indisputable that any argument about is redundant, however, never to forget that the damage caused to it are "generational damage', which are those whose magnitude affect not only the present generation but their effects will have impact on future generations."

4.2.1.4. Reversing the burden of proof

This is perhaps one of the most striking themes of the ruling, to recognize the validity of the constitutional provision that provides for the reversal of the burden of proof on environmental matters, contained in Article 397.1 of the Constitution. "The plaintiffs were not supposed to prove the damage but that the Provincial Government of Loja had to provide certain proofs that the activity of opening a road does not affect or will not affect the environment. It would be unacceptable the rejection of a protective action on behalf of Nature for failing to gather proof, because in case there were doubts, possibilities or they can be assumed after an environmental damage has been caused by pollution, must prove his absence not only that who is in better position to do so but who ironically holds precisely such damage does not exist."

4.2.1.5. Collision between rights

One of the issues that had caused more expectation regarding the right of nature was precisely how the case of an apparent conflict of rights would be resolved, because according to the constitution all rights enjoy the same legal category. However the judges of the Provincial Court of Loja took the position that the collision was only apparent and on the contrary, the rights of nature are competing with basic human rights such as the right to health, to decent life and to live in a healthy environment.[505]

4.2.1.6. Compensation measures

The Provincial Court in its ruling calls for the respect to the right of nature, to fully respect its existence and the maintenance and regeneration of its vital cycles, structure, functions and evolutionary processes are respected and orders the Provincial Government of Loja to obey and welcome any comments made by the National Environmental Authority, if not all the work would be suspended.

No se ordena en la sentencia medidas específicas de restauración integral del río Vilcabamba. Sin embargo estas medidas suelen solicitarse a través del Ministerio del Ambiente y su Programa de Reparación Ambiental y Social, PRAS.

Finally, it is ALSO noteworthy the measure of satisfaction imposed when it was order to the respondent company for a public apology for starting a work without the environmental licensing.

This case, the first to address directly the implementation of the rights of nature, left a high optimism about not only the application of this law, but also the application of precaution, the intergenerational and resolution of the balance between development and environmental protection. However, when dealing with unlawful conduct, -the lack environmentally license-, the resolution is almost obvious and still leaves pending proof of a balance between a development policy versus environmental protection measures.

4.2.2. Precautionary measures for environmental remediation of the oil spill of the Company Oleoductos de Crudos Pesados OCP vs. Carlos Alberto Hanze Moreno.

Another ruling worth commenting on is the one related to the precautionary measures requested in the case of the restoration of nature, due to oil spill caused by a pipeline ruptured due to landslides. The responsible company demanded entry to the premises to carry out environmental restoration and repair and one

---

505 "As regards the allegation of the Provincial Government that the population ..., needs roads, it is noted that: In case of conflict between two consti tutionally protected interests, the solution must be found in accordance with the legal elements which provide the specific case and in light of the constitutional principles and values ... But in this casewe must not weigh because there is no collision of constitutional rights or sacrifice of one of them, because it is not about the widening of the Vilcabamba-Quinara road, but to do it respecting the constitutional rights of nature." Ruling, Provincial Court of Loja. Criminal Chamber. March 31, 2011.

of the affected owners prevented it. Those responsible from the company demanded precautionary measures to enter the premises.

Thus, the judge decides to deny the revocation of the precautionary measures "as it refused to perform activities that allow to mitigate and remedy the negative impacts derived from the event of force majeure KP 474, furthermore it has prevented access to the Winchele estuary and its banks located in this land, where remediation tasks are executed. (...) With this attitude adopted by the plaintiff, it threatens to cause environmental damage because the mitigation and remediation activities aimed at eliminating the negative impacts of the event, can not be carried out properly, thus precautionary measures were issued aimed at cessation of the refusal by the plaintiff. The precautionary constitutional rights are the right to live in a healthy and ecologically balanced environment under Article 14 of the constitution and the law of nature to restoration under Article 72 of the Constitution." [506]

It is the first case where a company causing significant environmental demands the terms to undertake the tasks covered remediation and restoration protected under the collective right to live in a healthy environment, as well as in the right to the restoration of nature. Precautionary measures proved to be an effective mean for this purpose.

But the "proof of life" of the rights of nature will not come from common judgments for the defense of environmental rights judgments, they can be obtained with the invocation of the collective right to a healthy and ecologically balanced environment, since its object it's not to dispute, compete, or add to it.

5. Implementation of the rights of nature in the case ITT-Yasuni

It is important to comment on the case of the project Yasuni - ITT in the context of the enforcement of the rights of nature. First because of the notoriety the case has worldwide, but especially since for a time it was believed that the way to demand the enforcement of that right was easily illustrated by the invocation of these rights for this particular case.[507]

However, over a year after the government announced the origin of the extractive project in Yasuni National Park because of the lack of international compensation for leaving the oil underground, different social groups that promote the conservation alternative have not yet defined invoking a protective action in a time when our legislation not only allows applying a protective action [508] for violations of constitutional rights by acts or omissions of any non-judicial public authority but also against public policies.[509]

Notwithstanding this, the strategy of conservation groups has focused more on a political strategy that involves of a referendum to ask citizens the origin of the exploitation project in the national park, in a case of wide national dissemination.

---

506 Judgment No. 8242-2013-0053 followed Andres E. Mendizabal Mochkofsky vs-. Hanze Carlos A. Moreno.

507 The Yasuni ITT initiative by the Ministry of Environment and the Ministry of Foreign Affairs, Trade and Integration, raises the commitment of the Ecuadorian State to leave oil in the ground Ishpingo, Tambococha and Tiputini fields (ITT) located within the National Park Yasuní. That is, not exploit 846 million barrels of oil, which will prevent the emission of around 410 million tonnes of CO2, as the basis for shaping a different devel opment model inspired by a post-oil economy, as well as the need to radically change the ways of relating to nature. Specifically, this proposal aims was to mitigate carbon dioxide emissions to fight global warming; protect biodiversity in Ecuador; reduce poverty and inequality; and support the exercise of the right to voluntary isolation of indigenous cultures not contacted (Tagaeri and Taromenane). In return for the decision of the Ecuadorian government to keep oil from Ishpingo, Tambococha and Tiputini (ITT) fields below ground contributions of the countries, institutions would receive, in general, of all actors in the international community to form a capital fund managed by a trust with the participation of the major contributors, under mechanisms that will be detailed later, at least 3,500 million. After nearly five years of starting the fundraising tasks, the poor results were the basis for the government to derail the initiative and declared the origin of oil exploitation in the ITT.

508 2008 Constitution Art. 439 The constitutional action may be submitted by any citizen or citizen individually or collectively. (open legitimation)

509 Constitution 2008 Art 88. The protective action shall relate to the direct and effective protection of the rights recognized in the Constitution, and may be filed when there is a violation of constitutional rights by acts or omissions of any non-judicial public authority; against public policies when involving the deprivation of the enjoyment and exercise of constitutional rights; and when the violation comes from a particular person, if the violation of the right causes serious injury, if you pay utilities improper, if it acts by delegation or concession, or if the person concerned is in a state of subordination, defenselessness or discrimination.

On this subject, despite the negative rating of the consultation on the national electoral body, the presidential project has already received the legal viability of the National Assembly, [510] as requested in Article 407 of the Constitution.[511]

The case is still not closed even though the project has already started construction of the road towards the concession area.

6. Procedural Reform in place and limiting the capacity to act on behalf of the rights of nature.

Despite the efforts of the current Constitution to extend the legitimacy and leave it sufficiently open to let any group or person claim the right to the nature under the provisions of Article 71, stating that "Every person, community, people or nationality may require the public authority to enforce the rights of nature." These rights are the subject of heated debate within the recently approved General Process Code in the Committee of Justice and State Structure in which Chapter II regulates the "Representation of Nature".

It states that "Nature can be represented by any natural or legal person, community or group, through the Ombudsman who will also act on their own initiative. Nature can not be sued in court or counterclaim. The Ombudsman will respond in accordance with the law and this Code.

The introduction of this dual representation strikes strongly, in contravention of Article 71 of the Constitution in which no qualification for the representation is established.

However, a point that is clearly satisfied is the one related to "actions for environmental damage, as well as actions for damages caused to persons or property as a consequence of environmental damage, will be exercised separately and independently." Ending the confusion created by article 43 of the Environmental Management Act, discussed above in which the actions of compensatory damages were confused with the environmental damage itself.

It also states that "If by application of other laws prevention, remediation, restoration and repair of environmental damage would have been achieved at the expense of the responsible party, it will not be necessary to process the actions described in this chapter.

Remedial, restoring and repairing environmental damage measures, and their implementation will be subject to approval by the national environmental authority." Further, "in the absence of such measures, the judge will order them".

While this reform aims to the logic of not to allow two actions for the same reason, and to process the exception of compliance with the exercise of remedial, restorative and repair activities, should clearly leave intact the rights of communities to request social and environmental repair, when having to demand compensation for the damages sustained in the event of loss of use and enjoyment of natural resources in their community.

This recently approved Code in a first debate, awaits the date for discussion for a second debate in the plenary.

CONCLUSION

After the long journey from the first outlines of environmental policy in the hands of the international regulatory need, through sufficient constitutional norms but applied sparingly, and environmental standards that did not deal properly with the issue of the application, we are now in a new institutional moment with the Constitution of 2008. A new starting point that allows us to test again the system of state guarantees on the environment.

---

510 Resolution No. CAL-2013-2015-021, of August 29, 2013.

511 2008 Constitution Art. 407. extractive activities of non-renewable resources in protected areas and in areas declared as protected zones is prohibited, including logging. Exceptionally these resources may be exploited at the request based on the Presidency of the Republic and prior declaration of national interest by the National Assembly which, if deemed appropriate, may call referendum.

It is necessary, now more than ever look back and recognize all the progress but above all the setbacks and the factors that have limited the effectiveness and the required enforcement of the environmental law in Ecuador as the arm in charge of implementing sustainable development policies.

For many years the Ecuadorian society has worried too much about generating rights and guarantees, and too little on creating the conditions for such rights and guarantees to be exercised properly in order to create a culture of enforcement and respect for the existing standard. To apply the collective right to a healthy environment, and now, the rights of nature, it is not enough just to write them, you must know them, understand them well, and generate its own dogmatic to allow its full implementation.

This institutional and regulatory momentum where we find ourselves raises the bar. Not only because of the visibility of the flagship rights contained in our Constitution, but because we have become a social laboratory, with the world watching over. Failures in enforcement, poor interpretation of its scope, the drawback of overlapping rights can disrupt the opportunity to get into new paradigms that give concrete content to sustainable development and to transform environmental law into the guarantor of development.

BIBLIOGRAPHY

Albán, MA., Barragán, D. Bedón, R., Crespo, R. Echeverría, H. Hidalgo. Ma. Muñoz ,G. y Suárez S. “Ecuador Ambiental, un recorrido propositivo” CEDA, (2011)

Arango, Rodolfo. Derechos, Constitucionalismo y Democracia. Serie de Teoría Jurídica y Filosofía del Derecho. No. 33. Universidad del Externado. (2004)

Bedón Garzón, René. Aspectos Procesales relativos al daño ambiental en el Ecuador. IUS HUMANI, Universidad de los Hemisferios. (2010).

Lorenzetti, Ricardo Luiz. Teoria del Derecho Ambiental. Primera Edición. Pontificia Universidad Javeriana. Editorial Temis. (2011)

Martin Mateo, Ramón. Tratado de Derecho Ambiental, Vol 1. Editorial Trivium S.A. (1991)

Melo, Mario. https://mariomelo.wordpress.com/2011/06/01/exigibilidad-judicial-de-los-derechos-de-la-naturaleza/ (2011)

Molina Roa, Javier Alfredo. Derechos de la Naturaleza. Universidad del Externado. (2014)

Mosset, J. Hutchingson, T. Donna, A. Daño Ambiental, Tomo I, Rubinzal-Culzoni Editores. (2011)

Narvaez, Ivan. Derecho Ambiental en clave Neo constitucional. (enfoque político). FLACSO. (2012)

Pérez Camacho, Efraín. El proceso Ambiental en la Constitución. Revista Jurídicas de Derecho. Tomo 6. (s/f)

Pigretti, Eduardo A. Derecho Ambiental. Ediciones Depalma. (2000)

4.3 Supporting Policy, Law and MEA implementation: Lessons and Experiences on accountability and compliance (of trails, streams, people and rivers in the Americas)

Eduardo Abbott y Peter Lallas

Key Words

Accountability, enforcement, compliance, enabling environment, influencing models, lessons learned, GEF, safeguards, Inspection Panel, International Organizations.

This paper and presentation will consist of two main parts. The first part will review experiences and lessons in the field of accountability and policy compliance - - especially environmental and social safeguard policies - -of the World Bank Inspection Panel. The analysis will describe how the Panel, and similar independent accountability mechanisms at other international organizations, respond to concerns of local communities around the world to address concerns about non-compliance and potential harm from projects financed by these organizations. The discussion will highlight key findings from specific cases and investigations, and results achieved. The second part will review experience and lessons in projects designed to support enhanced policy and regulatory systems at the national level in the field of environmental protection, drawing on the experience of the Global Environment Facility (GEF). This analysis will consider some best practices and lessons in supporting these "enabling environments" in support of the global environmental agenda, noting that the new GEF 2020 Strategy for the Global Environment identifies these types of "upstream" projects as one of the five main "influencing models" of the work of the GEF. The paper and presentation will conclude with observations on the role and importance of both "upstream" initiatives (supporting policy/law and regulatory systems) and more "downstream" interventions (accountability and reviewing policy compliance), and linkages between the two. Practical lessons and insights from work in the field, as well as emerging issues and trends, will also be highlighted.

INTRODUCTION

Our (rather sizable!) topic is about ways to support the implementation of environmental policies, laws and, especially, multilateral environmental agreements (MEAs). We will take a crack at this topic looking through the lens of two streams of work in this field. The first is the Global Environment Facility, or GEF - - which is a financial mechanism to support implementation of a number of MEAs and global environmental benefits. The second is the work of the International Institutions (IFIs) independent accountability mechanisms (IAMs) - - citizen-based accountability and recourse mechanisms that respond to concerns of local communities to see if the IFIs are complying with their own policies designed to avoid, compensate and reduce harms to people and the environment. We will do this by focusing on the work of the World Bank Inspection Panel, the first IAM established by an IFI.

The core idea presented is that to tackle environmental problems effectively, we need to look both "**upstream**" and "**downstream**". The upstream element here refers to developing a normative and institutional framework that not only sets the rules but also creates an "enabling environment" toward what we are trying to achieve. By way of illustration, we will touch on work by the GEF to support such "enabling environments" to help achieve global environmental benefits and support implementation of MEAs.

Equally importantly, there needs to be a "downstream" component - - a system of checks and balances to review whether these norms and enabling environments are being well applied. Here we will take a look at independent accountability and recourse systems at the international level as represented by the Inspection Panel (IPN).

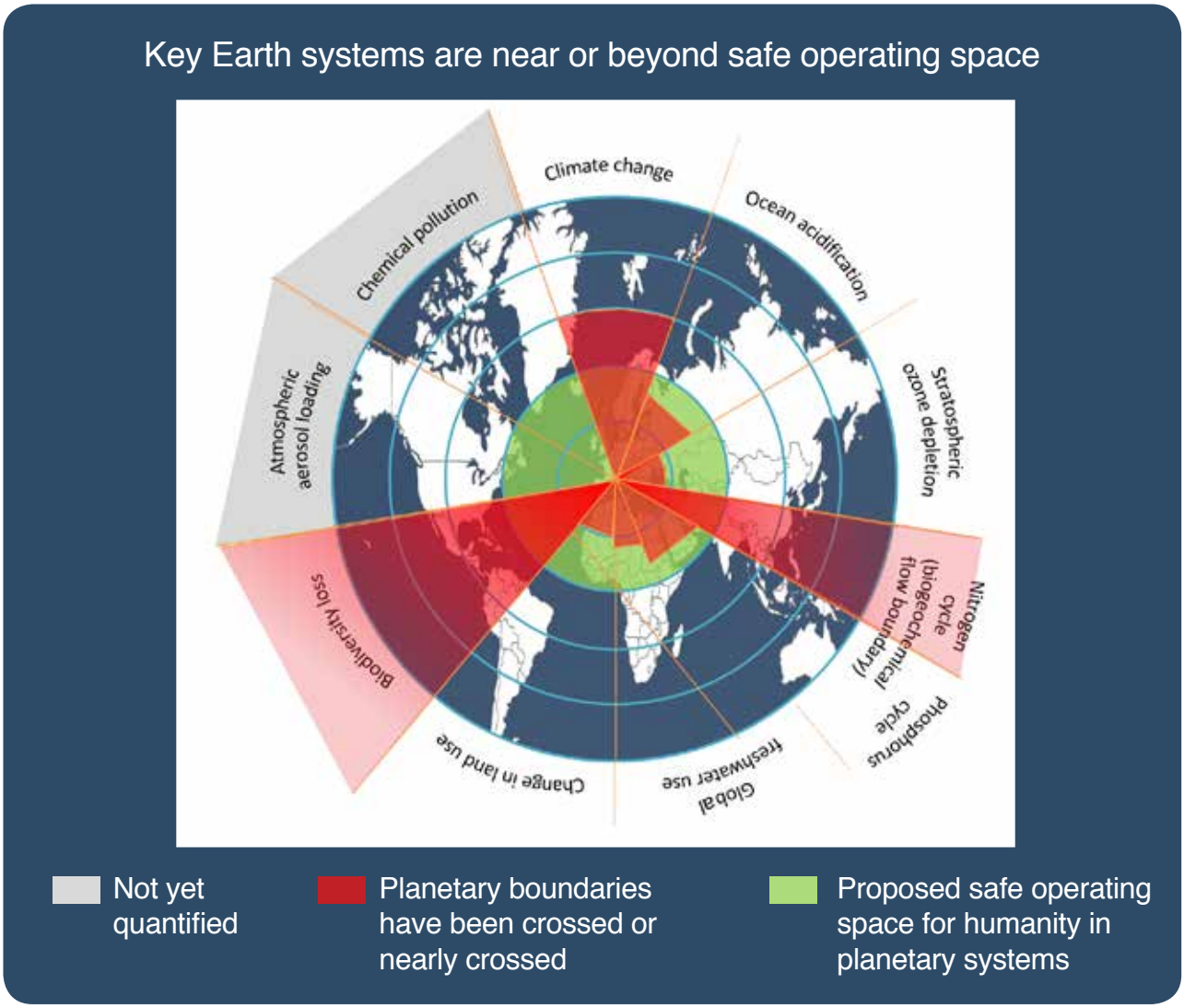
Upstream . . . and the GEF

Downstream . . . and the Inspection Panel

1. GLOBAL ENVIRONMENTAL CHALLENGES

To begin, it is important to consider the problems which we are trying to address - - and how we are doing so far. This now famous graphic in Figure 1, below, illustrates critical earth ecosystems, and shows that for several we are reaching danger zones - - near or beyond tipping points.[512] As we will review in a moment, the GEF has authority to help address almost all of these, and the work of IAMs like the Inspection Panel is also highly relevant to this effort, as a check-and-balance to help give voice to local communities and consider the social and environmental implications of projects supported by international organizations.

Figure 1



512 A more recent graphical illustration of these issues and pressures is set out in Rockstrom et. al, "A Safe Operating Space for Humanity," Stockholm Resilience Center, 2015.

2. Working Upstream - - the Global Environment Facility (GEF)

So let's start with the GEF. As described in more detail on the GEF website (www.gef.org) and in the *Instrument for the Establishment of the Restructured Global Environment Facility,* March 2015 (reproduced on the website), the GEF was established around the time of the 1992 Rio Earth Summit. The central goal and mission of the GEF, as well as its mandate and role as a financial mechanism under a number of MEAs, are indicated briefly below.

- **Goal**: *to address global environmental issues while supporting national sustainable development initiatives.*

- **Mission**: *mechanism for international cooperation to provide new and additional grant and concessional funding to meet agreed incremental costs of measures to achieve agreed global environmental benefits.*

- **Financial mechanism**: the GEF is a financial mechanism for several MEAs,[513] and has authority under the GEF Instrument to finance and support projects in focal areas in biological diversity, climate change, international waters, land degradation (primarily desertification and deforestation), and chemicals/wastes.[514]

The GEF provides grants and concessional funding (overall, mostly grants) to support projects and programs in recipient countries around the world, in support of its mandate for the global environment. The funding for this work comes in periodic replenishments (every four years) to the GEF Trust Fund from donor countries.[515] The GEF is, in many ways, a partnership for international cooperation in support of these broader goals and objectives, where the countries of the world work together with international organizations, civil society and the private sector, to address global environmental issues and problems. The institutional arrangement and governing structure of the GEF is set out in the GEF Instrument.[516]

The projects and programs financed by the GEF cover many key areas in support of the global environment, ranging from support for protected areas and sustainable land use and management, fighting against illegal wildlife trafficking and species loss, tackling deforestation and land degradation, support for renewable energy sources, technologies and alternatives, promoting protection and sustainable use of the oceans and marine resources, supporting best practices and regional approaches to international waterways, supporting efforts to eliminate the use of persistent organic pollutants (POPs) which can naturally transport across national borders, to clean up stockpiles and dangerous sites, and to combat and protect against risks of contamination from mercury. In the years since its establishment in 1991, the GEF has provided some $13.5 billion in grants, supported by approximately $65 billion in co-financing for a total of nearly 4,000 proj-

---

513 As described in the GEF Instrument, these include: the UN Framework Convention on Climate Change (UNFCCC); the Convention on Biological Diversity (CBD); the Stockholm Convention on Persistent Organic Pollutants (POPs); the United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (UNCCD) and the Minamata Convention on Mercury. See GEF Instrument, paragraph 6.

514 See generally GEF Instrument, especially paragraphs 2 and 3.

515 The most recent replenishment concluded in 2014 in the largest amount ever of $4.43 billion for the four year period of GEF-6, and with a number of new countries become GEF donors for the first time. See GEF/C.46/07Summary of the Negotiations of the Sixth Replenishment of the GEF Trust Fund

516 The GEF governing structure includes: the GEF Assembly (meeting once every four years) and GEF Council (meeting twice a year), composed of government representatives from around the world; the GEF Secretariat, a Scientific and Technical Advisory Panel (STAP); an Independent Evaluation Office; GEF Implementing Agencies and Partners, which originally were three (the World Bank, UNDP and UNEP) and now are expanded to 14 GEF Agencies); Focal points within governments; and CSO networks and stakeholders who engage and play a critical role in the work of the GEF.

ects in more than 165 developing countries. The projects can be large or small, local, national, regional or global, and the GEF also supports a very active Small Grants Program that provides grants to support to civil society and community-based organizations; to date these consist of more than 20,000 grants for a total of approximately $1 billion (see www.thegef.org for details and further information).

In GEF's program and project work, an emphasis is put on innovation and partnerships, supporting people and livelihoods, gender equality, and opportunities to "scale-up" individual projects for greater impact. Often, the projects and programs seek to advance and support more than one global environmental objective at a time, in line with GEF's mandate to finance actions in support of several MEAs and thematic objectives (we will come back to this point below).

Through this work, the GEF and its many partners have supported much progress in the past 20 years in advancing the global environmental agenda and tackling key problems and pressures. Illustrations of this progress - - as well as the challenges faced - - are set out in a number of publications, the Annual Monitoring Reports presented to meetings of the GEF Council, and the periodic reports on activities presented to the various MEAs (see www.gef.org and bibliography, attached).

Nevertheless, urgent problems remain for the global environment, and in some case are growing larger under the pressures people are putting on the planet. Simultaneously, there is also a substantial body of experience from which to learn - - about what has been working well and less well - - in tackling these problems.

2.1. The new GEF 2020 Strategy

The new GEF 2020 Strategy,[517] endorsed by the GEF Council in September 2014, attempts to crystallize lessons and best practices from this experience, as part of an overall blueprint for its future work. The key new strategic directions set out in GEF 2020 are indicated below:

- Centrarse en lo que impulsa la degradación ambiental
- Entregar soluciones integrales, dado que muchos desafíos globales están interrelacionados
- Mejorar la capacidad de resistencia y adaptación al cambio climático
- Garantizar la complementariedad y sinergias en el financiamiento climático
- Adoptar el modelo de influencia correcto

Además de estas principales directrices estratégicas, la estrategia FMAM 2020 también resalta estos tres principios básicos operativos para su labor futura: (1) la movilización de los actores locales y globales; (2) la mejora de la eficacia operativa; (3) el fortalecimiento de la gestión de resultados. Estas directrices estratégicas y principios operacionales sirven para apoyar la visión del FMAM 2020: "…para que el FMAM sea un líder del medio ambiente por su rol como mecanismo financiero de varios... AMUMAS, respaldando un cambio transformador, y logrando los beneficios ambientales a una escala mayor".GEF 2020, p. 15.

2.2. Adoptando el modelo de influencia correcto para apoyar los beneficios ambientales globales FMAM 2020 presenta un tipo de "tipología" de los diferentes modelos de influencia, que incluye:

- *Focus on drivers of environmental degradation*
- *Deliver integrated solutions, given that many global challenges are interlinked*
- *Enhance resilience and adaptation to climate change*
- *Ensure complementarity & synergies in climate finance*
- *Choose the right "influencing model"*

The first two are especially relevant to this presentation and Conference, as they relate to the creation of "upstream" enabling environments that create a critical foundation for subsequent programs, projects and initiatives. These upstream elements are integrated into many, many GEF projects. Another way of saying this is that helping to build good norms and institutions is a key way to advance policy priorities, in this case tackling common environmental challenges. Getting this part right, including the strengthening of public sec-

517 GEF 2020 is reproduced at www.gef.org.

tor institutions and improving their transparency and efficiency, is critical to building incentives, more well-functioning markets, predictability, and equity into these efforts - - rather than just supporting good "projects" in a vacuum that do not lead to lasting change or improvement.

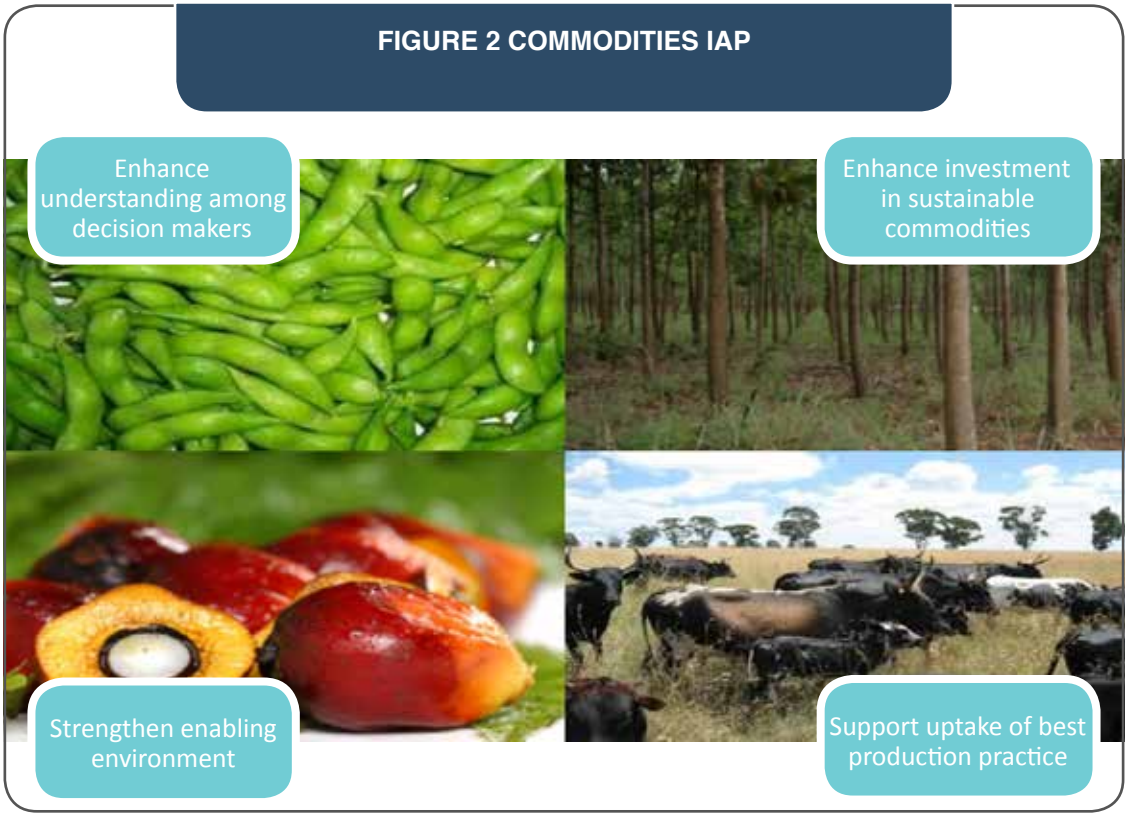
2.3. Illustration – the GEF integrated approach pilot

The GEF's support for effective enabling environments can be seen, for example, in its recent efforts to foster more integrated approaches to confront global environmental problems. On the cutting edge of this work are three recently initiated integrated programs (Integrated Approach Pilots, or IAPs). The GEF recently has developed three new major IAP initiatives in GEF-6, known as: (1) *Sustainable Cities*; (2) *Taking Deforestation out of the Commodity Supply Chain* (palm oil, soy, beef); and (3) *Food Security in Sub-Saharan Africa*. These integrated approaches take advantage of a unique asset of the GEF, i.e., its ability to address inter-linked global environmental problems because it supports several MEAs focused on different but related problems.

Over the past year and more, the GEF Secretariat and its partners have devoted substantial work and effort to developing the initial concepts (in the form of Program Framework Documents or PFDs) for these three IAPs, on the basis of multiple dialogues with countries, agency partners, stakeholders, the GEF Council and others, and taking into account the opportunities presented by these new approaches. A detailed description of this work and the new IAPs is now on the GEF website, entitled "*Integrated Programs: GEF's new way to create multiple environmental benefits*" (at www.thegef.org), and the PFDs are part of the larger GEF Work Program document just approved by the GEF Council at its meetings in Washington, D.C. in June 2015.

These IAPs, like many other GEF supported projects, have an important emphasis on creating an "enabling environment" of laws, policies and institutions to help ensure effectiveness, longevity, and ability to scale up. As illustrated in Figure 3, below, the Commodity IAP will work on building such foundations along the entire value change, and will seek to create incentives among producers/growers, buyers/distributors, and final consumers to shift away from destructive existing production-consumption chains.[518]

FIGURE 2 COMMODITIES IAP



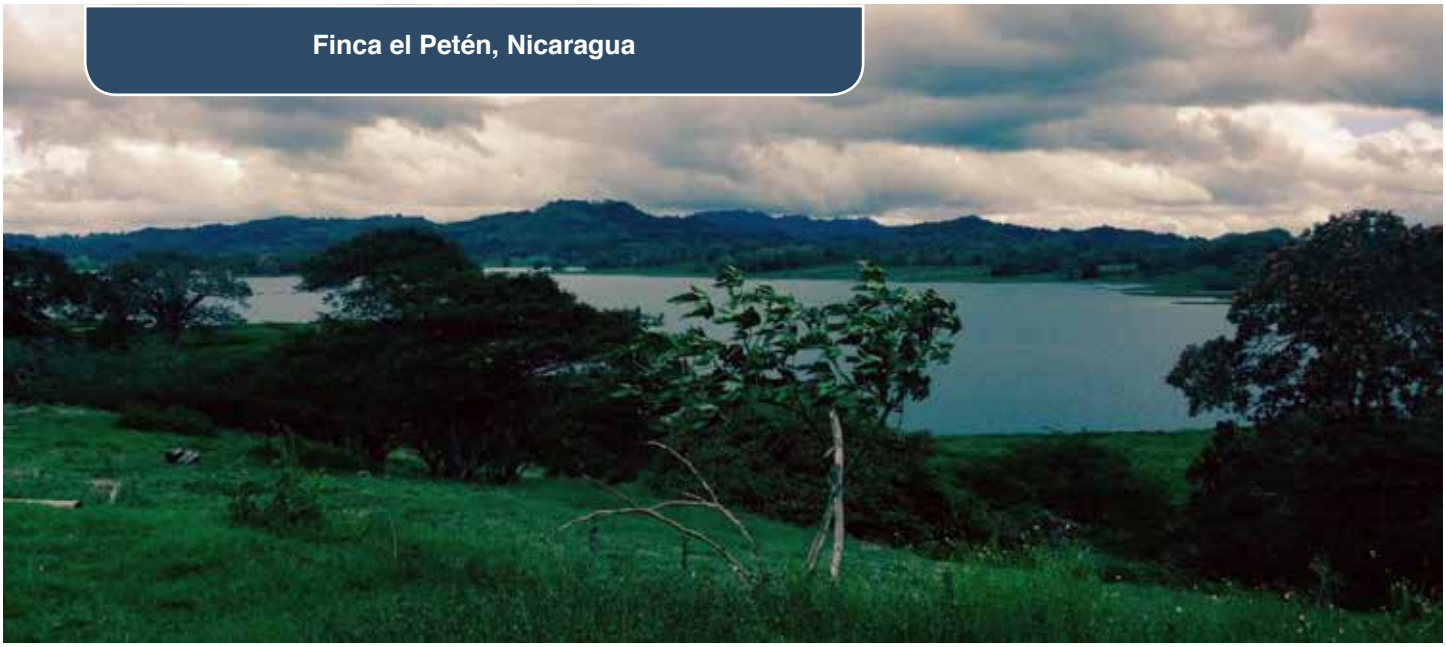
518 GEFC.48/08/Rev2, Work Program (see, e.g., pp. 14-17 describing the three IAPs).

