

INTERNATIONAL LAW OF SUSTAINABLE DEVELOPMENT, TRADE AND COMPETITIVENESS

>> A bi-regional perspective

HENRIQUE LIAN

Aline Marsicano Figueiredo (organizer)

With collaborations from:

André Odenbreit Carvalho; Carlos Nomoto; Daniela Arruda Benjamin; Eduardo Matias;
Frank Hoffmeister; Gabriele Reitmeier; Géraldine Kutas; Kathia Martin-Chenut; Karima Essabak;
Lorella de la Cruz Iglesias; Luiz Marques; Marco Antonio Fujihara; Maristela Basso; Werner Grau.

INSTITUTO
ETHOS

Friedrich Naumann
STIFTUNG **FÜR DIE FREIHEIT**

Brazil-European Union Dialogue

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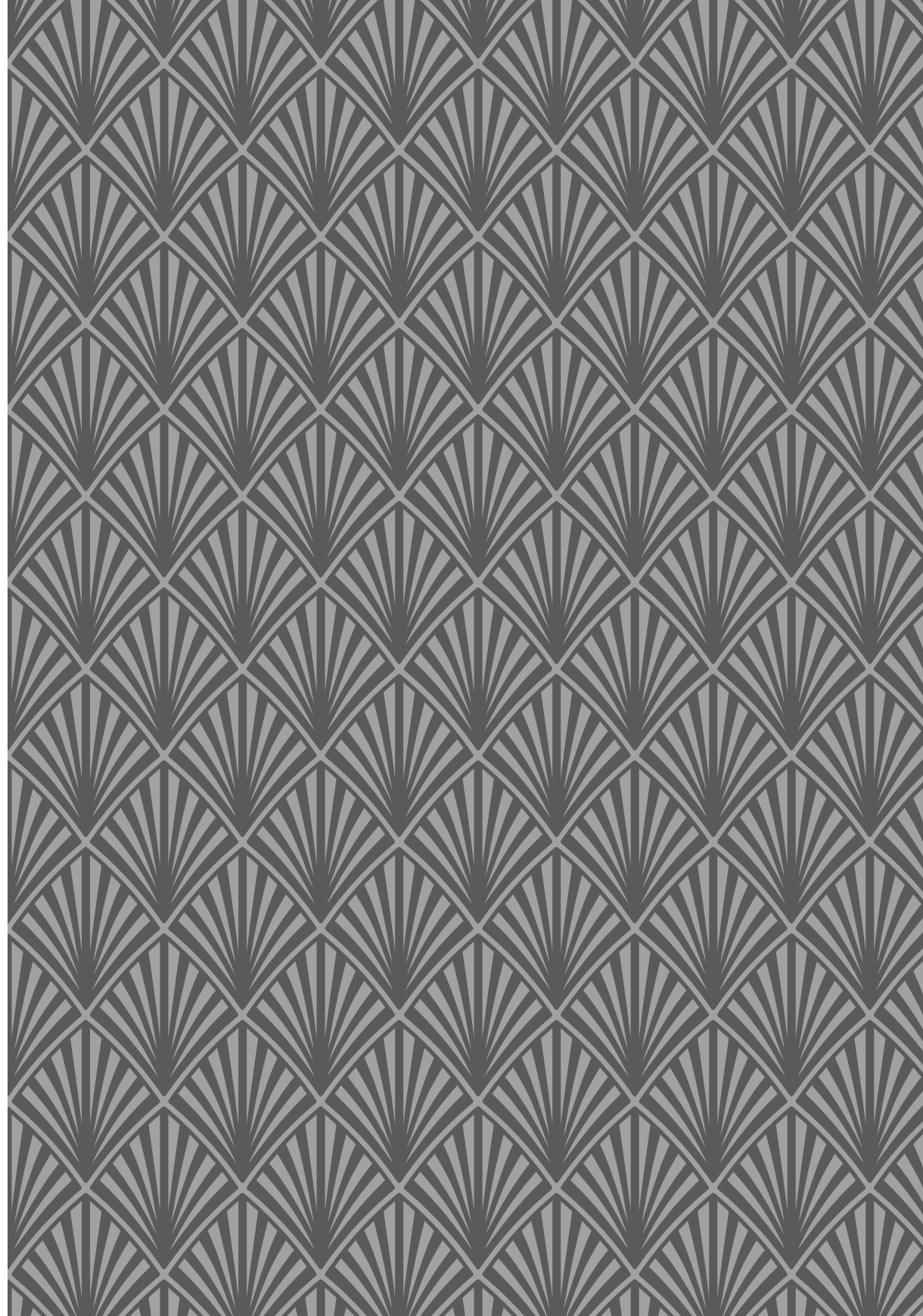
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PREFACE

The author, the collaborators and the organizations involved in this project depart from two assumptions. The first one is that to walk towards sustainable development, one needs more than good intentions. Complex analyses, adaptation and the creation of new and proper mechanisms are necessary, and the nature of these instruments may vary from economic and financial to legal. The second assumption regards the centrality of trade relations to the effective implementation of sustainability concepts. With no embedding of these concepts in everyday matters of trade, we remain in the realm of rhetoric or, as mentioned before, good intentions.

This publication marks the beginning of the third phase of the project *Brazil-European Union: Trade and Sustainability*, which is sponsored by and co-constructed with the Friedrich Naumann Foundation.

Owing to an indication from the External Relations Ministry, Ethos Institute was invited to monitor negotiations of a Free Trade Agreement between Mercosur and the European Union, making this project possible. In the first phase of the project, we organized a seminar, in November 2013, sponsored by BNDES (the Brazilian Development Bank), to discuss how economic incentives could catalyze the negotiations of the trade agreement between the two economic blocs.

At that time, we hoped to identify what were the comparative advantages of each bloc and how the sustainability perspective could open the way to new opportunities, looking for these advantages, notably in the areas of technology and processes, for the EU, and products that are not intensive in greenhouse gas emissions, on the part of Mercosur. The results of the seminar were included in the book *Brazil-European Union Dialogue: Trade Negotiations and the Building of Low-Carbon Economy*, in May 2014.

From this discussion, we left for a deeper investigation of sustainable development in International Law, trying to understand to what extent it was inserted in treaties and conventions. At this point and already supported by the Friedrich Naumann Foundation, with whom we started a five-year partnership, we commissioned a report on sustainable development in International Law. The study served as inspiration for our transition from a purely economic focus, translated into our first publication, to the legal approach, notably the prospect of transformation of *soft law* into *hard law*, discussed throughout this second edition.

Once again, we brought the issue to discussions at a seminar, this time allocated in Brussels, with: Hans H. Stein, Director of International Policy Dialogue, Friedrich Naumann Foundation; Lorella de la Cruz Iglesias, Coordinator of Commercial Relations between the European Commission and Mercosur; André Odenbreit Carvalho, Chief Minister of the Brazilian Mission to the EU; Frank Hoffmeister, Expert in World Trade Organization (WTO) and Cabinet Member of Karel de Gucht, the European Union Parliamentarian; Marco Antonio Fujihara, Director at Key Associados and Manager of the BNDES Brasil Sustentabilidade fund; Carlos Nomoto, Sustainable Development Director of Banco Santander; Karima Essabak, of World Forum Lille; Gabriele Reitmeier, of Friedrich Naumann Foundation, Maximiliano da Cunha Henriques Arienzo, Sub-Chief of the Environment Division of the Brazilian Ministry of External Relations; Luiz Gustavo Villas-Boas Givisiez, Second Secretary, Mission of Brazil to the European Union; Henrique Lian, Executive Director of Institutional Affairs at Ethos Institute;

Aline Marsicano Figueiredo, Coordinator of Institutional Affairs at Ethos Institute; Géraldine Kutas, Senior Advisor of UNICA President for International Affairs and Director of International Relations. This highly qualified group allowed us to advance in legal discussions about sustainable development and explore the potential of this agenda, always bearing in mind the commercial perspective.

This seminar, held in May 2014, was the opportunity to test an initial hypothesis on International Law of Sustainable Development and to understand how the European Union and Brazil – and afterwards extend the discussion to Mercosur - see this as an opportunity.

The topic was also at the center of a discussion organized at the Ethos Conference 2014, a Roundtable on International Law for Sustainable Development. Our illustrious group was composed by: Daniela Arruda Benjamin, General Coordinator for Dispute Settlement at the Ministry of External Relations; Eduardo Matias, Associate at the Nogueira, Elias, Laskowski and Matias office; Luiz Marques, Professor in the Department of History, Unicamp; Maristela Basso, Lawyer and Professor of International Law at Universidade de São Paulo Law School; Werner Grau, Associate at the Pinheiro Neto Advogados; Henrique Lian, Executive Director of Institutional Affairs at Ethos Institute; and Aline Marsicano Figueiredo, Coordinator of Institutional Affairs at Ethos Institute. With the rich contributions that participants provided to this table, we had inputs to further deepen our studies of the subject, strengthen our advocacy strategy and raise our project to the next level, all of which we present in this publication.

This book, more than a compilation of the enriching discussions organized in Brussels and São Paulo, during the Ethos Conference, is our contribution to the development of Public International Law, specifically, the International Law of Sustainable Development, and a real progress in discussions about the promotion of sustainable development in trade negotiations.

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This work, as well the seminars that served as inputs for the project and publications, would not be possible without the support of our partners. So we would like to thank:

- The Friedrich Naumann Foundation, sponsor and major partner in the creation and execution of the project;
- The Ministry of External Relations, Department of International Negotiations and, especially, the Ambassador Ronaldo Costa Filho;
- The Mission of Brazil in Brussels, especially André Odenbreit Carvalho, Chief Minister of the Brazilian Mission to the European Union;
- The European Commission, particularly, Lorella de la Cruz Iglesias, Coordinator of Commercial Relations between the Commission and Mercosur;
- The European Parliament, here represented by Frank Hoffmeister, an expert in the system of the World Trade Organization (WTO) and cabinet member of Karel de Gucht, the European Parliamentary Union;

- The Politica Externa Magazine and, especially, Carlos Eduardo Lins da Silva, for letting us reproduce the article “From Moral Commitment to legal Obligation in the International Order” published in the 4th quarter, 2014;
- The experts present in Brussels and those who helped us to continue the discussions in São Paulo, during the Ethos Conference and brought us greater clarity on the issue;
- The lawyers Maristela Basso, Lawyer and Professor of International Law at the Law School of the USP and Werner Grau, Partner at Pinheiro Neto Advogados.

Finally, a special thanks to Dr. Gabriele Reitmeier, former Director of the Friedrich Naumann Foundation office in São Paulo, whose dedication has allowed us to turn the project into reality.

To all, our thanks for their efforts and commitment to building a more just and sustainable society.

PART I. TRADE AND SUSTAINABILITY

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PROMOTING SUSTAINABILITY THROUGH FREE TRADE

**André Odenbreit Carvalho, Carlos Nomoto,
Hans H. Stein, Henrique Lian, Lorella de la Cruz
Iglesias, Marco Antonio Fujihara**

Hans H. Stein: We have decided to start discussions with our friends and colleagues from Brazil who came over here for a two-day conference with representatives from European Institutions and other stakeholders. For the Friedrich Naumann Foundation, trade is an important issue. We have already discussed earlier this year the negotiations between the United States and the European Union regarding trade and investment partnerships. We also brought to light some aspects of negotiations for participating countries and how they will influence trade and, with that in mind, we have debated trade strategies with Commissioner De Gucht¹.

¹Karel Lodewijk De Gucht is a Belgian politician who has been the European Commissioner for Trade from February 2010 to 31 October 2014.

From left to right,
Henrique Lian, Ethos
Institute; Carlos Nomoto,
Banco Santander;
Lorella de la Cruz
Iglesias, coordinator of
Commercial Relations
between the European
Commission and
Mercosur; André
Odenbreit Carvalho,
Chief Minister of the
Brazilian Mission to
the EU; Marco Antonio
Fujihara, manager
of Brazil's BNDES
Sustainability Fund
and Gabriele Reitmeier,
the Friedrich Naumann
Foundation.



Therefore, this debate neatly fits the whole of our debates on trade, as we believe that it benefits consumers, because it meets their needs and increases the welfare of all people. People who trade and negotiate usually don't shoot each other and this shouldn't be forgotten. Therefore, it is a true pleasure to welcome: Lorella de la Cruz Iglesias, Trade Coordinator for Free Trade Agreements (FTA) with Mercosur, DG Trade, European Commission; Carlos Nomoto of Banco Santander; and Marco Antonio Fujihara who is Manager of the BNDES Fundo Brasil Sustentável (Sustainable Brazil Fund); and André Odenbreit Carvalho, Diplomat for the Brazilian Mission at the European Union. The discussion will be moderated by Henrique Lian, Executive Director at the Ethos Institute.

Henrique Lian: Thank you so much Doctor Stein. I want to thank you in the name of the Friedrich Naumann Foundation for making this seminar happen here in Brussels. It is our second initiative in an attempt to develop contents on this very important and difficult issue of

sustainable development in a free trade agreement between Mercosur and the European Union. We know that the success of any negotiation is the ability of the parts to put aside their differences and concentrate in what they have in common. In this case, we are quite sure that sustainable development is what the European Union and Mercosur have in common. Although the concept of sustainable development can vary a lot, being generally associated with the green economy concept for the European Union, and poverty eradication for Mercosur, the common basis is there, and everybody agrees we need economic growth, social inclusiveness, and environmental protection for a sustainable development agenda. Hence, we have this five-year joint project to produce consistent knowledge and build a narrative for key actors in this dialogue. In my short interventions, I will talk more about it.

Without further ado, I will give the floor to Mrs. Lorella de la Cruz Iglesias, I and would like to hear her comments concerning European Union and sustainability conditions in a possible free trade agreement.

Lorella de la Cruz Iglesias: Thank you for the invitation. I will introduce myself for those who don't know what I do or to whom I work for. I am in charge of negotiation coordination between the European Union and Mercosur and I am the director on trading for the European Commission. This description is one of the reasons why I was invited here, and I really thank you for the opportunity to talk about such an important issue. For the European Union, sustainable development is an overarching principle that, in fact, is in the treaties themselves. Thus, since the last treaty of the European Union, we have a provision that warrants sustainable development advancement based on the three pillars: economic development, social development and environmental protection. So it is an obligation for the European Union (EU) to take action both domestically and elsewhere to pursue this objective. Trade then plays a central role, since it promotes economic growth, which provides capacity to improve social conditions and to adopt environmental protection measures. This is especially true for cases of countries that need to adopt certain economic, social and environmental measures while engaging in structural reforms.

Nowadays, trade is really an ingenious type of growth. It is more important today than maybe before the economic and financial crisis. However, trade cannot be the only tool for sustainable development, which is clear. Trade has to go hand in hand with other policies, both domestic and international. Obviously, policies in areas such as climate change, environmental protection, and conventions on labor rights are fundamental. As for the EU trade policy, there is obviously a consistence in the mutual supportiveness regarding other policies involved in the goal of sustainable development.

There are many ways to do it, and therefore we have different ways to get to this target. There is participation in multilateral forums, like the general initiative on green goods being launched this year², for example. In the context of the WTO, they were quite supportive. There is also an autonomous trade measure, a very important one in the EU It is the GSP Plus strategy³, which provides additional trade preferences for countries that agree to add international conventions on Human Rights and environmental agreements. For example, Paraguay is one of the Mercosur members benefiting from this regime.

I want to talk more about the role played by the FTA in promoting sustainable development, about how we can pursue or ensure that this objective is safeguarded by a free trade agreement (FTA).

The EU has different ways to deal with it. I would say that most of this is in the introduction of a title in our FTA about sustainable

² *Single Market for Green Products Initiative* whose goal is to standardize measuring processes of environmental performance of green products, facilitating the identification of green products as such.

³ The Generalized System of Preferences, or GSP, is an initiative to stimulate sustainable development and good governance. The system establishes a preferential tariff system for Less Developed Countries (LDC), so they can, for instance, export to the EU everything but guns without paying any tariffs. Countries that are not considered LDC may have access to preferential tariffs (GPS+) once they ratify and apply international conventions in areas such as Human Rights, Labor Rights, sustainable development and good governance.

development, these issues related to trade, but, before going further into this topic, I will mention first the importance of evaluation on the potential impact of the trade agreement. As you may know, any EU initiative has to go through a prior process of impact assessment on the potential benefits and challenges in terms of economic, social and environmental effects. Trade is not an exception. One key aspect of this process is its conduction by an independent contractor, in charge of providing consultation to a broad range of stakeholders, including our trade partners, those with whom we are negotiating. As a result, one has a very broad view of the challenges we might face in terms of sustainable development. Naturally, the agreement with Mercosur follows the same procedure.

The EU conducted this sustainability impact assessment back in 2009. After that, the study was published and, as a result, the EU adopted a series of recommendations. The idea of these studies is to identify challenges and identify possible measures that could reduce anticipated negative effects in a long-term or a short-term perspective. In the Mercosur case, as I said, this study was conducted in 2009 and became more complete for the negotiation of the agreement. We included a solid title on sustainable development provisions related to trade and free trade agreements. We are not talking about the negotiation of the free trade agreement here; we are talking about an association agreement; so there are other agreement pillars to deal with issues relevant to sustainable development. There is the political pillar incorporation, on Development Cooperation, for instance, but I will not deal with this part of the agreement.

We have a consistent practice of agreeing on these titles and free trade agreements. We have recent examples, like Korea, and Colombia and Peru in Central America. Also, the agreements negotiated with Ukraine, Singapore, Moldova, Georgia, and in the ongoing process this will be an obvious part of the negotiation. How do we support sustainable development in the FTA? We aim at getting binding commitments, but binding commitments that are a reference in international standards. We don't intend to duplicate or create parallel standards in terms of

sustainable development. We also foresee the right of the parties (to the agreement) to regulate. The aim is to obtain a high level of protection in both social and environmental objectives. Because the parties are easily free to regulate, we aim at the effective enforcement of domestic legislation. The reason is to avoid risks such as reducing your regular protection in order to promote trade and investment, and so we secure the commitment from parties in order to avoid this kind of "race-to-the-bottom" approach on environmental and social issues.

Moreover, the use of environmental and social measures as protectionism is often a concern to trading partners and something we try to ensure that is not going to happen in the agreement. Finally, on the contents of the agreement or the commitments, we also have a type of provision that is supportive of some initiatives that deal with facilitating sustainable development while promoting trade or the making of products with natural resources in a sustainable fashion. Timber or fisheries are good examples. The FTA case with Singapore that was recently completed, for example, has specific articles dealing with fish products, providing sustainable product management commitments for the parties. There are also provisions on illegal logging as well. We also highlight the parties' responsibility to promote the kind of initiative that presents public or private market standards related to policies of trade and, obviously, responsibilities of corporations as well.

Another important element for the sustainable development approach in our FTA is the institutional set-up. We consider that it is essential to follow up these commitments as an important part of the agreement's wide acceptability itself, and so our approach is to provide an institutional set-up that seeks government-to-government dialogue and the involvement of civil society. Apart from this set-up, we also have the objective of providing an arbitration system. We have a fair example if the Korean FTA with the establishment of domestic civil society groups; one group from the EU, and another from Korea. Consequently, there is dialogue between those two groups in the form of a new civil society forum. I believe this particular forum has had two meetings already.

In addition, you have the government-to-government dialogue and trade discussed within a sustainable development committee, providing an overview on the actual implementation of commitments. We also have a very recent example with the first meeting of the Colombia and Peru committee on trade and sustainable development in the realm of the EU. It happened as shortly as last February. It was also an open committee involving civil society. We really believe it is important to have the involvement of civil society to achieve a wide acceptance of the agreement and to have the different viewpoints regarding the impacts of the agreement. In the future, we will do this kind of meeting under the realm of the EU on Central American agreements. Essentially, to sum up our approach, sustainable development has to be an effective part of free trade agreements. In fact, I will not hide that this is really one of many elements in oversight when it comes to the European Parliament, especially concerning consulting on the agreement's title, and this is drawing the attention of the civil society.

Our approach is based on international conventions, and I believe we have common ground with Brazil and other Mercosur members to agree on those standards. We are already members of several conventions in areas such as environment and labor. There is enough middle ground to strengthen the cooperation on the enforcement of these conventions. The key challenge now is to agree on the way to pursue the objectives under the agreement.

Henrique Lian: Thank you, Mrs. Lorella. I would just like to remark something concerning the social awareness you have mentioned. In our last seminary in November, in São Paulo, a congressional representative called Leonardo Gadelha, said that “conquerors react to social pressure”. Therefore, if there isn't social pressure for sustainable development inside a country, there won't be sustainable development. Applying this same rule, I am clearly aware that even in the international agenda we need some pressure for sustainable development. This is one of the targets of this project, together with making key negotiators discuss these issues, talking to international parliaments, provoking both the European Union and the Mercosur,

talking with international companies and international NGOs, so as to put pressure over official negotiations and, ultimately, making the agenda move forward.

Now, maybe this question will come up after everyone speaks, but I would like to bring some light to it. We know that the agreement association between Mercosur and European Union largely contemplates the political section, the cooperation section and sustainable development. Now we are coming into the “moment of truth”, which is the actual trade agreement. Hence, what are the real perspectives for the sustainability agenda move forward in the trade dimension with or without legally binding commitments inside the treaty?

I will give the floor to Mr. Marco Antonio Fujihara, who is a special advisor of the World Bank, fund manager of the Brazilian National Development Bank, and advisor to both Brazilian and international companies.

Marco Antonio Fujihara: Thank you very much. I am from a business sector that looks for sustainability in the risks, not to lower them, but to identify and quantify them. The Business sector looks for sustainability approaches regarding the risks, and there are very good opportunities for us in the private sector, in several areas, actually, if you consider the sustainability agenda. Brazil has relevant experience with that. The case of renewable energies, for example, illustrates this very well. When sustainability got attention because of the Rio 92 in Brazil, the energy sector started looking at it as an opportunity and they managed to make profit from it.

