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The Role of Brazil and the United States in the International Promotion of the Right to a Healthy Environment

José Adércio Leite Sampaio,¹ Beatriz Souza Costa²

ABSTRACT: This article has the objective of analyzing the role played by Brazil and the United States in protecting the right to a healthy environment at an international level, especially at the World Trade Organization level. First, we must try to identify the fundamental right to a healthy environment, in its internal dimension and as a human right, at the international level. We used the bibliographic technique and deductive methodology to develop the research. The results at the conclusion evidence that the behavior of political and economic agents has a direct impact on the level of environmental protection. In the United States several draft bills were submitted to change trade laws under the argument that environmental protection would reduce competitiveness of national goods and services at the internal and the international levels. In Brazil there was a reduction of environmental protection, normative, and institutional instruments in order to stimulate the economy. In both countries however the role of higher or lower protagonism has also been directly related to the requirements of economic sectors in the country. The supremacy of the economic interests is the reason why the global international system and especially WTO have not granted a suitable and effective treatment to the right to a healthy environment.

KEYWORDS: Brazil; United States; Healthy Environment; Global System for the Protection of Human Rights; WTO; Human Rights.

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I. Introduction

The environment is the world in which we live. A commonplace statement, although appropriate to the consideration that humanity lives in the same space and uses, at least potentially, the same resources.

Environmental degradation is not a phenomenon that matters only to one country, one continent, or one terrestrial hemisphere. That objective connection sends us to an inter-subjectivity necessary to understand and deal with the problem generated by human activity. However, that inter-subjectivity comes into conflict with political borders and economic interests. If states, according to their convenience and demands, tend to regulate the subject as monads, the task is made for failure. The issue requires other nations and peoples to converge into the bases for sustainable development.

Here is the question asked in this paper: How should environment protection, internal and external systems, relate? This question demands a previous answer on the status given to environmental protection, its subjectivity as a power or right assigned to all on the common good of humanity; that is, a healthy and ecologically balanced environment.

This paper defends the environment's nature of human or fundamental right as the expression of a basic need for individuals; groups and nations; a plural right; and a multi-subjectivity that requires assistance by a protection regime that meets its indivisible nature. Next we must try to identify the barriers to the interconnection between the systems regarding both internal and international protection, making it difficult to have the necessary treatment for the indivisibility of phenomena—i.e. global heating; depletion of the ozone layer; and pollution of the oceans, air, and land. Nevertheless, there are elements that ease matching the two systems that try to recover the sense of unity imposed by living on the same planet. We try to identify the arguments that help in understanding why states resist the obvious.

The paper also presents an approach about the role played by Brazil and the United States in both senses—to approximate and to move environmental protection instruments for national and international systems apart. Those theoretical explanations are tested to reveal what moves one and the other to act both as a part or monad and as a whole.

II. The Right to a Healthy Environment: A Human Right and a Fundamental Right³

There are dogmatic and material arguments that support the definition of the right to a healthy environment or, as the Brazilian constitutional law states it, ecologically balanced environment—both as a human right in its international perspective and as a fundamental right in its internal definition.⁴ The dogmatic arguments are based on the existence of several agreements, declarations, covenants, and international treaties that recognize it in general⁵ and specific⁶ aspects. It is also foreseen in constitutions and declared by the constitutional jurisprudence of several states.⁷

Material fundamentals are identified by consensus at a state and international community level. The environment is interpreted as a moral value that requires due protection by the legal systems.⁸ That moral value may be primary, recognizing the environment as a valuable good in itself according to the line defended by the different trends that form the bio-centric ethics or the so-called “deep ecology;” or it may be a secondary or instrumental value, although legally and politically essential due to its indispensability for human life on

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3. We are going to use both “right to a healthy environment” and “right to an ecologically balanced environment,” the terminology that is used by the 1988 Brazilian Constitution. CONSTITUIÇÃO FEDERAL [C.F.][CONSTITUTION] art. 225 (Braz.).
 4. *Id.*
 5. Refer, for example, to regional instruments of human rights such as the Additional Protocol to the Inter-American Convention of Human Rights on Economic, Social and Cultural Rights, the African Letter for the Human Rights and its Additional Protocol on the Rights of Women. Within the United Nations, the Universal Declaration of Human Rights, the International Agreement on Economic, Social and Cultural Rights and the Convention on the Rights of Children set forth the right to the highest level possible of health. Under PIDESC, the right to health includes the obligation to promote environmental health to protect citizens against environmental risks to health to insure healthy work conditions and secure the right to safe food and drinkable water. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3.
 6. Among several documents, we list the Convention for the International Trade of Endangered Forest Fauna and Flora Species (CITES), Board Convention on Weather Changes (UNFCCC), Convention on the Access to Information and Public Participation in the Decision Process and Access to Justice in Environmental Issues (Convention of Aarhus).
 7. CONSTITUIÇÃO FEDERAL [C.F.][CONSTITUTION] art. 225 (Braz.).
 8. JOHN BENSON, ENVIRONMENTAL ETHICS: AN INTRODUCTION WITH READINGS 1 (2000).

Earth.⁹ However, there would be difficulties of a liberal order regarding its categorization especially at a fundamental right level. As a “collective right” or “community good,” the healthy environment could not technically be considered a right with a fundamental status.¹⁰ Evidence of this is the impossibility that a good belonging to all could be a protection for the minority as opposed to the majority.

Authors such as Beatriz Costa understand the ecologically balanced environment as a fundamental right due to several aspects listed in the 1988 Federal Constitution.¹¹ That is the right of all included in Article 5, Item § 2, and also Article 1, Item §3, in which the dignity of the human being is deeply connected to the healthy environment.¹² The author affirms “in Brazil, there is no doubt that the environment is considered a fundamental right, because any interpretation another way had not found support in the Federal constitution.”¹³ Those difficulties are confronted by the conclusion that the harmful effects of environmental disturbance fall especially over more vulnerable people, including poorer populations, traditional and native communities, ethnic minorities, women, the elderly and children.¹⁴ There would be a social division of the environmental damage or of the polluted environment.¹⁵

In the face of diffuse consequences such as global heating and the hole in the ozone layer, in the short run, people having higher purchase power would be able to neutralize them or at least reduce the harm.¹⁶ It is liberal criticism that does not change the nature of other possible theoretical interpretations such as the communitarian one, and even some republican trends, that do not deny collective rights as the characteristic of being fundamental.

9. *Id.* at 119; *see also*, DAVID R. KELLER, ENVIRONMENTAL ETHICS: THE BIG QUESTION 235 (David R. Keller ed., 2010).

10. BENSON, *supra* note 8, at 123.

11. BEATRIZ SOUZA COSTA, MEIO AMBIENTE COMO DIREITO À VIDA: BRASIL, PORTUGAL & ESPANHA [ENVIRONMENT AS RIGHT TO LIFE: BRAZIL, PORTUGAL & SPAIN] 60 (2nd ed. 2013).

12. CONSTITUIÇÃO FEDERAL [C.F.][CONSTITUTION] art. 1, 5 (Braz.).

13. COSTA, *supra* note 11.

14. Francis O. Adeola, *Cross-National Environmental Injustice and Human Rights Issues A Review of Evidence in the Developing World*, 43 AM. BEHAV. SCIENTIST 686 (2000).

15. *Id.* Many studies demonstrate that perverse social division. *See also* “What Will Happen if Hunger Comes?” *Abuses against the Indigenous Peoples of Ethiopia’s Lower Omo Valley* HUMAN RTS. WATCH (Jun. 2012).

16. Adeola, *supra* note 14.

In practice, however, international or not, agencies and governments structure environmental issues at a human and fundamental right level, each one of them at its own level, or they otherwise do it superficially or even in a diversionist way. International laws and regulations are important tools to protect the environment but, in general, when they address the subject, they tend to concentrate in technical regulatory aspects as well as in certain ecologic processes.¹⁷ At that pace, governments are not able to solve the impacts of environmental disturbance on human rights in a comprehensive way.¹⁸

It is important to note that in 2012, the UN's Council for Human Rights assigned "its first independent expert to develop studies and reports on compliance with human rights liabilities related to a safe, clean, healthy and sustainable environment."¹⁹ Maybe one of its most important tasks is to help define the content of the human right to a healthy environment and to define instruments that secure the effective exercise of it.