For example, in the Commodity IAP, incentives are being discussed and developed for producers to no longer expand into forested areas, and for major retailers to make pledges not to buy commodities from such areas. These can be supported through dialogue, and also through improved rules throughout the system to build incentives for better alternatives. The potential benefits are high: this IAP focuses on 3 global commodities – soy, palm oil and beef – which account for some 80% of tropical deforestation, which in turn reduces ecosystem services and increases the emission of greenhouse gases (GHG) such as carbon and methane in an amount of approximately 12% of GHG emissions. The ambition is to "break the logic" leading to the current levels of deforestation associated with these supply chains, and help to create a new "business model" that leads to a different result, with multiple benefits for the global environment.[519]

There is also ongoing discussion within the GEF system, including in the context of meetings of the Scientific and Technical Advisory Panel (STAP), on opportunities to support stronger action against plastics and other debris going into the ocean from urban and other land-based sources. In this context too, an enabling environment that takes aim at upstream "materials" put into circulation and supports mid-stream actions (e.g., recycling and re-use; barriers to outflow) to prevent such materials from getting unloaded to sea, could help to ignite action to "turn off the tap" that is flowing out to this giant and urgently enlarging mess out in the oceans.

2.4. Illustrations – Nicaragua Integrated Watershed Management Project

Beyond the IAPs, many other GEF projects have included the development of a supportive enabling environment as a key to effective action. A GEF-supported project in the mountain highlands of Nicaragua, the Nicaragua Integrated Watershed Management Projects, provides an illustration. The project seeks to restore a beautiful and economically important watershed to the benefit of ecological and livelihood interests, after years of serious impacts, mis-uses and water diversions.



In support of these project objectives, and among other activities, the project seeks to work with key ministries, local stakeholders and NGOs to propose new laws/norms to: (a) support conservation, restoration and sustainable management; (b) support and allow agricultural practices consistent with ecological goals (e.g., incentives and certification for shade grown coffee); and (c) put a value on eco-system services (and natural capital more generally), for example the lake and river waters that previously were diverted to farmers at little cost. In a recent on-site visit, those responsible for the project at the local level mentioned that this last part, in particular, is hard - - it requires lots of dialogue and really a change in culture - - but the better understanding of the full and alternative values of the ecosystems, and the commitment of the participants, is giving it a much stronger chance.

---

519 Id. See also more general descriptions of the IAPs at www.thegef.org.
520 For more detailed description of this project see www.thegef.org.

GEF 2020 notes another example of building effective enabling environments: a project in South Africa which supported efforts of the government to adopt new policy and regulatory frameworks for renewable energy markets, giving a strong boost to the market for clean energy in South Africa over the past five years (GEF 2020, p. 27).

3. Working Downstream – IAMs and the World Bank Inspection Panel

Now let's turn (briefly) to the second part of this presentation, and look at opportunities to support implementation of MEAs and related international normative frameworks through the lens of the work of the IAMs, and more specifically World Bank Inspection Panel (IPN). The Inspection Panel is designed to provide an independent, fair and impartial forum where people affected by projects financed by the World Bank can raise concerns, seek to ensure that the World Bank's social and environmental safeguard policies are respected, and get a meaningful response from the institution where things have allegedly gone wrong. When the IPN was established it was an unprecedented development in international law that gave people affected by IFI financed projects and programs the right to complain and influence international decisions that affected them. In short, it broadened the accountability of IFIs beyond their own management and member countries and gave standing to peoples and communities that were affected by IFI decisions and financing. Today the example of the IPN has been followed - and in certain cases expanded with new capacities (e.g., ombudsperson and advisory roles, monitoring) - and all IFIs have mechanisms of this nature.

The work of IAMs is not always easy, and there are pressures within the system, but it is a beautiful idea - - and has led to many tangible results. At its core, it is based on the proposition that people have a right to meaningfully engage in actions and decisions that affect them, and that their rights - - and the needs of the environment where they live - - should be both considered and properly respected. It also reflects the reality that local people and their partners have deep knowledge and expertise about the places that they live, and their lives and livelihoods are often inextricably intertwined with the proper care and respect for these places.

There are literally hundreds of articles and a few books that focus on the IPN and other IAMs. The website of the Inspection Panel (www.inspectionpanel.org) provides much information about the history of its work and investigations. The publication "The Inspection Panel at 15 Years" (2009), reproduced on the website, provides additional narrative on this work, and a reference list of other publications and commentaries about this work. Another publication, "Citizen Driven Accountability for Sustainable Development" (2012), presents a broader overview of the work, results, and challenges of work of the Inspection Panel and the many other IAMs that have been created since the establishment of the Panel. These are interesting and ongoing stories and explanations about this downstream work on accountability and compliance. The other IAMs have also interesting and very useful websites.

3.1. Illustration - Panama Land Administration Project

One example of the accountability and recourse work of the Inspection Panel is seen in its response to concerns received from Naso and Ngobe indigenous peoples in Panama about a World Bank-financed land administration project. The indigenous communities complained that the project was giving inadequate attention to protection of their ancestral land rights, and was in fact promoting titling practices contrary to these rights and the people's desire to have collective – not individual – titles to the land. In response to these concerns, and in accord with its procedures, the Inspection Panel hired independent experts, visited (three times) the country, the affected people and the project-affected areas, met with government and World Bank officials, and on the basis of its own fact-finding reviewed whether the World Bank was respecting key safeguard policies on indigenous peoples and environmental assessment. As shown in the photos below, a key

part of this work was going along the rivers and trails to meet with the people to learn about and understand their concerns.

The Panel ultimately found, on the one hand, that the World Bank, in several ways, had taken significant steps to try to support the land rights of the indigenous peoples through the project, and especially through their efforts early in the project to support the government in seeking Parliamentary approval for the creation of a "Comarca" (autonomous homeland) for the Naso people. The Panel also commended the Bank for its willingness to engage in this difficult work. On the other hand, the Panel also found that the Bank's efforts failed to comply in certain key respects with the Bank's Safeguard Policy on Indigenous Peoples and its Policy on Project Supervision. In particular, the Panel noted that the lack of appropriate consultations in the early phases of the project resulted in insufficient attention to key issues and concerns facing the Ngobe people, at a time when their land was under significant pressure for development from people outside their communities. The Panel also found that Bank Management and the project did not adjust sufficiently to address the rights and interests of the Naso under Bank Policy after the proposal to establish a Comarca did not pass the Parliament. These concerns were compounded by the fact that the Naso community was facing a significant internal conflict over its leadership. The Panel also noted, in its investigation report, that the World Bank to its credit significantly increased its efforts to address the concerns of the communities once the complaints surfaced and the Panel process was initiated.[521]

This experience illustrates some of the opportunities and challenges presented by systems of accountability and recourse at multilateral and regional development banks and other international organizations. In addition to their intended direct impact of providing response and recourse to the concerns of local communities, the work of the IAMs seeks to create incentives for greater attention to the content and actual application of governing policies – especially environmental and social safeguards – that are designed to promote and ensure better and more sustainable and equitable development. The cases and investigations themselves also provide a window into the challenges and difficulties that can arise in the course of development and other types of projects supported by international organizations, including the GEF.

This work on accountability and recourse, and safeguard policies more broadly, also have a direct normative link to implementation of MEAs. Specifically, the World Bank's Policy on Environmental Assessment, for example, contains a requirement that the Bank shall not finance activities that contravene the obligations of a country under international environmental agreements or instruments (OP 4.01 on Environmental Assessment, paragraph 3). The Inspection Panel has considered whether this provision, too, has been properly applied in specific cases - - in response to concerns from affected communities.[522]

This can be difficult work, and even with the best of efforts projects and programs financed by international organizations (including for developmental and/or environmental purposes) do not always go as planned or hoped for. The right and ability of people to seek redress may result in project outcomes better aligned with their objectives, and an overall improvement in the content and/or application of operational policies designed to help avoid social and environmental harm.

---

521 See Inspection Panel Investigation Report, Panama Land Administration Project, and the Bank Management Response to the Panel Report, at www.inspectionpanel.org. Following the issuance of its Report, the Panel learned that affected communities subsequently were able to refer to the Panel's fact-finding and analysis in a related claim in support of their rights in front of the Inter-American Commission of Human Rights.

522 See, e.g., Inspection Panel Investigation Report, Democratic Republic of Congo (forest-related projects), August 2007, Chapter 4.C. Obligations under International Environmental Treaties and Agreements (pp. 93-95); Inspection Panel Investigation Report, Honduras Land Administration Project, June 2007, Chapter 4.B Relevant International Agreements: ILO Convention No. 169 (pp. 69-72) (considering also the broader language on international agreements in Bank Operational Manual Statement 2.20 (now superseded by a subsequent change in Bank policies on Investment Lending)).

3.2. Grievance Redress Systems for GEF-financed projects

Recognizing this, the GEF itself has a basic Policy on Minimum Environmental and Social Safeguard Standards that GEF (implementing) Agencies need to have in place, as a basic element of carrying out GEF project and programming work. This Policy is based on the core safeguard policies of the World Bank, and in addition requires that each of the Agencies have in place an independent grievance response mechanism (such as the Inspection Panel at the World Bank) to provide a place where locally affected people can raise concerns about a project and seek responsive action. Under this Policy, the GEF Secretariat also has a Conflict Resolution Commissioner to provide further support and capacity to respond to issues and concerns that may arise (see www.thegef.org).

3.3. Working "Downstream"

Because of limits and time and space, we will not dive any further into the work and lessons of the Inspection Panel or other IAMs. The purpose here is rather simply to point to a lively and evolving area of work on accountability and compliance relating to the project-related work supported by international organizations. These independent accountability and recourse systems provide a means for people affected by project activities to raise concerns that all is not going well, and seek responsive action to address these concerns. The idea is that such "downstream" mechanisms can help ensure that environmental and social norms and policies are respected and improved, and that responsive action is taken when something goes wrong, in support of more sustainable and equitable development.

CONCLUSION

A key theme highlighted in this presentation is that international efforts and initiatives to support the global environment and sustainable development need to consider and address both upstream and downstream dimensions of a problem. This is all fair enough, of course - - the importance of a holistic and integrated approach. But what it means is not always obvious.

The next time we present these ideas (if and when!), we would like to reverse the presentation, so that the "IAM part" comes upstream and the "GEF part" comes downstream. This is because, as may be obvious by now: (a) IPN also has an effect "upstream" (by creating incentives and lessons that flow back into improvements to the current policy framework and the design of future projects) while GEF also works downstream (in the broad sense, to support implementation of MEAs and more specifically in supervision, monitoring, tracking and evaluation of the results and implementation of GEF-funded projects); (b) both address the inter-related issues of impacts on people and the environment; and (c) the two "parts" of the stream are inter-connected, so that action on one end (or in the middle) reinforces the other (both normatively and ecologically).

But here there is also another dimension, where the feedback loop may not be so positive. In the "real world" there can also be an inverse relationship. For, example, the development of stronger downstream accountability/enforcement systems can lead to pressure to weaken the upstream norms and enabling environment or the selection of "safe" (low impact/limited returns) projects to finance, and vice versa. There is literature on this, but we also offer this thought because we've seen and heard about it in talk along the corridors in different organizations. This possible relationship will be an important item to keep a watch on in ongoing efforts of international organizations to update or modify their basic social and environmental safeguard policies, and in the future evolution of IAMs.

A second core theme running through our remarks is that real and meaningful public and local community participation is core to both GEF and IAM mandate and results. Work in the field, and literature too, highlight that the interests of people and the environment are closely intertwined. The Brundtland Report [523] many years ago helped vivify these connections, and we live with them all the time - - so if we protect our resource base we improve our lives economically, socially and culturally as well. We are part of the environment, and we need each other! Experience also underscores the fact that local people have expertise, knowledge (and rights) that may not exist outside or in international organizations, and it is critical to listen, learn, enlist and support this in the work that is done.

---

523 Our Common Future, The World Commission and Environment and Development, Chaired by Gro Harlem Brundtland, 1987.

This, in short, is the idea in this presentation about "trails, streams, people and rivers", that is, that those involved in international or inter-American level work (maybe at the GEF or MDBs or the OAS or wherever) need to be out there, to connect to the affected people and places, go up the river, on the roads, in the cities, along the trails, where the people live. The contact between different places and worlds is amazing, there's so much potential to learn and help each other . . .

And finally, we would like to say one or two words about the contributions of law and lawyers. The good news, we think, is that law and lawyers have a big potential contribution to make in this work. Taking on board what we've seen in our own work and experience, here are a few thoughts. In respect to law: (a) as illustrated here, it is a key part of an enabling environment - - i.e., laws and policies are a way to advance key strategic goals and priorities; (b) laws and norms also are a core ingredient to assuring effective implementation – by creating a basis for enforcement, a check on compliance, etc.. In respect to lawyers: legal experts and lawyers may have much to offer in these efforts, but in our experience some key watchwords here might be humility and openness to working with colleagues. As we've seen it, a key role of a lawyer is not just advising on risk but using knowledge and training to help identify and build opportunities to meet policy objectives, including through enabling environments (whether in treaties, national laws, IFI operational policies or elsewhere). There is also a critical need for us to work well with others, clients of course but also in a constructive (and creative) inter-disciplinary way. Lawyers may have skills and a disposition to think in a certain way, but to address global and local environmental problems we need other ways too. Lastly, we are also ourselves inspired by what young Mahatma Gandhi said when he was practicing law in South Africa: "*I realized that the true function of a lawyer was to unite parties riven asunder.*"[524] In a field where political will is key and negotiating tensions and differences are often high, let us see if we can help on this too!

BIBLIOGRAPHY

Instrument for the Establishment of the Restructured Global Environment Facility, March 2015

GEF 2020 – Strategy for the GEF

A Safe Operating Space for Humanity, Rockstrom et al, Nature, 2009

GEF documents and publications at www.thegef.org, including: Annual Monitoring Reports and Program Documents presented to Council Meetings; Gender Equality Action Plan, July 2015; Forests and the GEF: a brief look at Two Decades of Support for Forests; Sustainable Cities 2015; Taking Tropical Deforestation out of Commodity Supply Chains, December 2014; Poaching and the Illegal Wildlife Crisis – the GEF Response; GEF Investments on Payments for Ecosystem Services Schemes; Indigenous Peoples Principles and Guidelines, 2014; International Waters – Delivering Results, 2013; Impacts of Marine Debris and Biodiversity – Current Status and Potential Solutions, October 2012; Country Support Program Toolkit, 2012; The A to Z of the GEF, June 2011

The Inspection Panel at 15 Years: Participation and Accountability at the World Bank, 2009

Citizen Driven Accountability for Sustainable Development: Giving Affected People a Greater Voice – 20 Years On, June 2012 (Lewis, based on inputs and reviews of IAMs in the IAM Network)

IPN documents and publications at www.inspectionpanel.org, including: investigation report and other documents relating to the Panama Land Administration Project.

The World Bank Inspection Panel: In Practice, Shihata, 2000

Demanding Accountability: Civil Society Claims and the World Bank Inspection Panel, Clark, Fox and Treakle, 2003

Citizen-Driven Accountability - The Inspection Panel and other Independent Accountability Mechanisms: A Tale of Two Cities, Peter Lallas, 2013 (American Society of International Law Proceedings)

Our Common Future, The World Commission on Environment and Development, Gro Harlem Brundtland Chair, 1987

The Law and the Lawyers, M.K. Gandhi, October 1962

524 An Autobiography, (1959), pp. 95-97, in The Law and the Lawyers, M.K. Gandhi, October 1962.

4.4 Network Performance by Prosecutors: The Experience of Latin America's Environmental Prosecutor's Network

Silvia Cappelli

Key Words

Enforcement, Environmental Prosecutors, Network performance, Latin-American Experience.

Pollution, environmental degradation and organized crime know no boundaries. However, the state response by the Prosecutor and other public officials to environmental offenses is legally limited to the territorial area of attribution of that agent, which obstructs effective action planning.

To overcome difficulties in the implementation of environmental law in Latin America, the Latin American Network of Environmental Public Prosecutor (referred as Network) was created, and nowadays has 328 members from 16 countries. The Network serves to exchange successful experiences, training on common issues and plan joint actions. Its main tools of communication are a web page (www.mpambiental.org), a mailing list and a WhastsApp group.

The Network has trained, since its creation in 2008, around a thousand members and advisors of the Prosecutors, it has held six international Congresses, published four books, supported the establishment of the Environmental Attorney's Offices and Offices of satellite monitoring to combat deforestation. It also has working groups on hydropower, CITES and satellite monitoring. Joint operations to combat illegal mining, trafficking of timber, coal, and wildlife have been organized, as well.

We still have many challenges to face, but the work of the Prosecutors in the Network ensures greater effectiveness and success in implementing environmental law, and allows the training of the Prosecutors between countries by sharing successful experiences.

INTRODUCTION

As commonly understood, pollution, environmental degradation and organized crime have no boundaries. However, state response, as represented by prosecutors and other public officials in charge of environmental damages is limited to the legal standards of the attributed land of the official, which complicates effective action planning. In the fight between polluters and the State, the latter always looses.

On the other hand, since the 1980s, with the restoration of democracy in most South American countries, the prosecutor's office presented a profound change in order to take control of societal defense in a specialized performance. In Brazil, besides that, the prosecutor became head of collective civil action in defense of the environment; strengthening environmental law enforcement, since criminal law, although preventive, can only assume impact after the action is done.

To overcome the difficulties of environmental law enforcement in Latin America, successful experiences of common actions taken from cases between Brazil and Paraguay, and, as well, the Brazilian experience of river basins, the Latin American Network of Environmental Public Prosecutor (referred as Network) was created in 2008, and is currently comprised of 330 members from 17 countries: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Paraguay, México, Nicaragua, Peru, Panama, Dominican Republic, and Venezuela, additionally, French Guyana.

1. Objectives and legal nature of the Network

The Network is not a governmental entity, but rather the voluntary conjunction of the prosecutors in order to exchange successful experiences, receive capacity building in common themes, and plan common actions.

The primary means of communications of the Network include: a webpage www.mpambiental.org , a mail-list serve, and a *WhatsApp* Group. The webpage allows the prosecutor to be contacted online by a recipient of an environmental claim, includes a comparative legislative chart of various countries, a chart of experts, legislation, jurisprudence and doctrine.

2. Latin American Environmental Prosecutors

The origin of environmental prosecutors goes back to the 1980s with the surge of democracy in most countries of the region. Most of our countries have specialized judicial institutions for prosecutors, among them: Argentina, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, Dominican Republic and Venezuela.

There is great variety among prosecutor institutions; firstly, regarding its nomenclature, the term for prosecutor may refer to the state's public defense lawyer in some countries, while in others it refers to the attorney general. There are also distinctions as to their independence, both in policy and budgetary terms. Some prosecutors are considered to belong to the Executive, while others to the Legislative, or Judiciary. Even in countries like Brazil, prosecutors are autonomous bodies, but not state powers. There are countries that enable life tenure of its members; meanwhile, others enable periodical mandates and renewal of their positions. Some act only in criminal matters (most of them), while also others in civil matters (for example in Brazil and Mexico). For all of these reasons, a harmonious physiognomy cannot be truly drawn between institutions. However, although there is legal provision for some prosecutors to act in the civil field, only the Brazilian Public Ministry exercises collective civil actions, in addition to traditional ownership of prosecution. Brazil has hundreds of specialized attorney offices, usually in the capitals of the departments. Furthermore, members of the Public Ministry sometimes accumulate other functions related to supra-individual interests.

There is great variety in the legal provision of environmental crimes, ranging from the few articles contained in the Penal Code to specific laws. The penalties are also varied. There is no procedural uniformity. There is no harmony in what is expected by the provision of environmental crimes in Latin America. Thus, the Network has a key role in being able to reach the members of the Public Ministries so that they can develop strategies to combat environmental crime and also implement effective actions based on priorities, the dissemination of best practices, and capacity-building. How can this be performed if the legislation is so different, not only in the material sense, but also in form?

3. Achievements of the Network

In these almost seven years of existence, the Network with its courses and congresses has already trained almost one thousand members and advisors to prosecutors, held six international congresses, published four books, supported the creation of Environmental Prosecutors, helped with the creation of three offices for satellite monitoring to combat deforestation and burning.[525] Additionally, the Network supported the development of the regulations for the Central Bank in Brazil to require works funded that have an impact on the environment should include a responsibility clause. The forecast of the funding responsibility is essential to meet the environmental requirements in projects carried out by companies in more than one country and are usually funded by regional development banks.[526] In addition to the congresses, courses and the work offices, working groups have been created to bring together members that share common issues, including hydroelectric, CITES and satellite monitoring (deforestation); responsible for setting up offices in Ecuador, and in the process of implementation in Peru, as well. Joint operations to combat illegal mining, timber and carbon trafficking have been organized, as well at the beginning of combat operations for logging and burning, and illegal trafficking of wildlife.[527]

4. Challenges and future of the Network

Taking into consideration the differences in legislation regarding the protection of the environment and the differences between the Public Prosecutors in Latin America, including in their independence and structure, the biggest challenges are to organize joint operations, ensure the permanence of specialized members in their positions, extend the allocation for action, also in civil matters, through collective action and increasing the number of specialized ministries.

It is also essential to have a panel of experts that can be used by prosecutors in other countries, in order to democratize the accumulated experience, adding the efforts in environmental protection, with additional economy of human and material resources. In other words, it is necessary to train experts and key players to protect the environment, not only limited to the legal and administrative scope.

However, considering that the Network has been active for only six and a half years, and currently has 330 members in 17 countries, we are still growing rapidly. Most importantly, in this case, who benefits from these efforts of strengthening public prosecutors is the environment and the population.

---

525 Las acciones de la Fiscalía y el monitoreo por satélite fue resaltado por informe divulgado en la reunión de la ONU sobre cambio climático como significativa contribución Del Ministerio Público en la reducción de la deforestación de la Amazonia.
Fuente: http://g1.globo.com/natureza/noticia/2014/06/brasil-e-exemplo-de-sucesso-na-queda-do-desmatamento-diz-relatorio.html. Noticia del 5.6.2014. Acceso en 17 de junio de 2014.

526 Resolución Banco Central del Brasil -BACEN n. 4327 de 24.5.2014.

527 Creación de su red de Fiscales para combate al tráfico de animales en São Paulo, octubre 2014.

V. ACCESS RIGHTS: INFORMATION, JUSTICE AND PROCESS

Access rights are the cornerstone of the environmental rule of law. Instruments such as the Inter-American Strategy for the Promotion of Public Participation in Sustainable Development Decision Making and the Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation, and Access to Justice in Environmental Matters have been adopted and applicable in countries of the Americas. Trends and challenges regarding access rights are addressed in the abstracts under this sub-theme, taking into account the three different adjudication procedures that are central to access to justice in member States': (1) to challenge the refusal of access to information; (2) to seek prevention and/or damages for environmentally harmful activities; and (3) to enforce environmental laws directly." [528]

---

528 Ved P. Nanda y George Pring, Derecho Ambiental Internacional y Política para el siglo 21 (2003), §2.2.1.3 en 52 .

5.1 The world's 100 laws on ATI and their impact on the strengthening of environmental law

Ezequiel Santagada

Key Words

Paraguay – ATI – Law – Litigation – Human Rights – Environment

This article tells the story of a decade-long advocacy process carried out by Paraguayan CSOs to achieve a law on access to information, work that was supported by regional CSOs, based on the incorporation of the standards of the Inter-American System for the protection of human rights, and which had strategic litigation as one of its main centerpieces.

In September 2014, Paraguay became the 100th country to pass a law on access to public information (ATI). This law is the result of the persistent efforts of NGOs working together for almost 10 years through a coalition called the Task Force on Access to Information (GIAI, by its Spanish acronym).

The Environmental Law and Economics Institute (IDEA, by its Spanish acronym) has been involved in the GIAI from its beginning and has had a leading role, not only coordinating the drafting of the bill on ATI, but also carrying out a strategic litigation process since 2007, which included the active involvement of civil society organizations (CSOs) from across the Americas. The peak was Supreme Court Decision 1306 of October 15th, 2013, with all of its members participating in the ruling. This sentence declared that the right to ATI is a human right according to the doctrine of the Inter-American Court on Human Rights in re Claude Reyes vs. Chile. Its political impact still remains, and it was a key element to reach the enactment of the ATI law.

This law was conceived according to the OAS Model Law on ATI and includes clear provisions for access to environmental information in the chapter on active transparency, following the recommendations of the Bali Guidelines.

This article will tell a success story. It will concentrate on the strategies developed by CSOs and the importance of maintaining them over time in order to succeed and get the law passed. It will also explain how a ruling based on the Inter-American Law on Human Rights influenced the procedures established by the ATI law to challenge the denial of access to information at the judiciary level. Finally, it will give details on how the ATI law is fundamental to implementing initiatives on newly started environmental governance in order to combat illegal deforestation and strengthen the enforcement of environmental laws with the collaboration of local (municipal) governments.

INTRODUCTION

In September 2014, Paraguay passed the 100th Law on Access to Information in the world.[529] This law was the result of the persistent work of various CSOs coming together in the Task Force on Access to Information (GIAI) for almost 10 years.[530]

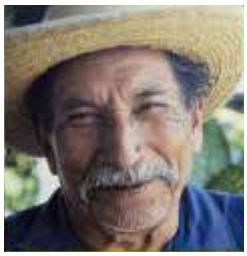
The Environmental Law and Economics Institute (IDEA) was part of GIAI from the start and had a prominent role.

Not only was it responsible for coordinating the drafting of the bill, but since 2007 it lead the strategic litigation, involving

529 Official Gazette No. 180 from September 19, 2014. Retrieved from: http://www.gacetaoficial.gov.py/gaceta.php?action=show&id=2549&num=180 [Last accessed March 2015].

530 The GIAI is an unincorporated coalition originally founded in order to work toward a law on access to information in Paraguay. The GIAI is composed of: IDEA, the Center for Information and Resources for Development (CIRD), the Center for Judicial Studies (CEJ), the Free Foundation, Seeds for Democracy (SPD), and the Chair of the Right to Information of the Philosophy Department of the National University of Asunción.

CSOs of the Americas in the process. In this way, it arrived at the final judgement, Judgement 1306 on October 15, 2013, rendered by the Supreme Court plenary. That judgment held that the right of access to public information (ATI) is a human right according to the doctrine established by the Inter-American Court of Human Rights in the case of Claude Reyes et al. vs. Chile from October 19, 2006.[531] Its political impact had several ramifications and was a key element in the enactment of the ATI Law.



This law was conceived in light of the OAS Model Law[532] and includes clear provisions on access to environmental information in the chapter on active transparency, following the Bali Guidelines.[533]

This article will tell a success story. It will elaborate on the strategies used by the CSOs and the importance of maintaining them over time in order to achieve the law. Also, it will explain how a sentence built on inter-American human rights law influenced the text of the law, particularly in the procedures established to go to court in the face of ATI denials, and how this law is fundamental to implementing environmental governance initiatives already underway to combat illegal deforestation and strengthen the enforcement of environmental laws with the participation of local governments (municipalities) in Paraguay.

1. More than a decade of back and forth toward a law on access to information

The 1992 Constitution of Paraguay expressly recognizes the right of persons to receive truthful, responsible, and impartial information, and for public information sources to be free to all (Article 28).

The first attempt to regulate this constitutional provision was at the beginning of the century.

On July 17, 2001, Law 1.728/01 "On administrative transparency" came into effect. The objective of this law was "to promote the transparency of public administration and ensure access to information related to administrative acts of government" (Article 1).

Immediately, the media's reaction was felt. The criticism focused on the provisions permitting the denial of ATI under Article 6, since they left "a dangerous number of benefits in the hands of the President and other officials."[534]

For example, the law allowed for the denial of access to information "that could **harm national defense or state security or international relations**, provided there is sufficient evidence that it can cause damage in these areas and **the criteria has been specifically defined in an executive decree** and documents are properly classified according to these criteria,"(Article 6, paragraph b) or information that dealt with "**preliminary information on behavior of officials or acts of corruption** until the end of the corresponding investigation" (Article 6, paragraph k).

That is, it left it up to the executive branch to establish discretionary criteria to limit ATI (one could argue that a case of gross negligence or corruption affecting a president could "affect the security of the state" in the face of the fierce criticism of public opinion), and it shielded information on cases of corruption (if preliminary information on acts of corruption is unavailable, two things could happen: corruption cases are never released to the public, or the information is conveniently modified to protect the corrupt).

In addition, it expected that the applicant for information should not only cover the cost of reproducing that information (Article 8, paragraph a), but also "the cost of administrative staff's work to satisfy the request, or the security of the inspection of the document and the materials used for its reproduction," (Article 8, paragraph b) making it so that the cost of accessing information would vary depending on the number of people

---

531 Retrieved from: http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_esp.pdf [Last accessed March 2015].
532 Retrieved from: http://www.oas.org/es/sla/ddi/docs/AG-RES_2607_XL-O-10_esp.pdf [Last accessed March 2015].
533 Retrieved from: http://www.unep.org/civil-society/Portals/24105/documents/Guidelines/GUIDELINES_TO_ACCESS_TO_ENV_INFO_2.pdf [Last accessed March 2015].
534 "'Ley mordaza' preocupa a periodistas de Nueva York," Diario ABC Color. Retrieved from: http://www.sindicatomercosul.com.br/noticia02.asp?noticia=1925 [Last accessed March 2015].

involved in its safe-keeping and the different wage levels of those people, limiting the economic capacity of the applicant and therein the ability to effectively access the required information.

It also required that any information request be submitted in writing, with the full name and signature of the applicant (Article 9). That is, it required the identification of every person requesting information, which could eventually generate some drawbacks to state officials. Thus, in a subtle way, it put into play the atavistic fear of citizens to "be targeted" and "suffer retaliation" by officials who made up the apparatus of power in a country that was just emerging from one of the longest dictatorships in Latin America, and that—because of the logic used during the transition—sheltered many officials of the old regime.

To close the circle, whomever had been denied the information and had appealed "to the superior hierarchy" in a procedure taking no less than a month or whoever considered that the cost established for access to information was excessive, could appeal to the Court of Audits and travel to Asuncion (with extra costs involved for those who live in the interior of the country) for a process which, formally, would have lasted years (without counting the eventual appeal to the Supreme Court) and which was subject to payment of court fees. Obviously, a cocktail of unbridled discretion in favor of the executive branch, high costs of access, fear of the possibility (real or imagined, that's the least of the concerns) of retaliation, and long legal proceedings that could only be brought in Asuncion prevented in practice any possibility of effective exercise of the—real and true—right to ATI.