On a separate note, we have a very good regulation of capital markets. Two weeks ago, the Brazilian Central Bank made a specific agenda for sustainability for all the banks. Under the new regulation, they all need to consider sustainability risks when giving credit from now on, not only for social impact investments or for infrastructural projects, but also for credit in general. In Europe, on the contrary, the Central Bank

doesn't have this approach. Therefore, it is not only about decreasing risks, but also about how to increase opportunities and the new regulation is very relevant. When the Central Bank applies it to the other banks, what is the message for the markets? The message is "ok, we have a lot of opportunities; even if we have a considerable amount of risks; but it is possible to mitigate risks and increase opportunities in terms of capital or credit market increase"

Moreover, the private equity/venture capital industry in Brazil is extremely important, and we have several important agendas for this sector, some of it introduced internationally. People are looking for very good investments, to increase profitability. Why? The answer is very simple: market logic. When sustainability is brought into the picture, one must create a new kind of business while decreasing risks, especially social risks. We, in Brazil, have some specific risks. To do business in the Amazon region, for example, or in the Northeast, regions rich in natural resources, one must face serious social and environmental risks, which turn into reputational risks and impact profit rates. Is it possible to work under this perspective? Absolutely, because even if the risks are high, the opportunities are even greater.

Innovation in sustainability is a fascinating approach, not only in Brazil, but in other countries as well. Paraguay, for instance, has a very strong agenda on innovation in sustainability right now, seeking a balance between forest preservation and housing difficulties in one case, or investing in sustainable agriculture while managing water resources on another. In the agribusiness, Brazil offers attractive investment opportunities, especially when you consider sustainability as a differential. How can one use these advantages to add value within this framework?

There is one index in the international market called Dow Jones Sustainability Index. It is one of the most important shares index in the world today. Dow Jones Sustainability Index has up to this moment ten Brazilian companies, and by that I mean not only big Brazilian companies such as Vale do Rio Doce or Petrobras, but smaller companies as well. One case that illustrates this is Cemig, a small energy company

from Minas Gerais, which has sustainability as part of its DNA and is considered one of the most sustainable companies in the world. It is a very good example of how it is possible to use sustainability to impact the international market. Another example is Banco do Brasil, a commercial bank that got in the Dow Jones Sustainability Index for the first time recently and had its share for ADR increased 12% in one year.

The bottom line is this: business shares are very important for international markets, and shares in Brazil, if we consider the sustainability index, reflect how sustainability affects results and how it is relevant when dealing in a risky sector. In São Paulo, Ibovespa, the stock exchange market, has a specific index that takes into account sustainability. The name is ISI, *Índice de Sustentabilidade Ideal*, [Ideal Sustainability Index] and the most important companies are in that stock exchange market and use this index for share trading at the national and international levels. How can we create a similar mechanism for trading financial resources?

In the agribusiness sector, there is a very good example of trading financial resources. Copersucar, for example, the most important national commodity company, deals with sustainability in its core strategy. Because it produces sugarcane, it can produce either sugar or biofuels. The second product contributes to the environment and, in addition, requires a good amount of P&D investment, which can only benefit the market while bringing profits at the same. So it's clear that it is only a matter of transforming sustainability into opportunities.

Henrique Lian: Thank you, Marco. I will also leave you with a question to think about while we listen to other speakers. In your opinion, do we need more pressure from corporations in terms of regulations? Or, on the contrary, if somehow they are finding their way to sustainable development through those indexes and through voluntary commitments, then treaties or international agreements are not needed?

I will call Mr. Carlos Nomoto who is director of sustainability at Banco

Santander in Brazil and ask his assessment on the financial sector specifically. We would like to hear a little bit about this protagonist characteristic of the financial sector and future perspectives.

Carlos Nomoto: To answer your question, I will start with a first point. There is a strong global movement called Equator Principles, which started in 2003, and demands from banks the consideration of the social and environmental aspects on their finance projects and, if I am not mistaken, it is extending to other operations as well. One very positive side of the Equator Principles⁴ is the tone of discussions; the last ones were not about the proposals or about the objectives, they were about the operational matters; how to implement them, which is good, because it is a consensus that social and environmental risks are a reality. Banks are not perfect, but on the side of the risks, it is very clear that if a bank finances an operation in Brazil or in a country in Africa or Asia, and a social or environmental problem arises, it is not the country's problem; it will be directly related to the reputation of banks.

I would like to add that there are other specific guidelines in the financial sector; The PRI, Principles for Responsible Investments, promoted by the United Nations⁵ is the first example that comes to mind. The PSI, Principles for Sustainable Insurance followed this trend and were a bit inspired by the PRI. The Natural Capital Declaration⁶, led by UNEP and the UNEP Financial Initiative, to mobilize financial institutions for conducting studies that must or can be used as evaluation methodologies

⁴ "The Equator Principles are a risk management framework, adopted by financial institutions, for determining, assessing and managing environmental and social risks in projects and is primarily intended to provide a minimum standard for due diligence to support responsible risk decision-making." (<http://www.equator-principles.com/>)

⁵ "Principles for Responsible Investment (PRI) Initiative is an international network of investors working together to put the six Principles for Responsible Investment into practice. Its goal is to understand the implications of sustainability for investors and support signatories to incorporate these issues into their investment decision-making and ownership practices. In implementing the Principles, signatories contribute to the development of a more sustainable global financial system. The Principles are voluntary and aspirational." (<http://www.unpri.org/about-pri/about-pri/>)

⁶ "The Natural Capital Declaration (NCD) is a finance sector initiative, endorsed at CEO-level, to integrate natural capital considerations into loans, equity, fixed income and insurance products, as well as in accounting, disclosure and reporting frameworks." (<http://www.naturalcapitaldeclaration.org/about-the-natural-capital-declaration/>)

for services, and social and environmental externalities is another one. These sorts of initiatives are central for financial markets in the next years. Therefore, this is part of the answer to your earlier question, yes. These guidelines, these *soft laws* are bringing social and environmental concerns to the attention of the banks.

In the last ten years, we started to discuss projects and their sustainability aspects. If you start talking about one huge project in any bank, anywhere in the world, eventually, someone will ask: "what about social and environmental risks?" Social and environmental risks are undeniably relevant and a reality that must be dealt with during the evaluation of projects in any bank. The other part of the answer on the need to make treaties or agreements is, because financial markets are still an industry that tries to build long-term relationships with all economic sectors, but at the same time, they are valued and, therefore, managed by a short-term perspective, there are still some challenges that the sector could not resolve by itself.

That is why I think the financial sector understood very fast the risk side of sustainability, but still doesn't understand sustainability opportunities.

Inspired by Mohamed Yunus, some companies started microcredit operations all over the world, and so did the Santander bank. We have the largest microcredit operation in Brazil. However, if we compare our microcredit operation to other projects or other loans, it is still very small. We can see the micro credit as a business model to Latin America, which is what we are saying, a good opportunity, but we are not seeing the financial markets strongly moving to this direction. Micro credit is a perfect example among many others that reflects the characteristics of Brazilian economic agents.

Henrique Lian: Thank you, Nomoto. I will leave you with a question to think about as well, using a provocation made by Marco Antonio Fujihara. For a few years now, he has defended that we should have a combination of private equity and financial structure by private companies for sustainability projects. Leaving the risk dimension to the private equity funds, financial

projects of banks would focus on opportunity and competitive advantages. Let's think a little if that is feasible or not. Now we are going to listen to our special guest, Minister André Odenbreit Carvalho.

André Odenbreit: Thank You. Well, Brazil has been an active participant on sustainability discussions even before the 1992 Conference. We have also been quite active while structuring these regimes, moving forward with concrete actions for international progress on climate change, biodiversity, desertification, and such topics. We are quite active and, moreover, within these areas, Brazil has put forward some innovative ideas and established important parameters. One example is what came to be known as the Clean Development Mechanism⁷, based on a Brazilian proposal during the Climate Change Convention (IPCC, 2007); it associates compliance problems with additional financing actions on developing countries. Departing from this idea, we reached the conclusion that carbon markets are important to ensuring greater levels of mediation with lower costs. We consider of great importance maintaining the sustainability agenda as a clear political focus even in moments when the international community has to look at other critical issues. This was exactly the idea behind the proposal for the Rio+20 meeting.

The Rio+20 Conference was quite successful in keeping these issues on the political radar, reiterating and strengthening political commitments and presenting new ideas. A new area of work was created, the so-called Sustainable Development Goals (SDGs), which are quite innovative in terms of how they are presented to the global community and how they generate significant opportunities for transformations at the international and the national level.

Brazil has not only focused its attention on international regime building. We have national achievements, too. Deforestation, for example, is a significant political priority nationally, and Brazil is not only calling other countries out, but is willing to act on it.

⁷ The Clean Development Mechanism (CDM) is one of the flexibility mechanisms defined in the Kyoto Protocol (IPCC, 2007) that provides for emissions reduction projects which generate Certified Emission Reduction units which may be traded in emissions trading schemes.

Of course, this does not eliminate the challenges Brazil still faces in adequately trying to combine environmental protection, social inclusion and economic growth. This is a challenge that all countries face to some extent.

Going forward on the sustainability discussion, talking about the Post-2015 development agenda, the Brazilian government flags poverty eradication as the greatest global challenge, which was stressed by several other countries during Rio +20. This brings forward the importance of recognizing the economic dimensions of sustainable development, because it is clearly presented as a global proposal and we feel that there is space to finally reach what has always been a critical feature of sustainable development: the balance between commonality and differentiation.

We believe that the discussion around sustainability has focused largely on the production side of the economy, and that consumption should benefit from the spotlight as well. Brazil and the EU are aligned in seeing things under this complementary perspective. Another point we always emphasize is that sustainable development must create benefits for all. This is one of those ideas that, when presented, everybody seems to agree on. However, when one starts to think about the implications behind this idea, the complexity of it becomes evident; for example, in many discussions around the concept of green economy, it is often said that it involves the application of new and innovative technologies and that the economy requires them to be "green". At a first sight, this seems quite logical, but it is important to notice that, in the real world, access to these technologies is not the same for all. Therefore, unless this transition to a green economy happens in a way that takes into account the issues of access to technology and technology transfer, the concept of green economy would be limited to benefitting some rather than all.

Equity in the sustainable development can generate some rather tough economic decisions in the international level that we must face. The position of the Brazilian government has been always strongly based on the solidity and basal nature of multilateral agreements. In this

sense, one should note that during Rio+20, declarations with some ideas on how sustainability and trade connect were presented in a very clear fashion. The first one is that market access favors sustainability. The second is that the recognition that a level of caution regarding disguised protectionism is needed. The third is that unilateral actions should be avoided.

The Brazilian government often presents these ideas as important guidelines and they are often considered quite prudent. However, it is important to know that this prudent approach is not a Brazilian creation, but, rather, has its origins on a multilateral agreement based on a set of considerations about opportunities and risks. If we look to the Rio +20 declaration, we will see the same kind of approach, with just one or two important additions.

One of them is the idea that open trade is not enough; there has to be an actual meaningful trade liberalization to work in favor of sustainability. That means not only opening markets, but also making them more open than they currently are. The second one is the importance of language or semantics, if you must. This can be illustrated by a misguided impulse of some countries to advance towards sustainable development for the wrong reasons, and I say this, because it should be clear that market access should not be considered a prize to be received once you have achieved sustainability, but that, instead, market access is a tool to help countries develop more sustainably.

We have significant concerns around any approach that would bring the idea of restrictions or possible sanctions. This is not based on a generic risk consideration, but rather on our concrete experience, and I believe that Brazilian biofuels illustrate this very well. From our perspective, the sugarcane ethanol sustainability performance would guarantee it a distinct treatment when it came to market access, different from what is actually offered. Nevertheless, this has not been the case, which demonstrates that, in the real world, sustainability considerations are mixed with political and economic considerations in a competitive atmosphere.

I would like to mention, as Henrique did, that in the other pillars of the agreement association, the political and the cooperation pillars, sustainability is already inside them. I do not consider this inclusion a minor issue, because if you want to have a change on how sustainability is perceived, you need to consider it within a political framework. Moreover, if you want to implement joint action to produce practical results, you will need it in the cooperation pillar. If suddenly sustainability were to disappear from the political and the cooperation pillars, this would generate an enormous and justified outcry. Going back to the trade pillar, with these considerations in mind, Mercosur has accepted this perspective and we have presented certain premises that will establish a positive framework. It is in its preliminary stage, but we hope to be able to explore the possibilities of these confluent areas. Thank you.

Henrique Lian: Thank you. When you say that poverty eradication is one of the most critical questions of our time, it comes to my mind the compatibility between the Sustainable Development Goals and the “old” Millennium Development Goals (MDGs). I would like to raise two questions for everyone at the table: Do you think the Millennium Development Goals will be replaced by Sustainable Development Goals to better integrate social and environmental concerns, or do you think they are going to run parallel tracks? What kind of implications may they have over future commerce agreements?

Carlos Nomoto: One interesting thing from Rio +20 is the massive presence of global companies operating in Brazil and Brazilian companies. When we talk about uniting the finance project with equity, I see that possibility, and it is a service the financial markets can provide to the clients. We know that there are not green bonds negotiations in Brazil and we do not have a strong carbon market, so for Brazilian companies willing to trade carbon credits, they must do it abroad. We have the main part of the whole finance project concept in equity in terms of sustainability. We can trade it, evaluate it, and monetize it. The mechanisms exist, what we don’t have is the will to do it.

Another problem is that, in the last 15 years, both the financial results that are raised from credit and the economic scenarios are changing. I am not saying they are good or bad, but they are changing and it will be necessary to create or to move to a different kind of financial operation. I think the point is not a matter of financial mechanisms; the problem is more about having a new perspective for the clients, a new way to see our own strategy on doing business and connecting all the parts. This is possible, but we need more leadership. The government is not supporting it, the clients are not demanding it, and the consumers are not willing to pay more for sustainable products. That is the main question, everything exists but we need leadership to connect the dots, more specifically, to connect the finance project and the equity. The problem is about perspective rather than mechanisms.

Henrique Lian: I could not agree more with you on the lack of leadership. It seems to be in all sectors, including the private sector. At the Rio+20 you could see the appetite of private companies that were there, trying to look to sustainable development through the lens of opportunity, but, still, there is not much leadership from the private sector.

André Odenbreit: I am not a specialist on SGDs, so I cannot go into it very deeply, but I think there is a distinction between the Millennium Goals political discussion and the SDGs political discussion: the MDGs were perceived as challenges that some countries face; whereas the SDGs clearly place challenges that all countries face. Even those who have achieved higher levels of development within the sustainability framework still have problems to overcome. In that sense, I believe the SDGs conception forwards the idea of challenges shared by all, and I hope the idea of universal applicability can help establish a differentiated approach, respecting national realities and capabilities. The problem is in the political difficulties regarding this balance between commonality and differentiation.

How does this link up with poverty eradication? I think this was one important outcome from Rio+20, which is setting poverty eradication

as a top priority. Anything perceived as an obstacle for poverty eradication within the SDGs debate will create unsurmountable obstacles and, therefore, their success will depend on the centrality of this agenda.

On the issue of technology transfer and the difficulty in transforming it into reality, I fully agree with Marco Antonio Fujihara. I would like to point out that the reason why it hasn't yet become a detailed agenda is because we haven't reached an agreement at the general political level. Concerns about whether technology transfers should happen, or whether facilitated access to technology should occur, dominate discussions, as many voices from developed countries favor the idea of deploying technology through the actions of the private sector.

The problem is that you cannot have an approach on sustainability if you do not have a commitment from the public sector to implement it. If it is the private sector that will generate the means of implementation, the natural response from the other side will be proportional to the level of sustainability produced. Therefore, if you want to push it higher, you have to engage the public sector on both sides of the equation. So far, we have not been able to agree internationally that technology should be facilitated with public sector involvement.

CHALLENGES TO THE NEGOTIATION PROCESS: REPRESENTATIVENESS, AMBIVALENCES AND FEASIBLE CONSENSUS

**André Odenbreit Carvalho, Henrique Lian,
Lorella de la Cruz Iglesias**

Lorella de la Cruz Iglesias: Well, as you may know these negotiations have been going on for quite a while. We started back in 2000. There were several rounds of negotiations. Unfortunately, in 2004, due partly to a certain inability to meet each other's expectations, negotiations were suspended. After informal discussions, we managed to achieve a common ground on how to meet each other's expectations and, then, we re-launched negotiations in 2010.

Andre Odenbreit,
Chief Minister of the
Brazilian Mission
to the EU



Since then, there have been nine rounds of negotiations, the last one taking place in Brasilia, in November 2012. So far, negotiations have been focusing on what we call agreement's rules and discipline. There was a positive development in January last year, in Santiago, Chile, where a ministerial meeting between the EU and Mercosur took place, and we committed to having a change of market access offers on goods, services and, in addition, to establish government procurement rules for the two sectors. We had initially estimated a target date for the end of the last year. Unfortunately, we could not meet that target date, but on the European Union side, what matters is that these exchanges are very successful and that they move the negotiating process forward. That is why we don't attach so much importance to deadlines, but to the outcome of that change. We had to re-confirm our commitment to this change in several occasions since then, during the U.N. Summit in February, for example.

More recently, there was a chief negotiators meeting held here in Brussels, in March 21, where we reaffirmed this commitment and informed each other of the progress being made on the finalization of market access proposals from each side. This is an important step in the negotiation because it will be the first market access offers exchange since 2004. The goals we have set for this exchange of welfares in 2010 are what we expect for this new step. There has been some improvements from offers made in 2004. There is a frank commitment on the side of the EU, and I believe the same goes for the Mercosur side. We believe this could be done in the following months, we are aware of the intensive work on the Mercosur side to put an offer together.

On the EU side, the work is finalized. We already had the opportunity to consult members of the Council about the services and the establishment of a government procurement offer. Later on, we are going to consult on the goods offer, which is more sensitive due to the concerns of some sectors, such as the agricultural sector. Ideally, we should have this change before the summer break, because there are other political processes in Brazil and in the EU that would take too much the attention. Moreover, the focus for us is on ensuring that the change will be successful; we cannot afford having a failure at this stage of negotiations. Brazil has been quite outspoken in favor of the change. We believe this is helping to get an offer by other Mercosur countries. We expect to have that change in the next months because the offers finalization processes on both sides are quite advanced.

However, I have read that is quite difficult to get a change offer in the Mercosur side due to resistance from Argentina. The country is not really trying to reduce tariff rates apparently. In addition, I do not understand how Venezuela can be able to join this process. Isn't Venezuela included?

André Odenbreit: I can offer a comment on this topic. Venezuela is a member of Mercosur and participates in the discussions, but it has the perspective of joining in the market access offer at a later stage. Therefore, the country is a participant in the negotiation but it does

not necessarily happen at the same time for all members of Mercosur. Regarding Brazil, Argentina, Paraguay and Uruguay, there has been a lot of talk in the media about the possibility of different formats and timelines within Mercosur. Nevertheless, that has not been the way Mercosur engages to proposals. The four countries are preparing the offer from Mercosur.

We understand that the four members have to work together to produce this kind of market access offer, the same way we expect the EU to organize and discuss their offer with the Member States, making it possible to move on successfully and finalize it.

As for the first part of your comment, I must say I did not see Argentina blocking the discussion or the perspective of having the common proposal agreed. I think sensitivities inside Mercosur exist, as well as inside the EU. The history of negotiations has shown this. It is not easy to put a viable proposal for a free trade agreement of this size forward. However, despite the complexities, everyone on the Mercosur side is very engaged in putting together something meaningful.

Lorella de la Cruz Iglesias: Yes, there are many who support the agreement. Does that mean there is no concern from specific sectors of the industry regarding the possibility of further opening up to imports? For example, the meat sector; some agricultural sectors say that some members are more affected than others, but, overall, this agreement is very significant in terms of GDP growth, in terms of increasing trade. Maybe the short-term losses are worth the effort. We believe we have a satisfactory proposal on a commission level that could meet the expectations of our Mercosur partners. At the same time, we have taken into account sensitivities of some sectors, like the meat one; therefore, we are not proposing full liberalization. We believe we have found the right balance, and soon it will be presented to Member States in the trade policy committee.

As for sustainable development, it is something we have to deal with; the question is how. We are not talking about parallel norms

for sustainability issues, we are talking about adherence to already existing international conventions and actually enforcing them at the domestic level. If we stress our commitment to this kind of international standards, we will avoid this kind of discussion in the WTO context.

André Odenbreit: I would be surprised if, in the absence of some substantive sustainability treatment, the WTO would see itself in a position of arbitrating. I know there is a significant amount of regulation present in multilateral agreements, to which Mercosur and the EU have agreed. However, I am not familiar with situations in which the WTO saw itself in a position of stepping in to make any kind of decision regarding these regulations, or whether or not these regulations have some aspects that should be evaluated by the WTO. Rather, I see a situation where a multilateral sustainability regime refers to the relation between sustainability and trade, which are similar to the references you find in the WTO system.

Lorella de la Cruz Iglesias: I agree that the WTO dispute system is not the forum to discuss implementation of international agreements on sustainable development, but it is true that, every now and then, this is a question of interpretation of international commitments on fees related to trade and to how they relate to the disciplines in the WTO agreement.

The main issues of a sustainable development chapter in a trade agreement are adherence to a certain core of high (and low) conventions, international level conventions and multilateral environmental agreements. We believe Mercosur member states won't see it as a difficult task. The commitment is not only to adherence or to ratification, but also to enforcing application and fostering cooperation in the conventions context. Moreover, in terms of regulations, they recognize the right to regulate these issues from both sides. We are trying to ensure that, whatever we have domestically agreed on as a standard, will be kept and not eroded by temptations of attracting trade investments by lowering the standards.

This is part of the agreements as well.

It is important that these commitments have means of implementation and that is why I mentioned this focus on the title on institutional set-up. First, there is a discussion with the government, in which we are able to touch matters of progress and the implementation of commitments, in addition to any concerns from both sides. Secondly, other efforts and issues can be brought to the sustainable development committee. That is the case of Columbia, Peru, Korea, Moldova and Singapore.

We also think it is important to involve civil society in this dialogue. Therefore, we wish to create domestic civil society groups for referrals. The idea is to have a domestic group that can address the governments. In the case of Columbia and Peru, there was an open session for this forum at the meeting on February earlier this year. The involvement of civil society will help us understand the challenges to the implementation of the agreement, as well as to have a wider acceptability of it.

The third element is that whenever there is a disagreement concerning the implementation of the foreseen commitments in the title, we would like to have an arbitration mechanism formed by a group of experts that would give a harmonized advice on that particular issue.

André Odenbreit: The idea that the agreements the EU has reached with others might serve as a format for the discussion with Mercosur is probably dangerous. The fact that Mercosur accepted discussing sustainability in the trade pillar means significant flexibility, because there is a strong understanding that the political and the cooperation pillars are actually the appropriate spaces for debating such matters. When it comes to trade, you risk establishing some kind of rule that can become or be potentially interpreted as a restriction or some kind of punitive decision.