Despite the difficulties, there is an increasing trend to treat the environment at a human and constitutional right level. Interconnections concerning that phenomenon are remarkable and expected within nations as well as internationally. Local contexts and even historical circumstances certainly modulate the intensity and the way the State contributes for that process of international confirmation of the right to a healthy environment. On the other hand, it goes through international progress and withdrawal influxes. However, the study of the subject is going to be limited to the United States and Brazil. But that is a circumscription that may help understand what happens in other places due to convergences and differences between the two countries.

17. An example that is always remembered is the Convention of Stockholm on Persistent Organic Pollutants. Georg Karlaganis et al., *The Elaboration of the 'Stockholm Convention' on Persistent Organic Pollutants (POPs): a Negotiation Process Fraught with Obstacles and Opportunities*, 8(3) ENVTL SCI. & POLLUTION RES. 216 (2001).

18. Juliane Kippenberg & Jane Cohen, *Lives in the Balance: The Human Cost of Environmental Neglect*, HUMAN RTS. WATCH 41, 48 (2013).

19. H.R.C. Res. 19/10, U.N. Doc A/HRC/RES/19/10 (Apr. 19, 2012).

III. Interconnections Between Internal and International Protection to the Right to a Healthy Environment

In a globalized world, it is almost impossible for states to make environmental policy decisions without taking into account the international scenario and contexts. Technical and economic reasons explain that behavior. In general, the use of stricter instruments for domestic environmental protection raises two major concerns. The first is on the effectiveness of the measures and the second, the impact produced on the competitiveness of the country and its companies.²⁰

Thus, the first one is based on the limitation that hinders states to combat isolated problems such as global heating, air pollution, or the destruction of the ozone layer.²¹ The second one relates to the relative increase of operational costs and of the production of goods and services for companies in states that adopt more restrictive environmental measures.²² They run the risk of seeing their products get more expensive in the external and internal market and, as a consequence, lose businesses.²³

The internal behavior of political and economic agents produce important effects at an international level.²⁴ Also regulatory measures and actions adopted by the international community end up producing important consequences domestically, sometimes beyond what is reasonably predictable.²⁵ Let us give an example by telling a story that took place in the end of the 1980's and beginning of the 1990's. Over thirty draft bills were submitted to the United States Congress in order to change trade laws due to complaints that the environmental legislation in force was reducing the competitiveness of the goods produced in the country.²⁶ The purpose of the drafts was to force other countries to effectively adopt environmental protection standards that were similar to the North American ones or even the ones inter-

20. Mary E. O'Connell, *Using Trade to Enforce International Environmental Law: Implications for United States Law*, 1 GLOBAL LEGAL STUD. J. 273 (1994).

21. *Id.*

22. *Id.*

23. Detlef Sprinz & Tapani Vaahoranta, *The Interest-Based Explanation of International Environmental Policy*, 48(1) INT'L ORG. 77 (1994).

24. *Id.* 103-104.

25. *Id.*

26. O'Connell, *supra* note 20.

nationally approved.²⁷ The penalty could be the impossibility to access the North American market or the increase of import charges.²⁸

Most of those initiatives failed to progress and some were converted into laws.²⁹ The Marine Mammal Protection Act (MMPA) changed the law for the protection of marine mammals.³⁰ Approved in 1972, the MMPA impacted fishermen in the country by limiting the number of dolphins that could be slaughtered annually due to tuna fishing.³¹ As a result of the limitation, fishermen complained about the import of fish from places where such restriction was not in place.³² With the changes to the MMPA, especially in 1988, fish from countries that did not adopt restrictive measures were not allowed to enter the North American territory.³³

Under a judicial order, the North American government embargoed the import of tuna captured by Mexican fishermen.³⁴ In the face of the embargo, Mexico appealed to General Agreement on Tariffs and Trade (GATT) to claim a violation.³⁵ The decision was in Mexico's favor; therefore, the United States was forced to suspend the embargo.³⁶ The unilateral was deemed harmful to free trade, thus unacceptable, even though correct from the environmental standpoint.³⁷

The decision guided many other judgments by GATT and its successor, World Trade Organization (WTO). The convergence of the humanitarian market reserve and environmental protection produced a series of relevant events for the internal and international environment protection system.³⁸ Some of them were positive, but others were not. The study of the reasons for the convergence between

27. *Id.*

28. *Id.*

29. *Id.*

30. Geoffrey W. Levin, *The Environment and Trade: A Multilateral Imperative*, 1 MINN. J. GLOBAL TRADE 231 (1992).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Earth Island Inst. v. Mosbacher*, 746 F. Supp. 964 (N.D. Cal. 1990) (a preliminary measure had been granted by a District Court in California in 1990 and it was submitted to an appeal by the North American government.)

35. *Id.*

36. *Id.*

37. *Mexico etc versus US: "Tuna Dolphin,"* WTO (Sep. 3, 1991).

38. *Id.*

normative systems points at multifactorial elements and a higher or a lower emulative or mimetic tendency or the coercive submission among them,³⁹ existence of communication and interaction networks,⁴⁰ and of crossed political and economic pressures.⁴¹ Theoretical guidance is added to economic or cultural bias when trying to find the reason for the behavior of the United States in the creation of an integrated internal and international system for environmental protection.

However, despite the complexity of the mechanisms that relate to both protection systems, we are able to notice two kinds of difficulty to obtain institutional isomorphism: the normative one from the international community, called “centripetal obstacles” and the other one, resulting from the internal environment of states or, in comparison, called “centrifugal obstacles.” There is an important counter-positioning element against the forces that dissipate the encounter between the two systems: the civil society and the internal, trans-frontier that mobilizes cooperation and makes both act as multi-directional facilitators.

a. Centripetal Difficult Forces

At the international level, the right to a healthy environment is subject to the vicissitudes of a non-systematic treatment of international human rights, international protection system, and economic logic within the WTO.

i. The Right to a Healthy Environment Within the International Law for Human Rights

The global system for the protection of rights has not given the appropriate treatment to the right to a healthy environment. It certainly has difficulties, but when it consistently fails to include environmental protection in its agenda, it ends up by reducing itself. Environmental problems reflect on several aspects to human life, from liberty to equality and health to education. Even if regulations are not

39. PAUL J. DIMAGGIO & WALTER W. POWELL, *NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* (Paul J. DiMaggio & Walter W. Powell eds. 1991).

40. Beth A. Simmons & Zachary Elkins, *The Globalization of Liberalization: Policy Diffusion in the International Political Economy*, 98 AM. POL. SCI. REV. 171 (2004).

41. George Hoberg, *Globalization and Policy Convergence: Symposium Overview*, 3 J. COMP. POL'Y ANALYSIS: RES. & PRAC. 127 (2001).

seen as proper law, an assessment of the nuclear elements is necessary.

People who live in an environmentally disturbed area are not duly respected in regards to their dignity. The inaccurate treatment that is given to the subject reflects the low systematic number of approved international agreements and treaties. Areas that are both blank and overlapped generate a loss of normative content and efficiency. The complexity of the subject already creates obstacles to setting conceptual units and the lack of normative syntonic creates more difficulties. The multiplicity of international documents results in additional costs for state administration, not only because they require extra internal coordination work, but also because they require follow up actions and negotiations within international and regional organisms.

The fragmented treatment currently given to those problems only postpones the inevitable consideration of the environment as a true human right. The wasted time may result in additional costs. It is more than time that the international law for human rights takes over the task of defining the content and the structure of the right to a healthy environment, reinforcing its institution by means of mechanisms aimed at people, groups, or states that, for action or omission, start environmental crises.⁴² While the international law for human rights fails in that mission, environmental protection at a global level is subject to the changes and desires of economy revealed by the experience of GATT and its successor, WTO.

ii. The Right to a Healthy Environment Within the World Trade Organization.