The pressure from the press and the public made this law one of the least effective in the legislative history of Paraguay, and on September 25, 2001 it was repealed (Law 1779-1701). This experience left its mark and marked with fire future discussions for an ATI law. In mid-2004, a group of civil society organizations came together to promote an ATI law again, and they decided to form the GIAI as an unincorporated coalition whose purpose was to promote the right of ATI and to advocate to achieve an effective law.

After its establishment, the GIAI set about writing the first draft of an ATI bill, which was ready in March 2005. The bill quickly gained the support of several deputies.

While the draft did contain exceptions to information access, none of them gave powers to the executive branch to classify it on a discretionary basis; in the same way, it established that information be free-of-charge and the ability to verbally request it; finally, it established protected and free legal proceedings before any trial court of the Republic with periods similar to any trial.

That is, they had tended to all the questions from the "gag law" of 2001.

In May 2006, before it was legally sanctioned, the newspaper *Diario ABC Color* began to question the bill. The same day it was to be negotiated, its editorial headline read: "Law proposed to make judges the squires of public officials."

The *Diario ABC Color* maintained:[533]

> *The bill on access to public information, partially approved by the Chamber of Deputies, will be studied in the Senate today.*
>
> *This project aims to regulate Article 28 of the Constitution... The text of that article states: "Public information sources are free for everyone. The law shall regulate the corresponding modalities, terms and sanctions so that this right be effective."*
>
> *The project being debated in Congress goes much further than establishing modalities, deadlines, and sanctions supposedly for whomever denies it. It allows for the listing of the type of information that public bodies will provide and what will be withheld, through the enumeration of a huge amount of exceptions**, an extensive list of cases that will be extremely useful to exonerate the authorities from providing public information, exceptions that will grant to judges and magistrates the supreme power to "interpret" in a way that suits their usual patterns,** bearing in mind that it is the politicians in power who manipulate the judiciary in matters of this kind.*

533 Retrieved from: http://www.abc.com.py/edicion-impresa/editorial/proyectan-ley-para-que-jueces-sean-escuderos-de-los-funcionarios-publicos-906328.html [Last accessed March 2015].

> ***The media has maintained and will continue to maintain the view that the best law of press and information is that which is not written. We understand that in our country, in these matters, the Constitution is sufficiently clear*** *and that any attempt for further clarification or to "make it enforceable," under the label of the famous "regulation" by way of Congress, will succeed only in obscuring it, giving pretext to public authorities to escape their mandates, to corrupt officials, and to provide resources to the judges to placate politicians and earn promotions or perks . . . .*
>
> *If a process of this kind is ever finished, it will be several years later, when the intended information has become worthless.*
>
> *In a country like ours, plagued by corruption, before putting obstacles and regulations to free access to public information in place, we should facilitate it as much as possible, knowing that* ***the only ones who benefit from the arbitrary management of public affairs are officials and corrupt politicians and their businessmen accomplices.***

It is clear that *ABC* was not against specific provisions of the bill, but rather that it was against the law in general. Any text would have been criticized: "The media has maintained and will continue to maintain the view that the best law of press and information is that which is not written."

Three days after this editorial, the ATI bill was rejected and finally archived.

In a release published by the digital newspaper *Iniciativas Ciudadanas* months after the archiving of the ATI bill, Armando Rivarola, one of the most prominent journalists at *ABC*, maintained: "I do not agree with the sanctioning of a law **at this time** in our country for a very simple, basic reason: **the problem of access to information in Paraguay, in particular, is not legal, but institutional in nature.** Given our condition of extreme institutional weakness, a law would be a tool to be used against transparency, not in favor of it," he said.

He argued that officials and institutions would **hide behind the exceptions in the law (with or without good reason)**, that there would be a high "criminalization" of specific cases; trials would last too long (no matter what the law says about the time frames, these will not be met and when the trials do end, the information will no longer relevant) and, in many cases, because of pressure on judges, corruption, or just plain ignorance they would end up misinterpreting the scope of exceptions and ruling against access to information, which would set a disastrous precedent.

> *I do not object the text of the bill, which I think is correct, especially the article that states that in case of doubt, rule in favor of access to information, which includes the (key) principle of "narrow interpretation."*
>
> *If we want to go to court to defend access to information, it is possible to do so today by way of the action of unconstitutionality, based on the provisions of Article 28 of the Constitution: "Public information sources are free to all" and using the broad doctrine that already exists on the subject. It is true that this article adds that "the law shall regulate the arrangements... etc.," but you have to put forward that the lack of regulation is not sufficient to invalidate a legal statute, much less when it has constitutional status.*
>
> *I know that much time and money has been invested in the bill, and I am sure that it was in good faith. But* ***we are in Paraguay, this is our reality, we cannot be separated from it.***[534]

Anyone who does not live disengaged from the social and political reality of Paraguay will understand that this is a compelling argument; it was in 2007, and it remains so a few years later. However, it is also an argument that rejects the idea that laws can contribute to generating social and institutional changes that enhance democratic institutions and improve the people's quality of life. By contrast, the position of the GIAI is that public pressure and good laws contribute to generating and strengthening these changes.

---

534 *Opiniones cruzadas sobre la ley de acceso a la información pública.* Retrieved from http://www.cird.org.py/periodico/200703/noticia7.php [Last accessed March 2015].

In retrospect, the GIAI could have done its job better. It did not advertise all the consequences that the gag rule left behind in 2001. It lacked an exercise in finding empathy with those who had opposed the law. It was believed that the changes introduced in the new draft regarding the shortcomings of the 2001 law would be sufficient to counteract the fears and criticism. It was not so.

They had to start again.

This new start should postpone the idea of presenting a new bill draft. *ABC*'s attack was against any law. Now they had to prove that a law (a good law) was necessary.

The GIAI organizations continued to be united by the same ideal: to promote the right to ATI and demonstrate the need for a law. However, each chose to work toward that ideal using their own strengths and by adopting various strategies; for example: to work so that municipal governments or agencies of the executive branch would enact regulations on ATI, to optimize the information service of the judiciary, to give talks to raise awareness about the importance of this right, to participate in radio programs, to conduct seminars attended by experts, to create web portals with information of public interest and support legal actions against the refusal of government to hand over public information.

Meanwhile, shortly after the bill was archived, in September 2006 the Inter-American Court of Human Rights (IACHR), ruled in the case of Claude Reyes vs. Chile.[535] This ruling marked a milestone, as it was the first time that the IACHR ruled on a case in which the right to ATI had been involved.

The IACHR upheld the petition of a Chilean citizen who had applied for environmental information from the authorities of his country and it had been denied.

The IACHR held that Article 13 of the American Convention on Human Rights "protects the right of people to receive such information and the positive obligation of the State to provide it... without the need to prove direct interest or personal involvement in order to obtain it," among other important considerations.

With this precedent at an inter-American level, IDEA, as a member of GIAI, proposed to disseminate the case and to encourage citizens to make ATI requests, as well as to sponsor legal complaints where the parties were willing to bring the government to court invoking this doctrine.

The purpose was simple: start generating precedents gradually recognizing the right of people to access information, and in this way gradually close off the possibility for judges to interpret, using the words of *ABC*, "in a way that suits their usual patterns" (politicians).

The strategy was risky in that, effectively, there was a possibility that judges would have restrictive interpretations on the right to ATI. However, IDEA had lawyers with experience in strategic litigation in matters of public interest and the ability to seek international counsel if the situation required. In addition, it considered that even in the worst case scenario, that is, getting lost in the national court system, the precedent set by the Inter-American Court on Human Rights in Claude Reyes opened the possibility of bringing a case before international bodies, where it would have a good chance of success.

From an institutional point of view and since it dealt with human rights cases, IDEA sought the intervention of the Ombudsman's office, whose constitutional function is the "defense of human rights, the channeling of popular demands, and the protection of the interests of the community" (Article 276, Constitution).

The Ombudsman lacked experience in litigating human rights cases and IDEA thought that this would be a good opportunity for them to—just like the rest of the Ombudsmen of the region—begin to bring these cases to justice and build institutional strength. Thus, lawyers for the Ombudsman would exercise institutional representation and IDEA's lawyers would sponsor them.

This proposal was accepted by the Ombudsman and thus created, through Resolution 160 on February 9, 2007, the Center for Access to Public Information (CAIP, in Spanish).

---

535 Retrieved from: http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_esp.pdf [Last accessed March 2015].

Immediately, IDEA's lawyers and CAIP's managers began to give talks to disseminate information on the right of access to information and the services provided by the CAIP. [536]

As a result of this work, many citizens began to make ATI requests. In many cases, they received the response they hoped for; in others, no.

Among those that had no response, there were cases of people who chose not to pursue the claims, but also a few people who wanted to try the judicial route.

Of the cases brought before the courts, there are two of particular importance: those of Felix Picco Portillo and Daniel Vargas Telles.

In all of the cases in which the central or local government was unwilling to provide information, they simply did not answer the requests for information.

Thus, the first obstacle to overcome was to give legal consequence to that silence. Paraguay lacks a law of administrative procedure, which means that, among other things, it does not have a generic legal time frame for considering that the administration's silence amounts to a tacit refusal (Article 40, Constitution).[537]

Consequently, the first thing they had to do was to bring *amparo* and expedited response actions forcing public agencies to reply within a time frame set by the court, warning that the silence would be considered as a tacit refusal that would enable the claimant to raise the issue (ATI) before the court.

The cases of Felix Picco Portillo and Daniel Vargas Telles were similar. Mr. Vargas Telles made a request on April 5, 2007 to the then-mayor of San Lorenzo for, "a printed copy with the number of contracted employees and appointees with their first and last names, positions, and respective salaries."

Given the municipality's silence, Mr. Vargas Tellez requested that CAIP initiate a legal action to get an answer, and so they proceeded in this way. When the municipality answered the complaint, it refused to provide the information, arguing that if it did so it would be "violating" Article 33 of the Constitution (the right to privacy). The municipality's lawyers argued: "In the present case, they are inquiring, without explaining why, about issues that directly affect the 'personal privacy' of municipal officials. The municipality cannot violate the privacy of its employees by giving information that could be used to their detriment. What does it matter to a third party the salary of an employee, their function, and where they are going!!!" (sic).

Daniel Vargas' application for ATI was discussed in one of the many talks given by CAIP and IDEA and immediately Mr. Picco Portillo, a member of the group of neighbors "Citizens Lambareños," wanted to make the same request to the then-mayor of Lambare.

That municipality did not answer either. Mr. Picco Portillo also asked the CAIP to initiate an action for *amparo* and expedited response. The municipality did not respond, nor did it issue the information, and the time frame the judge had set for it to do so expired.

Given the express refusal of the municipality of San Lorenzo and denial of the municipality of Lambaré, two separate *amparo* trials began, this time invoking the undermining of the fundamental right to ATI and the doctrine of the Claude Reyes case.

In both trials, the trial court judges rejected the *amparo* action without deciding on the background issue, rather holding that the procedural route chosen was inappropriate because it challenged administrative acts of individual scope that should have, where appropriate, been brought before the Court of Auditors by way of litigious administrative action.

---

536 CAIP's services can be found on the Ombudsman's webpage http://www.defensoriadelpueblo.gov.py/acceso_informacion/acceso_a_la_informacion_publica.htm. There, one can also find the information request form template. This is the template used by the protagonists of the most emblematic cases decided by the courts.

537 Constitution: Article 40: "All persons, individually or collectively and without special requirements, are entitled to petition the authorities, in writing, and they must respond within the time frame and in the manner determined by law. Any petition that does not obtain a response within that period will be considered denied."

The decision to claim the right to ATI using the *amparo* action was made for two reasons: (1) It would be incompatible with the nature of this right to have to go through litigious administrative action, since this was an ordinary action whose procedure could take years, which would be incongruent with the relative immediacy required to reasonably satisfy a right to ATI action; (2) If the courts would not give adequate protection to the undermined right, then it was preferable to exhaust the internal procedures in order to resort to the Inter-American Court.

After appeals, Mr. Picco Portillo's case was in the hands of the 3rd Chamber of the Civil and Commercial Court of Appeals of Asunción, and Mr. Vargas Telles' was in the 5th Chamber of the same court. In the case of the municipality of Lambaré, their lawyers had appealed the trial court judgment, dissatisfied with the fact that each party was to bear their own costs in the case. They wanted the Ombudsman or the person filing the request for information to pay court costs and fees. The intention to intimidate in order to avoid future ATI claims was evident.

On May 2, 2008, the 3rd Chamber of the Civil and Commercial Court of Appeals in Asunción issued decision No. 51 and marked the first major milestone by recognizing the fundamental right of ATI, expanding on its foundations and characteristics, and making it clear that it was a summarily enforceable right by way of *amparo* action.

This ruling had many repercussions, not only in Paraguay,[538] but also internationally.[539] In fact, its importance was later highlighted in the 2010 Report of the Special Rapporteur for Freedom of Expression of the Inter-American Commission of the Organization of American States. [540]

The most relevant passages of judgement No. 51 are the following:

> *As to the legitimacy of the amparo action: "The right to information, as a fundamental right, does not tolerate, by its nature, procrastination from a contentious litigation—if there were such a way, which we estimate there is not. In these circumstances, there are not, as the defendant maintains, adequate precautionary measures to preserve the right in its entirety, since the information, being unlawfully refused, violates per se and of immediate quality, the rights of the individual. The urgency is when the remedy that the relevant channel offers is not able to repair the damage caused or to restore the right infringed upon without producing an irrecoverable loss. That said, we can conclude that there do not exist, in this case, previous or parallel administrative channels sufficient to preserve the substance of the right denied. Therefore, the reasoning for rejection of the action should be dismissed."*
>
> *Regarding the right to ATI, it said: "The addition of the right to information into the catalog of fundamental human rights is relatively new." In addition, it said that "this right is justified by the more generic right, essential to deliberative and participatory democracies, to forming opinions freely and to participating responsibly in public affairs; it contributes to the formation of both individual and public opinion, which is closely linked to political pluralism. It is, therefore, an essential instrument for matters that collect interest in civic and community life, and that condition participation in 'public' management, that is, the system of relations and relationships that constitute the basic livelihood of democratic coexistence."*

The joy that this decision caused was short-lived. On July 16, 2008, the 5th Chamber of the Civil and Commercial Appeals Court of Asunción ruled on the case of Daniel Vargas Telles, through judgement No. 78.

---

538 *Fallo histórico a favor de la información*. Nota de tapa del Diario ABC cover story in the Friday, May 16, 2008 edition. Retrieved from: http://www.abc.com.py/edicion-impresa/politica/fallo-historico-a-favor-de-la-informacion-1067089.html. [Last accessed March 2015]. "Mediante amparo judicial acceden a documentos municipales de Lambaré." Story published in the print edition on Saturday, May 17, 2006. Retrieved from: http://www.abc.com.py/edicion-impresa/interior/mediante-amparo-judicial-acceden-a-documentos-municipales-de-lambare-1067263 html [Last accessed March 2015]. It was even a featured story on the Supreme Court's website: "*Cámara de Apelación falló a favor del derecho a la información*." Retrieved from: http://www.pj.gov.py/notas/1473-camara-de-apelacion-fallo-a-favor-del-derecho-a-la-informacion [Last accessed March 2015].

539 See, for example, ARTICLE 19 *celebra dos decisiones judiciales que reconocen el acceso a la información pública como derecho humano fundamental*. Disponible en https://ifex.org/paraguay/2008/05/30/article_19_celebrates_judicial/es/ [Consulta realizada en marzo de 2015]; o COURTS RECOGNISE ACCESS TO INFO AS HUMAN RIGHT http://www.ifex.org/paraguay/2008/06/03/courts_recognise_access_to_info/ [Consulta realizada en marzo de 2015].

540 See Chapter IV "Buenas Prácticas Judiciales en Materia de Acceso a la Información en América", page 313, points 34 and 35. This report is available at: http://www.cidh.oas.org/annualrep/2010sp/RELATORIA_2010_ESP.pdf [Last accessed March 2015].

Twenty-two terse lines were sufficient to explain the reasons for the rejection of the appeal: "The appeal was denied by the A-quo. Article 40 of the Constitution states that the right to petition the authorities is a right, but it must be done "in a legal manner." The same Constitution establishes that the limit to this right must be established by the law. And, Law 1682/00 in Articles 4 and 5, and its amendment, Law 1969/02, state that the data requested, when it refers to assets, must be authorized by the affected party. Asking for salary data of third parties has its legal counterweight in the constitutional right to privacy; therefore, by conditioning the law to third party authorization, the writ of amparo request is inadmissible because it does not conform to Article 134 in the part that says that it is affected by a "manifestly illegal" act. The refusal by the municipality of San Lorenzo to provide such information adheres strictly to the Constitution and Law 1682/00. Moreover, you have not defined what the damage is that the failure to provide such data will cause the petitioner. The lack of the aforementioned requirement is sufficient to confirm the rejection of amparo and, therefore, judgement No. 105 dated March 13, 2008, is confirmed, with costs to the losing party."

Up against this decision, an unconstitutionality action before the Supreme Court was the only option. However, the active standing of the Ombudsman to file this action was not entirely clear, since it was not expressly provided in Law 631/95 "Organic Law of Ombudsman" that they could file it.

An argument was developed to overcome this drawback; they spoke with the Ombudsman and he decided to personally make the presentation to the Supreme Court. It would be the first time that the Ombudsman appeared before the highest court of the Republic.

To write an unconstitutionality action, IDEA sought the intervention of the founder of the Department of Information Law, Faculty of Philosophy of the National University of Asuncion, Dr. Benjamin Fernandez Bogado, as well as the man who succeeded him and is still the head today, Dr. José María "Pepe" Costa, who agreed to sponsor the Ombudsman pro bono. Along with them, Dr. Sheila Abed and I (the author) proposed a text to the Ombudsman, who had no qualms, and thus on October 5, 2008 it was presented to the Supreme Court.

The action was formally accepted very quickly, and the then-president of the Supreme Court requested that the case be decided by the full court.

Only in June 2011 were the parties notified of the inclusion of the case in the Constitutional Court, and beginning on that date the case was ready for judgment to be handed down at any time.

Meanwhile, the municipality of San Lorenzo responded to the petition, previously opposing the inaction and lack of legal action exceptions. The public prosecutor had issued an opinion stating that the Ombudsman had not attacked the constitutionality of the court ruling and therefore the rejection of the petition was withheld.

In February 2010, the Supreme Court summoned the Friends of the Court[541] that wanted to appear. In fact, several international organizations had already informally indicated their intention to appear when they learned that the case would be heard by the Supreme Court,[542] since this was one of the first cases to reach an American supreme court that would test the strength of the Claude Reyes case. The interest was to find out whether the Claude precedent would be taken into account and followed by the supreme courts or if, conversely, the case would end up in the Inter-American system.

The Open Society Justice Initiative (OSI-JI), as well as several member organizations of the Regional Alliance for the Freedom of Expression and Information, an American coalition of organizations working to promote freedom of expression and access to information, appeared as "Amicus Curiae." The Paraguayan organizations making up the GIAI—the Center for Judicial Studies, the Center for Information and Resources for Development, and Seeds for Democracy—supported the presentations of the OSI-JI and the Regional Alliance.[543]

---

541 The figure of "Amicus Curiae" or "Friends of the Court" is regulated by decree of the Supreme Court of Justice No. 479 from October 9, 2007.

542 See, for example, "Un juicio sobre el acceso a datos públicos atrae a juristas de EEUU." Published in the print edition of *Diario Última Hora* on Sunday, June 14, 2009. Retrieved from: http://www.ultimahora.com/un-juicio-el-acceso-datos-publicos-atrae-juristas-eeuu-n229837.html [Last accessed March 2015].

543 Obviously, IDEA could not since two of its members at the time, Sheila Abed and Ezequiel Santagada, were sponsoring lawyers. The Fundación Libre did not either, since Dr. Benjamín Fernández Bogado presided over it.

Since mid-2009, IDEA had begun drafting a new ATI bill as an academic exercise that would allow them to slowly gather the necessary consensus that would facilitate the introduction of a new bill.

The start of the drafting of the new bill came in a very different context than in 2005. The IACHR had now ruled on the Claude Reyes case. In Paraguay, there were already some legal precedents that had begun to outline the breadth of the right to ATI. In the region, Chile and Uruguay already had ATI laws and Brazil had started parliamentary discussion on a bill introduced by former President Lula Da Silva. The Inter-American Juridical Committee (CJI in Spanish) had already developed the "Principles on the Right of Access to Information" (CJI/RES. 147 (LXXIII-O/08))[543] and the General Assembly of the Organization of American States had ordered the drafting of a Model Inter-American Law on Access to Information (the model law was finally adopted by the General Assembly in 2010).

In any event, a general consensus was still lacking. First, they worked on a document that would serve as a catalyst for discussion. The new text should clarify international standards. Also, it remained to be seen how the court would rule in the case of Daniel Vargas Telles.

However, it was known that there were two thorny issues: the inclusion of exceptions and the creation of a "guarantor body."

In 2010, a first version was circulated among some politicians and journalists. In early November of the same year, a group of lawmakers was even interested in presenting that version. Immediately *ABC Color* featured it, describing the project as an initiative "seeking to impose limits on journalistic work" and, of course, the presentation was postponed.[544]

The GIAI not take it as a setback because what it had sought in circulating the draft bill was to start gathering opinions and seeking consensus, not to formally submit it to Congress, since they understood that the moment was still not right.

In September 2011, the GIAI announced publicly that it would begin to advocate again for a law on access to information, but only after they had generated the necessary consensus.[546]

There were several meetings with journalists, including some of those who had publicly stated their opposition to an ATI bill.

As a result of these meetings, it became clear to the GIAI **that a law with exceptions would be resisted by *ABC* again. The argument was practical, not legal:** If an ATI law specified exceptions, this could be interpreted by public officials as an absolute prohibition on facilitating information covered by the exceptions, including in the cases where anonymity is secured by the guarantee of confidentiality of sources. The fear was that officials would interpret the exceptions to their will.

This argument seemed reasonable to the GIAI. Besides, the exceptions were already covered by other legislation, for example: Articles 84 to 86 and 91 of Law 861/96 "Of banks, financial and other credit institutions"; Articles 322 to 326 of Law 1268/98 "Criminal Procedure Code"; Articles 12 and 13 of Law 1337/99 "Of national defense and internal security"; Articles 23 and 71 of Law 1630 "Of patents and inventions"; Article

---

544 Document available at: http://www.oas.org/cji/CJI-RES_147_LXXIII-O-08.pdf [Last accessed March 2015].

545 See, for example, the following news stories: http://www.abc.com.py/nota/sondearon-de-vuelta-sobre-ley-de-informacion/; http://www.abc.com.py/nota/vuelven-a-presentar-proyecto-de-ley-para-regular-informacion/; http://www.abc.com.py/nota/aplazan-presentacion-de-proyecto-de-ley-de-prensa/; http://www.abc.com.py/nota/a-favor-de-la-prensa-dicen/ [Last accessed March 2015].

546 "Insistirán sobre la ley de acceso a la información." Published in ABC Color on September 8, 2011. Retrieved from:: http://www.abc.com.py/edicion-impresa/politica/insistiran-sobre-la-ley-de-acceso-a-la-informacion-305446.html [Last accessed March 2015]. "¿Por qué es necesaria la ley de acceso a la información?" Published on the digital edition of ABC Color on September 7, 2011. Retrieved from:: http://www.abc.com.py/nacionales/por-que-es-necesaria-la-ley-de-acceso-a-la-informacion-304835.html [Last accessed March 2015]. In this article, ABC reinforces that "Currently, the Instituto of Law and Environmental Economy (actually, the GIAI) is gathering opinions from various sectors of society to drive a national project."

4 of Law 1682/01 with a reform from Law 1969/02 "Which regulates private information"; or Articles 27 to 29 of Law 1680/01 "Code on Children and Adolescents."

Thus, by introducing repetition, it did not make sense that the same exceptions were detailed in the ATI law. Moreover, if these reiterations did not respect the same language as the regulations already provided in the exceptions, it could result in an interpretive chaos that could be used to apply the exceptions broadly.

The other point of concern was the creation of a guarantor body. While this body works very well in Mexico and Chile, in Paraguay it would be difficult for its formation to be exempt from political influence, and this was another objection. Moreover, in Mexico oversight bodies enjoy an autonomy established in the Constitution,[547] which in Paraguay could not occur without an amendment or constitutional reform.

The GIAI took these concerns to heart and amended the bill, eliminating the exceptions and the creation of a guarantor body.

The final text of the GIAI bill reflected an attempt to develop a standard to contemplate every one of the international standards for ATI.

In order to dispel any lingering doubts about the purpose of the project and to avoid any interpretation that would attempt to use the provisions of the ATI law as a tool that could undermine freedom of expression, Article 2 stated that nothing in this rule could be understood or used to deny, impair, or limit freedom of expression, freedom of the press, or freedom of journalism.

It provided that any public agency of any state power, centralized or decentralized, including local governments (cities and municipalities) would be public sources of information. It also established the way that Paraguayan officials and representatives of binational entities would facilitate the right of individuals to request and receive public information (Article 8).

It set the minimum information that any public agency must make available to the public (Article 9) and the minimum information that each branch of government (Articles 10 to 12) must facilitate.

In order to avoid local interpretations that undermine the exercise of the right of access to information, the bill established that the only permissible exceptions were those provided for in Article 13 of the American Convention on Human Rights (Law 1/89), taking into account the standards and the jurisprudence of the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights.

For all information held by the state that for whatever reason is not publicly available on a website, a simple procedure was established for access to that information and rapid administrative and judicial remedies in the event of divergence (Articles 14 to 25).

It also set sanctions for the suspension and even dismissal and disqualification of officials who, by violating the law, individually or collectively shirk the right to ATI, for those who do not properly substantiate the denial of an access to information request, as well as those who unjustifiably refuse to deliver the information (Article 38 and 39).

In the same way, it established mechanisms for obligatory compliance to decisions ordering the delivery of public information (Article 40).

Finally in 2012, this latest version of the bill was again circulated among journalists, academics, and politicians.

Soon after, former President Lugo was impeached and it was obvious that the timing was not right to present the draft prepared by the GIAI.

During the first part of 2013, public attention was focused first on the presidential elections and then on the transition. Immediately after the election, the National Anticorruption Department (SENAC), which was

---

547 Article 6, paragraph 4, section (A), subsection (IV) of the Constitution of the United Mexican States: "*Will establish mechanisms for access to information and procedures for expedited review. These procedures shall be brought before specialized and impartial organs or agencies with operational autonomy of management and decision-making.*"

created in November 2012, took the initiative to analyze the feasibility of presenting an ATI and transparency bill.[548]

In June, the GIAI, along with SENAC, "debuted" the ATI bill.[549] The start of a new constitutional government seemed an opportune moment to suggest that the need for such a law be debated in Paraguay.

No sooner had the newly elected 2013 to 2018 legislators assumed office than the newspaper *Ultima Hora* requested the payroll for public employees and contracted staff of the Chamber of Deputies, with details on their remuneration.

The president of the Chamber of Deputies, with the support of some officials, refused to give this information, arguing that if he did so, it would violate the workers' right to privacy.

Última Hora newspaper published on September 29 a list of some of the public officials in the Chamber of Deputies.[550]

The legislators reacted and on October 8 they approved a resolution to criminally denounce the leaking of this information, alleging a violation of the Ministry of Finance's computer system. [551]

The public outrage that this aroused was unprecedented. Social networks exploded. The news made the cover of all the major newspapers in the country.

On October 10, President Cartes said that "the public is public."[552] That same day, a group of senators endorsed the GIAI bill and formally presented it in the Senate. [553]

The climax came on October 15, when the Constitutional Chamber of the Supreme Court, composed of all of the ministers, issued judgment 1306 and settled the case of Daniel Vargas Telles.[554] The verdict was read in the courtroom after noon and with many TV and radio stations broadcasting live.

The story had changed. The press spoke of an "informative spring." [555]

The Supreme Court unanimously upheld the unconstitutionality presented by the Ombudsman on behalf of Daniel Vargas Telles and thereupon ordered the publishing of the full list of all employees and contractors serving in the judiciary.

> The Court based its ruling in favor of Daniel Vargas on the provisions in Article 28 of the Constitution that recognize the fundamental right of ATI, and held that to determine its scope one had to take into account the decision of the IACHR in the Claude case since, first, that interpretation is considered the *"highest interpretive organism of the provisions of the Convention (Pact of San Jose, Costa Rica), consequently making it logical and reasonable that their decisions be considered by the Supreme Court" because it "will prevent any adverse decisions for our country for not complying with the principles of the Convention, which would compromise its international responsibility"; and also because, secondly, this interpretation "is fully consistent with our constitutional system, characterizing precisely the scope and applicability of the right of access to information, criteria that are equally applicable in the Republic of Paraguay."*

548 "En busca de una ley de acceso a la información." Article published in *ABC Color* as a weekend special on May 3, 2013. Retrieved from: http://www.abc.com.py/especiales/fin-de-semana/plantearan-ley-de-acceso-a-la-informacion-publica-567883.html [Last accessed March 2015].

549 "Organizan conferencia de acceso a la información pública." Article published in *ABC Color* on June 25, 2013. Retrieved from: http://www.abc.com.py/nacionales/organizan-conferencia-de-acceso-a-la-informacion-publica-588456.html [Last Accessed March 2015].

550 "Funcionarios que evitan la entrega de informes tienen jugosos salarios." Article published in *Diario Última Hora* on September 29, 2013. Retrieved from: http://www.ultimahora.com/funcionarios-que-evitan-la-entrega-informes-tienen-jugosos-salarios-n726888.html [Last accessed March 2015].

551 "Diputados castigarán a los que filtran del Congreso." Published on the website *HOY*, of Grupo Multimedios, on October 8, 2013. Retrieved from: http://www.hoy.com.py/nacionales/diputados-castigaran-a-los-que-filtran-datos-sobre-sus-parientes-contratado [Last accessed March 2015].

552 "Presidente afirma que 'lo público,' es público y apoya transparencia." Article published in *ABC Color* on October 10, 2013. Retrieved from: http://www.abc.com.py/edicion-impresa/politica/presidente-afirma-que-lo-publico-en-publico-y-apoya-la-transparencia-626775.html [Last accessed March 2015].

553 "Senadores proponen libre acceso a la información para la ciudadanía." Article published in *ABC Color* on October 11, 2013. Retrieved from: http://www.abc.com.py/edicion-impresa/politica/senadores-proponen-libre-acceso-a-la-informacion-para-la-ciudadania-627166.html [Last accessed March 2015].

554 The complete ruling is available at http://www.pj.gov.py/contenido/945-informacion-publica/945 [Last accessed March 2015].

555 "Las victorias de la indignación ciudadana." Opinion piece published in *Diario Última Hora* on October 19, 2013. Retrieved from: http://www.ultimahora.com/las-victorias-la-indignacion-ciudadana-n732813.html [Last accessed March 2015].

Recognizing that the right to ATI must be interpreted in accordance with the provisions established in the Claude case, the Court considered whether the ATI request that Daniel Vargas Telles had made complied with this interpretation.

The Court found that yes, as the conflict between the rights to ATI and to personal privacy—as far as salaries of civil servants are concerned—was properly contemplated and regulated in Law 1682/01 (text according to Law 1969/02), and that regulation suited the exceptions of the Convention.

Thus, the Court argued that the law distinguishes between public personal data and private personal data. And that within the latter there is sensitive information and patrimonial information. Sensitive information is protected under the scope of personal privacy, and the patrimonial information may be disclosed when it is recorded in "public sources of information."

The Court held that *"there is no legal provision defining what a 'public source of information' is, and since the judges are obliged to preside even in the case of silence, lack of clarity or insufficiency of the law (Article 6, Civil Code), a judicial interpretation should be made."*

So it interpreted that public sources of information are "the three powers that the people's government exercises... or, more precisely, the documents that are in its possession."