However, there are certain parameters placing the discussion under a positive light such as the respect for the principle of common but differentiated responsibilities and the rights of countries over their natural resources. Respecting the establishment by each party of their own social and environmental policies at the domestic level and in

accordance with obligations from international agreements to which they are subject. The fact that the EU has agreed to this approach is an important advance. From our perspective, these parameters reflect multilateral agreements to which Brazil, the other Mercosur countries, and the EU adhered in previous negotiations. We feel that we can move forward, but this discussion is still in an initial stage, and the common grounds still being explored.

Lorella de la Cruz Iglesias: The principle of common and differential treatment is already an international commitment. Many premises mentioned here we could all agree on. The next step for us would be getting more concrete in terms of what we can do. With what type of conditions we can work together, what topics can we identify for this title? We don't intend to harmonize regulations. We want to preserve the European Union's right to regulate and to set our own standards on environment protection and social issues. We believe that an evaluation about the trade part of the agreement confirms the importance of a commitment with some international standards. Sustainable development and trade do meet in reality, and that is why we think there is a place for these issues in the trade part of the agreement.

André Odenbreit: Just one point I would like to add for clarification. We have in fact started the discussion about the agreement, we are considering the issues, but it is all on the open. We have a lot to explore before we conclude anything. In addition, I would like to stress that it is not a matter of questioning the environmental or labor rights parameters established in multilateral agreements; all parties are very clear on that. The question is whether this goes in the trade pillar or continues to be a matter of political commitment, unless the idea is to fit trade obligations under the environmental agreements. If that is the case, there is a concern about this becoming sanctions rather than a positive relationship between trade and sustainability

Lorella de la Cruz Iglesias: We are aware of this concern of Mercosur and of other trading partners. Our model doesn't foresee trade sanctions or this type of commitments in the title of trade and sustainable development.

Henrique Lian: I would like to explore some practical questions concerning market opening. For instance, in Brazil, we have a great potential of wind and solar energy generation, however, it has not been viable to produce thermal electric plates for solar energy generation in Brazil because the ones produced in China are 85% less expensive. Germany had the first position in wind devices and they are losing market space in Brazil as well, all because China is also producing that kind of device. Therefore is not viable to produce it in South America or viable to import from the European Union. The kind of sustainable development conversation we are having considers making the European and Latin American markets stronger for sustainable development and trade and, at the same time, trying to put this kind of competitor out of business, since it doesn't follow the sustainability and labor agreements. Am I being too utopist? I hope not.

STUDY CASE: BIOFUELS

**Aline Marsicano Figueiredo, Gabriele Reitmeier,
Géraldine Kutas, Henrique Lian and Marco
Antonio Fujihara.**

Aline Marsicano Figueiredo: When debating trade and sustainability it seems that bio-fuels always pop up in the discussions. Especially when it comes to Brazil. This is a major issue and a main concern for the low carbon economy and for sustainable development at large. Today, I am going to present a brief summary of the bio-fuels history in Brazil and a general idea of what is going on right now regarding Brazil and the US, our main competitor in this field. I will have the help of our two special guests: Madam Géraldine Kutas, representing CNA and UNICA, which are Brazilian sugar cane industry associations; and Marco Antonio Fujihara, the Director at Key Associados.

According to my research, the first studies regarding the use alcohol as a fuel were conducted from 1905 to 1925. In 1931, it became mandatory in Brazil to import gasoline with 5% of alcohol in it; in 1938, they applied the same rule for the national gasoline as well. During

the World War II, there was a production peak of 77 million liters, which represented at the time 9.4% of fuel production in the country. In 1943, because of some attacks of German submarines threatening oil supplies, we had a blend that was high as 50%, almost the double of what we have today in Brazil.

After all these advances on the production of ethanol, in the 1960's, there was suddenly no interest in it. The research, the efforts and incentives from the government to promote alcohol as a fuel were consigned to oblivion. Nevertheless, this didn't last long because of the first oil crisis, which brought to attention the need for an alternative energy source (non-fossil) in Brazil. In 1975, Brazil created PRO ALCOOL, a national alcohol program, which was nationwide and intended to phase out the automobile fuels derived from fossil. It must be said, however, that this was a reaction to market conditions, that is, it wasn't due to a concern with the environment, and it wasn't ideological. This is important because today we have been discussing a lot sustainable development, but we are also talking about free trade, thus this market response matters.

These new incentives and reinforcement were retaken with the second oil crisis, and the blend of ethanol fuel with gasoline fluctuated between 10% and 22% from 1976 until 1992. At the time, the Brazilian government gave incentives for ethanol productions, such as low interest loans for agro industrial ethanol firms and guaranteed purchase by the state-owned oil company, Petrobras.

After reaching more than 4 million cars and light trucks, which is equivalent to one third of the motor vehicle fleet, the ethanol production and sales decreased. The reason was the economic recession in the 1980's, which caused the drop of oil prices. By 1989, there was a shortage of ethanol fuels supply in the local market, which left thousands of cars in their garages due to lack of fuel.

Therefore, the history of ethanol production in Brazil oscillated between extreme highs and lows. It seems that bio-fuels developed in Brazil in spite of government incentives and not because of them.

They did exist at one point or another, but the government does not completely support the production we have today, its support comes from a market demand.

Today we have an interesting situation regarding Brazil and the US; being the largest producers, they reach about 70% of the ethanol production in the world. Both countries stand out in different areas; in terms of land for example, Brazil has great structural flexibility due to the ability to produce different percentages of ethanol; the government may adjust the blend of ethanol and gasoline from 20 to 25%.

I was talking to Mariah Aranha (CNA) yesterday about the myths surrounding ethanol production in Brazil. One of them concerns land and agriculture matters: apparently, there are 100 million hectares of arable land, and they are far away from protected areas, but of the 100 million hectares only seven are dedicated to planting sugarcane and only half of these goes to ethanol production; the other half goes to sugar production. So, we have more than enough land to produce ethanol.

In the US, land is not a problem either, but the production comes from corn, instead sugar cane. Corn is already a great part of the American agriculture, thus the ethanol production using corn doesn't affect agriculture. The difference between Brazilian and American ethanol lies on the production being much more expensive in terms of energy efficiency. Professor Goldenberg, who is an expert on this topic, explains why the Brazilian ethanol is much more energetically efficient than the American biofuel and how the US production requires more water comparatively. Now I invite our very special guests to talk about the current ethanol production in Brazil and to explain why it is so hard to make the above-named myths disappear.

Géraldine Kutas: The first myth we need to face is that sugarcane would promote direct deforestation of the Amazon. We have spent many years explaining to people that sugarcane plantation are 2,500 kilometers away from the Amazon, hence it could not be held responsible for

the deforestation. We have no proper climatic conditions or economic conditions to plant sugarcane in the Amazon; in addition, transporting ethanol for 2500 kilometers would make it very uncompetitive.

The second myth is the antithesis between food and fuel. It is common to hear that land currently used for agriculture production is scarce, but there still is a lot of land around the world that is not used for this purpose or that is poorly used. What we are missing is the technology to put this land on production mode. In addition, it is a bit ironic to speak about food matters in Brazil, bearing in mind that our grain production has doubled over the last ten years; clearly, the country doesn't have this problem. There is a problem of food distribution, but this is a completely different issue. It is not about having to produce more food; it is about having access to food.

Some people also think that the expansion of sugarcane crops push other crops or the cattle industry into the Amazon. As a consequence, the sugarcane production would be damaging the Amazon indirectly, but this is a tricky issue, because we cannot observe this phenomenon objectively. This indirect impact would have to be calculated through technical models. This is currently the main legislative proposal for biofuels in Europe: to regulate this indirect land exchange.

I believe we are losing perspective. Production and co-production of ethanol occupies between 1%, 1.5% of the land area around the world. Focusing on trying to tackle only biofuels seems illogical, because the necessity is to solve the right problem, which is land use and deforestation for all industries.

Another myth is the real carbon counting of biofuels. There is a tendency in Europe to think that all biofuels in fact emit more carbon than the fuels they replace. This might be the case for some, but not all bio-fuels are created the same. What we are trying to reveal here is that there are different kinds of biofuels, and depending on the crop used in the production, if it is biodiesel or ethanol, the results will be very different.

Some crops are much more suitable to produce bio-fuels than others. Sugarcane is one of them. If you take the Renewable Energy Directive⁸, you will see that cannot reduce emission by 71% compared with gasoline, but if we look at the Brazilian numbers, we go up to 90%. Considering that in Europe the transports sector is still growing, I don't think that it is possible to penalize or get rid of the biofuel option, even though it is reducing emission in 50% or 60%. There is still a very good chance to de-carbonize your transport sector.

The last myth is slave labor. It is less discussed because the attention in Europe is more focused in environmental issues, but slave labor is a serious problem. In Brazil, we employ more than 1 million people in the ethanol and sugar sector. There is always a sad story in such a big sector, and there are similar stories in other sectors, for example, here in Europe in fruits and vegetables. Although we have to consider that this happens in less than 1% of the sector, this is a problem that needs attention.

Marco Antonio Fujihara: Back to the ethanol matter, it is a sustainable fuel. Thus, how is it possible to use a sustainable fuel? Well, before using a sustainable product, long-term public policies are necessary. Ethanol has had several discontinuous public policies for many years. Therefore, we need to set these policies; it's not possible to sell ethanol around the world if we don't have continuous public policies in Brazil. It is an internal problem and it is also connected to economic issues; the country wants to maintain the same price control policies but changing the ethanol shareholders, which generates contradictory macroeconomic policies. The point is: to use ethanol in the way we wish, the macroeconomic perspective must change, not only the set of buyers.

Henrique Lian: Geopolitics older books treat structural powers as characteristics of nations with military, food and energy independence.

⁸ The Renewable Energy Directive is from the European Union and establishes levels of renewable energy use within the European Union. The directive requires the targets for European Member States such as 10% of energy in land transportation should come from renewable sources by 2020. This renewable energy could be in any form, such as hydrogen or electricity, but it is widely expected that the bulk of the target will be met by the use of bio-fuels.

However, the world has changed; there are other ways of possessing power. Brazil, for instance, is an environmental power.

In the 16th century, we were a dream to Europe, we had the land, the cattle, the minerals and especially the gold, and Pau-Brasil (type of wood). Those assets were exported and, at the time, we didn't absorb the value for our economy, for colonial reasons. Now, we are having this door of opportunity that is bringing together several essential assets in the contemporary world concerning climate change, energy supply needs etc. We still have 15% of the drinkable water in the world, we have the land, the sun, the biomass and we have social diversity.

This way, the umbrella framework for this dialogue and for everything that the Ethos Institute has done in the past years is to understand how we can transform these comparative advantages into competitive ones. Ethanol is a fantastic example, a green product that gives a great contribution not only to the national economy, but also to the whole world in terms of fighting climate change. Considering our present energy matrix, we still have more than 80% of renewable energy; nevertheless, the renewability is decreasing due to the Pre Salt oil and gas exploration. We will probably grow in gas power plants. These power plants have 50% less emissions compared to oil and coal, for instance, but there is a difference; while oil and coal power plants, thermal power plants, operate only in emergencies, or in funds like a hedge of the system, the gas power plants operate 365 days a year, which means much more emissions. Still, Brazil is very renewable.

If we are going to grow in thermal electric power plants, specially coal and gas, you we will need some technology in order to capture this carbon emission, like the CCS device, which is European, thus we might have to import the technology in the future. On the other hand, we have sustainable energy produced by hydroelectric power plants and complementary sources as well, such as wind power, solar power and biomass, but these cannot be exported since there is no technology to do so. Therefore, our exportable energy is ethanol.

Aline Marsicano Figueiredo: Concerning the logistics, why can't we export more? I know there are several countries that don't have oil reserves, for example, and it seems to be only logical for them to import something that is more sustainable. Germany, for instance, picks energy sources very wisely. Why aren't more people importing biofuels?

Géraldine Kutas: The main barrier to ethanol imports in Europe is the tariff. None of this will happen until we remove the tariff that is in place; it is 0,19 Euros per liter, meaning 40% of the ethanol value. This is a prohibitive tariff today. In the past, we have managed to export to the EU because they didn't have the production capacity to fulfill their needs, but with the directive that was adopted in 2009, the EU expanded its capacity and now they are almost self-sufficient.

Thus, the main barrier in Europe is not sustainability, and in fact, we have 33 mills certified with the sustainability criteria in Europe. Everything is ready; however, because of the imposed tariff the whole thing becomes impossible. In other countries, there isn't consumption of biofuels if there aren't policies to promote them, because all imports will always be cheaper than biofuels, for different reasons. They usually don't have a monopoly for the distribution of oil, hence, even if the ethanol is cheaper the company will not distribute it.

The problem is that you need to secure your supply. For this reason, if you don't go to countries where you have biofuel promotion policies you will not have biofuel import, and I am not talking about the 25% in Brazil, 5 or 10% would be a good beginning. The countries that have adopted mandatory blends, like plenty of countries in Africa and Asia, have fixed their mandate in a proportion they can supply for their domestic markets. Notwithstanding, in a lot of countries there are huge tariff barriers, and this is one of the contradictions of the ethanol policy, ethanol is classified as an agricultural product, while biodiesel is a chemical product.

Aline Marsicano Figueiredo: Are there any other countries interested in exporting ethanol as well?

Géraldine Kutas: The US is the main country that is interested in exporting ethanol besides Brazil, especially because the country adopted a very ambitious ethanol policy. Yet, the legislation is not accompanying the mandates. By 2022, the US will have a mandate of 132 billion liters of ethanol, and the legislation on blends is going to be left behind; today we have reached the limit of the E10⁹ mandate, and the US is already up to E15¹⁰. It is a lot, and will take 10 years to structure and apply a new gasoline standard considering that the whole system needs to adapt; like the car companies, they will have to change the car's standards as well.

In addition, there was, in 2009, a trilateral initiative between the EU, the US and Brazil. The first part of the work was to enlist the different standards for ethanol and biodiesel in the three territories, compare them and see where they could agree on and where there was a difference. The second step would have been to harmonizing all these standards and create a global commodity. Unfortunately, after the first report was published, too many incompatibilities were found and the work stopped at this point. It was a promising initiative, but sadly, it was discontinued.

Aline Marsicano Figueiredo: Do you feel that there is a strong advocacy in Brazil against biofuels? Do you believe that Brazil is not acting more aggressively to promote ethanol exports because we already have a large oil production and that could damage this particular market?

Géraldine Kutas: I don't see a negative feeling against biofuels in Brazil at all. It is not because the country has Raízen – a joint venture between Shell, Cosan and BP to invest in ethanol – that the sector is dominated by oil. I do not believe that companies like Shell or BP dominate the sector, is more a matter of the way ethanol is presented to the consumers. Ethanol does not offer a better deal than gasoline, so people don't use it as much. The fact that ethanol is better for the planet does not affect the decision of most costumers; actually, only a

⁹ Common ethanol fuel mixture, with 10% ethanol.

¹⁰ Ethanol fuel mixture with 15% ethanol.

few people know that choosing ethanol can make a difference on the climate change issue.

As for the government, it is clear that we do not have the same support that we had in the past. We were in a very high moment a few years ago and now we are descending and, unfortunately, I think we will go down even further. It is a very cyclical sector and we are in the downside of the cycle. Before we were working with 50% of renewable energy, nowadays the percentage is 42 and non-renewable energies are winning more space.

Marco Antonio Fujihara: It all depends on the price: if you have ethanol with a good price, the whole sector produces ethanol, if you have sugar with a good price, the whole sector will produce sugar.

Géraldine Kutas: Today almost 80% of the mills in Brazil produce both sugar and ethanol, which was not the case in the past. Before, we had a much higher share of mills producing only ethanol, but with the recent crisis, almost all had to add sugar to their production. Thus, the flexibility is limited to 10% to 15%.

Also, Brazil was unruffled to second-generation ethanol; first because we didn't have the technology, thus we would have to import it, and, second, because we had such a vibrant first generation ethanol sector that we didn't need a second one.

Then all changed. One of the reasons was that a lot of foreign companies using this technology were really interested in testing and applying it in Brazil, where the biomass cost is the lowest and which is available at the mill along with free and clean energy. However, Brazil has absolutely no policy for the second-generation ethanol, and the same happens with the US.

The second generation is not working. There are many projects, all well financed by the European Commission, but real second-generation ethanol in the market remains to be seen. The reason is the same; there isn't a second-generation policy in Europe at the present moment. The

current legislative discussion indicates there is not even 0.5% indicative target that will motivate heavy investment in second generation.

Henrique Lian: I would like to explain why we have chosen ethanol as a demonstrative case for this seminar. First, we needed to be concrete and not only discuss *soft law* and general rules; as Minister Izabella Teixeira used to say, there are "fifty shades of green". Therefore, having an object to evaluate can help us go through all these shades.

Ethanol is a good example of low carbon economy and we have dominated the technology and all the process, so we should try to promote it.

Aline Marsicano Figueiredo: Géraldine, do you think that should be more NGOs or international organizations advocating for the promotion of ethanol and sustainable or renewable fuels?

Géraldine Kutas: Yes, definitely. I believe NGOs should not only point out solutions, but the problems too. Hence, to some extent I cannot understand why Brazil does not have NGOs standing up to promote ethanol. Brazilian NGOs should be more vocal about ethanol abroad. Unfortunately, I do not see them promoting ethanol around the world. They don't speak up against it, but they are not promoting it either. Meanwhile, the European NGOs are extremely active against ethanol. I don't remember any European NGOs that is in favor of first generation ethanol.

Henrique Lian: I think we should go on striving for ethanol because if we fail to promote this green product, it will be a great disappointment. I will take the chance to put an end to this round of discussions. It has been a great learning process for us through the years, and last year we had this invitation from the Naumann Foundation to develop a joint program and content in order to support negotiations and promote sustainable development in a positive bridge between the European Union and Brazil. This project aims to produce knowledge and support real negotiations. We are not the negotiators, but we can certainly play a role promoting dialogues like this and involving parliaments.

This is what the Ethos Institute and the Friedrich Naumann Foundation have done: Talked to many people, to different stakeholders and tried to create awareness in support of good causes, which in this case means sustainable development with this important sector of trade. Thank you very much Gabrielle Reitmeier for all the support in Brazil and for the invitation for this joint project. I would like to thank my assistant Aline, who worked hard in the preparation of this seminary; it was brilliant; and especially our guests who came from Brazil, Marco Antonio Fujihara and Carlos Nomoto, and our guest from France as well; they are our partners in the World Forum Lille, certainly the most notable sustainable development forum for companies in France. Thank you Géraldine for being here in such a short notice; it was an honor to invite you and to have you here.

Gabriele Reitmeier: On behalf of our foundation, I would like to thank you so much for coming all this way from Brazil over to Brussels, I think it was worthwhile. In my opinion, we still lack the participation of big European NGOs, or the European commission, or people from the Parliament, but they are in an election campaign, thus that was unfortunate. Next time I am sure there will be participation from them. Thanks a lot to Aline and Henrique, you have done such an excellent job, you prepared it so well. I know it is a lot of work you have invested in this, thank you so much and I am very hopeful in cooperating for the upcoming event.

PART II. A CONCEPTUAL BASIS FOR THE INTERNATIONAL LAW OF SUSTAINABLE DEVELOPMENT

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FROM MORAL COMMITMENT TO LEGAL OBLIGATION IN THE INTERNATIONAL ORDER¹¹

An hypothesis on the necessity of observing sustainable development in international trade relations

*Henrique Lian*¹²

Is the already vast ensemble of principles, declarations, resolutions and guidelines on sustainable development we have been collecting at least from the Stockholm Conference (1972) but a mass of well-meaning documents, incapable of legally binding the nations and blocs that issued

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Henrique Lian analyzes how the advance in the International Law of Sustainable Development makes it more reliable for the preparation of international agreements.



them? Are the unilateral affirmative acts by these same actors mere exercises in magnanimity and benevolence, revocable at any time and according to changing circumstances and dignitaries? Is then *soft law*¹³, the prevailing instrument in sustainable development issues, really so “soft” as pretended by those who use political action to hinder the progress brought about by politics itself, oftentimes manifested at its highest level of expression, to wit, presidential diplomacy and declarations produced in the realm of the United Nations?

¹³ In order to correctly understand *soft law* as compared to *hard law*, we propose the following distinctions: *Hard Law*: legally binding; expressed by means of treaties, conventions, protocols and other instruments with a binding nature; follows formal rites until signature by a high dignitary, with domestic parliamentary confirmation followed by formal executive notification; self-applicable (*per se* enforcement); low flexibility as to ulterior alteration. *Soft Law*: non-legally binding; expressed by means of declarations, guidelines and resolutions; does not follow rigid formal rites, being constituted of manifestations, diplomatic notes and other similar instruments; not self-applicable; high flexibility as to ulterior alteration, being easily adaptable to changes in the political and social context.

The present essay aims at answering these questions denying this lack of force, either through arguments based on moral and political obligations assumed by the main actors on the stage of international relations – national states and blocs of countries with some level of integration (be it regional, commercial, or based on cultural, historical or developmental affinities and similarities) –, or on the metamorphosis of international acts initially defined as non-binding (*soft law*) into binding ones, especially by means of their incorporation/transformation into treaties and conventions, or into customs and general principles of law– there is great overlapping between the two –, to complete the list of primary sources offered in article 38 of the Statute of the International Court of Justice (1946).

We will not, in the following pages, pretend to a false neutrality when analyzing the research which inspired the present hypothesis¹⁴, as it has been especially commissioned to defend the necessity of considering sustainable development principles in every act of commerce celebrated by the nations and blocs which established those very same principles and committed to them, by force of politico-moral obligation. However, interpretation of dozens of formal agreements on sustainable development and trade, of rulings issued by international courts or in the context of arbitration processes, of the foundational acts of political and commercial blocs (especially Mercosur and the European Union), as well as of free trade agreements signed with other blocs or individual national states, has eventually led to an enlargement of our initial hypothesis, towards the very idea of transforming originally non-binding declarations into legal obligations within the international order. Financial and institutional support provided by the Brazilian Development Bank (BNDES) and by the Friedrich Naumann Foundation (Germany) and the research work done by the law firm of Nogueira, Elias, Laskowski e Mattias have been paramount to our formulations. I should also note my stimulating

¹⁴ Commissioned by the Friedrich Naumann Foundation to office Nogueira, Elias, Laskowski and Matias, entitled *Análise da incontornabilidade do desenvolvimento sustentável no Direito Internacional* (Analysis of the Unavoidability of Sustainable Development in International Law).

dialogue with the famously competent Brazilian diplomacy; especially with Ambassadors André Corrêa do Lago and Ronaldo Costa Filho and ministers André Odenbreit Carvalho and Francisco Canabrava.