Efforts led by the United States to rebuild commercial ties between nations after the Second World War resulted in the General Agreement on Trade and Tariffs (GATT).⁴³ That agreement established a set of standards to reduce tariff barriers to trade at a global level.⁴⁴

42. Kippenberg & Cohen, *supra* note 18.

43. *Id.*

44. *Id.*

In that document, the environment was only mentioned in Article 20 of GATT as an exception to free trade rules.⁴⁵ According to the article, countries are able to create measures “necessary to protect human, animal or vegetal life and health” or “related to the conservation of non-renewable natural resources” because those measures do not correspond to unfair discrimination against foreign products or operate in a restrictive and dissimulated way over trade.⁴⁶

We notice that the interest was little and the subject was in standby until the 1970s, when it effectively became part of GATT’s concerns, especially with the creation of the Group on Environmental Measures and International Trade (EMIT Group), with the document called “Control of Industrial Pollution and International Trade” and the debates and results of the Tokyo Round of commercial negotiations (1973-1979).⁴⁷ However, the concern was not exactly environmental protection, but the negative impacts of protection measures adopted by states on international trade. Exceptions to Article 20 should be duly treated to avoid becoming rules.⁴⁸

Another sign of that preference, trade over the environment, can be identified in the decisions made when solving conflicts between countries. The case of the dolphins between the United States and Mexico sets the pace of the preference.⁴⁹ According to the group that decided it, exceptions to trade foreseen in Article 20 should be interpreted restrictively.⁵⁰ In addition, the United States had not evidenced that the prohibition to import tuna was “necessary;” it was the less restrictive way for trade to protect dolphins.⁵¹

The United States could have obtained the same objective through agreements with other countries. Finally, North Americans could not use the exceptions in Article 20 to regulate natural resources outside the borders of the country. To summarize, the United States had used an unjustified discriminatory measure against Mexi-

45. *WTO Rules and Environmental Policies: GATT Exceptions*, WTO (2016), https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm [hereinafter *WTO Rules*].

46. *Id.*

47. *Early Years: Emerging Environment Debate in GATT/WTO*, WTO (2016), https://www.wto.org/english/tratop_e/envir_e/hist1_e.htm.

48. *WTO Rules*, *supra* note 45.

49. *Id.*

50. *Id.*

51. *Id.*

cans. The conclusion could have been different if environmental protection was a priority or, at least placed at the same level of trade promotion.⁵²

The World Trade Organization (WTO) was created in January 1995 as one of the main measures of the last round of GATT carried out in Uruguay between 1986 and 1994.⁵³ The WTO was established as a permanent organization and it maintained most of GATT's principles.⁵⁴ It has its own legal personality with member states and customs unions integrated in.⁵⁵ Institutionalism and permanence make the WTO different from its predecessor. Objectives were also added to include the trade of goods, the trade of services, and the protection of industrial property.⁵⁶ The environment was expressly mentioned in the introduction of WTO's Institute as one of the Parties' *consideranda*.⁵⁷ The economic activity would have to take place through the "optimal use of global resources according to the objective of sustainable development and trying to protect and preserve the environment."⁵⁸

Among the agencies that form the structure of the WTO is the Committee on Trade and Environment (CTE), which aims at conciliating trade demands and environment protection to allow for the

52. R. Kenton Musgrave & Garland Stephens, *The GATT-Tuna Dolphin Dispute: An Update*, 33 NAT. RESOURCES J. 957 (1993). According to the panel: "The Panel considered that if the broad interpretation of Article XX(b) suggested by the United States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations." *Id.*

53. *Who We Are*, WTO (2016), http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm.

54. *Id.*

55. *Id.*

56. *What Are Intellectual Property Rights?*, WTO (2016), http://wto.org/english/tratop_e/trips_e/intel1_e.htm.

57. *The GATT Years: from Havana to Marrakesh*, WTO (2016), http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm.

58. *Agreement Establishing the WTO*, WTO AGREEMENT SERIES 1 (2016), https://www.wto.org/english/res_e/booksp_e/agrmtseries1_wto_e.pdf.

promotion of sustainable development.⁵⁹ Since the creation of the WTO, eight Ministerial Conferences have occurred: Singapore in 1996; Geneva in 1998; Seattle in 1999; Doha in 2001; Cancun in 2003; Hong Kong in 2005; Geneva in 2009-2011; and Bali in 2013.⁶⁰ However, the CTE's recommendations have not led to any relevant changes regarding the multilateral trade system in what touches the environment, although they have been considered.⁶¹ In the first Conference, the commitment to the sustainable use of natural resources and to clean economic development was reaffirmed.⁶² At the same time, the cooperation between intergovernmental environmental organizations such as the United Nations Environment Program (UNEP) was stimulated.⁶³

However, negotiation rounds that followed it only rhetorically claimed that the promotion of global trade was compatible with the requirements of sustainable development. The practical results were unsatisfactory. The evidence shows that, although stimulated by the WTO, multilateral agreements concerning the environment still fail to receive normative treatment within the WTO. These results are not part of Attachment I to the Agreement that created it, and although they could be included into its legal order through the application of Article 5 of the Agreement, the members have not officially addressed the inclusion of these results.⁶⁴

That deficit of normativity reflects on the cases that were assessed via WTO litigation, and the fundament of the decision rarely

59. *The Committee on Trade and Environment ('regular' CTE)*, WTO, https://www.wto.org/english/tratop_e/envir_e/wrk_committee_e.htm (last visited Mar. 3, 2016).

60. *Ministerial Conferences*, WTO, https://www.wto.org/english/thewto_e/minist_e/minist_e.htm (last visited Mar. 1, 2016). The Ministerial Conference, integrated by the members of WTO, is the body that makes the most important decisions within the Organization, including subjects in any of the Multilateral Trade Agreements.

61. *See generally* LENORE SEK, *THE WORLD TRADE ORGANIZATION: BACKGROUND AND ISSUES* (2005), <http://fpc.state.gov/documents/organization/57791.pdf>.

62. *Id.* at 6.

63. *The WTO and United Nations Environment Programme*, WTO, https://www.wto.org/english/thewto_e/coher_e/wto_unep_e.htm (last visited Mar. 3, 2016).

64. *See* HENRIK HORN, PETROS V. MAVROIDIS, & ANDRÉ SAPIR, *BEYOND THE WTO? AN ANATOMY OF EU AND US PREFERENTIAL TRADE AGREEMENTS 3-7* (Andrew Fielding ed., 2009), <http://goo.gl/e6EenU>.

resorts to one of those agreements.⁶⁵ As illustrated above, environmental protection is interpreted by Article 20 of GATT as an exception to free trade.⁶⁶ The legal dispute between the United States and Mexico concerning tuna showed how the nature of that exception attracts restrictive interpretation, to the detriment of the environment. That guidance has not changed even after WTO committed itself to the environmental cause.

Very recently, the subject was revisited after Mexico raised a new claim against the United States. This new claim was raised to check compliance with the North American requirement that packages of tuna sold in the country were properly labeled to state the tuna was fished without posing risks to dolphins.⁶⁷ The panel understood that the required labeling was more restrictive to trade than necessary to meet the legitimate objectives of (i) making sure that consumers were not deceived or deluded about dolphin slaughter due to tuna fishing; and (ii) contributing to protect the dolphins, making sure that the North American market is not used to incentivize fishing fleets capture tuna and threaten the life of dolphins.⁶⁸ This idea has been reiterated since the WTO's first decisions.

In *Venezuela, Brazil v. United States*, the complaint was supported by a regulation approved by the United States Environmental Protection Agency (EPA), the Regulation of Fuels and Fuel Additives founded on the 1990 Clean Air Act that set forth base toxicity levels for imported gasoline.⁶⁹ Refineries in the country were in charge of establishing those toxicity levels, which would in practice result in a differentiated and more onerous treatment in regards to the external product, as compared to the internal one.

65. *See id.* at 20-23.

66. *See* WORLD TRADE ORGANIZATION, ANALYTICAL INDEX OF THE GATT, ARTICLE XX – GENERAL EXCEPTIONS 562-97 (n.d.), https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art20_e.pdf.