Thus, it concluded that *"as information on the salaries of civil servants necessarily must be recorded by one of its agencies, it is personal patrimonial data that can be published or disseminated."*

In sum, the Court incorporated the standards of the Inter-American System for the Protection of Human Rights and created conditions surrounding future legal regulation of the right of access to information. That is, it set limits on what a future ATI law may or may not contain, as well as what it should contain.

Thus, the characterization of ATI as a human right, the presumption that all information in the possession of the state is public, the lack of need to justify requests for access to information and making it free of charge, a strict legal regime limited in exceptions that is reasonable in a democratic society, the state's obligation to establish and prove that the damage that disclosing certain information would produce would be greater than holding it in reserve, that when in doubt access to information is favored, among others, are all issues that must thereafter be provided in an ATI law, and with some modifications to the GIAI's, all are reasonably addressed by ATI Law 5282/14.

This law also includes specific provisions on access to environmental information which, together with the other general provisions, reasonably comply with the Bali Guidelines on access to information.

Regarding Guideline 1, Article 4 of the law provides: *"Any person, without discrimination of any kind, can access public information free of charge and without the need to justify the reasons for the request . . . ."*

Regarding Guidelines 2, 4, and 5, Article 10 of the law provides that *"The Executive Branch should keep updated and available to the public in computerized form, a database containing: . . . (i) Environmental impact statements, management plans, plans for change in land use, reforestation plans, concessions and permits for water resource use, and all other administrative acts that grant rights to natural resource use, no matter the government department that issues it; (j) An annual report on the state and quality of environmental elements such as water, air, soil, protected areas, fauna and flora, including their mutual interactions, as well as activities and measures that have affected or may affect them . . . ."*

Regarding Guideline 3, Article 22 of the law states: *"Reserved public information is that which has been or is qualified or determined as such expressly by law."*

Regarding Guideline 6, it can be considered covered by what is established in Article 25: *"If the foundations of the written brief filing the action or at any other point in the process prove, in the opinion of the Court, the need for immediate action, provisional measures may be taken which correspond in protection of the right or freedom allegedly denied or diminished."*

Finally, as to Guideline 7, it is partially addressed by the provisions of Article 7 of the law: *"Public sources should constantly capacitate, update, and train the officials in charge of the office to gradually optimize the application of the provisions of this law."*

A separate issue is the legal action that can be resorted to in the case of negative responses to requests for ATI.

Article 19 states that *"the denial of public information may only be done through a justified resolution, which shall be issued by the highest authority of the required public source, who will express the factual and legal reasons on which the decision is based."*

That is, the refusal shall be expressed in an administrative appeal not subject to hierarchical appeal. Generally, this type of administrative act is only vulnerable to the courts by way of a contentious-administrative act defined in Law 1462/35, which is processed by the Court of Auditors.

However, Article 23 states that *"In the event of the explicit or tacit refusal of a request for access to information, or any other breach of public distribution with respect to the obligations presented under this law, the applicant, having filed a motion for reconsideration or not, may, if they choose, appear before any trial court judge with jurisdiction in their area of residence or where the public information source is located."*

Thus, it is clear that Law 5282/14 has put aside the contentious-administrative action as a means of challenging the denial of ATI, since this action may be brought only before the Court of Auditors.

That said, the law has not provided a specific procedure, and this should be subject to judicial interpretation. However, the fact that it has established that complaints may be brought before any trial court judge, that the period for bringing the complaint is 60 days (Article 24), and that Article 25, which deals with urgent measures, refers to "the measures that **protect** against rights or freedoms allegedly denied or abused," coupled with the nature of the right in question, in terms of what has been interpreted by the Supreme Court in Judgment 1306, allow us to infer that the legislature had a summary procedure in mind, perhaps an *amparo* action, which was expressly stated in the GIAI draft bill.

Finally, it must be noted that in the Commission's judgements before the ATI bill was brought to the Senate they considered the idea that the judicial action would be contentious-administrative, but that the changes that finally took shape in the text of the law (returning to a draft similar to the wording of the GIAI draft) were intended to prevent that from happening. While it lacked clarity in its drafting, the intention to regulate a brief judicial procedure was inspired by the very nature of the law and the doctrine set by the Supreme Court in the Vargas Telles case.

2. Some preliminary considerations on the impact of the ATI law on environmental governance

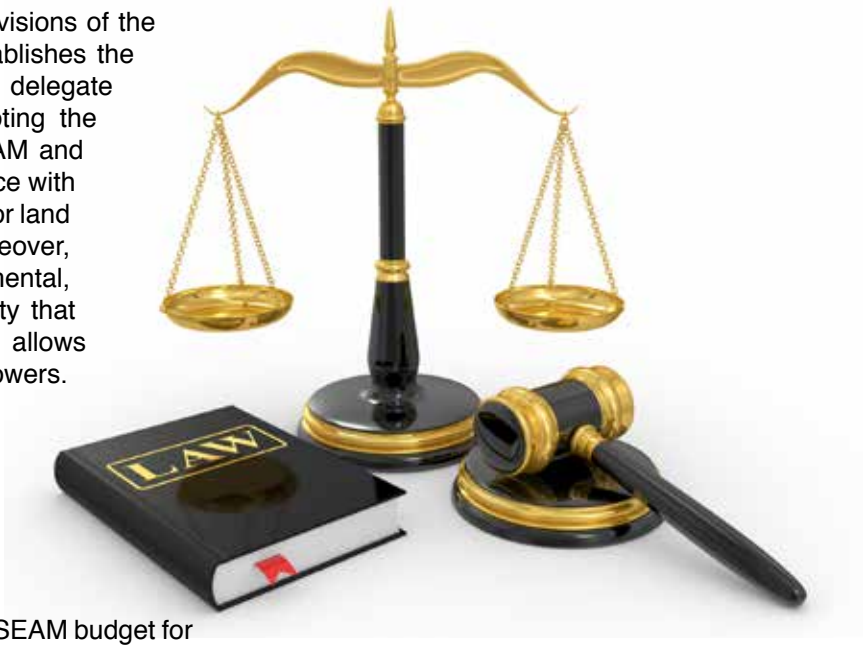
It is still premature to make statements about the impact this bill will have on environmental governance in Paraguay.

From a strictly formal point of view it seems obvious to argue that it is better to have this law than to not have anything, especially since, as we have seen, it is reasonably adapted to the Bali Guidelines on ATI. However, whether or not its provisions are fulfilled and applied will depend on political will and how that is reflected in the budget items that materialize.

In any case, there are already initiatives underway that allow us to see the future with cautious optimism.

Making the most of the fact that, as provided in Article 10 of Law 5282/14, the environmental impact statements, management plans, and plans for change in land use must be updated and available to the public in a computerized database maintained by the executive power (and the institutions that depend on it), IDEA and Guyra Paraguay Association, with the permission of the Ministry of Environment (SEAM), are digitizing the DIA and plans for Alto Paraguay, the region in which they are registering the highest rates of deforestation.

The intention is that this information is available to any interested party to confirm that the conditions set out in those documents are met.



In addition, taking advantage of the provisions of the Municipal Organic Law (Law 3966/10) that establishes the ability of authorities of the executive power to delegate powers to local governments, they are promoting the delegation of powers agreements between SEAM and municipalities so that they can monitor compliance with the conditions established in the DIA, and plans for land use change (deforestation authorizations). Moreover, when the delegated powers are environmental, municipal organic law provides for the possibility that municipalities create an environmental fee that allows them to defray the cost of implementing those powers.

Thus, municipalities can create and maintain a body of environmental auditors who can perform this task using the information that is available and updated under the provisions established in the law.

This can be done without increasing the SEAM budget for audits. In contrast, the cost of environmental auditing will be borne by the very people who should be audited (those who are engaged in activities with environmental impact) in a sort of application of the polluter pays principle, also allowing local capacity-building for environmental monitoring.

While the ability to delegate powers has existed since 2010, it is only since the ATI law came into effect that the delegation of powers in environmental matters makes sense, since without online and up-to-date information on DIAs and change of land use, it would be virtually impossible for other institutions to monitor compliance.

To complete this circle which promises to be virtuous, also during 2014 (Laws 5146/14 and 2598/14) administrative penalties for breaches of environmental legislation were increased significantly. And the delegation of powers agreements provide for the transfer of a percentage of what ultimately is applied in fines to municipal governments whose audits have allowed for the application of such fines by SEAM, giving a strong incentive to municipal governments to enter into delegation of environmental responsibility schemes.

CONCLUSIONS

As in most Latin American countries, in Paraguay the ATI law was achieved through persistent advocacy work by CSOs. The distinguishing feature of the Paraguayan case is that not only was it the politicians who were opposed to the law, but also one of the major media outlets, brandishing a legal interpretation about how the provisions of an ATI law would be interpreted *in practice*.

The key was to maintain the advocacy campaign despite the circumstantial failures, and to note that, sooner or later, an ATI law was inevitable, since similar processes were already underway throughout Latin America. In this sense, the Claude ruling and the subsequent development of the standards of the Inter-American system regarding ATI up until the Model Law were fundamental, but so was the coordinated work of CSOs across the region providing expertise and collaborating with the advocacy work of Paraguayan CSOs.

Another distinctive feature is that the process leading to the ATI law was catalyzed by a Supreme Court ruling which had unusual public importance; a ruling that determined the content of the law in interpreting the right to ATI in the light of the IHR Court doctrine.

Thus, having the OAS Model Law as a reference, it was easy to incorporate the Bali Guidelines, particularly in all that relates to the obligations of active transparency. This is another example of the

importance of a model law, since this instrument has the necessary flexibility to adapt to the distinct realities and opportunities each situation presents.

And it is the provisions on environmental ATI which today in Paraguay are enabling the development of environmental enforcement initiatives at the local level that, without a law like 5282/14 on ATI and the use of current technology, would have been impossible. The online availability of information on the conditions under which the use of natural resources is permitted allows anyone to monitor compliance. And if that possibility is taken advantage of by authorities who are much closer to the places where breaches occur but who had no authority to act, and if that is combined with the right incentives, the effectiveness of the enforcement of environmental law has the potential to grow enormously.

5.2 Specialized Environmental Courts and Tribunals (ECTs) – Improved Access Rights in Latin America and the Caribbean and the World.

George y Catherine Pring [556]

Environmental Courts and Tribunals, ECTs, Environmental Rule of Law, Access Rights, Access to Justice, Environmental Enforcement, Sustainable Development.

The rapid spread of specialized environmental courts and tribunals (ECTs) is one of the most significant developments in the environmental rule of law and access to justice. ECTs now exist in 11 Latin American and Caribbean countries, with more announced and in planning. Extensive study of ECTs by the University of Denver Environmental Courts and Tribunals Study (www.law.du.edu/ect-study) shows they can be an important and effective means for achieving the economic, social, and environmental goals of sustainable development.

Judicial courts and government administrative tribunals that specialize in environmental, resource, land use, and similar lawsuits are a fast-growing worldwide phenomenon. From a handful in 2000, there are now hundreds of environmental courts and tribunals (ECTs) in dozens of countries in all types of legal systems, and their number is growing. The experience with ECTs in Latin America and the Caribbean – including Bolivia, Brazil, Chile, Costa Rica, El Salvador, Guatemala, Guyana, Jamaica, Paraguay, Peru, and Trinidad and Tobago – shows ECTs are seen as improving the environmental rule of law, access rights, and sustainable development. Extensive global research by the University of Denver ECT Study has documented "best practices" by which ECTs improve access to information, public participation, and access to justice.

While most countries have laws to protect the environment, promote sustainability, and improve access rights, many do not have effective institutions to enforce these laws. Successful ECTs in the LAC region and globally provide models for countries considering creating such expert forums. Effective local, national, and multinational judicial institutions are needed to balance economic development and environmental protection, including challenges such as climate change; food, water, dwelling, and energy security; loss of biodiversity; indigenous rights; and pollution of land, air, and water. International judicial institutions like the Caribbean Court of Justice could evolve into forums for deciding transboundary environmental disputes.

Specialized ECTs, as well as environmental chambers and assigned "green" judges in existing general courts, can be effective means to achieve these goals.

1. Environmental Courts and Tribunals in Latin America and the Caribbean

Dramatic shifts in public awareness, policy, and law regarding the environment and economic development have occurred in the last 40 years. Globalized environmental problems are resulting in environmental and land use conflicts and creating new pressures on governments to achieve sustainability. A corresponding dissatisfaction with courts of general jurisdiction has emerged, as the general courts are often perceived as inaccessible, slow, expensive, unfair, and/or lacking the expertise to make decisions based on complex scientific and technical evidence.[557]

The consequence has been demands by civil society, international governmental and financial organizations, and the courts themselves for institutions that can deliver access to justice and are – in the trenchant words of Australian law – "just, quick and cheap." [558] This has led to the current explosion of *specialized* environmental courts and tribunals (ECTs) specifically designed to provide better access to environmental justice.

The University of Denver Environmental Courts and Tribunals Study (ECT Study) undertook a global examination of this phenomenon, reporting its findings in 2009 in the book, *Greening Justice: Creating and*

---

556 Published per exclusive license to publish from the co-authors who hold copyright title of the article

557 George (Rock) Pring and Catherine (Kitty) Pring, "Twenty-first century environmental dispute resolution – is there an 'ECT' in your future?," 33 J. of Energy & Nat. Res. L. 10, 17 (2015) (hereafter "ECT Future"), soon on the ECT Study website, http://www.law.du.edu/ect-study.

558 Civil Procedure Act 2005, sec. 56(1) (New South Wales, Aus.), www.austlii.edu.au/au/legis/nsw/consol_act/cpa2005167/s56.html; see similarly Planning and Environment Court Rules 2010, rule 4 (Queensland, Aus.), www.legislation.qld.gov.au/LEGISLTN/CURRENT/S/SusPlanPECRu10.pdf.

Improving Environmental Courts and Tribunals.[559] At that time, we identified over 350 ECTs in 41 countries. Today, just five years later, there are now over 800 ECTs authorized [560] in nearly 50 countries – worldwide, in every major type of legal system (civil law, common law, Asian law, Islamic law, etc.), at all government levels, from the richest to the poorest nations, with the majority created in just the last 10 years.[561] Based upon research and interviews to date with nearly 250 ECT-experienced legal experts – judicial branch environmental court (EC) judges, administrative branch environmental tribunal (ET) decision-makers, general court justices and judges, government environmental officials, criminal prosecutors, environmental advocates, business lawyers, ECT staff and mediators, and academics – we found that specialized ECTs definitely can improve access rights and the environmental rule of law.[562]

Latin America and the Caribbean (LAC) countries are among the leaders in developing ECTs. They are found in 11 LAC countries:

BOLIVIA

The Tribunal Agroambiental is a judicial EC covering agricultural, forestry, environmental, water, and biodiversity issues, created by the national Constitution, which authorizes seven judges who are popularly elected and courts at nine locations.[563] It resolved 423 cases in 2014.[564]

BRAZIL

The prolific ECT movement in Brazil has produced at least 17 ECs – nine federal district (trial) courts in seven different states, six state trial courts, and two specialized state appellate chambers in São Paulo, in addition to specialized environmental prosecutors.[565]

CHILE

There are two new Tribunales Ambientales, one in the capital Santiago and one in Valdivia that are ECs in their first years of operation.[566]

COSTA RICA

The Tribunal Ambiental Administrativo (TAA) is an independent ET that is part of the Ministry of Environment and Energy and one of the oldest ECTs in Latin America, created in 1995.[567]

EL SALVADOR

A 2014 law authorizes four Tribunales Ambientales, as part of the judiciary, three trial or first-instance ECs in each major zone of the country and an appellate EC chamber in the capital.[568] However, the Supreme Court has created only one EC for the whole country, citing budget and low caseload. It started in December 2014 and has already handed down several positive decisions.[569]

GUATEMALA

Guatemala has joined Courts for Drug-Related Activity and Crimes Against the Environment.[570] In those ECs, first instance judges of crimes against the environment have jurisdiction over investigation and ordering a trial to be held; sentencing judges conduct the trial and pronounce the verdict.

---

559 George (Rock) Pring and Catherine (Kitty) Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (The Access Initiative of the World Resources Institute 2009) (hereafter *Greening Justice*), copy downloadable free at the ECT Study website, www.law.du.edu/ect-study).

560 "Authorized" may not always mean "operating." A handful of countries have adopted ECT authorizing laws but then not set them up or discontinued them for a mix of political, budget, case load, or other reasons.

561 "ECT Future," note 1 above, at 10-11.

562 *Id.* at 11-12, 33; Greening Justice, note 3 above, 13-18, 91-93.

563 Official website: http://www.tribunalagroambiental.bo/.

564 "Bolivia – Agroambiental Court resolved 432 cases in 2014," *Bolivia en Tus Manos* (Jan. 15, 2015), http://www.boliviaentusmanos.com/noticias/bolivia/138896/tribunal-agroambiental-resolvio-432-causas-en-2014.html.

565 For an early list, see Vladimir Passos de Freitas, "Environmental Law and Enforcement in Brazil," PowerPoint at Asian Judges Symposium on Environmental Decision Making, the Rule of Law, and Environmental Justice, July 27-28, 2010, http://www.scribd.com/doc/37002374/Vladimir-Passos-de-Freitas-Environmental-Law-and-Enforcement-in-Brazil; subsequent updates in emails from Professor (former federal judge) Freitas on file with authors.

566 Official websites: http://www.tribunalambiental.cl/ (Santiago), http://www.tercertribunalambiental.cl/ (Valdivia).

567 Official website: http://www.tribunalambiental.net; see also http://www.minae.go.cr/. Tribunal Ambiental Administrativo, "Seis años de éxitos contra el daño ambiental (2008-2014)," http://www.tribunalambiental.net/noticias/2014/INFORME_TRIBUNAL_AMBIENTAL_2014_Resumen_para_prensa.pdf.

568 David Ernesto Pérez, "Primer tribunal Ambiental funcionará dentro de seis meses," *Diario Digital Contra Punto* (May 19, 2014), http://www.contrapunto.com.sv/politica/primer-tribunal-ambiental-funcionara-dentro-de-seis-meses.

569 *E.g.*, Ministerio de Medio Ambiente y Recursos Naturales, "Tribunal Ambiental da 24 horas a Alcaldía de Mejicanos para retirar basura y ordena a MIDES abrir puertas de relleno" (Feb. 12, 2015), in which the Ministry of Environment comments favorably on one of the Tribunal's first decisions, http://www.marn.gob.sv/index.php?option=com_content&view=article&id=3098:tribunal-ambiental-da-24-horas-a-alcaldia-de-mejicanos-para-retirar-basura-y-ordena-a-mides-abrir-puertas-de-relleno&catid=1:noticias-ciudadano&Itemid=227.

570 Network in Solidarity with the People of Guatemala (NISGUA), "Courts in the Criminal Process" (2008), http://www.nisgua.org/themes_campaigns/impunity/Guatemalan%20Courts%20in%20the%20Criminal%20Process.pdf; see, *e.g.*, "Guatemala – Temporary detention, and subsequent release, of human rights defenders following peaceful demonstration against mining activities," *Front Line Defenders*, www.frontlinedefenders.org/node/27316.

GUYANA

The Environmental Assessment Board (EAB) is an ET that is part of the government's Environmental Protection Agency (EPA)[571] and hears appeals of decisions by the EPA about development Environmental Impact Assessments (EIAs).[572] Guyana's Environmental Protection Act also authorizes an Environmental Appeals Tribunal (EAT) as a court of record to hear appeals of decisions of the EAB, although it does not appear to be operational.[573]

JAMAICA

The Natural Resources Conservation Authority Tribunal, under the Ministry of Water, Land, Environment and Climate Change, hears appeals against enforcement notices and decisions of the NRC Authority, and its decisions are final.[574] All six cases the ET heard in fiscal year 2013-2014 were filed appealing the Authority's enforcement actions on pollution and environmental permits for developments.[575]

PARAGUAY

Two "environmental courts" in Paraguay are mentioned in a UN report on indigenous issues, but no other references to them have been found.[576]

PERÚ

Peru's Tribunal de Fiscalización Ambiental (TFA) is an ET that is a branch of the national government's Agency for Environmental Assessment and Enforcement (OEFA)[577] and hears appeals filed against OEFA actions.[578] It has three specialized chambers, for mining, energy, and fishing.

TRINIDAD Y TOBAGO

This Caribbean island nation has an Environmental Commission,[579] which is a court of record with power to review appeals from decisions of the national environmental authority and citizen complaints. However, we found it has a very low profile and handles very few cases (an average of four per year),[580] and its website appears to have been "hijacked." However, we spoke with its Chairman at an October 2014 conference, and he reported the EC is operating, doing outreach, and just had its jurisdiction expanded to include land use planning.[581]

In addition, Mexico has authorized ECTs to begin this year, the Bahamas has just announced plans to create one this year,[582] the Ecuador government and environmentalists have been discussing a "pilot" EC to protect the Galapagos Islands,[583] and Nicaragua is reported in one article to have an "environmental court"[584] but no other references to it have been found.

---

571 [Guyana] Environmental Protection Agency, "Annual Report 2012" at p. 8, http://www.nre.gov.gy/Annual%20Report/EPA%20AR%202012.pdf.

572 Mark Lancelot Bynoe, "Citizen Participation in the Environment Impact Assessment Process in Guyana: Reality or Fallacy?," 2/1 *Law, Environment & Development J.* 34, 43-44 (2006), www.lead-journal.org/content/06034.pdf.

573 See, *id.* at 44.

574 NRCA Act sec. 34, http://nepa.gov.jm/legal/nrca_act_lpart1.htm.

575 Environment & Risk Management Division, "Appeals," http://www.mwh.gov.jm/emd/index.php/component/content/category/9-uncategorized

576 UN Economic and Social Council, Permanent Forum on Indigenous Issues, "Information received from Governments – Paraguay" (Feb. 5, 2010), at pp. 17-18, http://www.un.org/esa/socdev/unpfii/documents/E.C.19.2010.12%201EN.pdf.

577 OEFA, "Environmental Enforcement Tribunal," http://www.oefa.gob.pe/en/tribunal-de-fiscalizacion-ambiental.

578 *Id.*

579 Hamel-Smith Attorneys-at-Law, "Doing Business in Trinidad and Tobago," http://www.trinidadlaw.com/home/general/subcategory.aspx?categoryID=19&subcategoryID=63.

580 "Environmental Commission collapse?," Guardian Media (Mar. 18, 2013), www.guardian.co.tt/editorial/2013-03-18/environmental-commission-collapse.

581 Chateram Sinanan, Chairman, Environmental Commission of Trinidad & Tobago, Address at the First Interamerican Forum on Environmental Justice, Santiago, Chile (Oct. 9, 2014) (in September 2014) (notes on file with authors).

582 Federal Law on Environmental Liability, Transitory art. 3 (Mex.), http://www.dof.gob.mx/nota_detalle.php?codigo=5301688&fecha=07/06/2013; Antonio Gonzalez & Mauricio Llamas, "Enactment of the Federal Law on Environmental Liability in Mexico," www.martindale.com/environmental-law/article_Jones-Day_1841844.htm.

583 Allyson Maynard Gibson Q.C., Attorney General and Minister of Legal Affairs of the Commonwealth of The Bahamas, "Of Justice, Safety and Freedom – Remarks upon the Opening of Legal Year 2015," page 7 (Jan. 14, 2015), http://www.bahamas.gov.bs/wps/wcm/connect/8d053be7-8b79-4154-bebe-5938cd266606/Opening_legal+year+2015%5Bfinal%5D%5Bfinal%5D+(1)(2).pdf?MOD=AJPERES.

584 "First environmental court in Galapagos," Ecuador Times (Oct. 22, 2013), http://www.ecuadortimes.net/2013/10/22/first-environmental-court-in-galapagos/.

2. The Evolution of ECTs

ECTs are not a new idea. The earliest one appeared almost 100 years ago in Denmark,[585] but there was little "environmental law" to justify them until the environmental movement of the 1970s brought forth its explosion of laws governing environmental quality, land use development, and public health.[586] The 1972 UN Stockholm Declaration[587] marked a watershed that produced a flood of new environmental laws, moving away from protecting public and private exploitation of nature toward protecting the environment, human rights, and nature. Nations around the world, including those in the LAC region, began adopting complex new environmental laws and programs. More than 90 nations, including many in the LAC, have adopted provisions in their Constitutions guaranteeing citizens a right to a healthy environment.[588] These transformations refocus the law from economic development to sustainable development, from production of capital to elimination of poverty, from protection of private enterprise to protection of human rights, from secrecy to transparency, from focus on short-term benefits to long-range consequences, and from local and national interests to global concerns.

By the 1980s, it was clear that environmental law needed to resolve the inherent tension between environmental protection and economic development. What emerged is the concept of "sustainable development." More than 100 definitions of sustainable development now exist,[589] the most famous and widely used being that of the 1987 report of the UN World Commission on Environment and Development (WCED or Brundtland Commission): "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[590]

"Sustainable development" promotes the idea that environmental, economic, and social concerns can all be met within the limits of earth's natural resources; this assumes that economic and social progress can be achieved in ways that will not exhaust or seriously diminish the earth's finite natural resources.[591] Virtually all environmental laws, conventions, declarations, and programs since have been based on that concept.

The 1992 UN Rio Declaration,[592] another watershed, affirmed that "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature"[593] and stressed the necessity of protecting the needs of present and future generations.[594] Its most far-reaching provision is Principle 10, which is now driving new actions and commitments in the LAC and around the world:

> Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate *access to information* concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to *participate in decision-making processes*. States shall facilitate and encourage public awareness and participation by making information widely available. Effective *access to judicial and administrative proceedings*, including redress and remedy, shall be provided.[595]

Principle 10 was turned into binding law in the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention).[596] Aarhus has been called "the most ambitious venture in the area of environmental democracy so far undertaken under the auspices of the United Nations."[597] It sets forth detailed requirements for these "three pillars" of democratic governance – public "access rights" to information, participation, and justice – that are binding on its 47 parties (states of Europe and West and Central Asia) and enforceable by the European Court of Justice.

---

585 See *Greening Justice*, note 3 above, at 9.
586 For details on the 1970-present history of environmental law, see Ved P. Nanda & George (Rock) Pring, *International Environmental Law and Policy for the 21st Century* 6-7, 97 *et seq.* (2d ed. 2013).
587 Report of the UN Conference on the Human Environment, Stockholm, June 5-16, 1972, UN Doc. A/CONF.48/14/Rev. 1 (1973), 11 ILM 1416 (1972), http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503.
588 John H. Knox, UN Independent Expert on Human Rights and the Environment, "Report on Constitutional Environmental Rights" (Nov. 21, 2014); James R. May & Erin Daly, *Global Environmental Constitutionalism* (2014).
589 "Sustainable Development Information," http://www.sustainabledevelopmentinfo.com/the-definition-of-sustainable-development/.
590 WCED, *Our Common Future* 41 (1987); www.un-documents.net/our-common-future.pdf.
591 "The Definition of Sustainable Development," http://www.sustainabledevelopmentinfo.com/the-definition-of-sustainable-development/.
592 Rio Declaration on Environment and Development, Principle 1, UN Doc. A/CONF.151/26 (vol. I), 31 ILM 874 (1992), http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163.
593 Rio Declaration on Environment and Development, Principle 1, at http://www.unep.org/Documents.
594 *Id.*, Principle 3.
595 Id., Principle 10 (emphasis added).
596 2161 UNTS 447; 38 ILM 517 (1999), http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf.
597 UN Secretary-General Kofi A. Annan, http://www.aarhusclearinghouse.org/about/.

Furthering the development of access rights, at the 2002 World Summit on Sustainable Development in Johannesburg, over 100 senior judges from around the world, including the LAC, adopted the Johannesburg Principles on the Role of Law and Sustainable Development, reinforcing the close connection between human rights, access rights, sustainable development, and the environmental rule of law.[598] Access rights were elaborated in UNEP's 2010 Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (Bali Guidelines) setting out 26 strong, but voluntary, guidelines "primarily [for] developing countries" on how they should implement "their commitments to Principle 10" of Rio.[599]

At the 2012 UN Rio+20 Conference,[600] over 250 of the world's Chief Justices, Judges, Attorneys General, Auditors General, Chief Prosecutors, and other high-ranking jurists "seized a generational opportunity" to contribute to the development of environmental law, sustainability, and access rights by adopting the Rio+20 Declaration on Justice, Governance and Law for Environmental Sustainability, dealing with the role of courts and tribunals in protecting the environment – including for the first time in such an authoritative forum a call for ECTs:[601]

> Environmental sustainability can only be achieved in the context of fair, effective and transparent national governance arrangements and the rule of law predicated on:
>
> . . . .
>
> (b) public participation in decision-making, and access to justice and information, in accordance with Principle 10 of the Rio Declaration, including exploring the potential value of borrowing provisions from the Aarhus Convention in this regard;
>
> . . . .
>
> (e) accessible, fair, impartial, timely, and responsive dispute resolution mechanisms, *including developing specialized expertise in environmental adjudication,* and innovative environmental procedures and remedies;
>
> (f) recognition of the relationship between human rights and the environment; and
>
> (g) specific criteria for the interpretation of environmental law."[602]

Now, in the LAC region, another impressive movement is underway with regard to access rights. The UN Economic Commission for Latin American and the Caribbean (ECLAC, Spanish CEPAL) has brought together the region's nations to adopt the 2012 Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development, now signed by 19 of the 33 LAC member nations in ECLAC,[603] "launching a process to explore the feasibility of adopting a regional instrument, ranging from guidelines, workshops, and best practices to a regional convention" that will "ensure the full exercise of rights of access to information, participation and justice regarding environmental issues as enshrined in Principle 10 of the Rio Declaration of 1992."[604] This has been followed by several more instruments including the 2014 Santiago Decision, committing to "commence negotiations on the regional instrument."[605] A visionary draft of a "regional agreement" is circulating, with the goal of finalization by December 2016.[606] If adopted, it could potentially be an Aarhus-type agreement specially tailored to the needs and circumstances of the LAC region.

---

598 http://www.dfa.gov.za/docs/2002/wssd0828a.htm, pg. 2.
599 http://www.unep.org/civil-society/Portals/24105/documents/Guidelines/GUIDELINES_TO_ACCESS_TO_ENV_INFO_2.pdf.
600 On Rio+20 generally, see http://www.un.org/en/sustainablefuture/.
601 http://www.unep.org/delc/worldcongress/Home/tabid/55710/Default.aspx.
602 *Id.*, part II, 3d para (emphasis added).
603 http://repositorio.cepal.org/bitstream/handle/11362/37214/S1420707_en.pdf?sequence=1, 2d preamble. They are Argentina, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Panama, Paraguay, Peru, Bolivia, Saint Vincent and the Grenadines, Trinidad and Tobago, and Uruguay, *id.* at footnote 2 therein.
604 http://www.cepal.org/rio20/noticias/paginas/8/48588/Declaracion-eng-N1244043.pdf.
605 Copy of the Santiago Decision at http://repositorio.cepal.org/bitstream/handle/11362/37214/S1420707_en.pdf?sequence=1.
606 http://www.cepal.org/dmaah/noticias/noticias/8/54818/Preliminary_Document_P10_ECLAC_March_31st_2015.pdf.

3. How ECTs Can Improve Access Rights

Based on the University of Denver Environmental Courts and Tribunals Study research, interviews, and observations around the world, we found that specialized ECTs definitely can improve access rights and the environmental rule of law.

3.1. ECT Tools to Increase Access to Information

The ECT Study identified numerous methods ECTs are currently using to increase public access to information in environmental matters.[607] Perhaps most important is ECTs can enforce national "freedom of information" acts (FOIAs), such as many LAC countries have adopted.[608] ECTs can provide "discovery" procedures, giving litigants access to public and private documents. They can require full disclosure of information about cases; for example, New Zealand's Environment Court – a leader in using information technology (IT) and the internet – makes available all discovery and other case documents and decisions to the public via its website.