Moral Obligations

The ensemble of political manifestations by member states in the realm of the United Nations (UN) since 1972, when the Conference on Human Environment took place in Stockholm, as well as manifestations by blocs and individual sovereign states allow us to infer a progressive acknowledgment of the fact that the collective body of nations faces challenges requiring not only immediate technological and political answers, but also a search for consensus on a global level, and the improvement of governance systems. It also allows for the interpretation that the highest dignitaries of those countries do recognize a need for revision and qualification of our growth and development processes, based on at least some global epistemological benchmarks, such as the Club of Rome's works on the limits of growth, the UN report entitled *Our Common Future*¹⁵, published in 1987, which established the expression *sustainable development* and, finally, the well-known reports by the Intergovernmental Panel on Climate Change (IPCC) on the anthropogenic origin of phenomena such as global warming.

This acknowledgment has been eliciting repeated summit manifestations, expressed in documents such as political declarations, voluntary commitments, principles, guidelines and resolutions, all of them, in principle, non-legally binding; something which, in the language of international relations, is commonly referred to as *soft law*. The difficulties implicit in committing to stances with no basis in historical tradition or globally accepted benchmarks, and the absence of a centralized authority to control and enforce international resolutions – which, it is well to remember, are all ultimately voluntary, due to the principle of national sovereignty –, as well as the problems in the process of international negotiation originating in the well-known

¹⁵ Also known as the Brundtland Report, having been prepared by a commission headed by Norway's former Prime Minister, Gro Harlem Brundtland.

asymmetries in economic power and relative development among countries and blocs, all have combined to single *soft law* out as the means of choice in order to treat advanced subjects such as sustainable development and also, occasionally, environmental issues.

Whether these commitments are voluntary or not – and, as we have seen, which are not ultimately? – they do express visions, desires and political agendas that, while normally voiced by heads of state in summit meetings, should be respected and implemented simply because, from an ethical standpoint, they are “the right thing” to do. However, if this is correct from an ethical standpoint, the fact remains that, in everyday international relations, when it comes down to commercial issues, the contrary position, or at the very least its contradictory, actually prevails.

Legal Obligations

Adopting a conservative position, wary of doctrinally-laden controversy, we may say that legally binding commitments in the international order, or *hard law* – which, as we have already seen, meets serious limits in its implementation due to the principle of sovereignty – restrict themselves to the primary sources listed in article 38 of the Statute of the International Court of Justice, a document harking back to 1946 and acknowledged by international courts as the applicable framework in terms of primary and subsidiary sources of International Law. These sources are: *international conventions*, whether general or particular, establishing rules expressly recognized by the contesting states; *International Custom*, as evidence of a general practice normally accepted by countries; and the *General Principles of Law*, recognized by “civilized nations”, a kind of terminology that evidently struck a less dissonant note in mid-20 Century than nowadays.

Examination of each one of these primary sources leads us to notice the occurrence of multiple processes of metamorphosis of so-called voluntary commitments (*soft law*) into primary sources (*hard law*). Let us look at three such mutations:

The first one involves voluntary commitments, which, with the passage of time and political change, that is, modifications in aspects of convenience and opportunity for national states and blocs, eventually turn into binding commitments, via their incorporation into international treaties and conventions¹⁶. A good example of this phenomenon is the transformation of the Universal Declaration of Human Rights (1948) into a International Bill of Human Rights (1976) – although this last one is largely ignored, as we shall see later on.

The second case refers to voluntary commitments that have transmuted into international custom, understood as evidence of general legal and political practice on the part of countries and blocs. It is extremely important to note that *international law* does not establish any hierarchy between treaties or conventions and customs, granting the same statute and solidity, in the spirit of *jus cogens*, to both. Countries with a legal tradition founded on Roman Law, such as Germany, Brazil and most Latin countries, have more difficulty to give customs the same “firmness” and binding quality as treaties and conventions ritualistically signed by heads of state or dignitaries with special representational powers – most commonly, Ministers of Foreign Affairs, Finance or Justice – as well as approved by parliaments in accordance with local¹⁷ constitutional dispositions and ratified in

¹⁶ The treaties and conventions terms are quite flexible and there are, according to professors Francisco Rezek and Paul Reuter (see bibliography), dozens of other equally applicable terms without any connection as to the form or content of these instruments (memos, agreements, arrangements, adjustments, acts, letters, codes, appointments, constitutions, contracts, agreements, covenants, protocols, regulations, etc.). However, in recent practice, we observe the preference for the name treaty to agreements between individual states or between integration blocs, and free trade agreements are a good example of this. The nomenclature convention is more frequently reserved for agreements between sets of countries, or, at least, a large number of them, such as the United Nations framework Conventions on climate change, biodiversity and desertification, all three derived from Rio 92. As to the term protocol, it has been observed a preference for their use in regulatory situations of a treaty or convention (the Kyoto Protocol, for example, regulating the the United Nations Framework Convention on Climate Change), just as a decree regulating a law domestically.

¹⁷ In Brazil, the evaluation by the National Congress is ruled by art. 49, I of the Federal Constitution, whose unfortunate wording caused a multitude of doubts and differing interpretations, skillfully analyzed by authors such as Dalmo de Abreu Dallari (who says that the article “does not possess attributes of clarity, accuracy, harmony and exhaustion”), Rodrigo

a timely manner. However, the exact opposite happens in countries whose legal tradition is based on Common Law, such as the Anglo-Saxon countries. In these nations, repeated practice and the historical ensemble of court decisions are esteemed as much firmer than this or that legal document, as much as it may have been the object of formal ritual in its elaboration. An example of this second instance is the Principle of Common, but Differentiated Responsibilities, principle number 7 of the Rio Declaration, originated at the Rio Summit (1992). The interest and convenience of countries and blocs have widely consecrated this principle, it being repeatedly invoked in negotiations for the reduction of greenhouse gas emissions as well as in political negotiations of a general nature and other controversies. Now, the aforementioned principle is a direct companion to the Principles of Polluter Liability and of Precaution (numbers 13 and 15, respectively), both embodiments of sustainable development par excellence which must, therefore, enjoy the same weight and applicability as principle number 7. The latter, by the way, was already in full practice well before becoming *soft law* by dint of the Rio Declaration¹⁸, being internationally invoked and widely accepted in rulings by international courts and within arbitration processes.

In a seemingly more abstract instance than the former ones, this transformation occurs through “ratification” of a voluntary commitment by the UN General Assembly (UNGA), something which takes place when the UNGA issues a resolution (*stricto sensu*) addressing and accepting matter that has been the object of declarations, guidelines and resolutions (*lato sensu*) originated by member states in a former period¹⁹.

d’Araujo Gabsch, Alexandre de Moraes and André de Carvalho Ramos (see bibliography). The article clashes with the art. 84 of the same Constitution, disputing the exclusive competence for the final decision on international acts from Brazil, whether with the Congress (art. 49) or the President (art. 84). Not even the terminology is uniform, for while the first article refers to treaties, agreements or international acts, the second speaks of treaties, conventions and international acts.

¹⁸ Or a General Principle of International Law, due to the ratification of said declaration by the UN General Assembly, as we shall see.

¹⁹ Counted as the period between the final moment of the Annual General Meeting (September) and the beginning of the next one.

We accept the thesis by the eminent publicist Bin Cheng, according to which any political declaration by the UNGA may become, immediately, a Customary International Law. Our agreement is based on the fact that the UN stands for a parliament of nations, acting in that sense, *mutatis mutandis*, on a global level, in the same capacity as the national parliaments in processes of assessment and validation of commitments signed by individuals heads of state. Examples of this third case are the various outcome documents from conferences organized by the United Nations, such as the already mentioned Rio Declaration, the Plan of Implementation produced by the Johannesburg Conference (2002) and the outcome document of Rio+20, entitled *The Future We Want*²⁰, ratified, all of them, by immediately ensuing UN General Assemblies.

Soft Law or Hard Law? Choosing on effectiveness

Although the natural path towards more robustness in international commitments goes in the sense of transforming those that are initially voluntary into legally binding ones, there are cases where, perhaps paradoxically, those that are not legally binding actually prove more effective. This happens because of the time required for the negotiation of a binding commitment – with all the implied stages of domestic and foreign political negotiations – namely, parliamentary approval, where particular interests of different political groups may postpone *ad infinitum* the final acceptance of a given international agreement signed by a head of state, using it as a bargaining chip on behalf of more local agendas, as well as by the usual complexity of the matters involved. Whereas, for instance, the Universal Declaration of Human Rights (1948), a text which, in principle, is non-legally binding, remains the reference in this fundamental realm of international relations, the Bill of Human Rights (1976), a document derived therefrom, is largely ignored by dint of countless “softenings” worked into its contents in order to make it acceptable by signatory countries.

²⁰ In clear allusion to the former report entitled *Our Common Future* (1987), the founding document for discussions on sustainable development.

By the way, the Vienna Convention on the Law of Treaties itself, whose negotiation was concluded in 1969, took no less than 11 years to be ratified, and then only by 111 nations, little more than half the number of UN member states. In contrast, the Rio Declaration, the outcome document of Rio92, which as negotiated in a short period of time, had the adhesion of 180 countries, and its non-legally binding contents²¹ eventually originated three binding agreements, namely: the framework conventions on climate change, biological diversity and desertification.

The difficulties of reaching an agreement on several matters, the tortuous processes of negotiation, signature, domestic parliamentary approval and executive ratification, and the various concessions necessary in order to make the text “palatable” to all actors involved, oftentimes combine to make a non-legally binding commitment a more viable, suitable and effective option. Moreover, in cases when there is a strong consensus among countries and blocs, there is no justification for negotiating a binding document, with its implied political and financial costs. Similarly, if countries are not willing to change their practices, or if there is extreme urgency on a given subject, the path to build binding agreements will almost always prove ineffective.

Settling Disputes

In acknowledgment of the cogency of sustainable development commitments and of the inevitability of their inclusion in the international commercial life, the controversy settling processes conducted by the World Trade Organization (WTO), by international courts, and even within arbitration processes with a designated independent and trusted third party have repeatedly decided in favor of parties affected by breaches of sustainability principles. A paradigmatic instance is the “Shrimp-Turtle” case (India, Malaysia,

²¹ According to our hypothesis, however, its “ratification” by the UN General Assembly made it legally binding, by transmuting it into a general principle of International Law.

Pakistan and Thailand versus United States), in which the WTO’s ruling has cited its own foundational document, stating that the language adopted by its preamble, by establishing sustainable development as one of the organization’s objectives, reflects the negotiators’ intention that this guideline should add “color, texture and contrast” to the interpretation of other agreements within its purview, establishing moreover that article 20 must be interpreted in the light of the commonwealth of nations’ contemporary concerns with the protection and preservation of the environment. The same ruling also invokes both the Rio Declaration and Agenda 21 as parameters. Decisions by the International Court of Justice – such as the case of pulp mills in the Uruguay River, involving Argentina and Uruguay (2010) and the Gabčíkovo-Nagymaros case, involving Hungary and Slovakia (1997) follow in the same footsteps.

The Mercosur – European Union Free Trade Agreement

If sustainable development commitments are to have consequences in the lives of nations, their best translation will be the acts of commerce and, evidently, the agreements which precede them and make them viable. If we analyze, for instance, the Mercosur – European Union Free Trade Agreement, in negotiation since this 90s and still awaiting for mutual offers to be considered robust enough by the involved parties and the WTO²², we shall notice resistance on the part of South American negotiators to the inclusion of sustainable development clauses, as well as little emphasis on the European side for their inclusion too (contrarily to what has been seen in negotiations by the European bloc with other actors, such as, for example, Colombia and Peru).

²² The cooperation instrument was signed in 1995, comprehending the three classic dimensions, to wit, political dialogue, cooperation, and the actual commercial dimension. On the first two, there has always been a clear inclusion of sustainable development aspects, something which has not quite occurred with the third dimension – the object of more intense talks since 2004, with discussion of modalities and categories to be included in the agreement, as well as mutual offers.

Analyzing the EU's domestic legislation, we can identify vehement instances in favor of implementing sustainable development, something which, naturally enough, is not possible by leaving out acts of commerce. Such goals are clearly expressed in the Maastricht Treaty (1992), in the Treaty on the Functioning of the European Union (2007 consolidated version) and on the Charter of Fundamental Rights of the European Union (1992 and 2012 versions)²³. With markedly less emphasis, Mercosur's foundational document (Treaty of Asunción, 1991)²⁴, has also touched the matter, albeit in a "disguised" way, that is, deprived of its economic, social and environmental elements, and refraining from employing the key-phrase sustainable development. When it comes to trade agreements signed with other countries and blocs, both Mercosur and the European Union have been explicit concerning inclusion of the subject. So, Mercosur invokes it in its trade agreement with Egypt (2010). As for the European Union, besides the aforementioned free trade agreement with Peru and Colombia, concerns with the respect and promotion of sustainable development in international trade have been made explicit in free trade agreements signed with Mexico (1997), Chile (2002) and CARIFORUM (2008).

The characteristics and assets of both blocs and their obvious complementarity, particularly the socio-biodiversity of Mercosur countries and the technological expertise of the European Union, would recommend the incorporation of sustainability guidelines into their free trade agreement, just as with the other agreements mentioned above, even if such inclusion should be based only on the Smithian logic of comparative advantages. Besides, the ensemble of such commitments assumed by both parties and, individually, by its member countries, effectively obliges these actors to include them, if for no other reason, for the sake of coherence between their political discourse, oftentimes

²³ In European Union Law, its formative treaties constitute a primary source of law – secondary sources being the general principles of law, "derived law" (secondary norms, such as protocols, which have the purpose of implementing treaties) and international agreements.

²⁴ On the other hand, the UNASUR foundational treaty (2008) is much more explicit concerning action "in harmony with sustainable development".

translated into domestic policies, and international action. For quite diverse reasons, these two regions represent nowadays what is most promising in terms of progress towards an economy combining growth, environmental preservation and social inclusion. Therefore, the failure to include basic sustainability conditionality into their commercial relations reduces this potential to mere rhetoric - ultimately a hindrance to other blocs and processes of commercial negotiation.

Conclusion (with focus on Mercosur – European Union trade relations)

If our understanding prevails, namely, that well beyond moral aspects, most of the diverse voluntary commitments taken both by the EU and by Mercosur – together with individual acts by their member countries – have already become legally binding²⁵, even if the commercial dimension of their free trade agreements does not mention them, said agreements shall be interpreted by the WTO and by international courts in the light of these very commitments. The fact that they are not explicit in the actual texts must be supplied by the interpretation of courts, of the WTO, of international forums and occasional councils

²⁵ By the kinds of legal transmutation presented above.

2

SPECIALISTS VIEWS ON THE INTERNATIONAL LAW OF SUSTAINABLE DEVELOPMENT **ETHOS CONFERENCE 2014**

Aline Marsicano Figueiredo, Daniela Arruda Benjamin, Eduardo Matias, Henrique Lian, Luiz Marques, Maristela Basso, Werner Grau.

Benjamin Gonçalves: Good afternoon. We would like to thank the presence of all and start the discussions on International Law of Sustainable Development. I am pleased to invite to our discussion Henrique Lian, Executive Director of the Ethos Institute; Daniela Arruda Benjamin, General Coordinator for Dispute Settlement at Ministry of External Relations; Werner Grau, Partner at Pinheiro Neto Advogados; Maristela Basso, Professor of International Law in USP Law School; Luiz Marques, Teacher of the History Department of Unicamp; Eduardo Felipe Matias, Membership Nogueira, Elias, Laskowski and Matthias Lawyers, and Aline Marsicano Figueiredo, Coordinator of Institutional Affairs of Ethos Institute.

Speakers debate
the legal nature
of the sustainable
development
concept.



Henrique Lian: Good afternoon everyone. This roundtable has many participants, as you have noticed, so we are going to do two rounds of discussion. In this first moment, I will moderate the discussion with Daniela Benjamin, Maristela Basso, and Eduardo Matias. In the sequence, we will have Werner Grau, Professor Luiz Marques, and Aline Marsicano Figueiredo.

For two years now, Ethos Institute has been following trade negotiations between Mercosur and the European Union with the hopes of offering to negotiators a proposal to include sustainability conditionality in this trade agreement. A Mercosur-European Union agreement was first conceived back in 1995, although the idea only took the form of a proper trade agreement in 1999, with its three classic pillars: a political pillar, a cooperation pillar and the exchange of commercial offers. In the political and cooperation pillars, the agreement speaks

widely about the promotion of sustainable development, however, when we get to trade, to the exchange of commercial offers, Mercosur tends to be reactive to the inclusion of sustainability conditionality, whereas the European Union somewhat insists on this issue. Thus, sustainable development is yet to become part of everyday matters of the negotiation. It is still not an essential topic.

Due to this experience with this international agenda, we had an invitation from Friedrich Naumann Foundation to make a structured work of monitoring and advocating for sustainable development, a five-year project. To make this possible, the cooperation of the Ministry of External Relations was essential, with the representation of Ambassador Ronaldo Costa Filho, allowing us to monitor the negotiations, produce content and knowledge and advocate within the frameworks of both the Mercosur and the European Union. This way, we can follow the progress of the negotiations not only from what comes out in the newspaper, but as insiders.

Our kick-off for this project was the seminar produced in November 2013, where we had roundtables about sustainable production and consumption; public sustainable procurement; and the status of negotiations, with the participation of the Ministry of External Relations, the chief negotiator for Mercosur at the time, Minister Francisco Cannabrava now serving in Buenos Aires and also minister of the European Commission.

From the seminar in November, we assembled a publication, released on a seminar in Brussels in May 2014, which also had substantial involvement of Dr. Frank Hoffmeister, Deputy Head of Cabinet in Commissioner De Gucht's Cabinet, on the EU side, and Minister André Odenbreit, head of the Brazilian Mission to the European Union. For this release, we had commissioned a report, a collection of commitments, guidelines and declarations about topics under the umbrella of sustainable development that countries from both Mercosur and the EU had signed since Stockholm, in 1972.

The report commissioned was supposed to contain the inventory of all that these countries had declared voluntarily, the *soft law* of sustainable development. However, the final report went a little further: it brought statements, guidelines and commitments, but also a collection rulings on sustainable development issued by international courts, notably, the International Court of Justice (ICJ) and the Dispute Settlement Body of the World Trade Organization (WTO). In addition, we could find the constitutive treaties of Mercosur, of the WTO, of the ICJ, and of European Union; trade agreements between the EU and players not from Mercosur; and treaties between Mercosur and players outside the EU. The purpose of this collection of *soft law*, voluntary and non-legally binding documents, would be to defend the thesis of a politico-moral obligation, on the part of Mercosur and the European Union, to include, in the trade pillar, sustainability guidelines, since they have, for many years, repeatedly pledged themselves to the cause through declarations, guidelines and actual commitments.

However, when analyzing the report, we concluded that the moral commitment is very clear, very established, and that maybe we were already one step ahead, towards the consolidation of an International Law of Sustainable Development. In what way could this be? These non-legally binding commitments were somehow already turning into legally binding documents. Considering, for example, the Article 38 of the Statute of the International Court of Justice, the *corpus juris* of Public International Law sources, we see that there are three sources of Public International Law: treaties and conventions, international customs, and general principles of International Law. Many of these guidelines, voluntary commitments, and declarations have already been incorporated in treaties and conventions, and are, therefore, already *hard law*, or, most often, they are already transmuting into international customs or general principles of International Law; remembering, to those who are not lawyers, that there is no hierarchy between these three sources of International Law.

Well, looking superficially at the customs, how are international customs created? The repeated practice and the behavior of the

countries, implying that they recognize a specific guideline as legally binding, called *opino juris*, and as some jurists like Andrew T. Guzman will go as far as admitting a tradeoff, as these situations are sufficient to set up a new custom. General principles, though, are more complex, more elusive, and we will explore them later. What is certain is that the International Court of Justice, the Dispute Settlement Body and the Appellate Body of the WTO have already ruled in favor of sustainable development in the case of *vacatio legis*, those situations in which the trade agreements between countries do not address every topic and leave some gaps. This goes dispute settlement, to a procedure, an international arbitration process and these judges decide in favor of sustainable development, but in my point of view, with weak arguments. I will mention two classic cases.

The first case is the *Gabcikovo-Nagymaros*, involving Hungary and Slovakia, in 1997, in which the decision was based in the acceptance of the concept of sustainable development. There was a gap, an environmental damage, and the judge rapporteur said, “Look, we have to understand that the concept of sustainable development is already a legal reality, thus we have decided in favor of sustainability”. The other example is the *Shrimp-Turtle*²⁶ case, in 1998, which had, in one side, India, Malaysia, Pakistan and Thailand and, on the other, the United States. The decision also found no basis in formal trade agreements, and went as far as to the preamble of the WTO constitutive treaty. The first paragraph declares, “this court was made to promote trade from the perspective of sustainable development”.

At the end of the day, the fulfillment of international agreements are never as fast as one would like, since there is no supranational authority or jurisdiction to judge countries, who end up respecting, or not, their legally binding (or not) agreements on the basis of: damage to their reputation; or the possibility or not of reciprocity; whether or not there will be retaliation. The three R’s.

Even so, we believe that it is possible to advance in this sub-field

²⁶ https://www.wto.org/english/tratop_e/envir_e/edis08_e.htm

of International Law, which is the International Law of Sustainable Development, making it robust and more reliable for the preparation of international agreements, especially trade agreements, the ones we are interested in - for the interpretation of these agreements, the interpretation of the parties and the interpretation of referees or judges in the case of dispute and more consistence to the decisions of these courts mentioned above. If a judge decides, instead of vaguely mentioning the concept of sustainable development (that no one really knows how to define), invoking situations that have become international custom or new Principles of International Law, this decision will have much more weight.

Therefore, this is what we want to explore today with our great guests. I will suggest the following order of interventions: Eduardo Matias first, because he assembled this report, which was commissioned by the Friedrich Naumann Foundation, our partner in the project; next, the jurist and diplomat Daniela Benjamin, who has impressed me very much with her opinions on International Law; and, finally, concluding with the Maristela, whose reputation precedes her. At the end of interventions we can all ask questions. Eduardo, go ahead.