67. *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm (last visited Mar. 3, 2016).

68. *Id.*

69. *Venezuela, Brazil versus US: gasoline*, WTO, https://www.wto.org/english/tratop_e/envir_e/edis07_e.htm (last visited Mar. 3, 2016).

In that case, Article III § 4 issued by GATT-94 would have been violated.⁷⁰ The United States responded, arguing that the measure was necessary in order to reduce the emissions in the atmosphere of toxic substances resulting from gasoline combustion.⁷¹ Nevertheless, the WTO decided in favor of the plaintiffs.⁷² The North Americans had not proven that the environmental exception imposed was the least restrictive possible means to facilitate trade.⁷³ Also, unjustified discrimination had been promoted between the national and the imported product. According to the WTO, the measure created a disguised and unjustifiable restriction to the international trade under the excuse of promoting the environment.⁷⁴

However, the outlook is not entirely grim. In another case that was evaluated by the WTO, the United States was questioned by various countries, including Malaysia and Thailand, because the United States' legislation, among other restrictions, forbids the sale of shrimp captured by nets that would not allow for marine turtles to escape from them.⁷⁵ For the United States, the requirement was a necessary instrument for the protection of marine turtles, which were on the list of endangered species issued by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).⁷⁶ For the plaintiffs, it was a unilateral measure against GATT.⁷⁷ However, the WTO had a different understanding of the situation; unilaterally, it was not considered reason enough to say that the impugned measure is inconsistent with GATT, and the WTO did not find unjustified discrimination had occurred.⁷⁸ Additionally, distinguished from the Dolphin-Tuna Case I, it was allowed to restrict import based on its production process, instead of restricting import based on the product itself.⁷⁹ Furthermore, the WTO used a multilateral agreement that defended the environment, which rarely happens.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 10, WT/DS2/9 (May 20, 1996)..

75. *See generally id.*

76. *Id.* at ¶ 6.

77. *Id.* at ¶ 9.

78. *Id.*

79. *Id.* at ¶ 14.

In a later dispute, the European Union sued Brazil because Brazilian laws forbid the import of used and refurbished tires.⁸⁰ However, this prohibition did not apply against the countries in the Mercosur.⁸¹ Brazil claimed to be protecting the environment, and justified the exception by asserting that the imports from the Mercosur only compromised a small percentage of total imports into Brazil.⁸² The WTO recognized that the prohibition against the import of used or refurbished tires was justifiable due to the protection of the environment, as well as public health and safety.⁸³ However, the exception was not accepted once it was considered unjustifiable discrimination.⁸⁴

Regardless, it would be premature to say that the WTO has surrendered to the evidence of the environmental problem. Economic and pragmatic interests still prevail over the need to protect the environment. The limited number of cases decided in favor of the ecological issues, the lack of normativity within the WTO, and the lack of international treaties and conventions on the subject are still reasons for pessimistic conclusions which, in face of the Doha Round—where an approximation between WTO's agreements and the agreements of other international organisms was tested with an environmental objective—still have no prospect of reversal.⁸⁵

At the very least, the little dialogue between those organisms is a problem when obtaining reasonable levels of environmental protection. It is a greater problem when recognizing the right to a healthy environment. Approximation initiatives between the WTO, regional agencies, and the United Nations for Human Rights are still shy when

80. Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶ 1, WT/DS332/AB/R (Dec. 3, 2007).

81. *Id.* at ¶ 3.

82. *Id.*

83. *Id.* at ¶ 4.

84. *Id.*

85. See generally Sabrina Shaw, *Trade and Environment in WTO*, in *TRADE AND ENVIRONMENT: CONFLICT OR COMPATIBILITY?* 5.1 (Duncan Brack ed., Routledge 2013); HENRIK HORN ET AL., *BEYOND THE WTO? AN ANATOMY OF EU AND US PREFERENTIAL TRADE AGREEMENTS* 47 (2009); see also CHRONOLOGICAL LIST OF DISPUTES CASES, https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Mar. 11, 2015) (discussing World Trade Organization cases that involve environmental issues).

we think about the challenges ahead. Without understating, it is a matter of survival.

iii. The Hindering Centrifugal Forces

The countries pose difficulty in achieving international protection for the right to a healthy environment. Economic and geopolitical interests tend to guide the external politics of each country, interfering with the guidance adopted in international forums. Thus, peculiarities of the legal and political systems of the states may solidify the adoption of environmental standards and parameters they agree to follow. The diversity of maturity stages regarding legal institutions, associated to political cultures, may delay or even hinder the harmonization of the protection mechanisms. The subject would certainly require more detail, but the aim of this article is to assist relations between the Federal government and subnational entities, and between the Executive, the Legislative and the Judicial branches, as they define and carry out environmental public policies. Another element that may interfere in the process is the recognition of a fundamental right to a healthy environment. The Constitution is a key element to establishing or, at least, canalizing the forces that work on the interrelation between the internal system and the international system for the protection of the environment.

iv. Environmental Federalism

In both the United States and Brazil, federal and state efforts to protect the environment are cooperative in nature, which is a positive element for the committal of internationally agreed engagements.⁸⁶ Nevertheless, conflicts are not rare. In the United States, the increasing federal regulation on the issue is subject to severe criticism, especially from state authorities. For example, there has been controversy between the federal and state control over the extraction of schist oil.⁸⁷ The states claimed exclusive attribution on the subject and strongly protested against the intention of making it federal.⁸⁸

86. See generally Robertson C. Williams III, *Growing State-Federal Conflicts in Environmental Policy: The Role of Market-Based Regulation*, 96 J. PUB. ECON. 1092 (2012).

87. Albert C. Lin, *Fracking and Federalism: A Comparative Approach to Reconciling National and Subnational Interests in the United States and Spain*, 44 ENVTL. L. 1039 (2014).

88. *Id.*

In general, it is said that the hypertrophy of the federal government hinders the suitable and efficient management of environmental policies by the states and local powers. The centralization of the environmental policy does not hinder the state competence, since the complementary standards set forth stricter protection standards.⁸⁹ Concerning recent state complaints, articulation and incentive formulas have been used so that state legislations follow the federal model, especially in those fields in which the trade clause is not involved.⁹⁰

Environmental executive federalism has been criticized due to the expenses it generates for subnational bodies. Between 2000 and 2010, state cashboxes were burdened by at least \$23 billion US dollars due to the main regulations adopted by the Environmental Protection Agency (EPA) during that period.⁹¹ The Supreme Court has been called to give an opinion about possible centralizing excesses by the federal government but it generally has maintained an approval of the federal standard.⁹²

Brazil's legal system is facing similar controversy. The constitution tasks all federal bodies to promote a healthy environment.⁹³ Legislative environmental competence is also shared.⁹⁴ The federal government is in charge of deciding general standards, where states and cities, when appropriate, have the complementary competence.⁹⁵

Competence is significantly reduced once the constitution privately assigns the federal government authority concerning civil, trade, and procedural law, etc.⁹⁶ That is why many state laws, some stricter than the federal laws, have been declared unconstitutional by the supreme federal court. For example, the Court "prohibited the use

89. Williams III, *supra* note 86.

90. *Id.*

91. WALTER A. ROSENBAUM, ENVIRONMENTAL POLITICS AND POLICY 42 (2014).

92. Rosemary O'Leary, *The Impact of Federal Court Decisions on the Policies and Administration of the U.S. Environmental Protection Agency*, 41(4) ADMIN. L. REV. 549 (1989); Joseph F. Zimmermann, CONTEMPORARY AMERICAN FEDERALISM: THE GROWTH OF NATIONAL POWER 83 et seq. (2008).

93. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 220 (Braz.).

94. *Id.*

95. *Id.*

96. *Id.*

of products, materials or artifacts that contain any type of asbestos in the state of São Paulo.”⁹⁷

However, that centralizing trend in the field of material competences has been seriously reduced through federal laws that forward execution, including environmental permitting processes, to the states and cities. The competence transferring or returning process is not always followed by the allocation of resources, which has generated strong criticism against local governments. For environmentalist sectors, executive decentralization may increase the effectiveness of environmental standards, both the ones foreseen in the domestic legislation and the ones taken over externally. Due to that fact, it is said that decentralization has been taking place in a disorderly manner, without any planning or articulation regarding the three spheres of government. The picture is further aggravated when we consider the significant differences between the normative and the administrative systems of the several federative agencies, some of which lack the structure to carry out the task, in addition to being easier for the decision process to be coopted by the economic power.