The power of IT and the internet are opening access to information to the public, regardless of their status, location, education level, or involvement in the case.[609] Many ECTs maintain publically accessible websites, explaining rules, allowing e-filing, and posting hearing dates, as Chile's two ECs do. ECT judges and decision-makers can do their own research, obtain documents, conduct site visits, and consult scientific experts to give themselves access to critical information.

3.2. ECT Tools to Increase Public Participation

Effective ECTs have education outreach, rules, and procedures to encourage and empower the public to participate in environmental dispute resolution.[610] ECT education programs can involve IT, actual meetings, advertisements, and travel to educate the public about using the ECT. Our favorite example is the amazing Manaus State EC judge in the Amazon of Brazil, who – being also an artist – creates professional *comic books* for school children educating them about environmental protection and the EC (paid for with the fines collected from polluters)! [611] Some ECT judges in the Philippines and Brazil actually drive to remote locations in buses or vans equipped inside like miniature courthouses! Permitting public interest lawsuits (PILs) challenging government or private actions is another critical tool.

ECTs can improve public participation through legislation or rules expanding the definition of "standing" (*locus standi*) to allow persons and groups beyond those directly affected to file or participate in a case. Standing rules in progressive ECTs allow members of the public, environmental organizations, class action filers, and even representatives of "future generations" or nature itself to file non-frivolous cases and be heard. They can encourage participation beyond the parties by calling for "friend of the court" briefs, soliciting testimony from experts and other interested persons, and involving the public in monitoring enforcement of ECT decisions.

3.3. ECT Tools to Increase Access to Justice

The major focus of the University of Denver ECT Study has been on how ECTs can enhance access to justice. At least nine interlocking categories of "best practices" have been identified that directly impact access to justice:

3.3.1. Improved Access: A primary goal of effective ECTs is to create a "user-friendly" judicial system. This involves streamlined filing procedures; physical, cultural, and linguistic accessibility; psychological accessibility; and public information.

Filing Procedures: The "doorway" to general courts is typically difficult for the public to understand, let alone an uneducated, impoverished, or rural individual or group. Effective ECTs make it *easy* to file or join a case, with open standing, education, assistance, plain-language directions, on-line filings, community

---

607 "ECT Future," note 1 above, at 15,
608 See http://www.freedominfo.org/regions/latin-america/; http://www.freedominfo.org/regions/caribbean/.
609 "ECT Future," note 1 above, at 17, 28-29.
610 *Id.* at 29.
611 *Greening Justice*, note 3 above, see photo at 87.

outreach, and personalized help from court staff.[612] Filing fees are often eliminated, waived, or reduced. In a number of ECTs – such as the Trinidad and Tobago EC and the Tasmania State, Australia, ET – the staff advise people on how to prepare a filing and proceed. Some use environmental prosecutors, such as those for which Brazil is famous,[613] who can talk with a complainant, do an investigation, and file a case. An "ombudsman" (an independent public advocate) can investigate and address people's complaints and in some countries like Costa Rica even file a case in court.[614] Most important, ECTs can prioritize cases based on the immediacy of the threat to the environment or public health.

Physical, cultural, and linguistic accessibility: ECTs can provide handicapped-accessible facilities, broadcast trials, hold court on evenings and weekends, and even take the court to the people, like the EC in Valdivia, Chile, and "Flying" Judge Michael Rackemann of the EC in the huge Queensland State of Australia.[615] ECTs can provide multi-lingual staff representing various indigenous cultures, arrange translators, and give special accommodation to the visually and hearing impaired. Telephone testimony and audio-visual equipment is used by many, including the EC in Santiago, Chile, to allow evidence and testimony to be given from afar. All these tools have made access to the judicial process much easier and quicker.

Psychological accessibility: Some ECTs have embraced informality and dispensed with intimidating black robes, marble buildings, formal procedures, and arcane legal language. Instead, they provide staff and counsellors who will talk with citizens, an "early neutral evaluation" (to assess the case frankly), and a "multi-door courthouse" of services.[616] The result is a judicial forum that is truly accessible psychologically.[617]

Public Information: Model ECTs constantly work to educate the public about the court and its processes.[618] No longer are proceedings cloaked in secrecy, but instead are accessible through open hearings, IT, and the internet. A number of ECTs in LAC do these things, as well as ECs in New Zealand, Australia, and around the world.

3.3.2. Lowered Costs: The high costs of litigation are often a barrier to access to justice, but there are many innovative methods of eliminating or reducing costs in ECTs, for litigants and for the ECT and government budget.[619] Examples include adjusting filing fees, allowing *pro se* litigants (without attorneys), court-provided ADR and expert witnesses, transcripts on-line, shifting the burden of proof to the entity proposing the action, cost awards not automatically assigned to the losing party, eliminating or reducing security bonds for injunctions, intensive (even mandatory) use of ADR, government funding, and streamlined proceedings. Other cost-cutters include sharing staff and facilities with the general courts (as the Queensland EC does), use of "green judges" within general courts (as the Philippines does), and streamlined procedural rules.

3.3.3. Expert Judges and Decision-Makers: Effective ECTs require that appointed judges and decision-makers have experience in environmental law or undergo training and engage in continuing environmental law education.[620] Numerous ECTs in LAC have these requirements. Most nations have judicial training institutes, such as the Caribbean Academy for Law and Court Administration (CALCA),[621] which could provide specialized training for ECT judges, decision-makers, and staff in environmental law. UNEP, the Asian Development Bank, the Environmental Law Institute, and other international governmental and nongovernmental organizations also provide judicial training in environmental dispute resolution.

Some ECTs have very careful selection processes for judges and decision-makers to screen for principled jurists who are independent, unbiased, honest, and committed to the environmental rule of law and access rights. Chile, among others, has a very elaborate selection process (that is still on-going for judges for the third EC in Antofagasta).

---

612 "ECT Future," note 1 above, at 29; Greening Justice, note 3 above, at 76-79.
613 Lesley K. McAllister, Making Law Matter: Environmental Protection and Legal Institutions in Brazil (2008).
614 L. Arias, "Costa Rica Ombudsman's Office files complaint against GM corn," *The Tico Times*, June 5, 2013, http://www.ticotimes.net/2013/06/05/costa-rica-ombudsman-s-office-files-complaint-against-gm-corn.
615 "ECT Future," note 1 above, at 29; *Greening Justice*, note 3 above, at 76-79.
616 The Hon. Brian J. Preston, "The Land and Environment Court of NSW: Moving Towards a Multi-Door Courthouse," 19 *Australasian Dispute Resolution* J. 72 (Part I) and 144 (Part II) (2008), free copy at http://www.lec.justice.nsw.gov.au/lec/speeches_papers.html#Justice_Preston,_Chi. Justice Preston is Chief Judge of one of the most impressive ECs and a leading authority on them, with a wealth of articles and papers available to the public at that URL.
617 *Id.*
618 *Id.*
619 "ECT Future," note 1 above, at 21-22; *Greening Justice*, note 3 above, at 40-54.
620 "ECT Future," note 1 above, at 28; *Greening Justice*, note 3 above, at 72-75.
621 http://www.calca-ccj.org/

3.3.4. Use of Scientific and Technical Knowledge: Today's environmental cases frequently require complex scientific, economic, and technical knowledge and the ability to deal with uncertainty in future outcomes. ECTs employ a number of innovative ways to deal with this problem, using both internal and external expertise.

Internal Experts: A unique characteristic of some ECTs is the use of judges other than those trained in law, but trained instead in a scientific, economic, engineering, or other technical field.[622] ECs in Sweden were among the first to do this. In addition to law judges; the ET in Costa Rica has a judge who is an engineer, the two ECs in Chile have primary and alternate judges who are economists, an engineer, and a marine biologist; the Trinidad and Tobago EC law authorizes judges in engineering, natural sciences, and social sciences fields. These experts may have the same powers as a law judge, or act as advisors to the bench.

Other ECTs may have expert commissioners or a list of experts who can be called to judge a case in their area of expertise, such as Denmark with its panel of some 200 vetted volunteer experts. Some ask for advisory testimony or friend-of-the-court briefs from local institutes, government agencies, or universities.

External Experts: Expert witnesses provided by the parties can lead to the dreaded "battle of the experts," frequently a poor process in terms of costs, time, and truth. Effective ECTs use "active management" of parties' experts to deal with bias, disagreements, and dishonesty. Two excellent state ECs in Australia – the Planning and Environment Court of Queensland and the Land and Environment Court of New South Wales – are models for managing experts. Perhaps the most powerful tool is giving them pointed instructions with the judge requiring they be *solely responsible to the court* in their testimony, not the interests of the party paying them, or else be held in contempt.[623] Some ECT judges require the experts to meet together (often alone, without parties or attorneys present), identify their areas of agreement and disagreement, and write a joint report setting out the areas of disagreement and limiting court testimony to that. The technique of "hottubbing" – a tongue-in-cheek term from Australia – can be used, in which the ECT takes concurrent testimony from all parties' experts on a particular topic while the experts sit together in the jury box ("the hottub"). Sequencing issues is another technique, in which, for example, all parties' air pollution experts are heard in succession.

3.3.5. Maximizing Alternative Dispute Resolution: A hallmark of successful ECTs is the extensive use of ADR – mediation, early neutral evaluation, and other ways of resolving cases without trial – providing efficiency, saving expense, producing higher outcome satisfaction, and improving compliance.[624] Again, such services can be provided "internally" by court-paid mediators, commissioners, or judges or "externally," paid for by the parties. Restitution and restoration are often achieved by consent of the parties. In some ECTs, up to 95% of cases reach a mediated solution, which can then be formalized as a court order. We found ADR is a critical tool for resolving many environmental disputes, and that it is more effective when it is an integral part of the ECT structure.

3.3.6. Special Procedural Rules: ECTs may need procedural rules that are quite different from the general courts in order to be more "just, quick, and cheap."[625] In a famous example in the Philippines, a predominantly civil law system, the Supreme Court adopted specialized procedural and evidence rules for its ECs in 2010.[626] Although it is more challenging to adopt special rules for "green judges" within courts of general jurisdiction, it is not impossible, as the Philippines example shows. Special rules can be used to prohibit SLAPPS [627] and provide for processes like "continuing mandamus" [628] and the *writ of amparo*.[629] Other innovations include the development of a sentencing data base, court performance evaluation, public reporting mechanisms, fast-track directions hearings for the attorneys, and procedures to insure public access to information and participation.

---

622 "ECT Future," note 1 above, at 23-25; *Greening Justice*, note 3 above, at 55-61.

623 The Hon. Michael E. Rackemann, Judge of the State of Queensland District Court and the Planning and Environment Court, Address to the International Conference on Global Environmental Issues, New Delhi, India, Mar. 15, 2015, at 10, http://www.sclqld.org.au/judicial-papers/judicial-profiles/profiles/merackemann/papers/1. Judge Rackemann sits on one of the most impressive ECs and is an authority on them, with a wealth of articles and papers available to the public at that URL.624 The Hon. Brian J. Preston, "Characteristics of Successful Environmental Courts and Tribunals," 26 J. of Env. L. 365 (2014), free copy at http://www.lec.justice.nsw.gov.au/lec/speeches_papers.html#Justice_Preston,_Chi at 15, 24.

624 "ECT Future," note 1 above, at 25-27; *Greening Justice*, note 3 above, at 61-72.

625 "ECT Future," note 1 above, at 28-32; *Greening Justice*, note 3 above, at 76-87.

626 RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, A.M. No 09-6-8-SC (2010) (Phil.), http://www.lawphil.net/courts/supreme/am/am_09-6-8-sc_2010.html.

627 As the Philippines expressly does. For a treatise on SLAPPs, see George W. Pring & Penelope Canan, *SLAPPs: Getting Sued for Speaking Out* (1996).

628 Juan Arturo Iluminado C. de Castro, "Cleaning up Manila Bay: Mandamus as a Tool for Environmental Protection," 37 *Ecology L. Q.* 797 (2010), www.boalt.org/elq/documents/elq37_2_27_decastro_2010_0630.pdf.

629 Gloria Orrego Hoyos, "The Amparo Context in Latin American Jurisdiction: an approach to an empowering action" (2013), http://www.nyulawglobal.org/globalex/Amparo.htm.

3.3.7. Intensive Case Management: Many of the elements of effective case management have been covered in the above sections. Successful ECTs have adopted a number of tools to better manage the parties, data, case files, experts, and public access to information and employ IT.[630] Intensive case management aids both the parties and the ECT – providing information, assistance, and counselling and preventing cases from being needlessly delayed, documents unfiled or lost, and precedents forgotten. The ECs in Brazil and Chile, among others like the Australian and New Zealand models, have incorporated many of these tools.

3.3.8. Standard and Creative Remedies: Effective ECTs must have a sufficient range of remedies or enforcement tools to see that their decisions are implemented in the real world. Powers of courts of general jurisdiction are often limited by ineffective fines and inadequate remedies which fail to restore environmental damage, prevent future damage, or guarantee sustainable development. Essential remedies include: preliminary injunctions, interim relief, permanent injunctions, monetary damages, punitive damages, remediation orders, restitution, power to deny or amend a development proposal, adequate monetary fines, contempt of court, and attorneys fees awards.[631] Ideally, an ECT should have civil, criminal, and administrative jurisdiction and remedies. Power to employ "innovative" remedy powers, such as continuing mandamus, community service, restorative justice, financial assurance bonds, and natural resource damages, is also important. These in some ECTs have resulted in requiring polluters to attend and graduate from an environmental school (funded by the ECT from fines), ordering illegal loggers to replant and restore cut areas, holding coal companies liable for climate-change emissions by end-users, requiring construction of health clinics and infrastructure for impacted communities, financing environmental awareness ads and recycling programs, having NGOs monitor cleanups, and requiring polluters to hire environmental "watchdogs" on staff to report compliance to the ECT. The combination of broad enforcement remedies and ADR has allowed ECTs to develop, order, and enforce many of these effective solutions.

3.3.9. Embracing a Problem-solving Approach: Perhaps most important for sustainability and the environmental rule of law is the use of a problem-solving approach – finding an on-going *solution for the problem*, not just applying the law in a routine win-lose way that may not serve the parties or the environment. As the Hon. Brian J. Preston, Chief Judge of the State of New South Wales, Australia, Land and Environment Court, has stated:

The ECT…is better able to adopt a creative and innovative "problem solving" approach to restraining, remediating or compensating for environmental harm. Such a creative and innovative approach enables an ECT to effectively determine not only the legal aspects of the disputes but also the non-legal aspects of a dispute (eg ecological integrity). …[It is also] a less adversarial and more flexible, problem-solving based approach to expert testimony where participants are all working towards resolution of issues in dispute….[632]

The Hon. Michael E. Rackemann, Judge of the State of Queensland, Australia, Planning and Environment Court, describes his problem-solving approach this way:

> …[C]ertain important elements...should be part of any environmental dispute resolution process. …[This one] is crucial: you need to approach [the case] from a *problem solving perspective*. All we are concerned about [in standard cases] is resolving their dispute, and often that is done by the payment of some money. But environmental disputes are different: they're not about who owes who how much money; they're about the silent party in the case – the environment. Something which has a public interest and a public effect.[633]

Synergistically and in combination, the problem-solving approach and the other eight interlocking categories of "best practices" described above can dramatically improve the environmental rule of law, access rights, and sustainable development outcomes in ECTs.

---

630 "ECT Future," note 1 above, at 28-30; *Greening Justice*, note 3 above, at 76-79.
631 "ECT Future," note 1 above, at 30-32; *Greening Justice*, note 3 above, at 79-87.
632 The Hon. Brian J. Preston, "Characteristics of Successful Environmental Courts and Tribunals," 26 J. of Env. L. 365 (2014), free copy at http://www.lec.justice.nsw.gov.au/lec/speeches_papers.html#Justice_Preston,_Chi at 15, 24.
633 Rackemann Address, note 68 above, at 1, 8-9, http://www.sclqld.org.au/judicial-papers/judicial-profiles/profiles/merackemann/papers/1.

4. The Latin American-Caribbean Region and Projected Growth of ECTs

The membership of the UN's ECLAC (or CEPAL) – 33 LAC member nations and 13 associate member non-independent territories in the Caribbean – for convenience define the LAC region.[634] All are confronting poverty and a wide range of environmental issues – from development, mining, logging, urban pollution, protecting marine life and fisheries, and others. All are concerned at some level about water, food, energy, shelter, and health security. Some of the nations are reasonably prosperous economies – such as Brazil and Chile – and have ECTs. Others, such as Trinidad and Tobago, are less developed small island states, which have also embraced enforcement of the environmental rule of law through an ECT. Still others, such as El Salvador, Mexico, and the Bahamas are just beginning the creation of ECTs to serve their differing needs.

4.1. Current Status of Access Rights and Rule of Environmental Law

The 46 LAC nations and territories cover a very wide spectrum of ratings in terms of the rule of law and access rights based on several studies. The independent and well-respected World Justice Project (WJP) measures "open government" in terms of access rights and defines it as "a government that shares information, empowers people with tools to hold the government accountable, and fosters citizen participation in public policy deliberations…a necessary component of a system of government founded on the rule of law.[635] The report ranks 102 countries based on four measures: (1) publicized laws and government data, (2) right to information, (3) civic participation, and (4) complaint mechanisms.[636] It ranks 18 LAC countries from "most open" to "least open." [637] Although more than half of the LAC nations are not included in this project, it is apparent that those surveyed are very different in terms of open government – from highly ranked Chile, Costa Rica, and Uruguay to Bolivia, Nicaragua, and Venezuela which are ranked very low as to the government's openness.[638]

The World Justice Project also produces a larger annual report, *The Rule of Law Index*, measuring countries' adherence to the rule of law. Its definition of "rule of law," based on internationally accepted standards, is whether the following four principles are upheld:

1. The government and its officials and agents as well as individuals and private entities are accountable under the law.

2. The laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property.

3. The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.

4. Justice is delivered by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.[639]

In 2014, the report's most recent year, it examined 99 nations, including 15 in the LAC, ranking Uruguay and Chile highly, while ranking Bolivia and Venezuela among the lowest in following the rule of law.[640]

A third measure of access rights and the environmental rule of law in the LAC is ECLAC's 2013 report "Access to Information, Participation and Justice in Environmental Matters in Latin America and the Caribbean: Situation, Outlook and Examples of Good Practice,[641] which states:

---

634 http://www.cepal.org/en/estados-miembros. Two additional entities in the area, French Guiana in South America and Saint Barthélemy in the Caribbean, which are overseas dependencies of France, are not members of ECLAC, http://lanic.utexas.edu/subject/countries/. There are also 11 ECLAC members from outside the region.

635 World Justice Project, "Open Government Index: 2015 Report" at 4 (2015), http://worldjusticeproject.org/sites/default/files/ogi_2015.pdf.

636 *Id.*

637 *Id.* at 5, 15-17.

638 World Justice Project Open government Index, 2015 Report, pg. 16.

639 The World Justice Project, *Rule of Law Index 2014* at 4 (2015), http://worldjusticeproject.org/sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf.

640 *Id.* at 172-174.

641 LC/L.3549/Rev.1 (Apr. 12, 2013), http://www.cepal.org/rio20/noticias/paginas/4/49604/2013-247-PR10-Access_to_information.pdf.

> There is growing recognition by civil society and governments that access to information, participation and justice in environmental issues are essential for advancing towards environmental protection and sustainable development. In order to progress towards sustainable development, the countries of Latin America and the Caribbean need to work on developing policies based on a more informed, participatory process…[642]

It concludes "notwithstanding the significant progress made in the past 20 years, many countries [in the LAC] have yet to develop the legislation needed to facilitate the implementation of Principle 10 of the Rio Declaration, or are finding it difficult to apply in practice." [643] It found that limitations on access rights stemmed from a shortage of financial resources, lack of training, weak institutional frameworks, limited importance afforded environmental issues, insufficient release of information and education, and/or lack of participation by traditionally underrepresented groups.

With regard to access to justice in particular, the ECLAC report found that the "main barriers to access to justice in the region" include

- limitations on standing
- prohibitively high costs of litigation
- requirements for a security deposit ("undertaking for damages") to obtain an injunction
- lack of measures to help the poor gain access to justice
- insufficient integration of indigenous communities
- resolution of the question of "creating bodies with specialized jurisdiction" (*i.e.* ECTs and environmental prosecutors)
- alternative mechanisms for environmental conflict resolution
- means for disseminating information on access to justice.[644]

These are all barriers that ECTs have developed means to overcome.

One can conclude, from these and similar studies, that while progress has been made in achieving the framework for environmental rule of law and the guarantee of access rights in environmental matters, there is still a long way to go in many LAC nations and territories.

4.2. Recent Developments Which May Spur More ECTs in the LAC

Achieving the environmental rule of law and access rights has become a priority in the LAC region. There are now several intersecting processes that could make the LAC region a world leader in institutionalizing the environmental rule of law and access to information, public participation, and justice and could trigger growth in the number of ECTs.

The first is the groundbreaking initiative to develop a "Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin America and the Caribbean." This visionary, multinational, collaborative process to draft and ratify such an agreement by December 2016 is an offshoot of the Rio+20 initiatives. The end result could be anything from a nonbinding declaration to an enforceable treaty as powerful for the environmental rule of law and access rights in the LAC as the Aarhus Convention has been for its state parties. A "Preliminary Document of the Regional Instrument," [645] based on numerous prior meetings and discussions, was released by ECLAC on March 15, 2015, for the countries' further consideration. It sets forth a proposed "Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin America and the Caribbean." [646] Its Article 9 on Access to Justice is particularly relevant, as it *requires*:

---

642 *Id.* at 3.
643 *Id.* at 44
644 *Id.* at 41-42.
645 Note 51 above.
646 *Id.* at 1.

1. Each Party shall guarantee the right to access justice in environmental matters within a reasonable period of time through administrative and/or judicial means, in the framework of a process that grants guarantees of due process based on the principles of legality, effectiveness, publicity and transparency, through clear, fair, appropriate and independent procedures. The Parties shall ensure the right of appeal to a superior administrative and/or judicial body.

2. Each Party shall ensure, in the framework of its national laws, that any person is entitled to have access to a judicial body or other autonomous, independent and impartial body or administrative procedures to challenge the legality of:

   (a) any decision, action or omission related to the access to environmental information;

   (b) any decision, action, or omission, with respect to substance or procedure, related to participation by the public in environmental decision-making; and

   (c) any decision, action or omission by an individual, public authority or private entity that could affect the environment or violate, with respect to substance or procedure, the environmental laws and regulations of the State related to the environment.

3. To guarantee this right, the Parties shall establish:

   (a) jurisdictional or non-jurisdictional entities specialized in environmental matters;

   (b) effective, reasonable, fair, open, rapid, transparent, equitable and timely procedures;

   (c) broad active legal standing in defense of the environment, which may include collective actions;

   (d) timely and effective execution mechanisms for decisions;

   (e) timely, adequate and effective mechanisms for redress, including restitution, compensation and other suitable measures, and attention to victims as applicable, and establishment of funds;

   (f) the possibility of ordering precautionary, interim and oversight measures to safeguard the environment and public health; and

   (g) measures to facilitate the determination of environmental damage, including objective responsibility and reversal of the onus of proof.

   The Parties shall encourage, insofar as possible, the establishment of judicial and/or administrative standards of review in cases pertaining to environmental damage, such as the *in dubio pro natura* principle.[647]

Article 9(3) of the draft agreement is nothing less than a prescription for the creation of specialized ECTs! Further, it provides for dispute settlement that relies on "negotiation…or any other means" and refers unsettled disputes to the International Court of Justice or arbitration.[648] If this visionary agreement is ratified by LAC nations, it will most certainly be a driving force for creation of more specialized ECTs or environmental chambers and assigned green judges in general courts, to fulfill the agreement's vision.

The second process impacting the environmental rule of law, access rights, and ECTs in the LAC region is the global negotiation of the post-2015 Millennium Development Goals (MDGs).[649] The UN Secretary General's roadmap [650] sets out several essential elements for implementation, including protecting our ecosystems for all societies and our children, ensuring healthy lives, and promoting safe and peaceful societies and strong institutions to achieve justice.[651] ECTs which include the nine characteristics discussed in section III above can provide an effective institution for implementing those goals.

A third process potentially affecting the environmental rule of law, access rights, and ECTs in the Ca-

---

647 *Id.* at 18-19 (emphasis added).
648 Article 18, id. at 25-26.
649 UN Economic and Social Council, "Millennium Development Goals and Post-2015 Development Agenda," http://www.un.org/en/ecosoc/about/mdg.shtml.
650 UN, "The Road to Dignity by 2030: Ending Poverty, Transforming All Lives and Protecting the Planet – Synthesis Report of the Secretary General" (Dec. 2014), http://www.un.org/disabilities/documents/reports/SG_Synthesis_Report_Road_to_Dignity_by_2030.pdf.
651 *Id.* at 20.

ribbean is the CARICOM Strategic Plan for the Caribbean Community 2015-2019.[652] This may seem strange, since it is an economic plan focused on "development needs" and "socio-economic progress." [653] However it has provisions for the environment and access rights. One of its goals is "To ensure sustainable human and social development in the Region, with reduced levels of poverty and equitable access by vulnerable groups and significant improvement of citizen security by facilitating a safe, just and free Community.[654] It calls for strategies to

- reduce vulnerability to disaster risk and the effects of climate change and ensure effective management of natural resources across the region
- advance climate adaptation and mitigation
- advance disaster mitigation and management
- enhance management of the environment and natural resources
- increase use of clean and renewable energy
- mainstream environmental sustainability into policy, planning and public education and public awareness of sustainable environmental management
- develop arrangements for participatory governance.[655]

The CARICOM Strategic Plan specifically calls for judicial reform:

> Facilitating Justice Reform – modernized and efficient court systems and procedures, including the use of technology to facilitate case management and efficient filing, disposition and tracking of court matters; reduction of backlog in the judicial system; training and retaining skilled personnel in the justice system – judges, lawyers, police officers, investigators and counselors; structured cross-border/ regional systems to bolster national and regional efforts in justice protection, mutual legal assistance, law enforcement, enforcement of judgements; and improved access by the legal profession and the public to legislation, case-law and other legal information.[656]

And it recognizes that "good governance encompasses the rule of law" and that "the rule of law is one major aspect of a governance framework which provides a foundation for sustainable development." [657]

As this strategic plan is implemented over the next five years, development disputes can be anticipated, requiring expert balancing of the needs of the economy and the environment. Adjudication of such conflicts, enforcement of the environmental rule of law, and application of key legal principles could clearly benefit from expert, effective ECTs.

4.3. The Potential Role of a Regional Environmental Court or Courts in the LAC

The Caribbean area already has a respected regional court [658] – the Caribbean Court of Justice (CCJ)[659] – which could develop an expert ECT-type chamber or judges. As yet, Latin America has no such region-wide, multinational court on which to build a specialized green bench.

The CCJ began operations in 2005[660] and has 15 Caribbean countries as parties.[661] It constitutes a dynamic model for handling economic and environmental issues within the region. It is a hybrid, being a court

652 http://caricom.org/jsp/secretariat/caribbean-community-strategic-plan.jsp.
653 *Id.*
654 *Id.* at 21.
655 CARICOM, *Strategic Plan for the Caribbean Community 2015-2019: Repositioning CARICOM, Vol. 1 – The Executive Plan* (July 3, 2014) at 12-13 and 14 *et seq.*, http://caricom.org/jsp/secretariat/caribbean-community-strategic-plan.jsp.
656 *Id.* at 24.
657 *Id.* at 36.
658 Philip Dayle, "Caribbean court of justice: a model for international courts?," *The Guardian*, Sept. 10, 2010, http://www.theguardian.com/law/2010/sep/10/caribbean-court-judges-selection.
659 www.caribbeancourtofjustice.org.
660 Agreement Establishing the Caribbean Court of Justice (signed Feb. 14, 2001), http://www.caribbeancourtofjustice.org/court-instruments/the-agreement-establishing-the-ccj; CCJ, "FAQs – Establishing the Caribbean Court of Justice," http://www.caribbeancourtofjustice.org/about-the-ccj/faqs.
661 Antigua & Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Kitts & Nevis, St. Lucia, St. Vincent & the Grenadines, Suriname, and Trinidad & Tobago. *Id.* (click on flags at bottom of webpage) or see International Justice Resource Center, "Caribbean Court of Justice," http://www.ijrcenter.org/regional-communities/caribbean-court-of-justice/. For an excellent history of the CCJ and its human rights cases by a sitting judge of the CCJ, see The Hon. Mr. Justice Winston Anderson, "The Role of the Caribbean Court of Justice in Human Rights Adjudication: International Treaty Law Dimensions," 21 J. Transnat'l L. & Pol. 1 (2011-2012), http://archive.law.fsu.edu/journals/transnational/vol21/anderson.pdf (hereafter Anderson).

that both resolves treaty disputes between nations and serves as a final appellate court for civil and criminal cases. It has:

(1) Original and exclusive jurisdiction over legal issues under the 2001 Revised Treaty of Chaguaramas[662] and the CARICOM Single Market and Economy (CSME),[663] which establish the coordinated economy of CARICOM's 15 member states and five associate member dependencies.[664]

(2) Final appellate jurisdiction to hear civil and criminal appeals from CARICOM countries that have stopped using the Judicial Committee of the Privy Council of the United Kingdom as their appellate decision-maker and accepted the wider appellate jurisdiction of the CCJ.[665] To date, only the four Caribbean states of Barbados, Belize, Dominica, and Guyana have done so for all cases,[666] Trinidad and Tobago has done so for criminal cases only,[667] and the Jamaican Parliament will vote about joining on April 28, 2015.[668]

The CCJ's original jurisdiction has some environmental potential under the Revised Treaty,[669] but appellate jurisdiction is what has the potential to provide the Caribbean with an expert EC.[670]

The Hon. Justice Winston Anderson, a sitting judge of the CCJ and himself an expert in environmental and international law, has observed: "The original jurisdiction of the CCJ is of limited relevance to human rights litigation at the present time, but in its appellate jurisdiction the Court has the opportunity and responsibility to engage in human rights adjudication," pointing out "the CCJ's responsibilities for the development of an indigenous Caribbean jurisprudence." [671] In another article, Justice Anderson has also observed:

> In our increased era of globalization more and more transnational activities adversely affect the natural environment, including illegal trade in wildlife, climate change, and pollution of the global commons. National courts are not always equipped to deal adequately with these issues which probably require adjudication by a dedicated international judicial body. Unfortunately, no such body exists inviting the question of whether the time has come for consideration to be given to the establishment of an international environmental court.[672]

Has the time come to consider a specialized environmental chamber for this existing international court?

The CCJ has been acknowledged as a model for appointing high-quality judges, including legal, non-legal, and civil society representatives from different Caribbean countries, and an independence bolstered by being wholly financed through a trust fund of assessments on CARICOM members – all of which help assure highly qualified, credible, unbiased, and even-handed enforcement of the rule of law.[673] These characteristics position it to become a Caribbean court for the adjudication of the proposed Agreement on the Application of Principle 10 for Latin American and the Caribbean.[674] While the draft agreement currently refers all unresolved disputes to the International Court of Justice (ICJ),[675] it might be preferable to have appeals go to the CCJ for the Caribbean States and to a comparable regional EC or ECs created for Latin America. This would have the advantages of decision-makers from the affected region who are knowledgeable about social, cultural, economic, legal, and environmental factors within the region, and of being much more accessible than the ICJ, 10,000 km ± away in the EU.