Eduardo Matias: First, I would like to thank Henrique, from Ethos Institute, for the invitation to participate in this exciting and fresh debate. In fact, I usually say that globalization and sustainability are the two most important ideas that have emerged in the last 25 years, and to be able to speak about International Law, which is the basis of this globalization, and about sustainability, is undoubtedly a privilege. I will outline the arguments, the findings of the study mentioned by Henrique, especially with emphasis on international agreements.

It is important to understand that sustainable development is a multilayered and complex phenomenon that does not contemplate exclusively the environment, including social justice, access to culture, access to education, combating corruption, promoting ethics — in short, it is about the development of human capabilities to improve the quality of life for people around the world. Thus, there are documents

that are, by nature, aimed at sustainable development and others that deal with aspects that are at the heart of the matter, such as fighting corruption and pollution, promotion of humane working conditions, among others. There are also international instruments that deal with specific issues, such as free trade, but that refer to the commitment to sustainable development. Finally, there is the jurisprudence.

In relation to the first group of documents, the main references we have are United Nations international conferences on sustainable development. The first one, the Stockholm Conference in 1972, does not even address sustainable development specifically — especially since that term only came about and was put to current use after the report *Our Common Future*, the *Brundtland Report* of 1987, which gave defined the that we all know. In the Declaration of the Stockholm Conference, Principle 13 asserts: “... to ensure that development is compatible with the need to protect and improve the environment for the benefit of the population.”

On the Rio Declaration on Environment and Development, 1992, in one of its principles states that the right to development must be respected to meet social and environmental of both the present and future generations in a balanced way — hence, we can see here a part of the concept given by the *Brundtland Report*. And let’s remember that Rio-92 generated a number of other documents, such as the Agenda 21 and the Climate Convention, which also mentions the goal of sustainable development in Article 3 — “The parties have the right to sustainable development and must promote it” — in addition to a series of statements, the COPs, or Conferences of the Parties that take place yearly.

In this context of combating climate change, countries have been repeatedly affirming and reaffirming their commitment to sustainable development. Later on, in 2002, the Johannesburg Declaration spoke again about the common goal of sustainable development, and, in 2012, during Rio+20, countries renewed their commitment to it once again.

This commitment, however, goes beyond these conferences, for, as we have seen, sustainable development is a multifaceted phenomenon. If we look into the past, there are several international conventions, and treaties addressing aspects related to it — such as the Universal Declaration of Human Rights, the UN International Covenant on Economic, Social and Cultural Rights, the United Nations Convention on the Law of the Sea and the Montreal Protocol on Substances That Deplete the Ozone Layer. More recently, other agreements began to incorporate the expression and, more specifically, the goal of sustainable development.

The declaration of the International Labour Organization (ILO) about the fundamental principles and rights at work, of 1988, mentions the need to create broad-based sustainable development environment. The Rotterdam Convention on pesticides and hazardous chemicals, of 1998, says that trade and environmental policies should support each other, striving to achieve sustainable development. The United Nations Convention Against Corruption refers to a topic more directly associated to social responsibility, but that could also jeopardize sustainable development, as stated in the preamble of the Convention.

Therefore, we can see that in international agreements directly related (or not) to the environment, countries reaffirm their commitment to sustainable development. However there is yet another context, still very relevant, in which sustainable development is also mentioned: in treaties that take care of other matters entirely. In this case, there are some strands that can be explored, and the one that is interesting to this study, specifically, is regional integration.

Regional integration, of course, gives rise to a number of legal documents that apply to the countries that are part of each bloc. Both the Mercosur and the European Union, part to this negotiation, have taken in their constitutive treaties commitments that include sustainable development.

As for Mercosur, one can look at the Treaty of Asunción, of 1991, according to which countries should accelerate their

economic development processes with social justice, harness more effectively available resources and preserve the environment. Another example is the 2008 constitutive treaty of UNASUR, claiming that the union between the member countries must be guided by principles of reduction of asymmetries and harmony with nature for a sustainable development.

In the EU, this commitment becomes even clearer. Some documents state that sustainable development must be a principle. The Maastricht Treaty of 1992 states that countries are determined to promote economic and social progress of their peoples taking into account the principle of sustainable development; they must preserve and improve the quality of the environment and the sustainable management of global natural resources. The Treaty of Rome, responsible for determining the functioning of the European Union, was amended by the Treaty of Lisbon, in 2007, according to which the environmental protection requirements must be integrated to the definition and implementation of policies and activities of the Union, particularly aiming at the promotion of sustainable development. The Charter of Fundamental Rights of the European Union, in force since 2000, also says that a high level of environmental protection and improvement of the quality of the environment must be incorporated into the Union's policies and ensured according with the principles of sustainable development.

Therefore, in the context of regional integration it is patent that this commitment is starting to gain weight, but this is not the only area where this is happening. I usually say that economic globalization has been accompanied by a legal globalization. We have a true proliferation of international agreements and international organizations in recent years. And this legal globalization also brings sustainable development to the center of the discussion, not only because there are about 250 multilateral environmental agreements, but also because the recent plurilateral and bilateral free trade agreements contemplate sustainable development. An example to give you a clearer idea: according to the WTO, until early 2013, 543 agreements of this kind were in place, of which 354 were in force and half of this total was

signed in the previous ten years. As I will demonstrate here quickly, these agreements also bring within them, in addition to free trade, the commitment to sustainable development.

Although Mercosur has a large deficit of this type of trade agreement — we are lagging behind on it because of the lack of consensus among Mercosur countries —, this commitment is present in at least one of them: the agreement between Mercosur and Egypt, concluded in 2010, which is not yet in force. The European Union celebrates trade agreements much more frequently, repeatedly inserting the obligation to respect the sustainable development. The Free Trade Agreement between the EU and Chile, signed in 2002; between EU and the Caribbean Forum, 2008; between the European Union and Mexico, 1997; and most recently in 2012, with Colombia and Peru — in all of them the principle of sustainable development must be acknowledged.

You see, these plurilateral and bilateral recent agreements provide a series of rules that refer to a huge variety of subjects, such as intellectual property, movement of capital, environmental issues etc. The agreement with Colombia and Peru, for example, establishes rules regarding to fisheries, forests and climate change, in addition to affirming the need to promote international trade to achieve the goal of sustainable development.

It is this relation between free trade and sustainable development that one can start the discussion about *soft law* and *hard law*, since when one considers the possibility of enforcing sustainable development rules, one must understand how they conflict with more consolidate rules of International Law. Regarding the WTO, specifically, we have a classic example of how, when in conflict with other principles, sustainable development may not become a positive set of rules or a principle. This happens because there are specific courts used to dealing with issues of free trade and there are other realms preoccupied with asserting the objective of sustainable development. Because the WTO condemned many trade measures related to environmental protection after being considered harmful to trade, the organization gained a reputation of

prioritizing free trade over the environment. Moreover, it is actually very difficult to undo this reputation.

Although the preamble of the constitutive agreement of the WTO specifically recognizes the goal of sustainable development, WTO decisions only mention this disposition, but are not necessarily favorable to environmental policies that may affect trade. In its decision in the Shrimp-Turtle case, the Appellate Body found that the language adopted in the preamble of the constitutive treaty of the WTO reflects the intention of the negotiators and should add “color, texture and contrast” to the reading of other agreements of the organization. In addition, the Article 20 should be “interpreted in light of the contemporary concerns of the international community on the protection and conservation of the environment”. However, the Appellate Body, despite having argued that, ended up condemning the policies adopted by the United States because in their way of implementation, they were not compatible with the rules of that organization. The impression that remains, therefore, is that the WTO is not, in fact, oriented primarily towards sustainable development.

Even though there are a number of agreements and declarations, sustainable development is an incipient jurisprudence and predominantly underpinned by *soft law*. As a result, when it conflicts with other rules of International Law that find support in *hard law* agreements, formal sanction mechanisms and courts that can enforce these rules — like WTO court — sustainable development may indeed be left aside. And this is the question that I wanted to bring to the debate: how can one make sure that this *soft law* will effectively prevail in everyday practice of International Law, moving beyond the realm of good intentions. Thank you.

Henrique Lian: Thank you, Eduardo. This complicates our case, doesn't it?

When you say that the predominant interpretation of the WTO is in favor of free trade, it is actually respecting previous agreements and principles, such as Principle of National Treatment, for example, which we may have the opportunity to explore further.

Daniela Benjamin
on the difficulty
to find concrete
effects of any given
instrument, whether
it is a treaty or a
declaration.



Daniela Benjamin: Good afternoon, everyone. I would also like to thank you immensely for the opportunity to be here in this debate that is more than thought provoking. Over the last 20 years of my career, both academic and professional, I have observed how, in practice, how many of the institutional legal systems operate and their roles. Thus, I hope to contribute to this debate that I consider still incipient in Brazil, but also essential for us to have clarity regarding the scope of the international commitments concluded by our country, what role of these documents in inducing behavior and national public policy change, and, ultimately, how effective are these instruments that should guide international cooperation in different areas, particularly in the area of sustainable development.

This discussion goes necessarily through what is the essence of International Law and how it is perceived. This is obviously not a new issue. For those who accompany this topic, it is a fact that since International Law came to existence, there was always a search for a unified cohesive theory to define how International Law works. To this day, we have no such definition. The American professor, named Oscar Schachter, identified up to thirteen different theories that could explain the basis and the operation of International Law, the most widely known being the Theory of Consent, Natural law and the social need.

There is an endless amount of principles and ideas to explain the existence of rules that end up being respected by most international actors, the nature of these rules is not very clear. If we can add to these theories of International Law theories of International Relations - regarding the role of rules, the role of Law over the behavior of actors and over international politics -, we will find another endless amount of explanations, since scholars arguing that International Law has no influence over international relations until books and manifestos on the central role of it.

Some may even say that the search for this theory is equivalent to the mythical quest for the Holy Grail, virtually unattainable, but which, from the practical point of view, is important, precisely in order to guide us, so that we can know exactly what type of instrument is available to international actors and to States so they to regulate their mutual relations and to guide and induce compliance with certain objectives that, at any given time, are considered common goals. These instruments are of various natures. There is what we call, traditionally, *hard law*, which refers to international treaties, international customs and principles and they coexist with other various instruments: declarations, principles, acts of international organizations, a plethora of instruments used over time to promote international cooperation in any given area.

These instruments have always coexisted, of course, but that traditional International Law that used to regulate relations between nations but not necessarily the life inside these nations no longer exists. This happens because of the increasing density of International Relations and because of cooperation in different areas, which leads to regulating various subjects with the ever-increasing impact over the formation of public policies.

Therefore, this question of what is rule and what is not, of what is cogent or not, ended up having a much larger dimension. What you consider law depends somewhat on your perception of on what these rules would be. For those with a more traditionalist position, the valid

law would be one that is set by the legal order. For these positivists, so to speak, it is this would mean treaties and customs and, as for the rest, these instruments would end up contributing to the formation of these laws, but not necessarily considered as rules themselves. Others, on the other hand, may interpret International Law as a factor of social regulation and, as such, it encompasses a vast amount of instruments, each with a different scope. The problem is how practitioners act within this spectrum.

The moment when one negotiates a certain cooperation goal, objective, the question is how, exactly, to choose within this universe. In theory, the choice of a cooperation instrument and is associated with, or at least it should be, to the issue of consistency of effect these instruments are intended to have, the impact you want them to have. However, there is no consensus at the international level, with its several regimes and different actors involved, regarding which course of action is more effective and efficient. Even domestically, this is an issue. In theory, and putting it in a very simplistic way, the goal of every trader is to get the maximum gain possible with the least possible restriction. This is the goal-oriented negotiation, except it is increasingly difficult to identify exactly what is the main goal.

When discussing a particular topic, and environmental issues offer good examples, there are often too many interests of the state hinder clarity during a negotiation and even stops one from knowing the right time to add specific clauses to a certain legal instrument due to how complex are the implications for the several national interest groups. To add yet another layer of complexity, one cannot see the concrete effects of any given instruments, whether it is a treaty or a declaration. Because of the permeability of different regimes, a declaration may be invoked in a complete different context and be strengthened, I won't say legally, but in terms of causing a much larger impact than anticipated because of relatively vague terms employed, allowing for multiple interpretations. All of these elements make it hard to distinguish the limits between *soft law* and *hard law* and the potential impact for each one.

Does this mean - and I think the term used was transmutability - that one can assume that a declaration will transform, with given time, into a legal instrument? I tend to think otherwise, because in some cases flexible instruments may work a lot better, true; but, in other instances, bearing in mind the goals and precedents of the negotiation, one may need a more elaborate instrument. It may also be the case that a combination of different instruments is more effective to a legal landmark in a certain area. Once again, I will bring sustainable development as a concrete example of this.

Over the years, there was a combination of numerous instruments, from international treaties negotiated formally to declarations and principles that gradually contribute to a robust, solid legal framework. Under the umbrella of Public International Law, International Law of Sustainable Development might possibly be the branch that has advanced the most, except, maybe, for Human Rights. The challenge now, especially with the Post-2015 agenda, is how to consolidate these advances and take a step forward in the pursuit of these new goals. I think this will be on the minds of all negotiators, and all discussions from now on will be on how to identify these instruments.

Now — and here I am going to be a little provocative perhaps — I call the debate: the question is whether this dialogue goes primarily through a discussion about the legal value and the legal nature of these instruments, that is, if they should or shouldn't be regarded as customs and international principles; whether they should or shouldn't be embodied in a treaty or if this discussion should focus on effectiveness, on each instrument ability to contribute to achieving certain goals.

When talking about Sustainable Development Goals, what everyone is looking for, more than to achieve certain targets, is behavioral change in the long-term perspective, which could be imprinted on long-term public policies. You do not necessarily get to do this the easy way, enforcing a rigid rule, because the negotiation is much more complex in this case, potentially making it more difficult or limiting exceptions, “the exceptionality margin”, that participating countries could count on to achieve goals while respecting their own needs and limitations.

All of this, obviously, is an argument to be made and its effectiveness must take into account the increasing fragmentation of international regimes. In fact, nowadays, there are a number of issues that are dealt with in different regimes and not necessarily seen from the same angle. The World Trade Organization, when analyzing trade disputes that have an environmental component, will not be evaluating for the environmental point of view; not because the principles of sustainable right are not as important, but because it is the logic inherent to all jurisdiction, it will judge from its own perspective.

Environmental protection is very clear within WTO agreements. The Article 20 of the GATT, which is more or less replicated on other documents, makes it unmistakable that countries have the ability to internally adopt regulations they consider necessary for the protection of life and the environment. The discussion regarding what needs to be done, however, is not carried inside the WTO, although the evolution of cases has been a growing trend in this direction, with the employment of legal instruments from outside realms. There are even international treaties being taken into consideration, not only principles applied to rulings, either to clarify the scope of an environmental rule, or to assert a legitimate concern with the issue. However, the application of other instruments will always depend on the perspective of that particular system's goals and objectives. Even if there were a clear a set of environment rules, if a case was brought to the WTO, it would be analyzed under the lens of WTO objectives. Eventually, if there was an international court on environment and a case was tried there, the results would be different, with an additional risk we tend to forget: conflicting decisions.

Therefore, the effectiveness of the choice of this instrument goes through this analysis, always knowing that the reason why a state meets or fails to meet their international commitments, all categories included, are always difficult to precise.

Of course you will say, that the cost of failing to comply with a legally binding instrument is higher than disrespecting, let's say, a *soft law*.

Nowadays this difference, however, is much more tenuous. On the other hand, it is yet to be seen a country that has failed to fulfill an international commitment, however hard it may be, if it understands for any reason that it has good interests to do so. Throughout history this was even a matter of and modifications of rules.

In conclusion, I believe it is fundamental that the discussion goes through these issues, touching the efficiency and what is the most appropriate instrument to reach intended goals. Thank you.

Henrique Lian: Thank you very much, Daniela. When we arrive at a new field such as sustainable development, we must revisit the paradigm of Human Rights. I would like to recall, for example, the 1945 Universal Declaration of Human Rights, a non-legally binding voluntary act that inspired and transmuted into a convention, the Human Rights Convention, 1966. Nonetheless, the convention has been less effective than the declaration. The timeframe of the negotiation was too long, for the convention, the political cost of the negotiation with national parliaments was very high, and the number of signatories is not as high as it should be. Yet, the declaration is invoked, not as an instrument that somehow gained density and turned to *hard law*, if that even exists, as you say it does. Maristela, now the challenge is yours.

Maristela Basso: Thank you, Henrique. I think I'm the one who will

Maristela Basso stressed that there is no international trade without sustainability.



bring good news, right? I hope so. These good news is rooted in over 35 years during which I have been studying International Law, and I see the International Law evolve from a smaller field of the law to an absolutely independent field, with scientific autonomy. Today, undoubtedly, International Law is the most important field of legal sciences everywhere.

Sustainability was never my main focus in International Law, and this is why I have spent the last month talking to Henrique and researching. After pondering a lot about this topic, I have no doubt that the International Law of Sustainability is not a Public International Law field, the field of Public International Law is International Private Law, it is the right to development. International Law of Sustainability is an autonomous field, has scientific autonomy, that is, it leaves the structure of Public International Law and takes its own shape and life.

This has happened to Private International Law, which focused on law conflicts in matters of Civil Law, Commercial Law and the Labor Law, in the first half of the 20th century. From 1919 on, with the creation of the International Labor Organization (ILO), therefore before the existence the UN, becoming, later on, a UN agency, this changed. Because of ILO's work, from 1919 to 1960, we achieved scientific autonomy of International Labor Law. And why did this happen? Because, from then on, new sources of law were available, new lawmakers were working side by side with ILO, and the International Private Law did not recognize these sources. International Private Law scholars realized that there was a new *lex mercatoria*, with new sources, new lawmakers, new players that did not fit the old structure, and therefore the International Trade Law was emancipated, becoming an autonomous field.

The same happens for the International Law of Sustainable Development. The amount of sources we have today is sufficient for us to declare the existence of a new field of Law, just as important as the others. Discussing scientific autonomy is no longer necessary, because it is what it is. There will be no international organization to say that

“Henceforth there is an International Law of Sustainable Development.” As teacher Miguel Reale says: “the law is built every day, it is the law as experience, and this is done by us, the scholar and the practitioner, presenting to the world a set of sources and lawmakers” and saying “we are facing this field.” Having said that, let’s move to the International Law of Sustainable Development along with the International Law of Responsibility.

The 21st century belongs to the International Law Responsibility. It is no longer possible to accept that people die in Iraq whereas I go to sleep on my neat bed, as if nothing is happening, because the concept of humanity is collective. And if I do nothing about those people dying there, I am also the author of those deaths, and I am also a victim, because one or several relatives of mine are gone. Therefore, talking about the International Law of Sustainability and the International Law of Sustainable Development means talking about pacific topics.

Well, in this International Law of Sustainable Development - and I will bring some controversy here -, there is no distinction between *hard law* and *soft law*. Professor Luiz Olavo Baptista, while he was still president of the Appellate Body, said to his colleagues: “*Hard law* and *soft law* are figures of common law”. For us, countries of the Roman-Germanic tradition, there is no difference. For example, he said: “I am Brazilian if you asked me for an example of a soft law in Brazil I couldn’t think of one, because we don’t have it.” This is a definition that we have to abolish immediately, because it does not fit the tradition of Roman-Germanic countries and, in addition, it weakens the discipline, it weakens the International Law of Sustainable Development. A law is a law. States do not put anything on paper unless they mean to fulfill it. They can do it in a voluntary and festive way, or not comply at all. Nonetheless, the document that contains the declaration is definitely mandatory.

In International Trade Law, there is no distinction either. On the contrary, the so-called transnational sources are much more important than treaties and conventions. We don’t like treaties and conventions

because they are too hard, they involve heads of state that need to sign the document (or not) then send it to the Parliament, where it will stay for a really long time, frozen. We don’t have this time. There are other sources, customs, principles and rulings from relevant courts, and the doctrine; there is no hierarchy among them. What does, in fact, exist is an alliance of these sources with the individual and the goal of improving human life for each one of us. Therefore, regardless of the name they might have, they refer to a unified Law, and states must comply with the Law, with no distinction between legally binding or not legally binding. What could upright citizens do during a negotiation that is not legally binding? There is no need to invest heavily on missions abroad to sign, what, a “gentlemen’s agreement”? This simply does not exist in private affairs.

So my first concern is this: we are facing a new field that is not part of Public International Law, it has its own life, relates to all other fields of International Law, like it happened with International Intellectual Property Law that today is absolutely independent, has its own life and one of the most important fields of International Trade Law. My second statement is that we must abolish the distinction between *hard law* and *soft law*; the Law is the Law. My third concern is that we are more than aware of what we have to do in terms of sustainability, but how do we do it?

I have two suggestions, possibly terrible, and I will use as support my long experience to talk about them. There is no international trade without sustainability, and this is part of the preamble of the WTO constitutive agreement. If there is any doubt about it, we need to look for a WTO declaration, the Doha Declaration on intellectual property and public health. Well, there was no need for a WTO declaration as far as 2000 to inform countries that they cannot privilege the protection of intellectual property over public health. However, there was a time of threats to infringe patents, of parallel imports of medication, and the WTO did us a favor in stating what was already evident: states cannot protect intellectual property with no concern for public health. This was very important for intellectual property and for developing and least developed countries.

Therefore, we need a declaration from the WTO that nothing in trade agreements can be interpreted in a way contrary to sustainability principles, regardless of the character of *soft* or *hard law* they may have, in other words, principles that are impregnated in the legal legacy of men. I doubt we wouldn't have a big group of supporting countries and to approve it as fast as it happened for the public health and intellectual property declaration. It must be noted that there is no hierarchy among principles, they are balanced, and it is up to the interpreter to find this balance. If until now WTO rulings have not reflected this balance, it is because there was a misunderstanding.

I ask myself where are the organizations that protect the environment and defend of Human Rights. Why were they absent instead of sharing their reports and supporting plaintiff countries? What are we doing? In practice, institutions like this gain a role as lawmakers in International Law of Sustainable Development. We are the lawmakers. These non-governmental organizations will start to make recommendations for governments on how they should prioritize imports from countries that respect these principles and establish that companies will only have access to the international market, to public procurement and service contracts, if and only if these principles are embedded in their corporate governance. This is as if we were soldiers pressing for lawmaking and behavior change. Without this, we will always have to debate the same issues, with no effective change.

My suggestions are a bit drastic, but they occur to me after all these years I have watched the formation of International Law fields and how they were originally complementary but acquired scientific autonomy, becoming more important fields than the traditional International Private Law and Public International Law. Thank you.

Henrique Lian: Thank you Maristela. I don't know how to overcome this contribution to the common law. I really enjoyed the challenge; maybe the problem is legal colonialism.