The dependence of the legislature is another element that creates difficulty of making commitments to agreements already adopted and promotes changes regarding the external policies on the subject. In Brazil, an environmental treaty or agreement depends on approval by the National Congress to be part of the internal legal order, as in the United States.⁹⁸ Aside from that, there is always the possibility that the Legislature approves laws that deviate from international standards for the protection of the environment, even for worse. The internal hierarchy of treaties may aggravate that picture. In case there is no hierarchy, the later law revokes provisions in a treaty that integrates the legal order. The subject is delicate in the United States because of popular sovereignty.⁹⁹

In Brazil the situation is less complicated. Human rights treaties have a supra legal position in case they are not incorporated as a

97. R.S.T.F.-SP, ADI 3937, Reator: Min. Marco Aurelio, 4.6.2008, 103, DIÁRIO DA JUSTIÇA [D.J.], 16.6.2008 (Braz.).

98. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 49 (Braz.).

99. Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT’L L. 1 (1986); John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT’L L. 310 (1992).

constitutional amendment, preventing laws to revoke them.¹⁰⁰ The issue is knowing what discipline on the environment integrates the right to a healthy or ecologically balanced environment, and thus, what is placed outside the legislative provision and only reports to merely administrative tasks that could, in theory, be changed. The use of the social environmental non-retroactivity principle, which, in its most requiring perspective, prevents changes that directly or indirectly aggravate the environmental protection system is increasing in the country, especially within the doctrine.¹⁰¹ However, it is not universal insurance against legislative changes, especially in economic crisis periods.

Even if express constitutional recognition of the right to a healthy or ecologically balanced environment tends to reduce argumentative requirements for the approval of measures aimed at protecting ecologic processes, it is necessary to consider and to promote sustainable development. There is no device on that purpose in the United States and not even recognition by means of interpretative construction by the Supreme Court, and as a consequence, it is not a constitutional right. In Brazil, Article 225 of the 1988 Federal Constitution states:

“All have the right to an ecologically balanced environment, a common use good and essential for a healthy quality of life. The Public Power and the collectivity have the obligation to defend and preserve it for the present and future generations.”¹⁰²

It is certainly an important legal contribution to stimulate governors to take over external commitments for the protection of the environment, as well as to facilitate for its possible integration to the domestic order. Politics, however, is not always limited to the law.

v. Multi-Dimensional Facilitating Forces

Environmental law and policies tend to progress when the civil society is involved, and at the same time, when states agree to collaborate more than compete.

100. *Id.*

101. *Id.*

102. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 225 (Braz.).

vi. The Participation of the Civil Society

Entrusting the destiny of humanity to institutionalized representatives of the state power is not a guarantee that an efficient international environment protection system is going to be used. Besides the critical elements of the popular representation mechanism itself, economic and geopolitical interests end up interfering in deliberative processes. Discovering the civil society as an indispensable instrument is not only beneficial for democratic legitimation, but also for the control and effectiveness of the execution of public policies, in which liberals and republicans agree.¹⁰³ The phenomenon is not only restricted to states, it is internationally expressed.¹⁰⁴

The progress of communication that technology allows for the creation of forums, discussion, and articulation networks on many subjects, including environmental ones, makes it easier to spread the information and to organize events at the same time everywhere on the planet, to have a common agenda for claims, and to strengthen globalized environmental movements.¹⁰⁵ In earlier times, non-formal spaces were defended to spread collective ideas and projects to counter-arrest the corporatism of national parliaments. With democratic gains, we can now say the same to the international community in the face of multi-lateral organisms and multi-national companies.¹⁰⁶

That stimulus to social participation can be reinforced by the constitutions of the countries. In Brazil, the constitutional text creates real social participation and right promotion tasks, for example, the ones having a social bias such as health and education, as well as a collective bias such as the right to an ecologically balanced environment.¹⁰⁷ It also assigns power for the citizen to petition, represent, and control acts performed by public agents and also to impugn them judicially through a civil suit for the violation of environmental protec-

103. David J. Frank, *The Social Bases of Environmental Treaty Ratification, 1900-1990*, 69(4) SOC. INQUIRY 523 (1999).

104. *Id.*

105. Bart Cammaerts, *Lógicas de protesto e a estrutura de oportunidade de mediação*, 7(2) MATRIZES, 13 (2013); Francis L.F. Lee, *Internet, Citizen Self-Mobilisation, and Social Movement Organisations in Environmental Collective Action Campaigns: Two Hong Kong Cases*, ENVTL. POL. 308 (2014).

106. Lee, *supra* note 105, at 309-10.

107. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION], arts. 6, 252 (Braz.).

tion obligations.¹⁰⁸ The United States Constitution also stimulates the participation of individuals and groups in the deliberative processes of the country. That happens, not expressly, but by recognizing the freedom of speech and of press, the freedom of association and assembly, and the right to petition associated with a culture of vindication and defense of what de Tocqueville called “well understood interest.”¹⁰⁹

It is right that those participation *loci* are also available for occupation by the defects of formal deliberative processes and the explanation is not a complex one. Different interests of both a moral and altruistic nature, and an economic and egotistic aspect intersect in the exercise of participative competences. Environmental policy formulators cannot disregard that plurality of voices, which results in reduced expectations regarding original projects and plans. Instead of having a technically ideal solution for problems, we end up obtaining a hybrid product of arrangements, commitments, and various consensuses from the different actors and interests involved.¹¹⁰

The environment of dialogue and conflagration has caused environmentalists to adopt negotiation strategies with some pragmatism, so as to get the more beneficial alternative, even if it is not ideal, for environmental preservation.¹¹¹ To abandon the table of negotiations would be a formula for failure for the intended policy; however, to stay in it is a sign of the agony of the idealized policy.¹¹²

That happens not only in the legislative process (for example, the current Brazilian Forest Code, Law 12.651/2012), but also along the execution of the laws. This is more visible in the center of environmental public hearings so much that, most of the time, it reduces,

108. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5 (Braz.).

109. See ALEXIS DE TOCQUEVILLE, *A DEMOCRACIA NA AMÉRICA* 148-49 (2000).

110. See GRAHAM ALLISON, *THE ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* 144-45 (1971).

111. CHARLES A. LINDBLOM & EDWARD J. WOODHOUSE, *THE POLICY MAKING PROCESS* (1993); James G. Speth, *Environmental Failure: A Case for the New Green Politics*, ENVIRONMENT 360 (Oct. 20, 2008), http://e360.yale.edu/feature/environmental_failure_a_case_for_a_new_green_politics/2075/.

112. CHARLES A. LINDBLOM & EDWARD J. WOODHOUSE, *THE POLICY MAKING PROCESS* (1993); James G. Speth, *Environmental Failure: A Case for the New Green Politics*, ENVIRONMENT 360 (Oct. 20, 2008), http://e360.yale.edu/feature/environmental_failure_a_case_for_a_new_green_politics/2075/.

but does not prevent environmental damages due to projects that from the strict standpoint of environmental protection should not receive a permit.¹¹³ Even with that bias of pragmatism, social movements are indispensable for the promotion of internal and international environment protection policies. Difficulties and deviations faced from that movement tend to be overcome by education provided by the deliberative process itself. The union of environment and democracy is the hope for a better world.

vii. International Cooperation

Environmental problems concerned with the reduction of the ozone layer and loss of biodiversity are the result of human action and its impacts can also be felt all over the world; fighting or managing it depends on the cooperation of all countries. Deficits of dialogue between international environment protection agencies clash with the effectiveness of its regulations and policies, making the economic logic prevail over eco-protection needs.