---

662 http://www.caricom.org/jsp/community/revised_treaty-text.pdf.
663 http://www.caricom.org/jsp/single_market/single_market_index.jsp?menu=csme.
664 List at http://www.caricom.org/jsp/community/member_states.jsp?menu=community.
665 http://www.ijrcenter.org/regional-communities/caribbean-court-of-justice/.
666 "Dominica Officially Joins Caribbean Court of Justice" (Mar. 10, 2015), http://www.caribjournal.com/2015/03/10/dominica-officially-joins-caribbean-court-of-justice/#.
667 "Jamaica's Parliament to Vote on Move to Caribbean Court of Justice" (Jan. 21, 2015), http://www.caribjournal.com/2015/01/21/jamaicas-parliament-to-vote-on-move-to-caribbean-court-of-justice/#.
668 *Id.*
669 *See, e.g.*, Revised Treaty of Chaguaramas, note 107 above, art. 58 ("Natural Resource Management").
670 Agreement Establishing the Caribbean Court of Justice, arts. XXV(a), (c), (d), (f), note 105 above.
671 Anderson, note 106 above, at 32, 33.
672 Winston Anderson, Judge of the Caribbean Court of Justice, Address at the UN Environment Assembly Global Symposium on Environmental Rule of Law on "Judicial Perspectives on Human Right and the Environment" (June 24, 2014), https://westindiesstaugustine.academia.edu/WinstonAnderson.
673 Dayle, note 103 above.
674 Agreement, note 51 above.
675 *Id.*, art. 18(2).

At a smaller regional level, the Eastern Caribbean Supreme Court (ECSC)[676] is a superior court of record for countries in the Organisation of the Eastern Caribbean States (OECS)[677] and has jurisdiction over six independent states and three British overseas territories.[678] That court also could serve as an appellate level EC and adjudicate Principle 10 conflicts. It already has both civil and criminal jurisdiction to interpret and apply laws of its member states and to hear appeals,[679] including those concerning the environment and human rights.[680]

CONCLUSION

Initiatives in the Latin America-Caribbean region and globally – including the creation of an Agreement on the Application of Principle 10 Declaration for Latin America and the Caribbean, the UN negotiations on post-2015 Millennium Development Goals, and the CARICOM Five-Year Strategic Plan – will further highlight the importance of the environmental rule of law for achieving not just sustainability, but survival. With pressures for economic development will come conflicts, demanding expert, accessible, independent, affordable, and timely adjudication and enforcement of the environmental rule of law in the region. Specialized ECTs have demonstrated effectiveness as institutions capable of balancing the sustainable development conundrum, and so ECTs can be expected to increase in the region, in the interests of true sustainability for Earth and its present and future generations.

---

676 Official website, http://www.eccourts.org/.

677 Official website, http://www.oecs.org/.

678 OECS, "Eastern Caribbean Supreme Court," http://www.oecs.org/about-the-oecs/institutions/eastern-caribbean-supreme-court-ecsc. The court's jurisdiction includes the States of Antigua and Barbuda, Dominica, Grenada, Saint Kitts and Nevis, Saint Lucia, and Saint Vincent and the Grenadines and the territories of Anguilla, British Virgin Islands, and Montserrat.

679 *Id.*

680 *See, e.g.*, Virgin Islands Environmental Council v. Attorney General, Claim No. BVIHCV2007/0185, ECSC (2009), http://www.eccourts.org/wp-content/files_mf/1359390929_magicfields_pdf_file_upload_1_1.pdf.

5.3 Developing a Regional Instrument on Access Rights for Latin America and the Caribbean

Danielle Andrade-Goffe and Karetta Crooks Charles

Access rights, access to information, public participation, access to justice

Nineteen countries in Latin America and the Caribbean adopted the 2012 Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development with the aim of working towards a regional instrument on access rights (access to information, public participation and access to justice). This initiative could pave the way for achieving a regional standard for access rights that will mitigate social conflicts by channeling public concerns about environmental issues through a framework that promotes good governance.

Access rights: access to information, public participation and access to justice are pivotal elements for the promotion and growth of investment and development while at the same time reducing poverty, inequality, and ensuring social peace, good governance and sustainable development. Caribbean countries have made great achievements in access rights with the development of Freedom of Information laws (either in draft or fully enacted) in the majority of countries and the establishment of a Caribbean Court of Justice. At the same time there has been an unprecedented increase in the scale and pace of infrastructure development in the region which has resulted in natural resource related conflicts escalating in legal claims brought by civil society challenging the legality of decisions to approve projects particularly from Jamaica, Belize, Trinidad and the Bahamas.

There have been several international and regional instruments that promote the adoption of legal requirements for access rights in environmental matters. More recently, 19 countries in Latin America and the Caribbean have signed the 2012 Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development with the aim of working towards a regional instrument on access rights. There are several advantages to developing an instrument focused on the region. This latest initiative could pave the way for achieving a regional standard for access rights that will mitigate social conflicts by properly channeling citizens' concerns about environmental issues through a functional framework which promotes sound environmental governance.

INTRODUCTION

1. What are access rights and why are these rights important?

Social conflict can arise when citizens are not involved in decisions that directly affect them. This is particularly the case when these decisions have significant environmental, health and social consequences, when they impact the poor or vulnerable who may have a greater dependence on natural resources for their livelihood or when these decisions impact those who are at risk from environmental hazards. Statistics show that approximately 33% of the population in Latin America and the Caribbean (LAC) live in poverty.[681] This vulnerable group above all others requires special consideration in delivering appropriate mechanisms that facilitate their involvement in decision-making.

Latin American and Caribbean countries now have a unique opportunity to be part of a transformational initiative geared at improving the participation of all players of society in environmental issues. This initiative is known as the Latin American and Caribbean (LAC) Declaration on Principle 10 (P10). Principle 10,

681 *Millennium Development Goals: Achieving the Millennium Development Goals with Equality in Latin America and the Caribbean: Progress and Challenges,* United Nations Economic Commission for Latin America and the Caribbean, p.5, 2010, available at http://www.cepal.org/publicaciones/xml/5/39995/lcg2460_MDG_ingles.pdf

also called the environmental democracy principle, stems from the Rio Declaration which was one of the most significant outcomes of the 1992 United Nations Conference on Environment and Development. This principle affirms that all citizens have a say in environmental decisions that directly affect them and that all individuals shall have appropriate access to environmental information and effective access to judicial and administrative proceedings, including redress and remedy. These access rights (the right to information, public participation and justice) are recognized internationally and nationally in other regional and international instruments as the pillars of environmental democracy and essential to good governance, environmental protection and sustainable development.[682]

Access to Information is the basis of decision-making as it allows the public to make informed choices about the environment, understand decisions taken by the government and be able to take an active role in monitoring the environment. Public Participation allows the public to express their views and opinions, challenge decisions, and influence policies that could affect their livelihoods, health and environment. Access to Justice provides the public with avenues to seek legal redress where they have been deprived of access rights or suffered environmental harm. Collectively, these rights facilitate informed debate, improve accountability by providing a check on government and its tendency to align itself with industry interests and legitimize decisions taken by the government.

In the Caribbean region, in particular in Jamaica, Belize, Trinidad, the British Virgin Islands and the Bahamas, there has been an increase in judicial review cases brought by environmental public interest groups challenging the decision-making process relating to developments in environmentally sensitive areas. These conflicts centered around issues related to perceived denial of access rights such as the lack of information and insufficient public consultation on proposed projects.[683] Two decades since the 1992 Rio Declaration, this regional LAC Declaration on Principle 10 tantalizingly promises a way to achieve more effective national legal systems to avoid social conflicts around the use of natural resources.

2. Current Status of Access Rights in the Caribbean

Since the 1992 Rio Declaration on Environment and Development, many Caribbean countries have developed laws to provide the public with access rights in environmental matters. There remains in the majority of countries, issues related to implementation which include delays in enacting or amending laws to give effect to these rights. In these countries, reliance is placed on the use of guidelines or practice rather than binding legislative procedures.

2.1. Access to information

Of the 15 independent Caribbean countries examined in this paper, six have enacted legislation on access to information, five countries have legislation in draft, three countries remain without any legislation but have a constitutional provision for freedom to receive information and only one country has not introduced legislation or a constitutional provision regarding this access right.[684] In the majority of Caribbean countries, legal requirements for the proactive release and dissemination of environmental information are non-existent.

---

682 The 2001 Inter-American Strategy for Public Participation in Sustainable Development Decision-making and the 2010 UNEP Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (the Bali Guidelines)

683 *Belize Alliance of Conservation Non-Governmental Organisations v. Department of the Environment & Anor (Belize)* [2003] UKPC 63 and 2004 [UKPC] 6 available at http://www.bailii.org/uk/cases/UKPC/2004/6.html; *the Northern Jamaica Conservation Association and Others v. The Natural Resources Conservation Authority and Another (2006)* HCV 3022 of 2005 available at www.jamentrust.org; S*ave Guana Cay Reef Association Ltd and ors. V. The Queen and ors.* [2009] UKPC 448 available at http://www.bailii.org/uk/cases/UKPC/2009/44.html; *People United Respecting the Environment (PURE) v. the Environmental Management Authority* CV 2007-02263 (High Court of Justice of Trinidad and Tobago) available at http://webopac.ttlawcourts.org/LibraryJud/Judgments/HC/armorer/2009/CV_07_02263DD16June2009.pdf; *Jamaica Environment Trust v The Natural Resources Conservation Authority and the National Environment and Planning Agency* Claim HCV 05874 of 2010 available at www.jamentrust.org

684 Independent Caribbean countries: Antigua and Barbuda, Bahamas, Barbados, Belize, Grenada, Guyana, Haiti, Dominica, Dominican Republic, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname and Trinidad and Tobago. Cuba was not included in this review.

STATUS OF LEGISLATION ON ACCESS TO INFORMATION IN THE CARIBBEAN	
Country	**Draft Legislation (D), Enacted Legislation (E); Constitution (C)**
Antigua y Barbuda	Freedom of Information Act 2004 (E)
Bahamas	Freedom of Information Bill 2012 (D)
Barbados	Article 23(1) Constitution of The Bahamas (C)
Belice	Freedom of Information Bill 2008 (D)
Dominica	Article 20(1) of the Constitution of Barbados (C)
República Dominicana	Freedom of Information Act 1994 (E)
Granada	Environmental Protection Act 1999 (amended 2009) (E)
Guyana	Section 10 of the Constitution of the Commonwealth of Dominica(C)
Haití	General de Libre Acceso a la Información Pública (General Law on Free Access to Public Information - FAPI) 2004 (E)
Jamaica	Article 10 Constitution of Grenada (C)
Saint Kitts y Nevis	Freedom of Information Bill 2007 (D)
Santa Lucia	Article 146 of the Constitution of Guyana (C)
San Vicente y las Granadinas	Access to Information Act 2011 (E but not in force)
Suriname	Article 40 of the Constitution of Haiti (C)
Trinidad y Tobago	Freedom of Information Act 2002 (E)

2.2. Public Participation

Fourteen Caribbean countries have enacted legislation relating to public participation during the decision making process for projects, plans, programmes or laws affecting the environment. The majority of these countries have only introduced public participation requirements through the use of environmental impact assessments (EIAs) in planning legislation or framework environmental management legislation. An EIA is a process used to identify and assess the possible positive and negative impacts of a proposed project or activity on the environment. The EIA process typically involves an element of public consultation during the preparation of the EIA and on its completion. In this way, the public and those directly affected have the opportunity to understand and express their opinions about activities that can have major impacts on their lives. Public comments received during the public consultation process can also result in changes to the project design and implementation and in this way the EIA serves as a powerful tool in legitimizing decisions taken to approve these projects.[685]

In many Caribbean countries, legislation is limited in its scope with a requirement to prepare an EIA for specified activities and no procedural rules for public participation. In such countries, the EIA process is usually stipulated in non-binding guidelines. Five countries have enacted laws that provide regulatory authorities with the discretion to require public participation in the EIA process; four countries have enacted laws

requiring mandatory public participation during the EIA process; and six countries have no legislation relating to public participation and only rely on guidelines or practice. Six countries have legislation in draft relating to public participation in the EIA process.

Jamaica provides a good example of the use of public participation in decision-making regarding the use of forest resources. The Forest Act of Jamaica allows for the establishment of Local Forest Management Committees (LFMCs) for forest reserves, forest management areas and protected areas. The LFMCs are to be comprised of at least two members with local knowledge of the area and play an advisory role in the development of forest management plans, the making of regulations and the design and execution of conservation projects.[685]

STATUS OF LEGISLATION ON PUBLIC PARTICIPATION IN ENVIRONMENTAL MATTERS IN THE CARIBBEAN		
Country	**Draft Legislation (D), Enacted Legislation (E)**	**Environmental Impact Assessment (EIA), Plan & Policy (P), Legislation (L)**
Antigua & Barbuda	Physical Planning Act 2003 **(E)**	**EIA**: Discretionary provision for public participation in legislation; Procedure set out in draft legislation **P**: Public participation required for specific policies in draft legislation
Bahamas	Conservation and Protection of the Physical Landscape of The Bahamas Act 1997 **(E)** Planning and Subdivision Bill 2010 (D) Environmental Planning and Protection Act 2006 **(D)** Environmental Impact Assessment Regulations 2005 **(D)**	**EIA:** Discretionary provision for public participation; Procedure set out in guidelines **P**: Consultation on environmental programs and plans required in draft legislation
Barbados	Town Planning Act 1998 **(E)** Coastal Zone Management Act 1998 **(E)**	**EIA:** No provision for public participation in legislation; Procedure set out in guidelines **P:** Consultation required for Development Plans, Coastal Management Plans
Belize	Environmental Protection Act 1992 (amended 2009) **(E)** Environmental Impact Assessment Regulations 1995 **(E)**	**EIA**: Discretionary provision for public participation in legislation
Dominica	Physical Planning Act 2002 **(E)**	**EIA:** Mandatory provision for public participation in legislation **P:** Consultation required for National Development Plan
Dominican Republic	Ley General Sobre Medio Ambiente y Recursos Naturales 64 of 2000 **(E)** EIA Regulations 2002 **(E)**	**EIA**: Mandatory provision for public participation in legislation

685 Section 12 of the Forest Act of Jamaica (1996)

Grenada	Physical Planning and Development Control Act 2002 **(E)** Planning and Development Regulations 2002 **(D)**	**EIA**: No provision for public participation in legislation; Consultation procedures set out in draft regulations **P**: Consultation required for National Physical Plan
Guyana	Environmental Protection Act 1996 **(E)**	**EIA**: Mandatory provision for public participation in legislation **P**: Mandatory provision for public participation where EIA required
Haiti	Decree on Management of the Environment 2006 **(E)**	**EIA:** No provision for public participation in legislation **P:** Mandatory provision; Procedure not set out in legislation
Jamaica	Natural Resources Conservation Authority Act 1991 **(E)** Beach Control Act 1956 (amended 2004) **(E)** Forest Act 1996 **(E)** Town and Country Planning Act 1958 **(E)**	**EIA**: No provision for public participation in legislation; Consultation procedure is set out in guidelines **P**: Public participation required for specific plans
St Kitts & Nevis	Nevis Physical Planning and Development Control Ordinance 2005 **(E)** St Kitts Development Control and Planning Act 2000 **(E)**	**EIA**: Discretionary provision for public participation in legislation
St. Lucia	Physical Planning and Development Act 2005 **(E)** Solid Waste Management Act 2009 **(E)** National Conservation and Environment Protection Act 1987 **(E)** Environmental Impact Assessment Regulations **(D)**	**EIA**: No provision for public participation in legislation
St Vincent & Grenadines	Town and Country Planning Act 1992 **(E)** Environmental Impact Assessment Regulations 2009 **(D)**	**EIA**: Discretionary provision for public participation in legislation
Suriname	Environmental Act 2002 **(D)**	**EIA**: No provision for public participation in legislation; Consultation procedure set out in sectoral guidelines
Trinidad & Tobago	Environmental Management Act 2000 **(E)** Certificate of Environmental Rules 2001 **(E)**	**EIA**: Mandatory provision for public participation in legislation

2.3. Access to Justice

Twelve Caribbean countries are members of the Commonwealth and inherited the English common law legal system. These countries have similar access to justice provisions including the right to bring a legal claim to challenge decisions of public authorities through judicial review. Generally, only persons directly affected can bring an action against private corporations for breach of environmental laws. There are similar barriers to access to justice across the Caribbean, including high, prohibitive costs of litigation and lack of financial assistance mechanisms for the poor and public interest groups to access judicial and quasi-judicial forums.

There are examples of best practice to be drawn from the Caribbean. These include the use of specialised environmental courts and the provision of a broad right for members of the public to bring an action to challenge the breach of environmental laws. Trinidad and Tobago has established a specialized environmental court with jurisdiction to hear complaints of violations of the Environmental Management Act referred to as the Environmental Commission of Trinidad and Tobago. The advantages of having this specialised court include the jurisdiction of the court to examine the merits of a decision as well as procedural irregularities. The specialised court also benefits from having at least three technically trained judges with expertise in environmental issues, engineering and natural and social sciences.[686]

There are limitations in the jurisdiction of the Environmental Commission. The Commission cannot hear complaints relating to appeals by applicants for a Certificate of Environmental Clearance (permit), issues relating to enforcement of environmental regulations by the Environmental Management Authority (EMA), and appeals relating to designation of an Environmentally Sensitive Area.

Another good practice is the provision for Direct Private Party Action. In Trinidad and Tobago any individual or group of individuals expressing general interest in the environment or having a specific concern can institute a civil action before the Environmental Commission against another party for the violation of an environmental requirement of the Environmental Management Act. The action cannot be instituted until the expiry of 60 days after the EMA is notified of the breach and unless the authority has failed to take enforcement action.[687]

3. The Latin America and Caribbean Declaration on the Application of Principle 10

3. 1. What is the Latin America and Caribbean Declaration on the Application of Principle 10?

Ten LAC countries: Costa Rica, Chile, Dominican Republic, Ecuador, Jamaica, Panama, Paraguay, Peru, Mexico and Uruguay signed the 2012 Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean ("the LAC Declaration on Principle 10") at the United Nations Conference on Sustainable Development (Rio+20) in June 2012. There, these signatories to the Declaration agreed to support the development of a regional instrument and that they would work towards a regional convention aimed at strengthening access to information, encouraging public participation, and strengthening access to justice in sustainable development decision-making. Therefore, the LAC Declaration on Principle 10 can be seen as political commitment made by Governments in the region to actively undertake the necessary measures to transform the current state of decision-making processes.

The coordination of such an initiative requires a comprehensive and efficient overseer. As such, technical support for the LAC Declaration on Principle 10 is provided by the United Nations Economic Commission for Latin America and the Caribbean (ECLAC). ECLAC's support involves coordinating activities and meetings at the regional level and providing financial assistance for the active participation of representatives of Civil Society Organisations (Representatives of the Public) at such meetings.

3.1.1. Earlier Stages of the LAC P10 Process

Shortly after the Declaration was signed, the Parties gathered for the first meeting of the focal points of the signatory countries in November 2012 in Santiago, Chile. There a road map was agreed upon to ensure the full implementation of Principle 10 of the Rio Declaration. The Signatories approved a Steering Committee

686 Section 82 of the Environmental Management Act of Trinidad and Tobago (2000)
687 Section 69 of the Environmental Management Act of Trinidad and Tobago (2000)

to coordinate the regional process and particularly to coordinate the preparation of the Action Plan 2013-2015. The Committee comprised of the governments of Chile, Mexico and the Dominican Republic.

In furtherance of the progressive nature of the Latin America and Caribbean Declaration on Principle 10, the formulated Action Plan was adopted at the Second Meeting of the focal points in Guadalajara, Mexico in April 2013 and as a result two working groups were established; a Working Group on capacity building and cooperation coordinated by Colombia and Jamaica and a Working Group on rights access and the regional instrument coordinated by Chile and Brazil. Additionally, at that gathering they agreed on a formal Action Plan to be implemented during 2013-2014. Efforts have also been made to involve civil society in the process as well as to conduct outreach to non-signatory countries to encourage more countries to sign on to the Declaration.

3.1.2. Current stage of the LAC P10 Process

Thus far, nineteen Latin American and Caribbean countries have signed the LAC P10 Declaration: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Panama, Paraguay, Peru, St. Vincent and the Grenadines, Trinidad and Tobago and Uruguay. There are also three countries with observer status: Antigua and Barbuda, Saint Lucia and Nicaragua.

Although, it is noteworthy that the process is gaining traction throughout the region, it is also evident that advocacy needs to be strengthened and a concrete approach defined to attract more Caribbean signatories to the process.

In keeping with the first two pillars of access to information and public participation, the process has sought to ensure the continuous involvement of the public. The latest effort is the election of representatives of the public to maintain a continuous dialogue with the Presiding Officers. This decision originated from the Fourth Meeting of the Focal Points of the signatory counties of the Declaration on the Application of Principle 10 in Latin America and the Caribbean, held in November 2014. There, the signatories adopted the Santiago Decision [688] in which they agreed to invite the public to designate two representatives to maintain a continuous dialogue with the Presiding Officers. In fulfilling this commitment, ECLAC invited registered members of the Regional Public Mechanism[689] to submit their candidacy forms, which were then publicized on their website as well as disseminated to the members of the mechanism. It is noteworthy that the two representatives of the public and four alternates will be elected on the basis of the proposals received from the public on the modalities of the election of such representatives. However, it must be noted that ECLAC has indicated that the election of these representatives is not expected to limit the number of public participants who can contribute to the process at the various focal point and working group meetings.

The next meeting of the focal points is in May 2015 at which point the signatory countries will continue to define the nature of the instrument that is expected to guide the regional LAC P10 Process.

4. Benefits and opportunities for Caribbean Countries to join the LAC P10 process

There are numerous benefits and opportunities to be derived by Caribbean countries that join the Latin America and Caribbean Declaration on Principle 10. Considering that the Declaration strives to help countries improve access rights that are already part of the development agenda it would be prudent for Caribbean countries to sign on whilst the process is still at an early stage. By so doing these countries can ensure that their specificities are acknowledged and reflected in the instrument during ongoing negotiations.

---

688 Santiago Decision was adopted at the Fourth Meeting of Signatories to the Latin American and Caribbean Declaration on the application of Principle 10 in Santiago Chile in November 2014. The document can be accessed at: http://repositorio.cepal.org/bitstream/handle/11362/37214/S1420707_en.pdf?sequence=1 .

689 The Regional Public Mechanism is an on-line tool used by ECLAC to engage the public within LAC Member countries on the Latin America and Caribbean Declaration on Principle 10. It was an outcome of the Plan of Action to 2014 adopted in Guadalajara, Mexico, in April 2013, whereby signatory countries to the Declaration agreed to establish a Regional Public Mechanism for those interested who could subscribe by completing a short form available on the ECLAC website. The main objectives are to keep all those interested in the process informed and facilitate their involvement; to coordinate public participation in international meetings; and to contribute to the transparency of the process. The Mechanism may also serve as a complement for participation actions carried out at the national level.

Advancing towards the access rights path would translate into fewer conflicts between the state and citizens since LAC P10 seeks to help strengthen legislation which governs decision-making processes relating to the environment. Citizens would have clear and predictable expectations on their entitlements to information they should receive and public consultation procedures that they take part in.

It is anticipated that this Declaration will obtain an achievable standard for access rights in the region. As such, signatory countries will benefit from a regional process that will: provide capacity building opportunities in the form of technical assistance and workshops; channel financial and other support from international and bilateral donor organisations; provide a dedicated secretariat through ECLAC with continuous support to the participating countries; lead to increased efficiency as a result of the sharing of resources and knowledge between the instrument's Parties and interested partners; attract overseas development assistance on Principle 10 related-issues; establish consistent regional standards that will lead to closer integration of countries in the region, which leads to higher economic growth; create greater political stability within each country, which leads to greater political stability in the region, this is integral as it would assist Caribbean countries to find more sustained solutions to environmental matters instead of the modus operandi of altering the approach based on the beliefs of the ruling political party. The process, which is the first ever environmental democracy initiative in the LAC region is also expected to benefit signatory countries by bringing greater visibility to the region for its progressive initiative.

5. Challenges in Mobilizing Caribbean Countries

It is evident that the LAC P10 process has gained greater traction in Latin America than in the Caribbean, because of the 19 signatories there are only 4 Caribbean countries.[690] The Technical Secretariat, ECLAC has sent requisite correspondence to all the respective Ministries in the Caribbean informing them of the process and inviting them to join. Furthermore, The Access Initiative (TAI)[691] and the Jamaica Environment Trust,[692] one of its Caribbean partners, have also disseminated relevant documents on the process as well as strategies Civil Society Organizations (CSOs) throughout the region could employ to advocate for their respective countries to become signatories. Since 2012 these two agencies have also staged conferences on the status of Access Rights in the Caribbean to advance the discussion on the matter and to keep CSOs abreast of the LAC P10 process.

Despite these efforts, Caribbean countries have still not joined the process at a fast enough pace. On the other hand, however, Saint Lucia and most recently Antigua and Barbuda have been acknowledged as observers to the process. Whilst, since 2012 the Saint Lucia National Trust [693] has continuously engaged the Ministry of Sustainable Development, Energy, Science and Technology and plans are afoot to engage a fellow CSO in Antigua and Barbuda to strengthen advocacy on the issue which will expectantly result in their respective islands signing on to the Declaration.

The topic of access rights, albeit an important element in the achievement of sustainable development, might not be given the highest priority by Caribbean governments who are engrossed with a range of competing issues from unemployment, crime and violence and poverty to calls by the populace to improve health care, education and infrastructural damage caused to coastal communities by storms and hurricanes, among other issues. Conversely, the delay by more Caribbean governments could be as a result of the lack of political will or reservations in signing on to yet another "Declaration". Either way efforts must be bolstered to ensure that all Caribbean LAC member countries are a part of this process which since 2012 has actively engaged all sectors of society such as governments, academia, civil society and the general public in the decision-making process and the formation of the guidelines which will govern this regional process.

---

690 The Dominican Republic, Jamaica, St. Vincent and the Grenadines and Trinidad and Tobago.

691 The Access Initiative is the world's largest network of civil society organizations committed to ensuring that local communities have the rights and abilities to gain access to information and to participate in decisions that affect their lives and their environment.

692 The Jamaica Environment Trust is a non-profit, non-governmental membership organization whose main focus is environmental education and advocacy on the island of Jamaica.

693 The Saint Lucia National Trust is a non-governmental membership organization mandated to conserve Saint Lucia's natural and cultural heritage.

6. Implications of a regional instrument on access rights

6.1.Implications at the national and regional leve l

Although the details of the content for the LAC P10 regional instrument are still being negotiated, this presents an opportunity for the region to establish minimum standards on access rights. At the Fourth Meeting of the signatory countries to the LAC P10 Declaration held on October 3, 2014, the parties adopted the San Jose Content for the Regional Instrument: a proposal on the nature and content of the regional instrument.[694] The proposal while, leaving the nature of the instrument to be defined at a later stage of the negotiations, highlighted the scope of matters to be addressed in same. Whether this instrument becomes a binding instrument such as a treaty or non-binding as in the case of political declarations or guidelines will also determine the extent to which Caribbean countries may need to adopt legislative and regulatory changes to give effect to the instrument.

The 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) adopted in Aarhus, Denmark on 25 June, 1998 is the first and most comprehensive international agreement on the grant of access rights to individuals and NGOs at the national level and establishes minimum standards for States to give effect to these rights.[995] Similarly, the 2012 Declaration on the Application of Principle 10 in Latin America and Caribbean Declaration on Principle 10 can serve as the basis for a regional minimum standard on access rights. Caribbean countries share overwhelming geographic, economic and environmental similarities with most being isolated small island developing states that are resource dependent with highly vulnerable economies. The majority of these countries also share similar democratic governance structure. Naturally, these similarities should lend itself to a regional standard on access rights for the region.

These minimum standards would need to clarify the parameters of these rights such as who or which classes of the public have access to these rights. For example, the Aarhus Convention stipulates that the right to participate in environmental decision-making is granted to the “public concerned” which is defined as persons “affected or likely to be affected by, or having an interest in, the environmental decision-making.”[696]

In the area of public participation, an important consideration is defining the types of matters that should be subject to public participation. The Aarhus Convention remarkably widens the scope for the application of public participation in matters outside the EIA process to matters including development of legislation concerning environmental matters, plans, programmes and policies relating to the environment.[697] Although there is a mandatory requirement for public consultation on these matters, the Convention allows States a flexible approach in determining the modes of public participation. For example, although public participation is mandatory for specified activities that are likely to have a significant impact on the environment such as the mining and quarries and energy projects, the Convention stipulates minimum requirements for notification, timing, relevant information and comment periods while allowing States the discretion to determine methods for notification and whether there should be a public hearing. A similar approach can be taken in developing the regional instrument for Latin America and the Caribbean where there are great disparities in the capacities of Latin American and Caribbean countries to provide for public participation mechanisms such as public meetings and notification procedures.

In the area of access to information, many Caribbean countries already provide for a general right to information which allows the public to request official documents from public authorities. These countries may, however, need to consider the extent to which such laws would need to be amended to give effect to a specific right to environmental information and the effect of existing provisions that provide for certain types of information to be exempt from disclosure. More significantly is that the regional instrument could require

---

694 Proposal on the nature and content of the regional instrument for consideration at the fourth meeting of the focal points appointed by the gov ernments of the signatory countries of the Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean, Santiago, 4-6 November 2014, LC/L.3898, available at http://www.cepal.org/rio20/noticias/paginas/3/54423/Nature_and_Content_of_the_Regional_Instrument.pdf

695 Stephen Stec, Susan Casey-Lefkowitz and Jerzy Jendroska, eds., The Aarhus Convention: An Implementation Guide, DANCEE, United Nations, and the Regional Environmental Center; 2000 at p. 85; available at http://www.unece.org/env/pp/publications.htm (last visited June 30, 2010). Hereinafter referred to as “The Aarhus Implementation Guide”.

696 Article 2 (5) of the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

697 Article 8 of the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

these countries to introduce mechanisms to proactively generate and disseminate specific information relating to a range of environmental issues such as environmental emergencies and information on environmental enforcement and compliance and establish public pollutant release and transfer registers which would include information on sources of pollution generated by private corporations and public authorities. Very few Caribbean countries currently have comprehensive systems for the proactive release of environmental information. [698] The regional instrument also contemplates that information relating to the private sector such as information for consumers, promotion of the production of sustainability reports and environmental compliance by private entities would be proactively disseminated.[699]

In the area of access to justice, Caribbean countries may be required to ensure that the framework for their national legislation ensures that the public or certain classes of public have access to an independent and impartial adjudicatory body for the purposes of challenging decisions, acts or omissions. As mentioned previously, most Caribbean countries provide for this right albeit the class of persons who can exercise this right is generally limited to persons with "sufficient interest" in the subject matter, the definition of which varies from country to country. Traditionally at common law, standing or *locus standi* (the right to bring a legal action) were interpreted restrictively to those directly affected so as to prevent the meddlesome busybody from flooding the courts with legal actions.[700] Over time, the courts of the United Kingdom have relaxed to standing requirements to include persons and non-governmental organisations with a genuine interest in the issues raised in the claim.[701] Some countries such as Jamaica have already developed Civil Procedure Rules which define persons with sufficient interest to specifically include public interest groups.[702]

High legal costs associated with initiating a claim for judicial review is prohibitive and a significant barrier to access to justice where technical advice is needed. In most Caribbean countries unsuccessful claimants are also liable for costs of the defendant/s.[703] There are also no legal aid provisions in Caribbean countries for public interest litigation. The regional instrument, by requiring access to justice, could also address these barriers by requiring that affordable adjudicatory forums and mechanisms be implemented.