Sucena Resk: My name is Sucena, from the Envolverde website, I am

a journalist, and my question is about the role of Brazil in recent issues. Brazil signed the Treaty of Montreal, for instance, which is one of the most successful in the world, and even complied with it, but now, in Nagoya, there was no ratification. Also regarding the Charter on Deforestation during the Climatic Change Summit, Brazil did not sign it. We also have some disputes, like the issue with native populations and the construction of hydroelectric plants. So these are international treaties that are not fully accepted in Brazil, right? I would like you to point out what is the problem, why we only comply with some treaties.

Maristela Basso: Legally, there is a procedure with several steps, and this works for all countries. The fact that a country has not signed a declaration is a truculent gesture. Why? Because the treaty-making power, which is the power to celebrate treaties, goes through three main stages. At the end of a conference, there is a document. If the representative of a country signs it, this doesn't mean anything, there is no consequence. It means only that the country participated in the project and announced that it supports the proposal. The document is then delivered to the Parliament, which may, or may not, approve it. If the document passes, it is sent to the head of state. It would have been better if the President had forgotten the document inside a drawer considering government allies were not enough to disapprove it, because instead, she chose to tell the world she does not agree with this or that rule, and this in a country that is 60% forest. This was, let's say, not very diplomatic.

Henrique Lian: Reminding that you are here, Daniela, as a legal attorney, not as chief of Dispute Settlement of the Ministry of External Relations, but if you want to comment, Daniela, please feel free to do so.

Daniela Benjamin: I will take the cue from what Maristela said, because my world is not very optimistic regarding states' capacity to promote principles effectively. One thing is the general interest, the bigger purpose of cooperation; which, I believe, has a lot to do the civil society activism, due to a awareness. There was a big progress on the introduction of topics in the international cooperation agenda that contributed to form a consensus over broad lines. Obviously,

no one questions what has been said, that there is no trade without sustainability. This, in terms of principle, the same way the World Peace principle is enshrined in the UN Charter. The problem lies in the details.

In theory, again, foreign policy and international actions of a country should reflect its internal consensus. Countries are not separated from what happens at the domestic level. When there is no consensus or at least a solid support base gathered around general principles, the difficulty to achieve coherence, as one would like, is greater. There is also an aspect that is not frequently discussed, which is the limit of international cooperation. Not because the UN chose not to speak about it, or because the WTO did that, but because, for example, intergovernmental organizations and their decisions about which way to go in terms of cooperation depend on the consensus of its members.

Therefore, cooperation will not always advance in the same rhythm as states individually do, because interests diverge and this combination will lead to two steps ahead and three backwards. It is indeed frustrating for negotiators, because, at first, it is always a good idea, a good principle, but a certain sector within a state may pressure and lobby for something different, because it is not the right time for that particular group. This doesn't mean we shouldn't keep trying. The reasons that drove us towards cooperation are still there. The fact that there is no agreement of the WTO to deal with agricultural subsidies does not mean that the problem is nonexistent. It takes continued efforts, a long run.

Back to the legal realm, I would like comment broadly on the relation between national Law and International Law in Brazil, which has not been very explored so far, although Brazil is very active internationally, participating in different international regimes and organizations. We have too many gaps in the Constitution. The interaction between national and International law is a jurisprudential construction that dates from the times when there was no dynamism in the creation

of rules the Constitution is not necessarily ready to deal with the permeability among international and national legal instruments. Even in the field of the environment, we have national instruments turned into laws that are much more advanced than the ones referring to international cooperation, because, on the other side, we always have to deal with countries who have other difficulties. This means that there are two sides in this process, with pressure to project in the international real our interests with different levels of success, if we may say so.

The idea of an environmental declaration would be great, but it cost a lot to have one about public health. There is a committee at WTO for commerce and environment issues, for twenty years now, and they still did not get anything done. It doesn't mean that the countries are not involved and that they didn't sign the commitments, but there are different interests and situations that not necessarily match on a concrete level, although there is a consensus behind.

The idea of a declaration about the environment was great, but it took too much time for us to write one about public health. The WTO committee dedicated to trade and environment has been in place for over 20 years with no great results. Not that countries involved have not committed formally, but there are different interests in a different arena, which do not necessarily meet in practice, although there is a broad consensus on principles.

Regarding the reason why we haven't signed the agreement, or why we opted for a simple declaration, in formal terms, I must say it was something negotiated in rebellion. Moreover, it is always complicated to agree to an instrument without having participated in the construction of it and with no way to anticipate possible implications, as much as one agrees with its principles, as have mentioned here. I share this viewpoint with Maristela, especially when she says that Law is Law, and that, nowadays, even declarations may have a concrete effect. Speaking, now, as a negotiator, regardless as one looks at an instrument being signed, one must look three or four times, which does

not mean that with time and information of the reach of commitments it will not be good enough. Nevertheless, here I speak mostly as an observer. Thank you.

Eduardo Matias: I will make a very quick comment on this issue. On the beginning of my presentation, I said that Brazil is struggling to keep up with the two major ideas developed in the last 25 years: globalization and sustainability. In response to your observation, and in relation to these two issues, the Brazilian performance in the international realm is delayed. Regarding globalization, and more specifically, free trade, I have already mentioned how hard it is to sign agreements with other countries. This has a lot to do with a need for consensus within Mercosur, a consensus that never happens.

When we talk about bilateral investment treaties, we are talking about another area where we lag behind. Of 2500 bilateral investment treaties in the world, Brazil only signed 15 and hasn't ratified any. This reveals a legal framework, a real safety net on investment and free trade to which we have not adhered. As for sustainability, something similar happens. Brazil could adopt a leadership position, but it doesn't. It is hard to identify the reason why it doesn't, but I think it has a lot to do with the difficulty in perceiving sustainability as an inevitable trend, and that countries who don't understand that will be left behind. Many companies have come to accept that the sustainability funnel is narrowing; we are in an environment where this is widely known. In politics, however, this is not so widespread, or accepted.

Henrique Lian: Thanks a lot. Unfortunately, we don't have time for more questions because we are going to reorganize the table. I would like to thank Daniela, Maristela and Eduardo and say your good bye with a warm round of applause.

For this discussion, I will invite Werner Grau, Luiz Marques, historian and professor at the History Department of Unicamp, on the far right Aline Marsicano Figueiredo, internationalist and Institutional Affairs coordinator at Ethos Institute. I would like to start with Luiz so we can take a break from all the legal talk and listen to a historical point

of view, followed by Werner Grau and Aline, who will bring part of Ethos Institute's point of view.

Remembering that our discussion here aims at clarifying if what understand as *soft law* - a set of non-legally binding commitments related to sustainable development, in other words, declarations, commitments and guidelines - is already transmuting into *hard law*, which means being incorporated in treaties and conventions or becoming international custom or a General Principle of International Law. Bearing in mind that the courts who decide disputes involving sustainability, like the ICJ or the Dispute Settlement Body of the WTO have consistently ruled in favor of sustainable development, but often invoking vague concepts in cases of *vacatio legis* or evoking their own statutes, like the WTO has done. I wonder if it would be the case of providing deeper subsidies for these decisions and for the making of trade agreements with the presence of conditionality and sustainability or principles for existent treaties. Now, Luiz, it is your turn.

Luiz Marques: Good afternoon. I am very grateful to participate in this panel, with people that have deep knowledge about Law and diplomacy, knowledge that I completely lack. I will try to make a very brief intervention, of less than 10 minutes, and I will read it to avoid any delays.

The beautiful essay written by Henrique Lian proposed as a centerline and starting point to this debate, is focused on the International Law evolution, particularly on the inclusion of norms that contemplate environmental sustainability in commercial treaties between countries and blocs. According to him, taking into account Environmental Law and considering what happens in other areas of Law, jurisprudence will end up having the last word when it comes to the interpretation of the freedom of action of signatory countries of any given agreement in regards to sustainable development.

I quote him: "We believe to have open a new field of Law, as incipient as appropriate and necessary, the International Law of Sustainable

Development. As this new field, to which we intend to modestly contribute and, I am sure, to which we have already contributed, conquers progressive autonomy and epistemological soundness, doctrinal works, essays, and fundamental decisions, crucial to the understanding of the international actions in light of already consolidated principles, will be produced, and the impacts of such works will extend to the future generations of all nations.” I close the quote and start to discuss the text, which was very enlightening to me.

The first logical condition for the possibility of a productive discussion is the clarification of the premises upon which the parties base themselves. A complete agreement on the premises for a productive discussion is not necessary, but, instead, acknowledging the disagreement is crucial for the evaluation of each argument, evaluation that takes into consideration the premises upon which each argument is built. I believe that Henrique Lian’s conclusions are logical and historically supported. Therefore, they are convincing only if one adopts the author’s fundamental premise, which underlies the whole text. In my understanding, Henrique Lian’s fundamental premise is that nature provides us with all the time required by the traditionally slow rhythm of diplomacy. Unfortunately, that is not true. As reminded by Ban Ki-moon, the UN secretary-general, in his evaluation about the negligible results from Rio+20: “Allow me to be honest; our efforts were not up to the challenge. Nature does not wait; nature does not negotiate with human beings”.

It is true, the final document from Rio+20, *The Future We Want*, is an example of brave developmental anachronism. The word “crisis” appears only twice and, as unbelievable as it might sound, just as a reference to the financial and the energy crises. A creature that knew the planet only by reading this document would be certain that its inhabitants are not suffering multiple environmental crises. The ones controlling political decisions managed to resist public opinion and scientists’ pressure. We watched the creation of the most unusual alliances, for instance, Hugo Chavez’s Venezuela with United States, Russia and Canada — in order to avoid the approval of an open sea

protection plan. “Nothing could bond countries together but profit”, joked Kumi Naidoo, executive director of International Greenpeace.

On the other hand, the most frequently used word we see in the document is “sustainable”, with no linkage, whatsoever, to a single concrete action that could diminish our impact over nature and bring us closer to the world the document’s signatories seem to want. Former adviser of a special UN project complemented ban Ki-moon’s verdict on that same occasion: “We need urgent action, we cannot have a Rio+40. There is no time. We are behaving like idiots. The matter on sustainable development is not for the next generation to deal with, is for ours”. There won’t be any time for a Rio+40 if we continue to indulge ourselves with the rhythm of diplomatic negotiations evolution on environmental matters. Perhaps we can do a Rio+40, but it will happen under considerably more adverse conditions than what we face today.

What I intend to put into focus is that our diplomatic advances concerning environmental matters, substantial as they are, haven’t been capable of counterbalancing the scale, the speed and the acceleration of these three factors of environmental crises. It is clear that, since World War II there was a conscious effort to build a legal framework on the protection of the environment. Nevertheless, it is also undeniable that the three legally-binding UN resolutions of 1992 - the UN Framework Convention on Climate Change, the Convention on Biodiversity and the Convention on Combating Desertification - were not capable of bringing us closer to our societies of environmental sustainability.

The unavoidable fact is that the degradation of the Earth system, measured by any parameter we choose, is advancing fast. A bigger concentration of greenhouse gases in the atmosphere, climatic changes, deforestation, degradation and fragmentation of forests, reduction of water supplies, longer droughts, fast desertification and erosions, more frequent and devastating fires, habitat destruction, biodiversity collapse; water and land pollution by sewers and city and industrial trash, human and nature chemical intoxication, increase of pandemics due to antibiotics abuse, acid rain, ocean acidification, increase of dead

zones in rivers, lakes and oceans, destruction of corals, a bigger whole in the ozone layer at the Antarctic, higher ozone concentrations and other toxic particles on the troposphere, high speed melting in the Arctic, Greenland and west side of Antarctic, potentially catastrophic liberation of methane in the atmosphere, sea level elevation and intensification of extreme weather events, bigger hurricanes, strong rains, floods, torrid summers, colder northern winters with intense blizzards even though the world is hotter. The list is long and is far from being over; its consequences impose themselves even to those who want to look the other way.

According to a recent report from the Norway Council on Refugees, in 2013 alone, the so-called natural disasters, as if we didn't have anything to do with them, were responsible for the forced displacement of 22 million people in 119 countries, which is three times the number caused by armed conflicts. These are the facts and given that they are cumulative, synergistic and convergent, they are bringing us closer to limits beyond which, according to scientists, there will be non-linear changes in the state of a specific system, in this case, the biosphere

Beholding this perspective, we have to admit: diplomatic efforts seem to be, if not irrelevant, at least increasingly insufficient. Naturally, I do not intend to disqualify diplomacy by saying this. Diplomacy is the essence of civilization. Without it, the suppression or oppression of the weaker will prevail. Our globalized world made became best field to deal with environmental problems that are, most of the time, supranational. The problem with diplomacy, Brazilian or from elsewhere, is that it will be less and less a part of the solution and gradually more a part of the problem if it continues to get stuck in nationalist paradigms, that is, as long as it works as a transmission chain for geopolitical and economic interests of nations.

To conclude, what I am proposing here is to abandon the axiom of national sovereignty as the highest instance of a political decision-making and adopt, instead, the concept of relative national sovereignty. The twentieth century history and the current precarious global socio-environmental situation teach us that no nation or group of nations

can impose their will over the world, even if that nation possesses clear military superiority. Therefore, it is necessary to evolve to a model of shared global governance, in which nation-states are no longer the highest instance of the right to self-determination. The ONU must have a power superior to national sovereignty, should it wish to face problems, like environmental causes, that are larger than national borders in a pacific and rational way.

The concept of ecocide, for instance, that has been circulating in the literature on environmental crises for many years, and must necessarily have legal and criminal value. It is essential that we transform declarations of intentions into a national body and attribute its rulings coercive power supported by military power. It is not because Canada has bituminous sand or because Australia, Mongolia, USA and Russia have big gas and mine reservations that they will be able to lead us to an environmental breakdown through constant exploitation. It is not because Brazil and other countries possess the last great forest reservations that they are allowed to destroy them and their dependent ecosystems to satisfy private interests with no long-term value generation.

Once the notion of total national sovereignty is abolished, diplomatic action would take an inverted direction. It would cease to be representation of nations in international forums to become force of representation of national forums. The current scientific consensus on the predominantly anthropogenic feature of climate change and the biodiversity collapse presents itself as one of the most monolithic in the history of knowledge. Therefore, the time is now for the diplomacy free from national particular interest turn into a single vector of strength for a new and urgent transnational environmental agenda for the contemporary world. Thank you.

Henrique Lian: Thank you Luiz. We certainly left the legal sphere. Well, let us hear Werner and then we go through International Relations and close the debate and open for questions. Werner, if you please.

Werner Grau
comments on the
reasons why Brazil
chose not to sign the
document from the
Climate Summit,
adding important
nuances to the
discussion.



Werner Grau: Good Afternoon to all. I would like to thank Henrique's invitation. I am truly flattered.

I also would like to say I am a bit scared with what I have heard so far. I will start with some comments about this and then I will share with you what I had prepared for today. First, I would like to talk about the Climate Summit, the refusal from the Brazilian government to sign the agreement. Zero deforestation until 2030 means rejecting one of the most interesting instruments of the Brazilian Law system, which is the sustainable management of protected areas. We cannot sign such document. It is clear that we all believe in the principle behind the proposal, but implementing it requires one to look carefully to national realities; I for once always look at International Law from the Brazilian perspective.

Let's use, as an example, the climate issue. We are the only country in that debate whose main source of greenhouse gas emission is not the burning of fossil fuels; that discussion does not concern us directly. It could, if it brought us funding mechanisms customized for our needs, to allow us to preserve our forests, avoid deforestation and reduce of greenhouse gas emission, but this entails a latent internal conflict.

Recently, I wrote an article that I did not have the courage to publish; the title is *A Single Brazil is not enough*. In summary, with this article I meant to say that we have an enormous country, but at the same

time, we have so many types of interests on different ways of using our soil that there isn't room for all. When we analyze our internal reality, we realize this is the premise for an international discussion. When professor Luiz talks about abandoning absolute sovereignty, from a theoretical point of view, is all I want to see happening, whereas, from a practical point a view, I think it is very difficult to implement.

Let's also talk a little about sustainability, more specifically, the International Law of Sustainable Development, as an autonomous Law field that professor Maristela defended here. Professor Maristela tutored me during my Masters degree, and, ever since, we have had our differences.

The International Law of Sustainable Development, just as the Environmental Law as a subject of Law – let's call it in the Brazilian Sustainability Law, evidently it is an independent subject that doesn't depend on the rest but is transversal to all others, and also influenced by this transversal dynamic and the other subjects. In this context I see the transversal dynamic as very interesting, but also difficult. Starting from the question raised before, about international commerce.

When I create trade rules specially for sustainability purposes, I am stablishing rules of commerce and not of sustainability. What I mean is that I am inferring this variable in the trade relation and it is simple to do until a certain point, although we find it very complex during a negotiation because it is a very specific matter, we can see the context and the effects in each part involved. However, when we are talking about sustainable development, it is not free of controversies and different interpretations, we talk a lot about principles and it is very easy to agree upon them, but very difficult to make this principle effective through internal measures.

Obviously, this difficulty is grounded in what was said by professor Luiz, the sovereignty matter, and that leads to Brazil's behavior at the Climate Summit. I agree with the principle, but when you bring it to an internal level and pass it through the internalization process mentioned by professor Maristela, I can find some problems, and it will be hardly effective.

The other problem goes on the opposite direction. Professor Maristela defended not making a distinction between *hard law* and *soft law*. I still cannot see how, as much as I find the idea interesting. For instance, the Rio declaration, let's take a look at the debate we have in our Internal Laws every day, the precautionary principle. This principle, as it was used in the Rio declaration, it is not something that suddenly becomes a course of action; it is almost a protocol of intentions. It says that not having knowledge about the effects does not justify the absence of action on the matter; we immediately try to interpret it as, "There is nothing to do until we know all the effects". This is the first mistake as I see it; we must build together a course of internal action in the form of a law and try to make it fit our system, our problems. Obviously, the application of the Precautionary Principle in Brazil will be different from most countries and, in the way I see it, there is the great magic and also great difficulty of the International Law of Sustainable Development.

We must understand that when we create principles and parameters for the international level, they will have to be implemented on a national level and the effects and results can be very diverse. That's why it is a lot "easier" to create a commerce rule in the World Trade Organization and then it will be the same for everybody, a lot simpler.

A long time ago, I participated in an event to discuss the solar energy in Brazil, talking about the opportunities for generating energy through a photovoltaic array and I was discussing the following point: Brazil is not ready for a sustainable discussion in a legal point of view, but in the social and doctrine perspectives we are already using sustainable concepts. In a legal realm we haven't gone too far, we are still living the times of control and command.

Sustainability proposes that the law stops being the ultimate form of action to be its departing point. Beforehand, complying with law was enough, I was done with it. Nowadays, this is different: complying is the most basic premise. Also, there are matters of ethics, which cannot be utilitarian, a national resources ethic only resources national ethics only; I am going to look at the parts involved and many other interesting steps, however, with no legal support, so the discussion always ends in

the legal area and it goes something like this: we play a game by a set of rules that is later sent to a moderator, that is, the legal department, and the moderator plays by another set of rules. Therefore, the rules that will be valid are from the moderator, the one that follows the law as they are, the principle of legal certainty will be stronger and the problem I see, in an internalization of sustainability norms perspective, is how we can internalize these norms without disrespecting the principle of legal certainty.

I see two different scenarios: one is the International Law of Sustainable Development, where you have to create rules for the participating states, and then we can abandon the *hard law* or *soft law*, since it is binding for the state and the state has a clear idea that the internalization is a process. Above all of that is making it possible internally, which has to fit each state's reality, always with the same goal. This is the issue that cannot be overcome: The fact that we cannot develop an International Law of Sustainable Development because we are analyzing issues through internal perspectives, instead of looking at common international mechanisms that would solve the problem.

I would like to conclude with a practical example: The National Policy on Climate Change. Brazil goes to the Conferences of the Parties and we are signatories of the UNFCCC, but we are there in a condition that does not entail mandatory goals. We have committed to voluntary goals in the realm of discussions between Brazil and other member-states, in other words, the voluntary character of these goals is restricted to the international relations, because, as soon as they are internalized and become laws, the Brazilian state will discuss with other levels of the administration about a mandatory relation – there is no other way to do it.

In the National Policy, there is a clue pointing to stimulation instruments, not incentive ones. Incentive means conceding benefits to someone if he/she complies with this or that rule and if his/her activity is a little less aggressive to the environment. Stimulus means creating rules to induce investment capital to the kind of business that is less aggressive to the environment. This is nothing more or less than actually applying article 170, section 6, of our Constitution.

In the moment we started to talk internally about climate change the panacea begun, an endless discussion. Brazil is totally against goals definition by sectors, but internally is what we are going to do. Is it incongruent? No. In the international plan, we understand that working with goals for gas emission reduction by sectors would mean a setback the economy in some countries we don't like, but in the internal plan doing that makes a lot of sense. We are working on this adaptation with many difficulties, until we get to the National Policy for Climate Change. It should have already happen. Brazil goes to the climate discussion focusing on the international level because if it stops to think about the internal interests, Brazil wouldn't want to discuss fossil fuel burning for instance, only the thing we already defined as a topic. We need to have that in all our subjects, I see the International Law for Sustainable Development as something very affected by the affairs, as professor Luiz said, of each country from an economic and geopolitical perspective. Thank you.

Henrique Lian: Thank you Werner. Well, you talked about principles and Aline will explore this topic a bit more. As Maristela said, principles don't overlap with one another, so we have the Principle of National Treatment but also the Precautionary Principle. Everybody evokes the common although different responsibilities principle, but sometimes forget that this principle is related to the precautionary principle and paying polluter principle.

Aline Marsicano Figueiredo: Thank you Henrique. I am very pleased with this discussion because I am an interested party in this project, being a part of Ethos Institute, I wish to see this discussion moving. Forward we are worried with advocacy; our goal is to promote sustainable development. Therefore, I researched how advocacy could be more effective and using a bit of Daniela's idea about efficiency, and I started looking through the conference history gathered by professor Eduardo Matias. He talks about Stockholm in 1972, Rio in 1992, the Brundtland Report, and the Climate conference in Johannesburg; up

Aline explores
the interpretation
of sustainable
development as a
General Principle of
International Law.



until here there is a logical sequence that I understand; it is possible to identify the sustainable development concept progress and it is noticeable that it is, in fact, evolving, growing and moving on.