Economic theory and practice teach that, in the absence of cooperation, each country and each economic agent tends to maximize his own net benefits of cost reduction by using environmental policies.¹¹⁴ By doing so, they stimulate international competition that has deleterious consequences for the environment.¹¹⁵ Several studies indicate that the lack of natural resources and environmental disturbance may be reasons for conflicts and even wars, and may also contribute to stimulating the cooperation between countries.¹¹⁶ The more cooperation that occurs, the higher the damage and the lower the resource

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113. LCSAR, *Brazil Land Governance Assessment* 77 (Mar. 2014), http://siteresources.worldbank.org/INTLGA/Resources/Brazil_Final_Report.pdf.
114. Scott Barrett, *The Problem of Global Environmental Protection*, 6(1) OXFORD REV. ECON. POL'Y 68 (1990); ROBERT EB LUCAS ET AL., ECONOMIC DEVELOPMENT, ENVIRONMENTAL REGULATION, AND THE INTERNATIONAL MIGRATION OF TOXIC INDUSTRIAL POLLUTION, 1960-88 (1992).
115. Scott Barrett, *The Problem of Global Environmental Protection*, 6(1) OXFORD REV. OF ECON. POL'Y 68 (1990); ROBERT EB LUCAS ET AL., ECONOMIC DEVELOPMENT, ENVIRONMENTAL REGULATION, AND THE INTERNATIONAL MIGRATION OF TOXIC INDUSTRIAL POLLUTION, 1960-88 (1992).
116. See, e.g., Henry Fountain, *Researchers Link Syrian Conflict to a Drought Made Worse by Climate Change*, N.Y. TIMES (Mar. 2, 2015), http://www.nytimes.com/2015/03/03/science/earth/study-links-syria-conflict-to-drought-caused-by-climate-change.html?_r=0.

availability.¹¹⁷ There is still the variable imposed by the higher or lower return given by those resources so profitable that raw inputs tend to stimulate cooperative attitudes to stabilize markets and prices.¹¹⁸

There is also an ingredient added by the diversity of political and normative systems and structures between the countries that have already been addressed above.¹¹⁹ Those economic and institutional readings require a complement that is supplied by a culture of human coexistence that is not only based on the *homo economicus*.¹²⁰ Motivations of human actions and, inductively, of states, can be due to other reasons such as moral and political ones.¹²¹

Regardless of the direction one may follow, it is agreed that the cooperation fomented by international organisms shall take place through equalitarian bases, always considering the existing differences regarding the economic and social development between countries. The asymmetries have to be taken into account to coordinate the actions of international players. Adopting the hegemonic positions of more developed states ends up by making agreements or their effectiveness impossible.¹²²

The paralysis of WTO in the Doha round is an example. One cannot forget that it is healthy to include the private sector in that scenario, since its economic interests do not overlap the purpose of protection and the voice of the countries under development. The use

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117. Shlomi Dinar, *Resource Scarcity and Environmental Degradation, Analyzing International Conflicts and Cooperation*, BEYOND RESOURCE WARS: SCARCITY, ENVTL. DEGRADATION, & INT'L COOPERATION 26 (Shlomi Dinar ed., 2011).
118. Helge Hveem, *Minerals as a Factor in a Strategic Policy and Action*, in GLOBAL RESOURCES & INT'L CONFLICT 73 (Arthur H. Westing ed., Oxford University Press 1986).
119. Brett A. Leeds, *Domestic Political Institutions, Credible Commitments, and International Cooperation*, 43(4) AM. J. POL. SCI. 979 (1999).
120. Dirk Helbing, *Economics 2.0: The Natural Step Towards A Self-Regulating, Participatory Market Society*, 10(1) EVOL. INST. ECON. REV. 2 (June 2013), <http://arxiv.org/pdf/1305.4078v2.pdf>.
121. John Meyer et al., *The Structuring of a World Environmental Regime, 1870-1990*, 51 INT'L ORG. 623 (1997); David J. Frank, *The Social Bases of Environmental Treaty Ratification, 1900-1990*, 69(4) SOC. INQUIRY 523 (1999).
122. LAWRENCE SUSSKIND, ENVIRONMENTAL DIPLOMACY; NEGOTIATING MORE EFFECTIVE GLOBAL AGREEMENTS 18 (1994); see also Daniel Bodansky, *The Legitimacy of International Governance: A Coming Sharing of International Environmental Law*, 93(3) AM. J. INT'L L. 596, 603-604 (1999).

of certifications from “businesses friend of environment” through an expedient such as ISO 14000 tends to contribute to the process, since it does not mean a privatization of the protection parameters themselves at the expense of the deliberative power of the states, especially the poorer ones, and the claims of the globalized civil society.¹²³

The international cooperation is cause-and-effect, as one can notice, in terms of the approximation of the internal and international systems to protect the right to a healthy environment.

IV. The Role of the United States and Brazil in the International Protection of Environmental and Human Rights

The protagonism of the United States in the international policy of human rights and the defense of the environment is the foreseen result of its condition of economic, military, and cultural power.

Brazil has played the international role of hosting large conferences; however, when applying the existing legislation in favor of environmental protection, it also collides with economic interests.

a. The United States and International Protection of Human and Environmental Rights

At the end of the 1960's and beginning of the 1970's, the United States led the efforts for international agreements and treaties on the environment to be signed.¹²⁴ Treaties such as the 1972 Convention of London on ocean dumping, the 1972 Convention on World Heritage, the 1973 Convention on the International Trade of Endangered Species, and the 1978 MARPOL Protocol on the Pollution by Ships were the direct products of that effort.¹²⁵

However, the work of the United States is mostly guided by its strategic, economic, and geopolitical interests, resulting in some contradictory actions. The protagonism it adopted during that time, for most of the literature, was a result of the need to induce the other

123. Jennifer Clapp, *The Privatization of Global Environmental Governance: ISO 14000 and the Developing World*, GLOBAL GOVERNANCE 295 (1998); see also David J. Frank, *The Social Bases of Environmental Treaty Ratification, 1900-1990*, 69(4) SOC. INQUIRY 523 (1999).

124. Daniel Kelemen & David Vogel, *Trading Places: The Role of the United States and the European Union in International Environmental Politics*, 20(10) COMP. POL. STUD. 1 (2009).

125. *Id.* at 2.

countries to adopt the strict and expensive environmental legislation that, due to internal movements, it had approved.¹²⁶ The concern was more to equalize the cost of its products in the market than to convince others of the social, economic, and even ethical problem that the environmental issue raised.¹²⁷ There were also explanations for the withdrawal promoted by the country to ratify multilateral agreements, especially on the environment, after the end of the Cold War.

For example, the United States failed to ratify the 1989 Basel Convention on the Disposal of Hazardous Waste, the 1992 Convention on Biological Diversity, the 1991 Kyoto Protocol on Weather Changes, the 2000 Cartagena Protocol on Biosafety, and the 2001 Stockholm Convention on Persistent Organic Pollutants.¹²⁸ The United States' main concern is the defense of the internal interests of its producers and convincing commercial partners through unilateral sanctions.¹²⁹ The almost unconditional support to multilateral adjustment for the liberalization of trade such as WTO and NAFTA is an exception.¹³⁰

It is clear that the external North American politics assumes the promotion of Human Rights, in general, and of the quality of the environment as one of its main objectives.¹³¹ However, the words and intentions declared do not always result in the attitudes and initiatives taken.

On that regard, the contradiction is evident due to the non-ratification of the Inter-American Convention of Human Rights and the Rome Statute that created the International Criminal Tribunal.¹³² In what concerns international environmental law, refusing to sign the Kyoto Protocol and the objective of questioning the scientific bases of the relationship between global heating and the emission of gases, especially CO₂, goes beyond a legitimate exercise of doubting

126. Harold Jacobson, *Climate Change, Unilateralism, Realism and Two-Level Games*, in *MULTILATERALISM & U.S. FOREIGN POL'Y* 415 (Shepard Forman, Lynne Rienner, & Patrick Stewart eds. 2002).

127. *Id.*

128. Kelemen & Vogel, *supra* note 124, at 2.

129. *Id.* at 20.

130. CLYDE PRESTOWITZ, *ROGUE NATION: AMERICAN UNILATERALISM AND THE FAILURE OF GOOD INTENTIONS* 228 (2003).

131. *Id.* at 229.