While the regional instrument could set minimum standards, this would not preclude countries from adopting more stringent standards at the national level. The San Jose Proposal on the nature and content of the regional instrument requires consideration of the differing capabilities of the countries and requires the incorporation of capacity-building provisions in the regional instrument.[704]

7. Roles of various actors in advancing the Process

7.1. Governments

Governments have key roles to play in the LAC P10 regional process. Firstly, as signatories to the regional instrument they are expected to elect focal points, attend the meetings of the signatories and negotiate aspects of the regional instrument. Secondly, signatories are required to disseminate the Declaration and information on the process at the regional and international level to promote the incorporation of new signatories, and implement public awareness and communication strategies to increase awareness and involvement of their nationals in the process.[705] Thirdly, once the nature and content of the instrument is agreed upon and the final instrument adopted, governments will have the challenging task of promoting awareness of the

---

698 Jamaica has only recently introduced a Pollutant Release and Transfer Register, available at www.nepa.gov.jm

699 Proposal on the nature and content of the regional instrument for consideration at the fourth meeting of the focal points appointed by the governments of the signatory countries of the Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean, Santiago, 4-6 November 2014, LC/L.3898, p. 10, available at http://www.cepal.org/rio20/noticias/paginas/3/54423/Nature_and_Content_of_the_Regional_Instrument.pdf

700 *R. v Secretary of State for the Environment, ex parte Rose Theatre Trust* [1990] 1 QB 504 and *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All ER 93

701 R v Inspectorate of Pollution, ex parte Greenpeace Ltd (No 2) [1994] 4 All ER 329

702 Rule 56.2 of the Civil Procedure Rules of Jamaica, 2002

703 Jamaica is an exception where the general rule as it relates to applications for administrative orders is that if unsuccessful, no order for costs may be made against the applicant unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application. (Rule 56.15(5) of the Civil Procedure Rules of Jamaica 2002.

704 Proposal on the nature and content of the regional instrument for consideration at the fourth meeting of the focal points appointed by the governments of the signatory countries of the Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean, Santiago, 4-6 November 2014, LC/L.3898, p. 11, available at http://www.cepal.org/rio20/noticias/paginas/3/54423/Nature_and_Content_of_the_Regional_Instrument.pdf

705 Plan of Action to 2014 for the Implementation of the Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean and its Road Map, adopted at Guadalajara Mexico, 17 April 2013, available at http://www.cepal.org/rio20/noticias/paginas/3/54423/2013-208_PR10-Plan_of_action-17_April.pdf

scope of these rights among their nationals as well as putting in place appropriate mechanisms to give effect to these rights through the passing of legislation and implementation of laws and rules. Here the judiciary will have a significant part to play in clarifying the scope of these new laws while adjudicating on cases relating to breaches of these rights.

7.1.1 Civil Society Organizations and the Public

Civil Society Organizations (CSOs) play a critical role in the LAC Declaration on Principle 10. Public participation is pivotal to any process which strives to achieve sustainable development. It is acknowledged that systematic involvement of the citizenry strengthens decision-making forums because it offers a platform where a vast array of perspectives can be relayed to and considered by governments and incorporated in the decisions being deliberated. Furthermore, transparency is heightened when pertinent documents are shared with the public as well as when they are invited to participate at meetings and can thereafter relay the information to their organizations and citizens of their respective countries.

There are numerous CSOs which have a broad trajectory on Principle 10. As such, their participation is crucial to attract the requisite experience and knowledge on the subject. They play a key role in providing the relevant information on the practices existing in this area at the national level and the main challenges that need to be addressed.[706]

CSOs can serve as major proponents of P10 to encourage non-signatory countries in the region to sign on to the Declaration. They can also be advocates to signatory countries to encourage them to fulfil their obligations relating to the Declaration and be a source of support to the authorities to further advance the process.

Lastly, the extent to which members of the public can utilize new procedures relating to access rights will depend on sustained efforts to raise awareness, capacity building initiatives to encourage participation and establishing systems that overcome obstacles to participation in particular those specific to the poor such as low literacy and high costs for obtaining information, participating in consultative processes or accessing grievance mechanisms such as courts.

---

706 Plan of Action to 2014 for the Implementation of the Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean and its Road Map, adopted at Guadalajara Mexico, 17 April 2013.

7.1.2 Regional Organizations

The revised Treaty of Chaguaramas establishing the Caribbean Community (CARICOM)[707], makes reference to measures to promote and develop policies for the protection of and preservation of the environment and for sustainable development as well as to promote the development of special focus programmes supportive of the establishment and maintenance of a healthy human environment in the Community.[708]

The Principles for Environmental Sustainability in the Organization of Eastern Caribbean States (OECS) [709] as outlined in the St. George's Declaration are also congruent with the LAC Declaration of Principle 10. For example, it refers to achieving: "(1) Better Quality of Life for All: The people and the governments of the region will together strive to reduce poverty, create jobs, improve on health and welfare. In so doing, care will be taken not to destroy the environment and introduce changes at a rate to which people cannot adapt. (2) Integrated Development Planning: All local, national and regional development policies and plans will be fully integrated to include environmental, social, cultural and economic factors which affect the small island systems of the region. (3) More Effective Laws and Institutions: The national and regional institutions which are responsible for the management of the natural resources in each country, will be strengthened to implement programmes, decisions and to enforce appropriate laws relating to the environment. (4) Civil Society Participation in Decision-making: All public and private sector organizations responsible for the environment will ensure that all people, whether as groups or individuals, participate in decision-making on natural resources management and in the implementation of these decisions. They will be given every opportunity to share traditional knowledge on environmental management."[710]

Therefore, considering that both CARICOM and the OECS outline guidelines pertaining to sustainable development and the environment, it would be judicious if they played a key advocate role, thus, encouraging their respective member states to sign on to the progressive LAC Declaration on Principle 10.

---

707 The CARICOM Secretariat is the principal administrative organ of the Caribbean whose mission is to contribute, in support of Member States, to the improvement of the quality of life of the People of the Community and the development of an innovative and productive society in partnership with institutions and groups working towards attaining a people-centred, sustainable and internationally competitive Community. There are 15 member states Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago. While there are five Associate Members; Anguilla, Bermuda, British Virgin Islands, Cayman Islands and Turks and Caicos Islands. Available at: www.caricom.org

708 Available at: http://www.caricom.org/jsp/community/revised_treaty-text.pdf

709 The OECS is a nine member grouping comprising Antigua and Barbuda, Commonwealth of Dominica, Grenada, Montserrat, St. Kitts and Nevis, St. Lucia and St Vincent and the Grenadines. Anguilla and the British Virgin Islands are associate members of the OECS. It's mission to be a Center of Excellence contributing to the sustainable development of OECS Member States by supporting their strategic insertion into the global economy while maximizing the benefits accruing from their collective space. Available at: http://www.oecs.org/about-the-oecs/who-we-are/mission-objectives#sthash.GA7I5iZf.dpuf

710 The St. Georges Declaration of Principles for Environmental Sustainability in the OECS (Revised 2006), available at http://www.oecs.org/st-george-s-declaration

CONCLUSION

Whether the LAC Declaration on P10 will lead to a binding instrument is yet to be seen. Having regard to the multitude of "soft law" or non-binding instruments on access rights some would be tempted to think that little would be accomplished by the adoption of another such instrument for Latin America and the Caribbean. Regardless of the nature of the regional instrument, the process embarked upon for this Declaration on P10 is the first of its kind in the Caribbean – a process that involves the public throughout all the stages of negotiation and which recognizes citizens as integral stakeholders.

Since the start of this process in 2012, we have already seen some significant initiatives in the region including the establishment of a Caribbean Freedom of Information Network. The members of this Network include Information Commissioners, Access to Information Officers from various public agencies and members of civil society.

At its best, this Declaration could result in an achievable regional standard for access rights which would mitigate social conflicts in countries by channeling citizen concerns about environmental issues, channel technical assistance and capacity building for countries in the region, establish consistent regional standards that will lead to closer integration of countries in the region, which could lead to higher economic growth and create greater political stability within each country and by extension the region.

BIBLIOGRAPHY

Treaties and other regional instruments

Convenio sobre el acceso a la información, la participación del público en la toma de decisiones y el acceso a la justicia en materia de medio ambiente, UNECE (1998).
Declaración sobre la aplicación del Principio 10 de la Declaración de Río sobre el Medio Ambiente y el Desarrollo en América Latina y el Caribe. (2012).
Directrices para la elaboración de legislación nacional sobre el acceso a la información, la participación del público y el acceso a la justicia en cuestiones ambientales, UNEP (2010).
Estrategia Interamericana para la promoción de la participación pública en la toma de decisiones sobre desarrollo sostenible, OEA (2001).
Objetivos de Desarrollo del Milenio: El logro de los Objetivos de Desarrollo del Milenio con la igualdad en América Latina y el Caribe: avances y desafíos de la Comisión Económica de las Naciones Unidas para América Latina y el Caribe (2010).
Plan de Acción hasta 2014 para la implementación de la Declaración sobre la aplicación del Principio 10 de la Declaración de Río sobre el Medio Ambiente y el Desarrollo en América Latina y el Caribe y su hoja de ruta, CEPAL (2013).
Propuesta de la naturaleza y contenido a desarrollar en el instrumento regional, Cuarta Reunión de puntos focales designados sobre la aplicación del principio 10 de Latinoamérica y el Caribe, CEPAL (2014).
Tratado de Chaguaramas Revisado constitutivos de la Comunidad del Caribe (1973).
Decisión Santiago, Cuarta Reunión de puntos focales designados sobre la aplicación del principio 10 de Latinoamérica y el Caribe, CEPAL (2014).
Declaración de St. George sobre los Principios de. Sostenibilidad Ambiental en los países OECS (Revisado 2006).

Books, journals and articles

Joseph Foti and Lalanath de Silva, A Seat at the Table: Including the Poor in Decisions for Development and Environment, The World Resources Institute (2010).

Stephen Stec, Susan Casey-Lefkowitz and Jerzy Jendroska, eds., The Aarhus Convention: An Implementation Guide, DANCEE, United Nations, and the Regional Environmental Center (2000).

National legislation

Civil Procedure Rules of Jamaica (2002).

Forest Act of Jamaica (1996).

Environmental Management Act of Trinidad and Tobago (2000).

Cases

Belize Alliance of Conservation Non-Governmental Organisations v. Department of the Environment & Anor (Belize) [2003] UKPC 63 and 2004 [UKPC] 6

IRC v National Federation of Self-Employed and Small Businesses Ltd [1981] 2 All ER 93

Jamaica Environment Trust v The Natural Resources Conservation Authority and the National Environment and Planning Agency Claim HCV 05874 of 2010

People United Respecting the Environment (PURE) v. the Environmental Management Authority CV 2007-02263 (High Court of Justice of Trinidad and Tobago)

R. v Secretary of State for the Environment, ex parte Rose Theatre Trust [1990] 1 QB 504

Save Guana Cay Reef Association Ltd. and ors. V. The Queen and ors. [2009] UKPC 448

The Northern Jamaica Conservation Association and Others v. The Natural Resources Conservation Authority and Another (2006) HCV 3022 of 2005

Websites

CARICOM website www.caricom.org

Jamaica Environment Trust website www.jamentrust.org

NEPA website www.nepa.gov.jm

OECS website www.oecs.org

5.4 Advancing Access to Justice in Latin America and the Caribbean: Recent Trends and Developments in Environmental Access Rights

Dra. Maria L. Banda [699]

Environmental Rights, Access to justice; participation; in dubio pro natura; emerging principles.

The protection and promotion of environmental access rights is a crucial tool for sustainable development. Focusing on access to justice, this paper reviews innovative procedural developments in the jurisprudence of domestic courts that can be used to further study and give meaning to the right of access to environmental justice in Latin America and the Caribbean region. It concludes that facilitating exchange of legal ideas across state boundaries could help foster greater access to justice in the region.

The protection and promotion of environmental access rights—that is, rights to access to information, participation in decision-making, and access to justice—is a crucial tool for sustainable development. Focusing on the third pillar, access to justice, this paper seeks to identify a set of procedural norms and principles that have emerged in national jurisprudence that can be used to further study and give meaning to the right of access to environmental justice in Latin America and the Caribbean region. After briefly reviewing the practice of international human rights tribunals, this paper reviews innovative judicial solutions to environmental problems that could help facilitate the enforcement of environmental rights, especially for vulnerable populations. Specifically, it describes three key ingredients of access to justice: (i) the rules on standing, which act as a gatekeeper that regulates access to courts; (ii) interpretive principles like in dubio pro natura, which courts use to deal with legal ambiguity in complex environmental matters; and, (iii) new types of remedies that courts have devised in environmental cases. As this paper concludes, exchange of legal ideas across state boundaries could help foster greater access to justice, and courts in Latin America and the Caribbean are uniquely positioned to lead in this process.

INTRODUCTION

The protection and promotion of environmental access rights is a crucial tool for the protection of the natural environment and those who live in it.[711] Access rights, such as the right to have one's grievances heard by a competent tribunal, are procedural in nature and can be distinguished from substantive rights, such as the right to a healthy environment.[712] The importance of access rights is reflected in a number of international instruments, including Principle 10 of the 1992 Rio Declaration[713] and the 2000 Inter-American Strategy for the Promotion of Public Participation in Decision-Marking for Sustainable Development ("ISP"),[714] and, most recently, in the formulation of a binding regional instrument that would harmonize the application of Principle 10 in the Latin American and Caribbean ("LAC") region.[715]

Access rights are generally understood to rest on three mutually re-enforcing pillars: access to information, participation in decision-making, and access to justice. The first two pillars are largely concerned with democratic processes and participatory governance, such as the public's right to influence environmental decision-making through comments, environmental impact assessments, and administrative hearings. These

---

711 *See, e.g.,* "Rio+20 Declaration on Justice, Governance and Law for Environmental Sustainability," World Congress on Justice, Governance and Law for Environmental Sustainability, Rio de Janeiro, Brazil, 20 June 2012, available at http://www.unep.org/rio20/Portals/24180/Rio20_Declaration_on_Justice_Gov_n_Law_4_Env_Sustainability.pdf (environmental sustainability cannot be achieved without "effective legal regimes, coupled with effective implementation and accessible legal procedures, including on locus standi and collective access to justice..."); see also "The Johannesburg Principles on the Role of Law and Sustainable Development," UNEP Global Judges Symposium, Johannesburg, South Africa, 20 Aug. 2002, available at http://www.unep.org/Documents.Multilingual/Default.asp?ArticleID=3115&DocumentID=259.

712 The dividing line between procedural and substantive rights is rarely clear, and environmental law is no exception. See J. W. SALMOND, JURIS PRUDENCE: OR THE THEORY OF LAW 577-78 (1902), cited in André Nollkaemper, *International Adjudication of Global Public Goods: The Intersection of Substance and Procedure*, 23 EUR. J. OF INT'L LAW 769, 772 (2012) ("The law of procedure may be defined as that branch of the law which governs the process of litigation... All the residue is substantive law, and relates not to the process of litigation, but to its purposes and subject-matter... Procedural law is concerned with affairs inside the courts of justice; substantive law deals with matters in the world outside."). Both types of rights are held by individual citizens rather than States.

713 "Rio Declaration on Environment and Development," United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (12 Aug. 1992) (hereinafter "Rio Declaration").

714 Organization of American States ("OAS"), "Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development," CIDI/RES. 98 (V-O/00), OEA/Ser.W/II.5,CIDI/doc.25/00 (20 Apr. 2000) (hereinafter "ISP").

715 See Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean (June 2012); Santiago Decision on the Declaration on the Application of Principle 10 in LAC (4-6 Nov. 2014).

participatory access rights can help raise awareness about environmental issues, ensure that decision-making is inclusive, transparent, and fair, and, over time, lead to more informed and balanced environmental policy.

The third pillar—and the focus of this paper—relates to the public's ability to seek enforcement of other access and substantive rights through competent judicial and administrative bodies. It has both an international and a national dimension.

At the international level, access to justice has largely been synonymous with access to regional human rights tribunals, such as the Inter-American Court of Human Rights, which have increasingly treated alleged violations of environmental rights as an issue of human rights law and thus played an important role in advancing environmental protection. Human rights tribunals, however, are not designed to, and cannot, provide full and effective redress for a wide range of environmental harms.

For most environmental claimants, access to justice largely depends on the practice of national courts, which are asked on a daily basis to uphold constitutional and statutory guarantees to a healthy environment (where they exist), to provide redress for a wide spectrum of alleged violations, and to ensure compliance with the law.

This paper is therefore primarily interested in identifying a set of procedural norms and principles that have emerged in *domestic* adjudication that can be used to further study and give meaning to the right of access to environmental justice in Latin America. Specifically, it highlights several recent developments and procedural innovations in national courts, focusing on the rules on standing, interpretive principles, and remedies.

The remainder of this paper is structured in four parts. After briefly reviewing access rights at the international level in Section 2, this paper looks at access to environmental justice in the national context in Section 3. First, it examines recent developments in the law of standing—a threshold issue for environmental plaintiffs—in the practice of several high courts from different legal traditions, especially the Supreme Court of the Philippines, whose procedural innovations provide a timely case study for LAC countries. Second, it discusses the ways in which national courts have drawn on principles of international environmental law, such as the principle of in *dubio pro natura*, to fill a void in domestic jurisprudence and provide redress. And, third, it reviews the development of special remedies for environmental cases. Section 4 concludes with observations about the importance, and the limitations, of environmental access rights.

1. Environmental Access Rights in International Law and the Americas: Overview

At the international level, access rights represent an important area of overlap between environmental and human rights law.[716] Access rights can trace their origins to the civil and political rights recognized in all major human rights treaties in the Americas[717] and outside the region, such as the rights to a fair trial, to receive and impart information, and to participate in government.[718] In the environmental context, Principle 10 of the 1992 Rio Declaration articulated the three pillars of access rights: the right to "participation of all concerned citizens" in environmental issues, the right to "appropriate access to information," and the right to "effective access to judicial and administrative proceedings, including redress and remedy."[619]

---

716 The environmental impact assessment process is unique to environmental law, but it too has become part of international human rights jurisprudence and international law.

717 *See, e.g.,* 1948 American Declaration of the Rights and Duties of Man (right to freedom of investigation and opinion (Art. IV), to fair trial (Art. XVIII), to participate in government (Art. XX), freedom of assembly (Art. XXI), freedom of association (Art. XXII)); 1969 American Convention on Human Rights (right to fair trial (Art. 7), to receive information (Art. 13), freedom of assembly (Art. 15), freedom of association (Art. 16), to participate in government (Art. 23), right to judicial protection and remedy (Art. 25)).

718 *See, e.g.,* 1948 Universal Declaration of Human Rights (protecting a right to an effective remedy for acts violating the fundamental rights (Art. 8), a right to a fair and public hearing (Art. 10), the freedom to seek, receive, and impart information and ideas (Art. 19), the freedom of peaceful assembly and association (Art. 20), and the right to participate in government (Art. 21)); 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (right to fair trial (Art. 6), to impart information (Art. 10), to freedom of assembly and association (Art. 11), right to effective remedy (Art. 13)); 1966 International Covenant on Civil and Political Rights (right to an effective remedy (Art. 2), right to information (Art. 19), right to assembly (Art. 21), right to freedom of association (Art. 22)); 1981 African Charter on Human and Peoples' Rights (right to fair trial (Art. 7), to receive information (Art. 9), freedom of association (Art. 10), freedom of assembly (Art. 11), to participate in government (Art. 13)).

719 "Rio Declaration on Environment and Development," United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (12 Aug. 1992) (hereinafter "Rio Declaration"). See also UNHRC Resolution 2005/60 (2005) (emphasizing the importance of implementing "in particular principle 10, in order to contribute, inter alia, to effective access to judicial and administrative proceedings, including redress and remedy."). See also Rio+20 Outcome Document, "The Future We Want," UN Doc. A/CONF.216/L1 (reissued for technical reasons on 22 July 2012), ¶ 43 ("underscor[ing] that broad public participation and access to information and judicial and administrative proceedings are essential to the promotion of sustainable development.") & ¶ 99 ("encourag[ing] action … to promote" access rights).

The Rio Declaration was a soft law document, but it inspired the codification of procedural rights in a number of multilateral environmental agreements. The most significant is the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the "Aarhus Convention"), which gave Principle 10 the force of hard law for its State Parties in Europe and Central Asia.[720] The Aarhus Convention, described as "by far the most impressive elaboration of Principle 10 of the Rio Declaration," [721] has helped strengthen the domestic access rights in its signatory countries. The new regional instrument on Principle 10 that is currently under negotiation in the LAC region may be the next instance of progressive lawmaking and serve as a model on access rights beyond the region if the State Parties can agree on robust compliance and monitoring mechanisms.

The multilateral environmental regime, however, provides few avenues to bring claims,[722] and environmental plaintiffs have increasingly turned to the international human rights system for redress where domestic remedies have failed or proven inadequate. In recent years, *human rights* tribunals have been receptive to such claims, finding a violation of substantive human rights, such as the right to life, health, or privacy, as a result of environmental harm.[723] The Inter-American human rights system has been at the forefront of this "greening" of the human rights jurisprudence.

The human rights treaties, however, largely predate the emergence of international environmental law in the 1970s and do not specifically protect environmental rights.[724] Where the harm to the claimant is deemed to be too attenuated, tribunals have often relied on access rights—access to information, participation in decision-making, and access to justice—to indirectly grant protection for environmental interests.[725] For many claimants, access rights have been the primary (if not the sole) means of achieving environmental protection through the human rights system.

This is an obvious limitation. Without an underlying treaty right to a healthy environment, the tribunals cannot provide redress for a multitude of environmental harms that do not directly or immediately violate a human right, such as large-scale deforestation or habitat destruction, desertification, or ecosystem collapse. As the European Court of Human Rights observed in a case involving serious environmental degradation and harm to wildlife following the illegal draining of a swamp, unless the environmental harm directly affects individual rights, the treaty protections are not triggered, as none of the "Articles of the [European] Convention are specifically designed to provide general

---

720 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998, 2161 U.N.T.S. 447 (hereinafter "Aarhus Convention"). See generally Bende Toth, Public Participation And Democracy In Practice—Aarhus Convention Principles As Democratic Institution Building In The Developing World, 30 J. LAND RESOURCES & ENVTL. L. 295 (2010); Svitlana Kravchenko, Environmental Rights in International Law: Explicitly Recognized or Creatively Interpreted?, 7 FLA. A & M U. L. REV. 163 (2012).

721 Svitlana Kravchenko, *Environmental Rights in International Law: Explicitly Recognized or Creatively Interpreted?*, 7 FLA. A & M U. L. REV. 163, 176 (2012) (quoting former UN Secretary-General Kofi Annan).

722 The compliance mechanism under the Aarhus Convention is one of the exceptions.

723 *See, e.g.,* Saramaka People v. Suriname (Merits), Inter-Am. Ct. H.R. (ser. C) No. 172 (2007) (right to property); Kuna of Madungandí et al. v. Panama (Merits), Inter-Am. Ct. H.R., No. 125 (2012) ¶ 233 (precondition for other rights). See also Öneryildiz v. Turkey, Eur. Ct. H.R., App. No. 48939/99 (2004) (finding, inter alia, violation of right to life).

724 But see 1989 Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), Art. 11; 1981 African Charter on Human and Peoples' Rights, Art. 24 ("All peoples shall have the right to a general satisfactory environment favourable to their development."). See also SERAC et al. v. Nigeria, Afr. Comm'n H. & Peoples' R., Comm. No. 155/96 (2001) ("the Ogoniland case"); Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria, ECOWAS Ct. of Justice, Judgment N° ECW/CCJ/JUD/18/12 (24 Dec. 2012).

725 See, e.g., Claude-Reyes v. Chile, Inter-Am. Ct., (ser. C) No. 151 (19 Sept. 2006) (recognizing the right to access to environmental information in connection with freedom of expression under Art. 13 of the American Convention). See also Dées v. Hungary, Eur. Ct. H.R., App. No. 2345/06 (9 Nov. 2010) (lengthy administrative proceedings relating to environmental rights may violate the right to a fair hearing); Centre for Minority Rights Development (Kenya) et al. v. Kenya, Afr. Comm'n H. & Peoples' R., No. 276/2003 (4 Feb. 2010) (failure to conduct an environmental impact assessment contributed to a violation of the right to property).

protection of the environment as such..." [726] The Court suggested that domestic legislation may be "more pertinent" in dealing with such harms,[727] and the enforcement of those laws is in the purview of the national courts.

The following section therefore examines access to environmental justice from the perspective of the national courts, which are tasked with interpreting, applying, and enforcing a broad range of constitutional and statutory provisions relating to the environment.

2. Access to Justice in National Courts: Recent Trends and Developments

The right to access to justice is not defined in international law or most national laws, but it is generally understood as the right to have one's grievances heard and redressed by a competent authority. In practice, this right comprises a *cluster* of procedural rights, including the rules on standing, burden of proof and burden-shifting, fees, use of scientific and technical expert evidence, and remedies. This section examines three procedural ingredients of access to justice that arise in the judicial process and may offer guidance for cross-country learning: (i) standing, (ii) interpretive principles, and (iii) remedies.

Before turning to these procedural rights, however, it is important to note that the right to access to justice in itself is not a panacea: its ultimate purpose is to secure the respect, protection, and enforcement of the underlying substantive rights "to free all of humanity... from the threat of living on a planet irredeemably spoilt by human activities." This requires addressing a range of other practical barriers to justice. For instance, without available and affordable counsel to bring environmental claims, without impartial and independent courts to provide effective relief and impose sanctions on the violators, and without the rule of law to ensure that court decisions are respected and enforced, the grant of broad procedural (and substantive) environmental rights could be meaningless. [728]

3. The Doctrine of Standing

Standing, or *locus standi*, is a fundamental procedural right and a pre-requisite for the enforcement of all other environmental rights,[729] which decides which legal or natural persons may appear before a judicial or administrative body. Generally determined at the outset of the proceedings, standing acts as a gatekeeper doctrine to screen out plaintiffs with frivolous claims, "busybodies," and "cranks." [730] Interpreted too leniently, this doctrine could inundate the courts with frivolous petitions and result in an abuse of process; but interpreted too strictly, it could close the courthouse doors to claimants with legitimate grievances—public interest NGOs, indigenous communities, or vulnerable groups—whose interest in the matter may be deemed to be too indirect, abstract, hypothetical, or remote.

Nowhere is this risk more pronounced than in environmental cases, which, by their very nature, are difficult to reconcile with the traditional rules of standing. Most standing doctrines require a particular plaintiff to be directly affected by a harm that is concrete and either existing or imminent. Yet environmental harms are often future, uncertain, diffuse, dispersed across time and space, and ridden with scientific uncertainty. This has made climate change litigation, for example, procedurally complex: evidence of climate impact abounds, but tying it to specific harms suffered by particular plaintiffs and proving causation is exceedingly difficult. In other cases, the cumulative effect of many unrelated harms may result in a sudden threat to the ecosystem and those who depend on it, as with the global bee colony collapse, but does not lend itself easily to the adjudicative process.

Not surprisingly, one of the key recommendations in the ISP is that States "expand the legal standing" for all affected and interested persons and communities in environmental cases.[731] Still today, however,

---

726 Kyrtatos v. Greece, Eur. Ct. H.R., App. No. 41666/98, Judgment ¶¶ 52-53 (22 May 2003).

727 Id. See also Alan Boyle, Human Rights or Environmental Rights? A Reassessment, 18 FORDHAM ENVTL. LAW REV. 471, 489, 506, 510-11 (2007) (arguing that victories for environmental protection are the incidental consequence of human rights litigation, not the result of any commitment to a particular kind of environment).

728 As the ECOWAS Court observed, "the adoption of legislation, no matter how advanced it may be, or the creation of agencies inspired by the world's best models... may still fall short... if these measures just remain on paper." Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria, ECOWAS Ct. of Justice, Judgment No. ECW/CCJ/JUD/18/12 ¶ 105 (24 Dec. 2012).

729 *See* UNEP Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (2010), Nos. 15-18 (hereinafter "Bali Guidelines").

730 *See, e.g.,* North Queensland Conservation Council Inc. v. Executive Director, Queensland Parks and Wildlife Service, [2000] QSC 172 (14 June 2000), ¶ 12 (Aust.).

731 ISP, at pp. 7, 22-23. See also Bali Guideline 18 ("States should provide broad interpretation of standing in proceedings concerned with environmental matters with a view to achieving effective access to justice.").

limitations on standing in environmental cases remain a key barrier to access to justice in the LAC region.[732] While most jurisdictions have a standing doctrine, its content varies: international human rights law and environmental conventions only set the *minimum* standard by requiring States to provide access to justice, but they leave much of the content of the procedural rules, including on standing, to be filled in by national laws. Even under the Aarhus Convention, which expects State Parties to "giv[e] the public concerned wide access to justice," every State Party decides for itself who, and under what conditions, will have access to its courts, "in accordance with national law."[733] In the LAC region, the new regional instrument will also likely only set the floor for access rights, giving States considerable discretion on implementation. This makes cross-country learning and sharing of good practices across the region important to ensure that the goals of environmental justice are adequately and evenly implemented.

In general, countries with a constitutionally-entrenched right to a healthy environment tend to have more open standing rules for environmental cases than countries where public interest litigants can rely solely on environmental statutes.[734] Courts in many Latin American have made strides in grappling with environmental cases, aided in part by the "greening of Constitutions" in the region (most of which today incorporate environmental principles).[735] Chile's constitution, for example, protects the "right to live in an environment free from contamination."[736] In a famous case in 1997, the Supreme Court of Chile held that this right is owed to all citizens and granted plaintiffs leave to seek enjoinment of a large logging project in the pristine forests of Tierra del Fuego even though plaintiffs had not personally suffered any injury.[737] Other high courts have also held that the grant of a substantive right to a healthy environment implicitly gives claimants standing,[738] while a few constitutions, including that of Brazil, expressly provide for open standing for persons seeking to protect their environmental rights.[739]

In countries where the constitution is silent on environmental rights, plaintiffs have relied on citizen suit provisions in environmental statutes to bring public interest litigation, as in the United States, and on traditional civil actions.[740]

However, some courts have allowed for broad public interest standing through creative interpretation even in the absence of constitutional entrenchment. The Indian Supreme Court, for example, derived the right to a healthy environment by interpreting broadly the constitutional right to life.[741] To ensure its enforcement, the Court modified the usual rules of procedure and endorsed broad public interest standing in environmental cases.[742] As the Chief Justice of the Indian Supreme Court observed, "it has fallen frequently to the judiciary to protect environmental interests, due to sketchy input from the legislature, and laxity on the part of the administration."[743]

The Indian Supreme Court's environmental activism is well-known, but the recent jurisprudence of the Philippine Supreme Court has been nothing short of revolutionary and provides an interesting case-study.

---

732 *See* Economic Commission for Latin America and the Caribbean (ECLAC), "Access to Information, Participation and Justice in Environmental Matters in Latin America and the Caribbean: Situation, Outlook and Examples of Good Practice," LC/L.3549/Rev.1 (12 Apr. 2013).

733 *See* Aarhus Compliance Committee, Findings and Recommendation with Regard to Compliance by Belgium (Bond Beter Leefmilieu Vlaanderen VZW), Comm. No. ACCC/C/2005/11 (16 June 2006), ¶¶ 33-36.

734 George (Rock) Pring & Catherine (Kitty) Pring, *Specialized Environmental Courts and Tribunals at the Confluence of Human Rights and the Environment*, 11 Or. Rev. Int'l L. 301, 323 (2009).

735 *See* Jorge Caillaux et al., *Environmental Public Participation in the Americas*, in C. Bruch (ed.), The New "Public": The Globalization of Public Participation 105 (ELI: 2002).

736 *See* Constitución de 1980, Art. 19(8) (Chile).

737 *See* Decision No. 2.732-96 (the "Trillum Case"), Supr. Ct., 19 Mar. 1997, ¶ 13 (Chile), available at http://www.elaw.org/node/1310.

738 *See, e.g.*, Adriana Fabra & Eva Arnal, *Review of jurisprudence on human rights and the environment in Latin America*, Background Paper No. 6, Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, 14-16 Jan. 2002, Geneva (discussing the practice of the Argentine Supreme Court). *See also* Louis J. Kotzé & Anel du Plessis, *Some Brief Observations on 15 Years of Environmental Rights Jurisprudence in South Africa*, 3 J. Ct. Innovation 157, 163-65 (2010) (discussing South Africa's liberal *locus standi* provisions).

739 *See* Constituição Federal, Art. 5 (Brazil) ("[A]ny citizen has standing to institute an action seeking to annul an act... to the environment,... and the plaintiff is, except in the event of proven bad faith, exempt from court costs and from the burden of loss of suit."). *See also* Constitución, Art. 26 (Venez.) ("Everyone has the right to access the organs comprising the justice system for the purpose of enforcing his or her rights and interests, including those of a collective or diffuse nature to the effective protection...").