As for the legal realm, things are a little more complicated. In the Shrimp-Turtle case, referenced by Henrique, the only mention to sustainable development regards its relevance. There is no development of the concept, only the realization of its relevance and consequent need to consider it. In sequence, the Hungary case, mentioned as well, brings the idea of "reconciliation" – something, from my point of view, particularly interesting, and that I will discuss later. In the case of paper mills, involving Argentina and Uruguay, sustainable development is treated as a goal. Therefore, first, sustainable development is considered relevant, then it becomes a reconciliation principle and, finally, it is considered a goal. There is still no legal value, but henceforth decisions must be consistent with this goal. Finally, in the Iron Rain case, a judge involved states that sustainable development can already be considered a General Principle of International Law.

This evolution seems evident at a first sight, but only at a first sight. A judge or an expert declaring something to be a principle or a custom is not enough, because the interpretation is not the same for everyone, it

is not homogeneous. Is Maristela right when she does not differentiate *soft law* from *hard law*? On her side, we have references to sustainable development in 300 conventions, in at least 112 treaties and approximately 200 allusions to it in the operation part of treaties. So you think, “great, they (states) are already committed to it!” This is the good news.

The bad news is that sustainable development is seen as relevant, considered a law, a concept or even a principle; in other words, there is no clear definition of what is International Law of sustainable development. This is the first big challenge that I found, and it seems to be quite a big one. I have found two different paths and I have already chosen a favorite, but I open the debate for the experts present here.

The first issue is to find out whether sustainable development has legal value or not. By legal value we understand the obligation to develop and do it in a sustainable manner or not do it at all. Under the perspective of Negative Rights, the law forbids something, denies something to someone. However, in accordance to several references made today, sustainable development is neither; it is instead a concept that must be taken into account, it is (or not) the goal of treaties. In this case, does it have legal value? Some experts will argue that the legal value, the obligation, is in promoting sustainable development. Therefore, it is not absolutely indispensable or inexorable in itself, but the promotion of it is. As evidence of this, we have references to this in conventions, treaties. This would, then, be a solution to our problem, right? But then again, what is sustainable development? How one goes about promoting it?

Despite this lack of definition, there is a growing applicability in some states of sustainable development. There is a case in Sri Lanka that deals mostly with environmental matters, with no concern for social or economic aspects of sustainable development. In South Africa, there is similar case, but treating sustainable development as a Principle of International Law. In this arbitrage case, the concept displays all factors referenced and alluded to, getting close to sustainable development as an “umbrella” subject, which is closer to how we see it, but way too broad for the legal realm. This is why I believe this path offers no solution

for our problem. Having an accurate and incredibly detailed definition of sustainable development would not benefit our advocacy with the Ethos Institute. What path should we follow, then?

In my search, I have found Philippe Sands, an author that argues that sustainable development is a principle of interpretation of treaties. In other words, in a dispute for whatever reason, the notion of sustainable development, as it was formulated in the *Brundtland Report*, should be used: “the kind of development that meets the needs of the present without compromising the ability of future generations to meet their own needs”. This would make it an accessory principle to treaty interpretation, a very interesting notion. I have also explored Virginia Barlow’s work, going a little further than this. For her, it is not a principle of its own, but rather a secondary principle that serves not only to interpret treaties, but, more broadly, to reconcile economic development with social development and environmental protection. The intra and inter-generation aspects can extend to the interpretation of other existent rules and treaties – entailing a revision of International Law.

This seems to be the path with greater potential for our advocacy work, since one doesn’t just interpret treaties or dispute settlement agreements, but instead reviews already established principles. Naturally, this position has both friends and foes. I think it is interesting that Werner brought here the Precautionary Principle, because the *Gabcíkovo-Nagymaros* case, between Hungary and Czechoslovakia illustrates this very well. A dissident judge’s position prevails. His opinion was published and became the basis for the development of an International Law of Sustainable Development. I have here with me a large piece of this document, where he speaks lengthily about how people have interfered with nature and, with time, new rules and standards were created to reconcile economic development and environmental protection, just like in the definition of sustainable development. We see a progress here, but it is curious how in a document with more than 80 pages there isn’t a single reference to the Precautionary Principle. It seems that, on the one hand, the principle of sustainable development or even sustainable development as a General Principle of International

Law is evolving, whereas, on the other hand, there is a setback regarding the Precautionary Principle, which is a very important environmental principle. Therefore, progress and hindrances happen in parallel tracks, with no homogeneity on jurisprudence. I ask Daniela, our expert on this topic, and Werner to clarify this choice, so we can decide if this path is indeed the most interesting one for our advocacy purposes.

Henrique Lian: Excellent, Aline, the debate is now open. Daniela, would you like to comment?

Daniela Benjamin: Thank you. Actually I was going to ask to speak earlier risking of being accused of being advocating for my own cause here, considering the remarks made about diplomacy and foreign activities. But I wouldn't resist anyway because it always troubles me when I hear that diplomacy shouldn't act considering state's interests or, that supranational entities are more capable of promoting development or even that we should avoid acting according to our own circumstances. There are some practical difficulties in relation how this would work and legal difficulties as well.

In their essence, international conferences, COP mechanisms, intergovernmental bodies and international organizations were all conceived – this is specified in their constitutive treaties states – as instruments of state cooperation for the attainment of specific goals, defined in the interest of all; even if they express themselves in terms of concrete and immediate interests. Therefore, the very notion of acting in the international field without considering national interests is contradictory.

Obviously, the national interest is something complex that evolves with time, and it is not always easy to understand, but it is how it works. I found it hard to believe it would be efficient to have a supranational body that knows how to identify the common interest and how it works in practice. I remember that Unesco (United Nations for Education, Science and Culture), when it was created in 1946, supposed was to have an executive council without state

representatives, but with wise people, the civil society. Since the war started due to government interests, the solution laid in promoting education, peace and culture. It took three years for people to understand that there is nothing more attached to the government than education, culture, science and technology.

That being said, it doesn't mean there isn't space for ideas outside these definitions and for promoting ideas in the field where your issue of advocacy fits in. The law as a social phenomenon, as an instrument is used to regulate social needs. These social needs are defined with time depending on diffuse interests. Therefore, civil society participation, the international discussion in many different forums about what is good or bad, they are fundamental. Again, acting through international bodies is not the only possibility to promote certain instruments, but when it comes to non-governmental organizations I don't see how we can take government interests out of the question, I would like to hear about it.

Regarding your question, without doubt principles have gained an increasingly higher permeability in the discussions, I mean, there are consensus achieved internationally. There is one the interpretation principle consecrated in the Vienna Convention on the Law of Treaties, which says that we can interpret commitments in function of prior commitments between the states and there is a specific way of integrating, of allowing different legal regimes to communicate. Of course, practically speaking, it all depends on how the individual judging will see it, which legal regime this person is considering. It's a long-term construction. In the specific case of WTO, we see it happening as the international consensus about the importance of some concerns. A sensibility to some matters is noticeable, although everything is still stuck on matters of their own areas. I mean, it is normal to give a different weight to your own instruments. In International Law, there is a bad side, the conflict side. But there is also a positive side to this integration of principles. There is a case now being settled at the WTO and it is not exactly about sustainability, it is about health; it is about an Australian restriction to cigarettes, to cigarette brands. Every cigarette commercialized in Australia must have a generic box.

Some countries questioned the Australian measures at the Dispute Settlement System in the WTO because it violates brands rights. As stated by professor Maristela, the agreements recognized the importance of issues, the importance of health issues inside the WTO. There are a regulated space, the WHO Convention is, without doubt, one of the major international instruments against smoking, it has broad support. As these elements will be worked on and influence the decision or not, is something we are all curious about. This is a case that drew the attention of several countries, a case with the highest participation of third parties in a long time. That's because they will discuss the impact of other instruments over WTO agreements. So your argument can be proven, at least in the commercial area, in a short time.

Henrique Lian: Luiz, Do you wish to start?

Luiz Marques: Yes, I would like to be very brief in relation to the question that you apparently asked me. I think you are absolutely right, it is very difficult to imagine how the practical establishment of a new paradigm would be, and the example you gave about UNESCO seemed very interesting and convenient. Issues should be formulated from the diagnosis you make of reality. With a diagnosis, you establish priorities and also what should go to the next step.

In my diagnosis, we don't have time. In my diagnosis in relation to the speed with which we are evolving into a social and environmental collapse, it effectively displaces certain paradigms that are fundamental, which were built with a lot of difficulty in the history of ancient and recent diplomacy. My intervention will be mainly the following, due to the reality that we face today; certain assets of the legal and diplomatic knowledge should be placed in question. Why? Because they are not being able to counter the acceleration of environmental crises. If they are not capable of this and if these environmental crises, speeding up, lead us to a disastrous situation, then of course it becomes a reality, passes through the whole set of consensus that the history of diplomacy and International Law presents us today. Somehow, we need a paradigm breakthrough. How this paradigm break must be made clearly depends on extremely collective work, it is a diplomatic

work, it is a political work, more than political, is a decision to be made by society.

What I find it hard to understand is how, given this diagnosis, the scientific consensus deals with the imminent changes, the effective changes in the ecosystems state of equilibrium, can we still stick to let ourselves traditional diplomatic consensus that are necessarily very long, to reach very slow and it is normal that they are very slow the problem is that we do not have a lot of time. This is the issue for me.

Henrique Lian: We have time for one last comment and it will be from Werner. Do you have a question? Okay, one brief comment and I will give time to Werner to speak.

Audience: Thank you for all the questions. Regarding the advocacy, it is very complex, right? How can we reach the largest possible number of people? The International Criminal Court, for instance was in part a result of strong advocacy from NGOs, it was a social movement. I wonder if perhaps Ethos cannot act in two fronts, the issue of high level or even this legal matter, the ecosystem studies that are super connected to economic issues, this pile of super complex debates and the practical question to achieve as many people as possible, of having a sense of practicality and the necessity sustainable development. Sustainable development is very broad and we have the difficulty to make it tangible and the question I also wanted to comment is connected to diplomacy and how we have to break certain paradigms, I think it is easier to mobilize people using advocacy strategies than change diplomacy. Unfortunately, I think we will not succeed before climate change destroy us all.

Henrique Lian: Thank you for your comment. This gives me the opportunity, before moving on to Werner's comment, to say that we have an advocacy strategy in two continents simultaneously, participating in developed and developing countries, thanks to the Friedrich Naumann Foundation, I want to thank Dr. Gabriele who is here with us. We do an advocacy work in the European Union and another here and your suggestion is very welcomed. We started with

the high level, as fate intended, and we should have more guerrilla strategies in all locations. Thank you.

Werner Grau: Guerrilla strategy is a dangerous subject. Obviously all diplomacy, all diplomatic bodies when facing an international debate, consider state interests; clearly, it is something to consider. And that's what I said about the climate, being aware of the internal issues in Brazil, we went to the international debate to define principles that would apply to everyone, but dealing with the matter internally, as I already said, is different to Brazil and other countries due to the different sources of the greenhouse gas emissions, for example. So the measures are different, but the principles can be the same, I do not see any problem in that. I believe that advocacy is essential because it brings an additional element, right? We add and remove the various wills of the states in the discussions that are not linked to state projects, government projects.

What I see with some concern, I am not as pessimistic as Professor Luís, on the climate issue, which will be the conducting thread of the end of humanity if immediate action is not taken, but I think there is still time. Obviously not time for a Rio + 40, but we have time to find common ground to solve the problem. While this doesn't happen, the internal measures of each country can help and they can determine operational modes.

I just wanted to point out the following as a last comment: I think it is a lot easier to get to effective instruments for environmental issues from trade. I think it is easier for the trade to influence environmental issues than defining environmental principles that will not be applied on trade relations, social relations and so on, because we cannot reach a consensus on sustainable development issues per se.

Henrique Lian: Thank you, Werner. Thank you Luiz, Aline, Daniela. And thank you for resisting in such a hard discussion, but one that we must face.

INTERNATIONALIZATION OF HUMAN RIGHTS, SUSTAINABLE DEVELOPMENT AND CSR

**Special Contribution from Kathia Martin-Chenut,
Jurist and Professor of International Law at the
University of Strasbourg**

First, I would like to stress that I am no expert on Law of regional economic integration. Although I have conducted research on corporate social responsibility (CSR) that includes this approach, such as IDEX - Attractivité Project: *“Responsabilité Sociétale des Entreprises et Organisations: identification et classement des outils juridiques”*²⁷, my main focus on the issue comes from International Law of Human Rights. My analysis has as a starting point the internationalization of law in the field of Human Rights - including the right to a healthy environment as a fundamental condition for the enjoyment of many other rights - in order to achieve the transformation of the responsibility of an unavoidable actor of globalization: companies, especially transnational ones.

²⁷ <http://dres.misha.cnrs.fr/spip.php?rubrique193>.

Despite the risks of bias in this approach, with excessive focus on serious violations of Human Rights – a type of analysis that, in general, places the company as a predator, contrary to the perception diffused by CSR, with companies as vectors for the promotion and protection of these rights -, it illustrates the process of regulatory consolidation of this responsibility²⁸. My brief contribution is, therefore, an analog reflection, a search for clues in examples of Human Rights protection organizations of that normative densification process.

The relationship between sustainable development, Human Rights and corporate social responsibility interfere in the way we conceive the Law, in addition to the Law that “imposes”, emerges the Law that “guides”. This affects the way the Law is “manufactured, with “private factories” working side by side with the public ones, leading to true metamorphosis of legal categories such as responsibility²⁹, which is no longer limited to judges’ rulings, assuming various forms of accountability, including the protection of “future generations”.

The various regulatory areas of the United Nations in the areas of Human Rights and responsibilities of companies illustrate this.

Traditionally, companies are not considered traditionally as subjects of International Law, as they are not direct recipients of international protection treaties on Human Rights and there is currently no international convention to protect Human Rights related companies. The asymmetry between states and companies is striking, especially considering that most of the world’s economic entities are corporations, not states. Given the gaps in International Law concerning liability of companies and the heterogeneity national legal contexts, the UN has developed some initiatives.

²⁸ THIBIERGE, C. (dir.), *La densification normative. Description d’un processus*, Paris, Mare & Martin, 2014.

²⁹ MARTIN-CHENUT, K. QUENAUDON, R. de, *Développement durable: mutations ou métamorphoses de la responsabilité?*, Paris, Pedone, no prelo.

Generally speaking³⁰, we can divide the history of the relationship between business and Human Rights at the United Nations in four acts, or chapters.

The **first chapter** is marked by the participation of multinationals in the coup d'état in Chile and investments of certain companies in South Africa mid-apartheid. Here, the focus is clearly on accusing (vision of the company as a predator). It was the conduct of Telephone and Telegraph Corporation (ITT) in Chile, during the military regime of Augusto Pinochet, which led the UN to create a working group to draw up a code of conduct for multinational companies.

At the same time, the International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973, established a group of three States that should review periodic reports. This group received from the UN Commission on Human Rights a mandate to examine the role played by transnational corporations in maintaining the *apartheid* system in South Africa. From 1973 on, the Sub-Commission on Promotion and Protection of Human Rights decided to appoint a special rapporteur on the consequences for the enjoyment of Human Rights of the assistance provided to racist and colonialist regimes of southern Africa. The latter was in charge of establishing every year an updated list of companies investing in South Africa (blacklists strategy).

Despite the aforementioned efforts, The UN did not adopt a specific instrument for companies. The project for a code of conduct was not carried through. However, this initiative was taken up by the Organisation for Economic Cooperation and Development (OECD), which adopted, in 1976, its Guidelines for Multinational Enterprises and the International Labour Organisation (ILO), which, in 1977, established the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.

³⁰ For more information, see MARTIN-CHENUT, K., "Droits de l'homme et responsabilité des entreprises: les 'Principes Directeurs des Nations unies'", in G. GIUDICELLI DELAGE, S. MANACORDA (dirs.), *Responsabilité pénale des personnes morales: perspectives européennes et internationales*, Paris, Société de Législation Comparée, 2013, pp. 229-247.

If the idea of adopting guiding principles defining the role of states and companies in the protection of Human Rights had already been launched at the World Conference on Human Rights of 1993, in Vienna, it was only in the late 1990s that the issue of the responsibility of transnational corporations regained visibility, at the UN through, with the adoption of the UN Global Compact (Global Compact).

Then we enter what we call the **second chapter** of the treatment of corporate responsibility by the UN.

An initiative of Kofi Annan, who was then the UN Secretary-General, the Global Compact seeks to humanize globalization, offering companies voluntary adherence to ten principles Human Rights or environmental protection.

The optional nature of the Global Compact, often placed in evidence, was criticized notably by defense entities of Human Rights, which questioned the balance between the obligations and benefits for private economic actors. How does one ensure that these actors would not use the UN logo without actually respecting Human Rights? Wouldn't the Global Compact become just an additional form of advertising for companies, including free advertising that could be, in certain circumstances, misleading? With limited control over the use of the logo by companies on their websites, with *some* good practices, the Global Compact was considered a sham by certain activists in favor of Human Rights.

The Global Compact was the target of many criticisms, among them its optional character and the reference to international Human Rights instruments. Now, wouldn't this association make optional some core fundamental rights? Wouldn't it contribute to turning *hard law* into *soft law*? Wouldn't the UN Global Compact weaken the legal responsibility of companies?

Although the Global Compact has reformed its control system, criticism persisted and the **third chapter** in the history of corporate

accountability at the UN was marked by the failed attempt to adopt a legally binding instrument: the Standards on Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises project³¹.

The goal of the project was to make robust the Global Compact principles. The project aimed at creating an inventory of the instruments of protection of Human Rights in force, thus establishing a single reference to the obligations weighing on companies. The intention was to highlight that the international *corpus juris* for the protection of Human Rights was also applicable to companies by virtue of a reference present in the preamble of the Universal Declaration of Human Rights (1948): “all organs of society”. Voluntarism should not therefore dilute the obligation, but, on the contrary, strengthen it and even surpass it

However, this project was not adopted by the former UN Commission on Human Rights. Despite the rejection of the text, the topic of corporate responsibility in the field of Human Rights was inscribed on the UN agenda.

We move now to the **fourth chapter** in the history of business and Human Rights³² at the UN: Guiding Principles on Businesses and Human Rights, drafted by John Ruggie, Special Representative appointed Special Representative Secretary General the United Nations in charge of Human Rights issues and transnational corporations and other companies. Adopted in June 2011 by the UN Human Rights Council, they provide differentiated but complementary responsibilities, for states and companies. The text consists of three pillars:

- States obligation to ensure protection against Human Rights violations by third parties, including business;
- Corporate responsibility to respect Human Rights;
- The need to provide effective remedial measures for victims.

³¹ E/CN.4/Sub.2/2003/12/Rev.2. Vide DECAUX, E., “Le projet de l’ONU sur la responsabilité des entreprises transnationales”, in DAUGAREILH, I., (dir.), *La responsabilité sociale de l’entreprise transnationale et globalisation de l’économie*, Bruxelles, Bruylant, 2011, pp. 459-474.

³² A/HRC/17/31 (March 21st 2011), A/HRC/RES/17/4.

Each of these pillars is considered an essential component of an interdependent and dynamic system of preventive and reparation measures: the states responsibility to protect, as it is the foundation of the international regime of Human Rights. In sequence, the corporate responsibility to respect Human Rights, because it is the least that society expects from companies. Finally, access to remedial measures, as even the best efforts cannot prevent all abusive practices.

Companies should refrain from violating Human Rights, a (negative obligation). However, from this obligation arises other positive obligations, notably of due diligence: ie, prevent and avoid the negative impacts of a company’s activities that may constitute violations of Human Rights.

The state still has the fundamental role in the protection of Human Rights. The state should use all the economic and legal means (e.g., special conditions for participation in procurement processes or the creation and application of legal instruments to facilitate the attribution of responsibility) at their disposal, to make companies respect Human Rights.

This UN text is not legally binding and the judicial control mechanism is limited to a working group composed of five experts representing the five continents, appointed for three year-mandates. Despite the absence of a control with the examination of complaints, the group may conduct visits and observe violations of Human Rights by companies. In fact, the resolution that created it stresses the importance of its close relationship with international organizations to protect Human Rights, and this particular point may end up being one of the paths that will lead to the normative consolidation of these guiding principles.

After all, even if there has been, since the 1970s, a mobilization in the UN to regulate corporate responsibility and, despite the unsuccessful attempt to adopt, in 2003, a binding instrument, as well as the recent process initiated by the UN Human Rights Council - the resolution of 25 June 2014 establishing an intergovernmental working group in

order to elaborate a legally binding instrument for companies³³ –, *soft law* is still predominant.

However, this *soft-law* acquires an increasingly stronger normative³⁴ force by a densification process of law³⁵. Regarding this, one should note the impact of the UN Guiding Principles in several regulatory areas. In fact, despite the criticisms of which such principles were object, the process of adoption of these principles had the merit of keeping the issue of corporate responsibility regarding Human Rights on the agenda of the United Nations for more than six years. Moreover, John Ruggie, after the 2003 project failure and consequent reactions, was a skilled negotiator in the adoption process of the ISO 26000 standard, thus favoring the entry of Human Rights in the text. He also participated in the review processes of the OECD Guidelines and Performance Standards International Finance Corporation (IFC), ensuring within these documents a prominent place for Human Rights.

Well, in addition to the impact of the aforementioned documents on regulatory areas, it is worth noting its impact on the European Union. Through the Communication of 25 October 2011 on the social responsibility of companies³⁶, the European Commission also adheres to the UN Guiding Principles and calls on Member States to establish national implementation plans of them. Incidentally, in another European regional policy space, the Council of Europe, we can also notice repercussions of UN Guiding Principles (work currently developed by the Steering Committee for Human Rights - CDDH).

From the articulation between several regulatory areas regarding corporate responsibility in the area of Human Rights, two movements can, therefore, arise. They can also become more pronounced. One, already mentioned, is the processing of *hard law* into *soft law*, through

the presentation of legal imperatives as optional practices. The other, in reverse, tends to enhance legally CSR. My intuition is that this second movement is getting progressively more space.

Catherine Thibierge, French jurist who dedicated several papers to what she describes as “textures of law”³⁷, stated in an article published in 2004³⁸ that the *soft law*, or *droit souple*³⁹, not yet legally binding, was the prelude of a new law on liability. Ambassador Michel Doucin also considers that, in CSR topics, *soft law* is “*tête chercheuse*”, *hard law*.

The law - notably *hard law* – is progressively appropriating CSR, often thanks to the creativity of militant lawyers.