132. Kelemen & Vogel, *supra* note 124, at 9.

the fashionable scientific certainties.¹³³ The United States may find reasons, for example, in the interest of the country to keep growing at higher rates than Europeans and in preventing competition from countries such as China that were not linked to gas reduction targets.¹³⁴ Something similar happened with the non-ratification of the Cartagena Protocol.¹³⁵ The Cartagena Protocol dealt with farmers and the biotechnology industry in the country, with the use of genetically modified organisms, and whether they would be harshly impacted with the restrictions imposed by the trade.¹³⁶

The problems of geopolitics and economic interests explain most of that withdrawal. We cannot forget that part of the international legislation for human rights is a direct or indirect consequence of North American efforts before the different bodies in the international community, and that those efforts were during the time they were away from the subject. Thus, the country plays an important role in the mobilization of the United Nations Human Rights Council to respond to flagrant violations to human rights in different parts of the world.¹³⁷ The country has signed several regional and international treaties that have the purpose of protecting human rights and the environment.¹³⁸

For many, the increasing involvement of the United States in order to protect the global environment demonstrates the progressive awareness of citizens and leaders regarding not only the severity and the importance of the problem, but also moral and economic awareness.¹³⁹

The Convention on Biological Diversity (CBD) is worth adding to the analysis regarding cooperation and the use of native and

133. Jon Hovi et al., *Why the United States did not become a party to the Kyoto Protocol: German, Norwegian and US perspectives*, EUR. J. INT'L REL. 2 (2010); see also Louis A. DiLeo, *The Polar Bear Ethic: From the Reactionary Trend in Environmental Law-making to the Climate Change Imperative*, 28 J. ENVTL. L. & LITIG. 347 (2013).

134. Kelemen & Vogel, *supra* note 124, at 21-22.

135. *Id.* at 20.

136. Miranda Schreurs, *Global Environment Threats in a Divided Northern Community*, 5 INT'L ENVTL AGREEMENTS 349, 349 (2005).

137. HUMAN RIGHTS WATCH, WORLD REPORT 2014 654 (2014) [hereinafter WORLD REPORT 2014].

138. HUMAN RIGHTS WATCH, WORLD REPORT 2013 207 (2013) [hereinafter WORLD REPORT 2013].

139. ROSENBAUM, *supra* note 91, at 8.

traditional technologies among contracting parties. M. Visentin teaches when he mentions the Convention:

Each Contracting Party has to adopt legislative, administrative or political measures, as the case may be, to allow for effective participation in biotechnological research activities of all [p]arts, especially [c]ountries under development that provide the research with genetic resources and, if possible, within the territory of those Contracting Parties.¹⁴⁰

It is important to remember that the CDB, launched in Brazil at ECO-92, was not ratified by the United States at that time.¹⁴¹ Ratification only happened one year after the Convention. Brazil, a member of the CDB, has surprisingly not ratified the Nagoya Protocol, in force since October 2014, that sets forth the rules for the fair and equitable partition among member countries of benefits from the use of genetic resources.¹⁴² It is a subject that is clearly favorable to human rights. The delay to ratify is due to the great potential of supplying genetic resources, which has to be well structured.

b. Brazil and the International Protection of Human and Environmental Rights

Brazil's priority role is played at a regional level,¹⁴³ although it had decided to be more active at a global level, especially in the first

140. M. Alice Dias Rolim Visentin, *Acesso ao Recursos Genéticos, repartição de Benefícios e propriedade intelectual: A conservação da Biodiversidade e os direitos de patentes* [Access to genetic resources, sharing of benefits and intellectual property: Conservation of Biodiversity and patent rights], 17 (9) REVISTA VEREDAS DO DIREITO 163, 168 (2012).

141. *Id.*

142. *Id.*

143. Mercosul - *Tribunal Permanente de Revisão, Laudo n. 1/2005*. (Brazil worked to include the “environmental exception” for the Common Market of the South. Article 2, b, in Attachment I of the Assumption Treaty refers to the provision in article 50 of the 1980 Montevideo Treaty that says, “Art. 50. No provision in this Treaty shall be interpreted as a hindrance to the adoption and compliance of measures for: d) the protection of the life and health of people, animals and vegetal.” The Permanent Review Tribunal, court of Mercosur for the solution of controversies between its members, started to apply the principle of proportionality to assess, in the concrete case, the possible use of exception. It also worked to create the Work Subgroup n. 6 on Environment, which tries to promote the integration between trade and environment. The same can be said regarding the approval of the Board Agreement on Environment of Mercosur, which stated the principles of the Declaration of Rio de Janeiro on Environment and Development in 1992). *Id.*

ten years of this century.¹⁴⁴ That role and protagonism are also marked by actions that are not always coherent with the defense of human and environmental rights. In the United Nations Human Rights Council, with a representation between 2010 and 2011 as well as between 2013 and 2014, Brazil has voted in favor of the resolutions that addressed critical situations in several countries such as Belarus, North Korea, Iran, Syria, Sri-Lanka, and Sudan.¹⁴⁵ At the General Assembly of the United Nations, still in the first two years, the country voted in favor of two resolutions that condemned the violence of the State of Syria.¹⁴⁶ Also in that year, during the Universal Periodical Review at Human Rights Council, the country accepted 159 out of the 170 recommendations, agreeing to adopt measures to fight torture and improve the conditions of prisons and of public safety.¹⁴⁷

However, the new period at the Council was a step backwards and that behavior was repeated within the General Assembly. In 2013, for example, Brazil abstained from voting for a resolution that condemned the violence in Syria, recognizing the Syrian opposition, the National Coalition, as “an efficient speaker for a political transition;” Brazil did the same for the resolution concerning violations to human rights in Iran, such as torture and public executions.¹⁴⁸ At the end of that year, Brazil seemed to have the former positive attitudes when it supported a resolution that demanded all parts of Syria to stop violations and abuses to human rights and to international humanitarian law.¹⁴⁹ Its relative alignment with countries such as Russia and China, especially within BRIC, tend to slow down a more consistent external policy for the protection of the rights.¹⁵⁰

Especially on the environmental field, its work was praised at Rio 92 (Section II Conference of the United Nations on Environment and Human Development) for defending international cooperation for the promotion of fair and sustainable development in the course of a

144. Peter Dauvergne & Déborah Farias, *The Rise of Brazil as a Global Development Power*, 33 *THIRD WORLD Q.* 5, 903 (2012).

145. *Id.*

146. Visentin, *supra* note 140.

147. *Id.*

148. *WORLD REPORT 2014*, *supra* note 137, at 222-23.

149. *Id.*; *WORLD REPORT 2013*, *supra* note 138, at 207-08.

150. Amado L. Cervo, *Brazil in the Current World Order*, 1(2) *AUSTRAL: BRAZILIAN J. STRATEGY & INT'L REL.* 35, 40 (2012).

positive agenda, Agenda 21.¹⁵¹ At Rio 20, it promoted the adoption of the Objectives of Sustainable Development and of a new global indicator, the Inclusive Wealth Report (IWR).¹⁵² Brazil also contributed to the creation of the C-40: groups of cities worldwide, including Curitiba, Rio de Janeiro, and São Paulo, with common objectives of adopting sustainable urban policies.¹⁵³

Economic interests associated to strategic positions led to withdrawals or partial defenses of the environment in the global and regional scenarios, similarly to the human rights in general. A picture of that scenario may be found in the behavior of the country in face of the concession of preventive measures by the Inter American Commission for Human Rights, when the groups of native people impacted by the project were listened to in order to suspend the construction of the Belo Monte power plant.¹⁵⁴ The answer was truculent, not only when it classified the conclusions of the Commission as “premature and unjustified,” but also when it withdrew its ambassador at the Organization of American States.¹⁵⁵ After that, it proposed changes to the inter-American system of human rights that included the reduction of the power of the Commission to issue preventive measures.¹⁵⁶

The implementation of the commitments taken over externally, including the ones of which it was one of the promoters, still needs to be improved. Lack of priority of government planning and continuity, allied with the weak participation of the civil society, explains the low execution effectiveness regarding environmental objectives and targets the country agreed to accomplish. An example can be found in the implementation of the Agenda 21 by the cities. Information on the environment from IBGE’s “Research Profile of Brazilian Cities” indicates that from the Agenda 21 that existed in 2002, only 20% were

151. JOSE GOLDENBERG, *NEGOTIATING CLIMATE CHANGE: THE INSIDE STORY OF THE RIO CONVENTION*, 155-57 (Bo Kellén et al. eds., 1994).