740 *See also* Jorge Caillaux et al., *Environmental Public Participation in the Americas*, in C. Bruch (ed.), The New "Public": The Globalization of Public Participation 118 (ELI: 2002).

741 *See* Const., Art. 48A (India) (providing that the State, as a policy directive, "shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.").

742 *See generally* Bharat H. Desai & Balraj Sidhu, *On the Quest for Green Courts in India*, 3 J. Ct. Innovation 79, 91, 97 (2010) (noting that plaintiffs took advantage of the liberalized rule of *locus standi* to seek judicial intervention [concerning] … constitutionally recognized environmental rights that related more to diffuse interests than to ascertainable injury to individuals"). For the practice of the high courts in Pakistan, Bangladesh, Nepal, and Colombia, *see* James R. May & Erin Daly, *Vindicating Constitutionally Entrenched Environmental Rights Around the Globe*, 11 Or. Rev. Int'l L. 365, 399-401 (2010).

743 Chief Justice B.N. Kirpal, Supreme Court of India, "Environmental Justice In India," M.C. Bhandari Memorial Lecture, (2002) 7 SCC (Jour) 1, available at http://www.ebc-india.com/lawyer/articles/2002v7a1.htm.

The Philippine Constitution of 1987, like many Latin American constitutions adopted after the UN Conference on Human Environment held in Stockholm in 1972, protects "the right of the people to a balanced and healthful ecology."[744] It also empowers the Supreme Court to *create procedural rules* necessary for the enforcement of those substantive rights.[745]

As early as 1993, the Philippine Supreme Court observed that the right to a healthy environment would be enforceable even if it were not grounded in the Constitution because it "exists from the inception of humankind."[746] On this basis, the Court gave a group of public interest plaintiffs standing to bring claims not only on their own behalf, but also on behalf of future generations.[747] In 2006, the Court went further, holding that standing in environmental cases is a "*procedural technicality* which may, in the exercise of the Court's discretion, be set aside in view of the importance of the issue raised." [748]

Despite these open rules of standing, the Philippine Supreme Court found that there was a "need for more specific rules that can sufficiently address the procedural concerns that are peculiar to environmental cases"[749] and, in 2010, promulgated new Rules of Procedure for Environmental Cases.[750]

Among other provisions, the Court adopted a new citizen suit provision[751] to further "liberalize[] standing for all cases filed enforcing environmental laws."[752] In addition, the Court adopted a new special civil action—the writ of *kalikasan* ("nature")—to increase access to environmental justice in the Philippines.[753] The "writ of nature" is an extraordinary remedy focused on environmental harms of great magnitude that transcend political and territorial boundaries.[754] Anyone can file the writ, without a filing fee, to seek injunctive relief involving acts or omissions that threaten the constitutional right to a healthy environment.

It is still too early to tell what effect the new liberalized standing rules will have on the enforcement of the Philippine environmental laws. Thus far, the Supreme Court has issued injunctive relief in at least two writs of nature filed to date, including a case where a group of citizens sought enforcement of a long-forgotten law concerning rainwater catchment as a way to mitigate the impacts of climate change in the form of torrential floods and dry spells.[755]

The Court's other innovative procedural rules promulgated in 2010 include temporary and long-term environmental protection orders, Strategic Lawsuits Against Public Participation (SLAPP), rules on deferral of filing fees and cost recovery, as well as the writ of continuing mandamus and the precautionary principle, both of which are discussed below.

Courts also face other conceptual and procedural difficulties when deciding standing in environmental cases.

One such challenge concerns the rights of nature. Few national constitutions protect the environment *per se*,[756] and a plaintiff claiming a violation of his or her constitutional rights (such as the right to life, livelihood,

---

744 *See* Const. (1987), Art. II, § 16 (Phil.) ("The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.").

745 *See id.* at Art. VIII, § 5(5) ("The Supreme Court shall have the following powers... Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts …").

746 *See Oposa et al. v. Factoran*, G.R. No. 101083, 224 SCRA 792, 30 July 1993 (Phil.) ("Such a right belongs to a different category of rights alto gether for it concerns nothing less than self-preservation and self-perpetuation... the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind.")

747 *See id.*

748 *See Henares et al. v. Land Transportation Franchising and Regulatory Board*, G.R. No. 158290, 505 SCRA 104 (23 Oct. 2006) (Phil.) (emphasis added). This is consistent with the Court's doctrine that the rules of standing may be relaxes in cases that raise issues of "transcendental impor tance." *See* Justice Presbitero J. Velasco, *Manila Bay: A Daunting Challenge in Environmental Rehabilitation and Protection*, 11 Or. Rev. Int'l L. 440, 445 (2010).

749 *See* Annotation to the Rules of Procedure for Environmental Cases (Phil.), p. 98, available at http://philja.judiciary.gov.ph/images/A.M.%20No.%2009-6-8-SC_annotation.pdf (hereinafter "Annotation").

750 *See* Rules of Procedure for Environmental Cases, A.M. No. 09-6-8-SC (Phil.), available at http://www.lawphil.net/courts/supreme/am/am_09-6-8-sc_2010.html (hereinafter "Rules").

751 Rule 2, § 5 ("*Citizen suit*. – Any Filipino citizen in representation of others, including minors or generations yet unborn, may file an action to enforce rights or obligations under environmental laws.").

752 *See* Annotation, p. 111.

753 *See* Rule 7.

754 Annotation, p. 133 *et seq.*

755 *See* Hilario G. Davide Jr. (ret. Chief Justice), *The Environment as Life Sources and the Writ of Kalikasan in the Philippines*, 29 Pace Envtl. L. Rev. 592, 598 (2012).

756 *See, e.g.*, Dinah Shelton, *Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?*, 35 Denv. J. of Int'l L. and Pol'y 129, 163 (2006).

or health) as a result of some environmental harm will generally find it easier to establish standing, and have his grievances heard, than a plaintiff who is arguing for the right of rivers to run free or forests to remain wild. As the UN High Commissioner for Human Rights observed, "human rights strategies are a vital element of any successful legal strategy for environmental protection. *People, after all, have standing, even in jurisdictions where the natural environment does not.*" [757]

A number of jurisdictions have environmental legislation with "citizen suit" provisions, which enable individual persons or NGOs with a proven interest in the matter to bring statutory claims about the health of the forest or wildlife and ensure government compliance with the law.[758] Still, procedurally, a plaintiff seeking standing on behalf of the environment in the absence of any direct injury to himself (eco-centric) has a much higher burden than a plaintiff who is seeking standing on his own behalf (anthropocentric).

This may make it difficult to hear cases of severe environmental harm that involve no immediate human victims, though they could have widespread and long-term effects. To overcome this limitation, Justice William O. Douglas of the U.S. Supreme Court had argued in a famous dissent in 1972 that trees—or anyone who spoke for them—should have standing.[759] This issue has made no headway in the United States, unlike in Latin America, where Ecuador[760] and Bolivia[761] have adopted eco-centric laws, and in New Zealand, where the government and the Maori community recognized the legal rights of the Whanganui River. A case is also currently pending before the Philippine Supreme Court, where the plaintiffs are seeking standing as guardians for marine mammals whose habitat is threatened by underwater mining and drilling activities.[762] If granted, this could greatly expand the scope for environmental claims on behalf of nature.

Intergenerational standing and transnational standing are a further common challenge for the LAC region, which is becoming increasingly urgent under the growing impacts of climate change and transboundary harm. Both human rights law and environmental law have yet to provide a workable solution to address these issues.

4. Interpretive Principles

Though not procedural in themselves, interpretive principles, which help judges interpret the law where the underlying provisions are vague, can affect the judicial process and substantive outcomes in important ways. They are therefore an essential ingredient in the right to access to justice. There is evidence that national courts are increasingly relying on principles of international environmental law—such as the precautionary principle, polluter-pays, and inter-generational equity—to decide environmental cases when there is no clear national law on the matter.

The precautionary principle, articulated in Principle 15 of the 1992 Rio Declaration,[763] has proven decisive in environmental adjudication in a number of jurisdictions, as it permits redress, including injunctive relief, in cases of serious and irreparable environmental despite the lack of ironclad scientific evidence.

---

757 Statement of High Commissioner for Human Rights Navi Pillay at the UNEP World Congress on Justice, Governance and Law for Environmental Sustainability, Rio de Janeiro, 20 June 2012, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12263&LangID=e (emphasis added).

758 In the United States, as many as 75% of federal environmental cases in 1993-2002 were based on citizen suit provisions. James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30, Environmental Citizen Suits at Thirtysomething*, 10 Widener L. Rev. 1, 8 (2003). U.S. federal courts initially interpreted these provisions expansively, enabling citizens and NGOs to act as "private attorneys general." *See, e.g., Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971) ("But it remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role... Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy."). The U.S. Supreme Court has gradually narrowed the standing doctrine through statutory interpretation. *See, e.g., Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) (internal citations omitted) ("[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish."); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) ("To say that the Act protects ecosystems is not to say that the Act creates (if it were possible) rights of action in persons who have not been injured in fact, that is, persons who use portions of an ecosystem not perceptibly affected by the unlawful action in question."). *See generally* Maria Banda, Comment, *Summers v. Earth Island Institute*, 34 Harv. Envtl. L. Rev. 321 (2010).

759 *Sierra Club v. Morton*, 405 U.S. 727, 741 (1972), dissenting opinion by Justice William O. Douglas, citing Christopher Stone, *Should Trees Have Standing?--Toward Legal Rights for Natural Objects*, 45 S. Cal. L. Rev. 450 (1972); *see also* Prudence Taylor, *From Environmental to Ecological Human Rights: A New Dynamic in International Law*, 10 Geo. Int'l Envtl. L. Rev. 309 (1998).

760 *See* Constitución de 2008 (Ecuador), Sec. 7 (Right of Nature). *See also Wheeler y Huddle v. Director de la Procuraduria General del Estado en Loja* (30 Mar. 2011), Judgment No. 11121-2011-10, Case No. 826, Provincial Ct. Just. of Loja (Ecuador) (affirming constitutional right of Vilca bamba River to flow and ordering full restoration).

761 *See* Law No. 71 (2010) on the Rights of Mother Earth; Framework Law No. 300 (2012) for Mother Earth and Integrated Development to Live Well.

762 *Resident Marine Mammals of the Protected Seascape Tañon Strait, e.g., Toothed Whales, Dolphins, Porpoises, and Other Cetacean Species, Joined in and Represented Herein by Human Beings Gloria Estenzo Ramos, et al. v. Reyes*, G.R. No. 181527 (Phil.).

763 Rio Declaration, Principle 15 ("In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. ").

A number of Latin American jurisdictions have included the precautionary principle in their legislation. Courts have often relied on the precautionary principle, referring to it by its Latin name, *in dubio pro natura* ("when in doubt, favor nature"), which could counterbalance the more common principle of *in dubio pro reo* ("when in doubt, for the accused") in environmental cases. Costa Rica's Supreme Court, for example, has invoked the principle of *in dubio pro natura* to enjoin activities that might cause irreversible environmental harm.[764] The same is true of Brazil's courts, which have applied the principle in cases of illegal deforestation, disposal of asbestos, and severe mercury contamination.[765]

In the Philippines, the Supreme Court declared the precautionary principle to be an actual rule of evidence in the 2010 Rules, which applies whenever "there is a lack of full scientific certainty in establishing a causal link between human activity and environmental effect."[766] Moreover, under the Rules, "[t]he constitutional right of the people to a balanced and healthful ecology shall be given the benefit of the doubt."[767] The Court explained that "the precautionary principle shifts the burden of evidence of harm away from those likely to suffer harm and onto those desiring to change the status quo," which will "enable courts to tackle future environmental problems before ironclad scientific consensus emerges." [768]

Some jurisdictions have applied the precautionary principle on the basis of international law.[769] The Supreme Court of India had famously proclaimed in 1996 that "the precautionary principle and the polluter pays principle are part of the environmental law of the country" based on its reading of India's constitutional and statutory provisions and customary international law. In a landmark case in 2003, Indonesian courts also relied on the precautionary principle to find that logging activities had caused a landslide—which had resulted in a number of deaths and destroyed many homes in a village—and awarded compensation to the community on that basis.[770] The precautionary principle was not a part of Indonesia's environmental legislation, but the courts reasoned that it was *jus cogens*, a preemptory norm of international law from which no derogation is permitted, and could therefore be used to "fill the legal vacuum." [771]

5. Remedies

Another fundamental element of access to justice is the right to an *effective remedy* for a violation of environmental rights, including just and adequate compensation, as well as restoration in some cases. The Aarhus Convention, for example, establishes that judicial or administrative review of environmental claims must "provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive."[772]

At times, courts have found it necessary to devise entirely new types of remedies to address environmental harms, including precautionary and oversight measures. For example, the Philippine Supreme Court adopted a new writ of continuing mandamus as part of the 2010 Rules, which directs any government agency to perform an act decreed by a court judgment, which shall remain effective until the judgment is fully satisfied.[773] The Court had already implemented this remedy in an earlier case,[774] but the Rules codified the writ "as one of the principal remedies which may be availed of in environmental cases."[775] Interestingly, the Philippine procedure is expressly modelled after the jurisprudence of the Indian Supreme Court,[776] which had

---

764 *See, e.g.*, Recurso de amparo, Res. Nº 2011-016316, Q*uesada v. Municipalidad de Moravia et al.*, Constitutional Chamber of the Supreme Court, 25 Nov. 2011 (Costa Rica) (holding that, based on the Constitution and Principle 15 of the Rio Declaration, if there is uncertainty as to whether an activity will cause serious and irreparable damage (to groundwater), the administration should refrain from such activities).

765 *See, e.g., Brasilit Indústria e Comércio Ltda et al. v. State Prosecutor of Rio de Janeiro*, Special Appeal No. 1.367.923 - RJ (2011/0086453-6), Sup. Ct. of J. (27 Aug. 2013) (per Martins J.) (upholding a judgment by Justice Herman Benjamin), available at http://www.migalhas.com.br/arquivo_artigo/art20130906-05.pdf; *Ministério Público do Estado de Minas Gerais v. Pereira*, Special Appeal No. 1.198.727 – MG (2010/0111349-9), Sup. Ct. of J. (14 Aug. 2012), available at http://abrampa.org.br/doc/processo_indenizacao.pdf; *Alberto Pasqualini Refap S/A v. State Prose cutor of Rio Grande Do Sul*, Special Appeal No. 883.656 – RS (2006/0145139-9), Sup. Ct. of J. (9 Mar. 2010).

766 Rule 20.

767 *Id.*

768 Annotation, p. 158.

769 *See Vellore Citizens Welfare Forum v. Union of India*, 5 S.C.R. 251 (28 Aug. 1996) (India).

770 *See* Bandung District Court, Dec. No. 49/Pdt.G/2003/PN.BDG (4 Sept. 2003), upheld on appeal, Supreme Court, Dec. No. 1794 K/Pdt/2004 (22 Jan. 2007) (Indon.) (the "Mandalawangi Landslide Case"). *See generally Imamulhadi, Development of Precautionary Principle and Strict Liability in Environmental Disputes in the Courts*, 25 MIMBAR HUKUM 417 (2013) (Indonesian: "Perkembangan Prinsip Strict Liability Dan Precautionary Dalam Penyelesaian Sengketa Lingkungan Hidup Di Pengadilan").

771 *Id.*

772 Aarhus Convention, Art. 9(4)) (States "shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.").

773 Rule 1, § 4(c).

774 *Concerned Residents of Manila Bay v. MMDA*, G. R. Nos. 171947-98, 18 Dec. 2008 (Phil.).

775 *See* Annotation, p. 104.

776 *See* Annotation, p. 103 (citing T.N. *Godavarman* v. Union of India & Ors, 2 SCC 267 (1997), and Vineet Narain v. Union of India, 1 SCC 266 (1998) (India)).

broken new ground when it set up expert committees to supervise and monitor the government's compliance with court orders, including an order to clean up the Ganges River.[777]

Lastly, another development affecting the availability of remedies has been the unprecedented creation of specialized environmental courts and tribunals over the past decade. This could open additional avenues for the enforcement and monitoring of compliance with court-issued remedies by bodies that may have more specialist knowledge and experience than ordinary courts to deal with complex environmental matters. The Philippine Supreme Court alone designated 117 special courts in 2008 to try environmental cases,[778] and a number of such courts has been created in India and China.[779]

To carry out their mandate, however, the courts need continued support of the political branches, as South Africa's short-lived experiment with green tribunals suggests (where the project ran aground on the lack of political will to provide the necessary funding).[780] Ensuring access to justice in other cases may require overcoming the cost and practical difficulty of reaching the tribunal. Brazil's "court-on-a-boat" project in the Amazon, mobile-home tribunals, and the Inter-American program of "judicial facilitators" (*facilitadores judiciales*) are a few innovative ways to bring justice to remote and rural areas.

Conclusion: Importance of Environmental Access Rights in the Americas

"The field of law," as the former Executive Director of the UN Environment Programme observed, "has, in many ways, been the poor relation in the world-wide effort to deliver a cleaner, healthier and ultimately fairer world."[781] There are countless international environmental conventions and national laws, but "unless these are complied with, unless they are enforced, then they are little more than symbols, tokens, paper tigers." [782]

Environmental access rights are key to ensuring that environmental laws are more than "paper tigers." But access to environmental justice, as the foregoing analysis suggests, greatly depends on how the national judiciary interprets, applies, and enforces substantive and procedural environmental rights. A constitutionally-guaranteed right to a healthy environment, by itself, will not secure access to justice where the courts do not enforce the relevant procedural rights or interpret the rules on standing very restrictively, or where the government does not comply with judicial orders.[783]

Efforts to expand court access for environmental plaintiffs, as in the Philippines, could help supplement the State's limited monitoring and enforcement capacity, while application of interpretive principles, as used by Brazilian judges, could help protect vulnerable populations and their ecosystems. These environmental procedures and remedies are one example of the kinds of procedural solutions that are emerging across different national courts, which might foster faster and more effective access to justice in environmental cases, which tend to be procedurally complex and difficult to manage with the traditional procedural toolkit.

It bears emphasis that the Philippine Supreme Court's new rules of procedure are rooted in and shaped by the country's laws. A court sitting in a country that lacks similar constitutional or statutory foundations could likely not follow suit. Indeed, some courts have declined to rule on the merits in environmental cases in the absence of clear legislative guidance, as doing so might constitute judicial overreach and interfere with the government's complex policy calculus. [784]

---

777 James R. May & Erin Daly, *Vindicating Constitutionally Entrenched Environmental Rights Around the Globe*, 11 OR. REV. INT'L L. 365, 423, 432 (2010) (arguing that placing the burden on the successful plaintiff to bring repeated compliance actions would be expensive and unfair); see id. at 435 et seq. for other examples of remedies.

778 The Special Courts will still handle criminal, civil, and other cases. See Supr. Ct., Administrative Order No. 23-2008 re : Designation of Special Courts to Hear, Try and Decide Environmental Cases (28 Jan. 2008) (Phil.).

779 See generally Nicholas A. Robinson, *Ensuring Access to Justice Through Environmental Courts*, 29 PACE ENVTL. L. REV. 363 (2012).

780 Louis J. Kotzé & Anel du Plessis, Some Brief Observations on 15 Years of Environmental Rights Jurisprudence in South Africa, 3 J. CT. INNOVATION 157, 161-62 (2010).

781 Klaus Toepfer, Executive Director of UNEP, 2002, cited in UNEP, *Top Judges Meet in Johannesburg to Boost Propsects for Enforcing Environment-Related Laws*, UNEP Press Release (18 Aug. 2002), available at http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=259&ArticleID=3110.

782 *Id.*

783 *See, e.g.,* James R. May & Erin Daly, *Vindicating Constitutionally Entrenched Environmental Rights Around the Globe,* 11 OR. REV. INT'L L. 365, 397-98, 406 (2010) (discussing obstacles).

784 *See, e.g.,* James R. May & Erin Daly, *Vindicating Constitutionally Entrenched Environmental Rights Around the Globe*, 11 OR. REV. INT'L L. 365, 404, 407 (2010) (discussing Hong Kong judgments).

"Institutionalizing a permanent regional platform to support an ongoing exchange of experiences and information … could help legal ideas flow across national boundaries and foster greater access to justice in the region."

In some situations, international legal principles may help judges fill the legal void, as discussed above with reference to the precautionary principle or the principle of in dubio pro natura, which has been applied by the Indian and Philippine courts and has found increasing favor in Brazil and Costa Rica in recent years. These interpretive principles could be invoked in relation to climate change litigation and other novel environmental challenges that cross boundaries and affect future generations.

As courts increasingly look to international law and the practice of other national jurisdictions, we may continue to see the flow of legal ideas across boundaries, as with the new writ of continuing mandamus in the Philippines that was directly inspired by the practice of the Indian Supreme Court. The Philippine "writ of nature" may similarly find a fertile ground in the LAC region, where courts are facing similar challenges in trying to keep pace with the number and magnitude of environmental claims.

Courts in Latin American and Caribbean countries are uniquely positioned to engage in the conversation among national judiciaries and advance the process of cross-country learning and ideational exchange. Many national courts in the LAC region have already taken major and creative steps to address environmental issues and could offer valuable guidance, inspiration, and encouragement to courts in their sister jurisdictions that are facing similar challenges. Institutionalizing a permanent regional platform to support an ongoing exchange of experiences and information—for example, on the latest judicial decisions, legislative measures, and institutional mechanisms—in all regional languages could help legal ideas flow across national boundaries and foster greater access to justice in the region.

To the extent that this exchange of ideas continues, a common core of norms and principles may emerge across different legal traditions, which could, over time, help define the content of the procedural right to access to justice and contribute to the emergence of general principles of international law, affecting the practice of both international and national courts

REFERENCES

1. Aarhus Compliance Committee (2006). Findings and Recommendation with Regard to Compliance by Belgium (Bond Beter Leefmilieu Vlaanderen VZW), Comm. No. ACCC/C/2005/11 (16 June 2006).
2. Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights ("Protocol of San Salvador") (1989).
3. Afr. Comm'n H. & Peoples' R. (2001). SERAC et al. v. Nigeria, Comm. No. 155/96 ("the Ogoniland case").
4. Afr. Comm'n H. & Peoples' R. (2010). *Centre for Minority Rights Development (Kenya) et al. v. Kenya*, No. 276/2003 (4 Feb. 2010).
5. *Alberto Pasqualini Refap S/A v. State Prosecutor of Rio Grande Do Sul*, Special Appeal No. 883.656 – RS (2006/0145139-9), Sup. Ct. of J. (9 Mar. 2010) (Braz.).
6. Banda, Maria (2010). Comment, *Summers v. Earth Island Institute,* 34 Harv. Envtl. L. Rev. 321.
7. Boyle, Alan (2007). *Human Rights or Environmental Rights? A Reassessment,* 18 Fordham Envtl. Law Rev. 471.
8. *Brasilit Indústria e Comércio Ltda et al. v. State Prosecutor of Rio de Janeiro*, Special Appeal No. 1.367.923 - RJ (2011/0086453-6), Sup. Ct. of J. (27 Aug. 2013) (Braz.), available at http://www.migalhas.com.br/arquivo_artigo/art20130906-05.pdf.
9. Caillaux, Jorge et al. (2002). *Environmental Public Participation in the Americas*, in C. BRUCH (ED.), The New "Public": The Globalization Of Public Participation (ELI).
10. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998, 2161 U.N.T.S. 447 ("Aarhus Convention").
11. Davide, Hilario G. (2012). The *Environment as Life Sources and the Writ of Kalikasan in the Philippines*, 29 Pace Envtl. L. Rev. 592.
12. Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean (June 2012).
13. Desai, Bharat H. & Balraj Sidhu (2010). *On the Quest for Green Courts in India*, 3 J. Ct. Innovation 79.
14. Economic Commission for Latin America and the Caribbean (ECLAC) (2013). "Access to Infor-

mation, Participation and Justice in Environmental Matters in Latin America and the Caribbean: Situation, Outlook and Examples of Good Practice," LC/L.3549/Rev.1 (12 Apr. 2013).
15. ECOWAS Ct. of Justice (2012). *Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria*, Judgment N° ECW/CCJ/JUD/18/12 (24 Dec. 2012).
16. Eur. Ct. H.R. (2003). *Kyrtatos v. Greece*, App. No. 41666/98 (22 May 2003).
17. Eur. Ct. H.R. (2004). *Öneryildiz v. Turkey*, App. No. 48939/99.
18. Eur. Ct. H.R. (2010). *Dées v. Hungary*, App. No. 2345/06 (9 Nov. 2010).
19. Fabra, Adriana & Eva Arnal (2002). *Review of jurisprudence on human rights and the environment in Latin America*, Background Paper No. 6, Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, 14-16 Jan. 2002.
20. I.C.J. (2010). *Pulp Mills on the River Uruguay* (Arg. v. Uru.), Judgment ¶ 204, 2010 I.C.J. Rep. (Apr. 20).
21. Imamulhadi (2013). *Development of Precautionary Principle and Strict Liability in Environmental Disputes in the Courts*, 25 Mimbar Hukum 417 (2013) (Indonesian: "Perkembangan Prinsip Strict Liability Dan Precautionary Dalam Penyelesaian Sengketa Lingkungan Hidup Di Pengadilan").
22. Inter-Am. Ct. H. R. (2006). *Claude-Reyes v. Chile*, (ser. C) No. 151 (19 Sept. 2006).
23. Inter-Am. Ct. H.R. (2007). *Saramaka People v. Suriname*, (ser. C) No. 172.
24. Inter-Am. Ct. H.R. (2012). *Kuna of Madungandí et al. v. Panama* (Merits), No. 125.
25. Johannesburg Principles on the Role of Law and Sustainable Development (2002). UNEP Global Judges Symposium, Johannesburg, South Africa, 20 Aug. 2002, available at http://www.unep.org/Documents.Multilingual/Default.asp?ArticleID=3115&DocumentID=259.
26. Kirpal, B.N. (2002). "Environmental Justice In India," M.C. Bhandari Memorial Lecture, (2002) 7 SCC (Jour) 1, available at http://www.ebc-india.com/lawyer/articles/2002v7a1.htm.
27. Kotzé, Louis J. & Anel du Plessis (2010). Some Brief Observations on 15 Years of Environmental Rights Jurisprudence in South Africa, 3 J. Ct. Innovation 157.
28. Kravchenko, Svitlana (2012). *Environmental Rights in International Law: Explicitly Recognized or Creatively Interpreted?*, 7 Fla. A & M U. L. Rev.
29. May, James R. & Erin Daly (2010). *Vindicating Constitutionally Entrenched Environmental Rights Around the Globe*, 11 Or. Rev. Int'l L. 365.
30. May, James R. (2003). *Now More Than Ever: Trends in Environmental Citizen Suits at 30, Environmental Citizen Suits at Thirtysomething,* 10 Widener L. Rev. 1.
31. *Ministério Público do Estado de Minas Gerais v. Pereira*, Special Appeal No. 1.198.727 – MG (2010/0111349-9), Sup. Ct. of J. (14 Aug. 2012) (Braz.), available at http://abrampa.org.br/doc/processo_indenizacao.pdf.
32. Nollkaemper, André (2012). *International Adjudication of Global Public Goods: The Intersection of Substance and Procedure*, 23 Eur. J. of Int'l Law 769.
33. Organization of American States (2000). "Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development," CIDI/RES. 98 (V-O/00), OEA/Ser.W/II.5,CIDI/doc.25/00 (20 Apr. 2000).
34. Pillay, Navi (2012). Statement of High Commissioner for Human Rights Navi Pillay at the UNEP World Congress on Justice, Governance and Law for Environmental Sustainability, Rio de Janeiro, 20 June 2012, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12263&LangID=e.
35. Pring, G. & C. Pring (2009). *Specialized Environmental Courts and Tribunals at the Confluence of Human Rights and the Environment,* 11 Or. Rev. Int'l L. 301.
36. Provincial Ct. Just. of Loja (2011). *Wheeler y Huddle v. Director de la Procuraduria General del Estado en Loja* (30 Mar. 2011), Judgment No. 11121-2011-10, Case No. 826, (Ecuador), available at http://earthlawcenter.org/static/uploads/documents/Vilcambamba_River_Decision_3_31_11.pdf.
37. Rio Declaration on Environment and Development (1992). United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (12 Aug. 1992).
38. Rio+20 Declaration on Justice, Governance and Law for Environmental Sustainability (2012). World Congress on Justice, Governance and Law for Environmental Sustainability, Rio de Janeiro, Brazil, 20 June 2012, available at http://www.unep.org/rio20/Portals/24180/Rio20_Declaration_on_Justice_Gov_n_Law_4_Env_Sustainability.pdf
39. Rio+20 Outcome Document (2012). "The Future We Want," UN Doc. A/CONF.216/L1, ¶ 43 (reissued for technical reasons on 22 July 2012).
40. Robinson, Nicholas A. (2012). *Ensuring Access to Justice Through Environmental Courts,* 29 Pace Envtl. L. Rev. 363.
41. Santiago Decision on the Declaration on the Application of Principle 10 in Latin America and the Caribbean (4-6 Nov. 2014).
42. Shelton, Dinah (2005). *Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?*, 35 Denv. J. of Int'l L. and Pol'y 129.

43. Stone, Christopher D. (1972). *Should Trees Have Standing? Toward Legal Rights for Natural Objects.* 45 S. Cal. L. Rev. 450.
44. Supr. Ct. Chile (1997). Decision No. 2.732-96 (the "Trillum Case"), Supr. Ct., 19 Mar. 1997, ¶ 13 (Chile), available at http://www.elaw.org/node/1310.
45. Supr. Ct. Ind. (1996). *Vellore Citizens Welfare Forum v. Union of India*, 5 S.C.R. 251 (28 Aug. 1996) (India).
46. Supr. Ct. Phil. (1993). *Oposa et al. v. Factoran*, G.R. No. 101083, 224 SCRA 792, 30 July 1993 (Phil.).
47. Supr. Ct. Phil. (2006). *Henares et al. v. Land Transportation Franchising and Regulatory Board*, G.R. No. 158290, 505 SCRA 104 (23 Oct. 2006) (Phil.)
48. Supr. Ct. Phil. (2008). *Concerned Residents of Manila Bay v. MMDA*, G. R. Nos. 171947-98, 18 Dec. 2008 (Phil.).
49. Supr. Ct. Phil. (2008). Administrative Order No. 23-2008 re : Designation of Special Courts to Hear, Try and Decide Environmental Cases (28 Jan. 2008) (Phil.).
50. Supr. Ct. Phil. (2010). Annotation to the Rules of Procedure for Environmental Cases (Phil.), available at http://philja.judiciary.gov.ph/images/A.m.%20No.%2009-6-8-SC_annotation.pdf.
51. Supr. Ct. Phil. (2010). Rules of Procedure for Environmental Cases, A.M. No. 09-6-8-SC (Phil.), available at http://www.lawphil.net/courts/supreme/am/am_09-6-8-sc_2010.html.
52. Taylor, Prudence (1998). *From Environmental to Ecological Human Rights: A New Dynamic in International Law*, 10 Geo. Int'l Envtl. L. Rev. 309.
53. Toth, Bende (2010). *Public Participation And Democracy In Practice—Aarhus Convention Principles As Democratic Institution Building In The Developing World*, 30 J. Land Resources & Envtl. L. 295.
54. UNEP (2002). *Top Judges Meet in Johannesburg to Boost Propsects for Enforcing Environment-Related Laws*, UNEP Press Release (18 Aug. 2002), available at http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=259&ArticleID=3110.
55. UNEP (2010). Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters.
56. Velasco, Presbitero J. (2010). *Manila Bay: A Daunting Challenge in Environmental Rehabilitation and Protection,* 11 Or. Rev. Int'l L. 440.

Inter-American Congress on the Environmental Rule of Law

Organization of American States | More rights for more people