152. *Id.*

153. ANDRÉ A. C. LAGO, *ESTOCOLMO, RIO, JOANESBURGO: O BRASIL E A TRÊS CONFERÊNCIAS AMBIENTAIS DAS NAÇÕES UNIDAS (2007)*; see also Clitia Helena B. Martins et al., *Da Rio-92 à Rio+ 20: Avanços e Retrocessos da Agenda 21 no Brasil* [Rio- 92 to Rio + 20: Progress and Setbacks of Agenda 21 in Brazil], 42(3) *INDICADORES ECONÔMICOS FEE 97* (2015).

154. *WORLD REPORT 2013*, *supra* note 138, at 207.

155. *Id.*

156. *Id.* at 206.

still in force, although not forcibly effective by 2012.¹⁵⁷ The other ones had simply been forgotten.¹⁵⁸

Large projects such as the transposition of São Francisco River or the construction of Belo Monte, and the organization of mega events in the country such as the World Cup in 2014 and the Olympics in Rio de Janeiro in 2016, Rodrigo and Carlos José call attention to the following:

Associated to the interest of agro business and mining companies, mobilized government forces to mitigate the environmental rules, promote important interventions to the environment without the appropriate inspection of impacts and taking, in some of them, to social spatial segregation of the urban space (for the construction related to the World Cup and the Olympics) and even the rural space with the impact and displacement imposed to traditional groups and communities (such as in Belo Monte and the transposition of São Francisco River).¹⁵⁹

Nevertheless, successes have been reported. Deforestation has reduced by seventy percent between information dated 2013 and the average between 1996 and 2005 with the use of measures such as the creation of new protected areas in the Amazon. These measures include native reserves and sustainable use units, and the approval of the Plan for the Prevention and Control of Deforestation in the Legal Amazonia, besides the work of control bodies, especially the Public Prosecutors' Office.¹⁶⁰

V. Conclusion

With the trend to treat the environment at the level of human and constitutional rights, it would be fair to think that the protection

157. INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA (IBGE), *PERFIL DOS MUNICÍPIOS BRASILEIROS 2012* [PROFILE OF BRAZILIAN MUNICIPALITIES 2012] (2013).

158. *Id.*

159. Rodrigo M. Vilani & Carlos José S. Machado, *Justiça social e ambiental: reflexão sobre os megaeventos esportivos no Rio de Janeiro* [social and environmental justice : reflection on the mega sports events in Rio de Janeiro], 5(3) SUSTENTABILIDADE EM DEBATE 245 (2014).

160. Doug Boucher et al., *Report: Deforestation Success Stories. Tropical Nations Where Forest Protection and Reforestation Policies Have Worked*, 24-25 (2014), http://www.ucsusa.org/sites/default/files/legacy/assets/documents/global_warming/deforestation-success-stories-2014.pdf.

of that good would be insured in the countries that thus consider it. However, that is not true because in the globalized world, states cannot make environmental policy decisions without taking into account international problems and contexts related to it. They consider the effectiveness of the measures and also the impacts they are producing in their territories. Against that background, we tried to analyze the intentions of the United States and Brazil in the international promotion of the right to a healthy environment.

The performance of the United States for the international promotion of a healthy environment is variable and, nowadays, it is shy once its strategic, economic, and geopolitical interests mostly guide it. Its protagonism within the United Nations in the 1970's was replaced by reactive attitudes. One example of that was not ratifying several conventions, such as the 1989 Basel Convention on the Disposal of Hazardous Waste, the 1992 Biological Diversity Convention, the 1997 Kyoto Protocol, and others already mentioned above.¹⁶¹

Where there are concerns in environmental law, there also tends to be concerns with human rights generally. The United States has been adding the promotion of human rights in general and the quality of the environment in particular to its external politics speech. However, there is an evident contradiction for not ratifying the Inter-American Convention of Human Rights and the Rome Statute, among others.¹⁶² But it is also clear that North American citizens are getting involved in the defense of the environment with the moral awareness of the environmental issues due to economic progress at any price.

161. Noah M. Sachs, *Out of Sight, Out of Mind: Ratifying the Basel Convention on Transboundary Waste*, CPR BLOG (May 1, 2012),

<http://www.progressivereform.org/CPRBlog.cfm?idBlog=08A5B515-BA05-B72A-9AE04583A239DE21>; Robert F. Blomquist, *Ratification Resisted: Understanding America's Response to the Convention on Biological Diversity, 1989-2002*, 32 GOLDEN GATE U. L. REV. 493, 493 (2002); *China Calls on the U.S. to Join Kyoto Protocol*, WORLDWATCH INST. (2013), <http://www.worldwatch.org/node/144>.

162. Dan Beeton, *The Other Side of the IACHR Reform Debate*, CEPR CTR. ECON. & POL'Y RES. (Mar. 22, 2013), <http://cepr.net/blogs/the-americas-blog/the-other-side-of-the-iachr-reform-debate>; Curtis A. Bradley, *U.S. Announces Intent Not to Ratify International Criminal Court Treaty*, AM. SOCIETY INT'L L. (May 2002), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5361&context=faculty_scholarship.

The participation of Brazil to promote a healthy environment is revealed regionally and nationally at a global level also as contradictory. Its external protagonism in the 1990's was followed by more careful and even reactive behavior. Then, internally, it contradicted some international commitments and gradually reduced the levels of environmental protection. The construction of the Belo Monte power plant, the transposition of the S. Francisco River, and the organization of mega events such as the World Cup and the Olympics mobilized government forces to mitigate environmental standards.¹⁶³ Economic and strategic reasons were behind that mitigation and even disrespect to those already mitigated standards.

The United States, in the face of the reduction of tax barriers on global trade after the Second World War, helped create the General Agreement on Trade and Tariffs (GATT), which had no concern about the environment at its basis.¹⁶⁴ The decisions made, such as the case of Mexico versus United States in 1991 regarding tuna sales and dolphin protection, make the preference for the trade subject to clear in negotiations between trade and environment.¹⁶⁵

It was only with the World Trade Organization in 1995 that the Committee for Trade and Environment was created to conciliate trade and environment protection demands.¹⁶⁶ However, even after eight Ministerial Conferences for the members of the Organization, there were no significant changes to the multilateral trade system regarding the protection of the environment. Other negotiation rounds reproduced simple rhetoric claims for the promotion of world trade compatible with the requirements of sustainable development.

One can conclude that the international system for the protection of human rights has given a fragment treatment to the right to a healthy environment, making it difficult to frame it as a kind of human right and, even more important, to make it effective. Also within

163. WORLD REPORT 2013, *supra* note 134, at 207 (2013); *What Are the Challenges?*, U.S. EPA, <http://www.epa.gov/sfbay-delta/what-are-challenges>.

164. *Milestones: 1937-1945*, OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1937-1945/bretton-woods>.

165. *Mexico, etc. v. U.S.: 'Tuna-Dolphin*, WTO, https://www.wto.org/english/tratop_e/envir_e/edis04_e.htm.

166. *Trade and Environment*, WTO, https://www.wto.org/english/tratop_e/envir_e/envir_e.htm.

the WTO, the submission of the right to a healthy environment to the orders of economic logic is recurrent.

It is more than time for economic issues to be solved jointly with environmental issues once they are the two sides of the same coin. International law for human rights has to take over the task to define the content and the structure of the right to a healthy environment and reinforce its institutionalism by establishing mechanisms to hold accountable those people, groups, or even states that start environmental crises. The WTO has to take the environmental issue seriously when negotiating, adjusting it to stimulate international trade.