Densification strategies can be carried out by legislative procedures, for example, the process of reform of the French law on “due diligence”⁴⁰ of headquarters which, if effected, would integrate to the national Law the guiding principle of the United Nations No. 17 on due diligence. There are particularly interesting strategies from the judicial branch, driven by law enforcement officers who mobilize innovatively existing legal mechanisms. Several examples can be mentioned, such as the litigation based on infringement of misleading or deceptive business practice, aimed at punishing the lack of fairness in trade and consumption (companies communicate CSR policies, but they are not put in practice), thus avoiding greenwashing strategies. The same can be observed in cases of use of “contractual clauses on CSR”, or clauses on the protection of Human Rights in relations between members of groups of companies or between headquarter, branches and contractors. They, which often generate imbalances and dilution of responsibilities that can be corrected, for example by means of legal mechanisms as the device code on the French Trade “significant imbalance” (Art. 442-6 I 2 L).

³³ A/HRC/26/L.22/Rev.1.

³⁴ THIBIERGE, C. (dir.), *La force normative. Naissance d'un concept*, Paris, LGDJ, 2008.

³⁵ THIBIERGE, C. (dir.), *La densification normative. Description d'un processus*, Paris, Mare & Martin, 2014.

³⁶ Communication de la Commission Européenne “Responsabilité sociale des entreprises: une nouvelle stratégie de l'UE pour la période 2011-2014”, du 25 octobre 2011, COM(2011)681 final.

³⁷ THIBIERGE, C., “Le droit souple – Réflexions sur les textures du droit”, RTD Civ. 2003, p. 599 e s.

³⁸ THIBIERGE, C., “Avenir de la responsabilité et responsabilité de l'avenir”, Recueil Dalloz., p. 577 s.

³⁹ Conseil d'Etat, *Le droit souple*, Paris, La documentation française, 2013.

⁴⁰ “Proposition de loi n° 2578 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre”, (February 11st 2011). Available at: <http://www.assemblee-nationale.fr/14/pdf/propositions/pion2578.pdf>.

A movement that should also be watched closely is the evolution of the jurisprudence of regional systems for the protection of Human Rights with regard to socio-economic and cultural rights. An emancipation of international judges (but also of national judges, based on international jurisprudence of human rights) can be observed and must be accompanied. The judges of regional Human Rights protection systems are supported not only in the founding treaties of their systems for the jurisprudential development. They are increasingly using ancillary sources and even exogenous sources to systems to which they are part of, sources from *hard law* and *soft law*, which serve as interpretation parameters to the main endogenous devices.

The protection of the environment or of cultural rights, for example, is notably carried out through this type of dynamic interpretation of the founding treaties of regional systems. If, for now, we cannot observe the use of the UN Guiding Principles as a source of interpretation of regional Human Rights protection treaties, this is a track that should not be ignored on analyses of normative densification processes.

4

THE EVOLUTION OF THE INTERNATIONAL LAW OF SUSTAINABLE DEVELOPMENT

With the goal of understanding to what extent the principles of sustainable development were present in international documents, we have commissioned a report to gather documents endorsed by the international community and, specifically, by countries from Mercosur and from the European Union, as well as jurisprudence from international courts.

Assuming the existence of a moral obligation on the parts of states to promote sustainable development, our point of depart to this study. Our inicial goal was to pinpoint how many and where were located principles such as the promotion of environmental preservation, social justice, and ethics.

The results of this report, which provided empirical evidence to support the legal thesis discussed in the Part II of the book, revealed a vast set of declarations, agreements and treaties on sustainable development

and confirmed our suspicions that states could have a moral obligation to promote sustainable development. After a qualified analysis, we started to explore if, beyond moral obligation, there could be an autonomous field of International Public Law: the International Law of Sustainable Development.

Following the same reasoning applied in our theses, we have reorganized the commissioned report and largely expanded it according to the following taxonomy:

- I. FORMAL AGREEMENTS AND DECLARATIONS ABOUT SUSTAINABLE DEVELOPMENT;
- II. PRINCIPLES OF SUSTAINABLE DEVELOPMENT PRESENT IN OTHER AGREEMENTS AND DECLARATIONS;
- III. INTERNATIONAL DISPUTES SETTLEMENT AND ARBITRATION PROCESSES ON SUSTAINABLE DEVELOPMENT ISSUES;
- IV. CONSTITUTIVE TREATIES – MERCOSUR AND EUROPEAN UNION;
- V. AGREEMENTS SIGNED BY MERCOSUR AND THE EUROPEAN UNION WITH THIRD PARTIES.

I. FORMAL AGREEMENTS AND DECLARATIONS ABOUT SUSTAINABLE DEVELOPMENT

Declaration of the United Nations Conference on the Human Environment, Stockholm, 1972⁴¹

Introduction

2. The **protection and improvement of the human environment** is a major issue which affects the well-being of peoples and economic development throughout the world; it is the urgent desire of the peoples of the whole world and the duty of all Governments.

4. In the developing countries most of the environmental problems are caused by under-development. Millions continue to live far below the minimum levels required for a decent human

⁴¹ Report of the Brazilian Delegation participating in the United Nations Conference on the Environment in Stockholm, Available at: <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503> (Accessed on 29 Nov. 2014)

existence, deprived of adequate food and clothing, shelter and education, health and sanitation. Therefore, the developing countries **must direct their efforts to development, bearing** in mind their priorities and the need to **safeguard and improve the environment**. For the same purpose, the industrialized countries should make efforts to reduce the gap themselves and the developing countries. **In the industrialized countries, environmental problems are generally related to industrialization** and technological development.

[...]

The Conference calls upon Governments and peoples to exert common efforts for the preservation and improvement of the human environment, for the benefit of all the people and for their posterity.

Principle 4:

Man has a special **responsibility to safeguard and wisely manage the heritage of wildlife and its habitat**, which are now gravely imperilled by a combination of adverse factors. **Nature conservation**, including wildlife, must therefore receive importance in planning for economic development.

Principle 5:

The **non-renewable resources** of the earth must be employed in such a way as **to guard against the danger of their future exhaustion** and to ensure that benefits from such employment are shared by all mankind.

Principle 12:

Resources should be made available to preserve and improve the environment, taking into account the circumstances and particular requirements of developing countries and any costs which may

emanate from their incorporating environmental safeguards into their development planning and the need for making available to them, upon their request, additional **international technical and financial assistance for this purpose.**

Principle 13:

In order to achieve a more **rational management of resources** and thus to improve the environment, States should adopt an integrated and coordinated approach to their development planning so as to **ensure that development is compatible with the need to protect and improve environment** for the benefit of their population.

Principle 21:

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

Principle 24:

International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing.

Cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities

conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States.

Principle 25:

States shall ensure that international organizations play a coordinated, efficient and dynamic role for the protection and improvement of the environment.

Rio Declaration on Environment and Development, Rio de Janeiro, 1992 ⁴²

[...]

Principle 3:

The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

Principle 4:

In order to achieve sustainable development, **environmental protection shall constitute an integral part of the development process** and cannot be considered in isolation from it.

Principle 5:

All States and all people shall cooperate in the **essential task of eradicating poverty** as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world.

Principle 11:

States shall enact effective environmental legislation.

⁴² Complete text available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> (Accessed on 29 Nov. 2014)

Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.

Principle 14:

States should effectively cooperate to **discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation** or are found to be harmful to human health.

Principle 18

States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Every effort shall be made by the international community to help States so afflicted.

Principle 22

Indigenous people and their communities and other **local communities have a vital role in environmental management** and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

Principle 27

States and people shall cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of *international law* in the field of sustainable development.

It is noteworthy the fact the the Rio-92 Conference originated several other documents, among them the Agenda 21 and the The United Nations Climate Change Convention, which has spurred, in each of the subsequent Conferences of the Parties, (COP) other declarations.

United Nations Framework Convention on Climate Change, Rio de Janeiro, 1992⁴³

Introduction:

[...]

Acknowledging that **the global nature of climate change** calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions,

Affirming that **responses to climate change should be coordinated with social and economic development in an integrated manner** with a view to avoiding adverse impacts on the latter, taking into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty,

[...]

Article 2^o – Objectives:

The **ultimate objective** of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, **stabilization of greenhouse gas concentrations in the atmosphere at**

⁴³ Complete text available at <http://unfccc.int/resource/docs/convkp/conveng.pdf> (Accessed on 29 Nov. 2014)

a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.

Article 3^o – Principles:

In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, *inter alia*, by the following:

1. The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their **common but differentiated responsibilities** and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.

3. The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, **such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors.** Efforts to address climate change may be carried out cooperatively by interested Parties.

5. The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

Article 4^o – Commitments:

1. All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall:

(b) Formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing **measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol**, and measures to facilitate adequate adaptation to climate change;

(c) Promote and cooperate in the development, application and diffusion, including **transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases** not controlled by the Montreal Protocol in all relevant sectors, including the energy, transport, industry, agriculture, forestry and waste management sectors;

[...]

(f) **Take climate change considerations into account**, to the extent feasible, **in their relevant social, economic and environmental policies and actions, and employ appropriate methods**, for example impact assessments, formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change; [...]

(i) **Promote and cooperate in education, training and public awareness related to climate change** and encourage the widest participation in this process, including that of non-governmental organizations; and [...]

Agenda 21, Rio de Janeiro, 1992⁴⁴

Introduction

1.1. Humanity stands at a defining moment in history. We are confronted with a perpetuation of disparities between and within nations, a worsening of poverty, hunger, ill health and illiteracy, and the continuing deterioration of the ecosystems on which we depend for our well-being. However, **integration of environment and development concerns** and greater attention to them will lead to the fulfilment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future. No nation can achieve this on its own; but together we can - **in a global partnership for sustainable development**.

⁴⁴ Complete text available at <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf> (Accessed on 3 Dec. 2014)

Chapter 2:

2.2. Economic policies of individual countries and international economic relations both have great relevance to sustainable development. **The reactivation and acceleration of development requires both a dynamic and a supportive international economic environment and determined policies at the national level.** It will be frustrated in the absence of either of these requirements. A supportive external economic environment is crucial. The development process will not gather momentum if the global economy lacks dynamism and stability and is beset with uncertainties. Neither will it gather momentum if the developing countries are weighted down by external indebtedness, if development finance is inadequate, if barriers restrict access to markets and if commodity prices and the terms of trade of developing countries remain depressed. The record of the 1980s was essentially negative on each of these counts and needs to be reversed. The policies and measures needed to create an international environment that is strongly supportive of national development efforts are thus vital. International cooperation in this area should be designed to complement and support - not to diminish or subsume - sound domestic economic policies, in both developed and developing countries, if global progress towards sustainable development is to be achieved.

2.5. **An open, equitable, secure, non-discriminatory and predictable multilateral trading system that is consistent with the goals of sustainable development** and leads to the optimal distribution of global production in accordance with comparative advantage is of benefit to all trading partners. Moreover, improved market

access for developing countries' exports in conjunction with sound macroeconomic and environmental policies would have a positive environmental impact and therefore make an important contribution towards sustainable development.

2.11. The international community should aim at finding ways and **means of achieving a better functioning and enhanced transparency of commodity markets, greater diversification of the commodity sector in developing economies** within a macroeconomic framework that takes into consideration a country's economic structure, resource endowments and market opportunities, **and better management of natural resources that takes into account the necessities of sustainable development.**

2.31. The unfavourable external environment facing developing countries makes **domestic resource mobilization and efficient allocation and utilization of domestically mobilized resources all the more important for the promotion of sustainable development.** In a number of countries, policies are necessary to correct misdirected public spending, large budget deficits and other macroeconomic imbalances, restrictive policies and distortions in the areas of exchange rates, investment and finance, and obstacles to entrepreneurship. In developed countries, continuing policy reform and adjustment, including appropriate savings rates, would help generate resources to support the transition to sustainable development both domestically and in developing countries.

2.34. It is necessary to establish, in the light of the country-specific conditions, **economic policy reforms that promote the efficient planning and utilization of**

resources for sustainable development through sound economic and social policies, foster entrepreneurship and the incorporation of social and environmental costs in resource pricing, and remove sources of distortion in the area of trade and investment.

Chapter 4:

4.8. In principle, countries should be guided by the following basic objectives in their efforts to address consumption and lifestyles in the context of environment and development:

a. **All countries should strive to promote sustainable consumption patterns;**

b. **Developed countries should take the lead in achieving sustainable consumption patterns;**

c. **Developing countries should seek to achieve sustainable consumption patterns in their development process, guaranteeing the provision of basic needs for the poor,** while avoiding those unsustainable patterns, particularly in industrialized countries, generally recognized as unduly hazardous to the environment, inefficient and wasteful, in their development processes. This requires enhanced technological and other assistance from industrialized countries.

4.11. **Consideration should also be given to the present concepts of economic growth and the need for new concepts of wealth and prosperity which allow higher standards of living through changed lifestyles and are less dependent on the Earth's finite resources and more in harmony with the Earth's carrying capacity.** This should be reflected in the evolution of new systems of national accounts and other indicators of sustainable development.

4.17. In the years ahead, Governments, working with appropriate organizations, should strive to meet the following broad objectives:

a. **To promote efficiency in production processes and reduce wasteful consumption in the process of economic growth, taking into account the development needs of developing countries;**

b. To develop a domestic policy framework that will encourage a shift to **more sustainable patterns of production and consumption;**

c. **To reinforce both values that encourage sustainable production and consumption patterns and policies that encourage the transfer of environmentally sound technologies to developing countries.**

4.26. Governments and private-sector organizations should promote **more positive attitudes towards sustainable consumption through education, public awareness** programmes and other means, such as positive advertising of products and services that utilize environmentally sound technologies or encourage sustainable production and consumption patterns. In the review of the implementation of Agenda 21, an assessment of the progress achieved in developing these national policies and strategies should be given due consideration.

Chapter 6:

6.18. In addition to meeting basic health needs, specific emphasis has to be given to **protecting and educating vulnerable groups, particularly infants, youth, women, indigenous people and the very poor as a prerequisite for sustainable development.** Special

attention should also be paid to the health needs of the elderly and disabled population.

Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 1997⁴⁵

Among the results of the COPs on Climate Change, the Kyoto Protocol is emblematic, product of the COP3, in 1997. Unlike European countries, Mercosur members are not included in Annex I of the Protocol, mentioned in Article 2 above, but, still, the “mechanism of clean development”, detailed in Article 12 and mentioned below, in Article 2, applies to them as well.

[...]

Article 2:

1. “Each Party included in Annex I, in achieving its quantified emission limitation and reduction commitments under Article 3, in order to promote sustainable development, shall:

(a) Implement and/or further elaborate policies and measures in accordance with its national circumstances, such as:

(i) **Enhancement of energy efficiency** in relevant sectors of the national economy;

(ii) **Protection and enhancement of sinks and reservoirs of greenhouse gases not controlled by the Montreal Protocol**, taking into account its commitments under relevant international environmental agreements; promotion of sustainable forest management practices, afforestation and reforestation;

⁴⁵ Complete text available on <http://unfccc.int/resource/docs/convkp/kpeng.pdf> (Accessed on 29 Nov. 2014)

(iii) **Promotion of sustainable forms of agriculture** in light of climate change considerations;

(iv) Research on, and promotion, development and increased use of, new and renewable forms of energy, of carbon dioxide sequestration technologies and of advanced and innovative environmentally sound technologies;

(v) **Progressive reduction or phasing out of market imperfections, fiscal incentives, tax and duty exemptions and subsidies in all greenhouse gas emitting sectors** that run counter to the objective of the Convention and application of market instruments;

(vi) Encouragement of **appropriate reforms in relevant sectors aimed at promoting policies and measures which limit or reduce emissions of greenhouse gases** not controlled by the Montreal Protocol;

(vii) **Measures to limit and/or reduce emissions of greenhouse gases** not controlled by the Montreal Protocol in the transport sector;

(viii) **Limitation and/or reduction of methane emissions through recovery and use in waste management**, as well as in the production, transport and distribution of energy;

Article 12:

1. "A **clean development mechanism** is hereby defined.
2. The **purpose** of the clean development mechanism shall be **to assist Parties not included in Annex I** in achieving sustainable development and in contributing to the ultimate objective of the Convention, and to assist Parties included in Annex I in achieving

compliance with their quantified emission limitation and reduction commitments under Article 3.

[...]"

Article 13:

"[...]

4. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall keep under regular review the implementation of this Protocol and shall make, within its mandate, the decisions necessary to promote its effective implementation. It shall perform the functions assigned to it by this Protocol and shall:

(a) Assess, on the basis of all information made available to it in accordance with the provisions of this Protocol, the implementation of this Protocol by the Parties, the overall effects of the measures taken pursuant to this Protocol, in particular environmental, economic and social effects as well as their cumulative impacts and the extent to which progress towards the objective of the Convention is being achieved;

[...]"

Johannesburg Declaration on Sustainable Development, 2002⁴⁶

6. From this continent, the cradle of humanity, **we declare, through the Plan of Implementation of the World Summit on Sustainable Development and the present Declaration, our responsibility to one another, to the greater community of life and to our children.**

11. We recognize that **poverty eradication, changing consumption and production patterns and protecting**

⁴⁶ Complete text available at http://www.meioambiente.pr.gov.br/arquivos/File/agenda21/Declaracao_de_Joanesburgo_sobre_Desenvolvimento_Sustentavel.pdf (Accessed on 3 Dec. 2014)

and managing the natural resource base for economic and social development are overarching objectives of and essential requirements for sustainable development.

16. We are determined to ensure that our rich diversity, which is our collective strength, will be used for constructive partnership for change and for the achievement of the **common goal of sustainable development**.

19. We reaffirm our pledge to place particular focus on, and give priority attention to **the fight against the worldwide conditions that pose severe threats to the sustainable development** of our people, which include: chronic hunger; malnutrition; foreign occupation; armed conflict; illicit drug problems; organized crime; corruption; natural disasters; illicit arms trafficking; trafficking in persons; terrorism; intolerance and incitement to racial, ethnic, religious and other hatreds; xenophobia; and endemic, communicable and chronic diseases, in particular HIV/AIDS, malaria and tuberculosis.

21. We recognize the reality that **global society has the means and is endowed with the resources to address the challenges of poverty eradication and sustainable development** confronting all humanity. Together, we will take extra steps to ensure that these available resources are used to the benefit of humanity.

25. We reaffirm the **vital role of the indigenous peoples in sustainable development**.

26. We recognize that **sustainable development requires a long-term perspective and broad-based participation in policy formulation, decision-**

making and implementation at all levels. As social partners, we will continue to work for stable partnerships with all major groups, respecting the independent, important roles of each of them.

31. To achieve our goals of sustainable development, we need more effective, democratic and accountable international and multilateral institutions.

35. We commit ourselves to act together, united by a common determination to save our planet, **promote human development** and achieve universal prosperity and peace.

United Nations Framework Convention on Climate Change
(COP 15), Copenhagen Agreement 2009⁴⁷

1. We underline that climate change is one of the greatest challenges of our time. We emphasize our strong **political will to urgently combat climate change** in accordance with the **principle of common but differentiated responsibilities** and respective capabilities. To achieve the ultimate objective of the Convention to stabilize greenhouse gas concentration in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system, **we shall**, recognizing the scientific view that the increase in global temperature should be below 2 degrees Celsius, on the basis of equity and in the context of sustainable development, **enhance our long-term cooperative action to combat climate change**. We recognize the critical impacts of climate

⁴⁷ Complete text available at <http://unfccc.int/resource/docs/2009/cop15/eng/107.pdf> (Accessed on 29 Nov. 2014)

change and the potential impacts of response measures on countries particularly vulnerable to its adverse effects and stress the need to establish a comprehensive adaptation programme including international support.

3. Adaptation to the adverse effects of climate change and the potential impacts of response measures is a challenge faced by all countries. Enhanced action and international cooperation on adaptation is urgently required to ensure the implementation of the Convention by enabling and **supporting the implementation of adaptation actions aimed at reducing vulnerability and building resilience in developing countries**, especially in those that are particularly vulnerable, especially least developed countries, small island developing States and Africa. **We agree that developed countries shall provide adequate, predictable and sustainable financial resources, technology and capacity-building** to support the implementation of adaptation action in developing countries.

6. We recognize the crucial role of **reducing emission from deforestation and forest degradation** and the need to enhance removals of greenhouse gas emission by forests and agree on the need to provide positive incentives to such actions through the immediate establishment of a **mechanism including REDD-plus, to enable the mobilization of financial resources from developed countries**.

United Nations Framework Convention on Climate Change (COP 16), 2011⁴⁸ – Cancún Agreement

Reaffirming the commitment to enable the full, effective and sustained implementation of the Convention through long-term cooperative action, now, up to and beyond 2012, in order to achieve the ultimate objective of the Convention,

Recognizing that climate change represents an urgent and potentially irreversible threat to human societies and the planet, and thus requires to be urgently addressed by all Parties,

Article 1^o:

Affirms that **climate change is one of the greatest challenges of our time** and that all Parties share a vision for long-term cooperative action in order to achieve the objective of the Convention under its Article 2, including through achievement of a global goal, **on the basis of equity and in accordance with common but differentiated responsibilities** and respective capabilities; this vision is to guide the policies and actions of all Parties, while taking into full consideration the different circumstances of Parties in accordance with the principles and provisions of the Convention; the vision addresses mitigation, adaptation, finance, technology development and transfer, and capacity-building in a balanced, integrated and comprehensive manner to enhance and achieve the full, effective and sustained implementation of the Convention, now, up to and beyond 2012;

⁴⁸ United Nations Framework Convention on Climate Change (COP) – Cancun Accord, complete text available at https://unfccc.int/files/meetings/cop_16/application/pdf/cop16_1ca.pdf (Accessed on 25 Apr. 2014)

Article 2º:

Further affirms that:

a) Scaled-up overall mitigation efforts that allow for the achievement of desired stabilization levels are necessary, with developed country Parties showing leadership by undertaking ambitious emission reductions and in providing technology, capacity-building and financial resources to developing country Parties, in accordance with the relevant provisions of the Convention;
[...]

Article 4º:

Further recognizes that deep cuts in global greenhouse gas emissions are required according to science, and as documented in the Fourth Assessment Report of Intergovernmental Panel on Climate Change, with a **view to reducing global greenhouse gas emissions so as to hold the increase in global average temperature below 2°C above pre-industrial levels, and that Parties should take urgent action to meet this long-term goal, consistent with science and on the basis of equity;** Also recognizes the need to consider, in the context of the first review, as referred to in paragraph 138 below, strengthening the long-term global goal on the basis of the best available scientific knowledge, including in relation to a global average temperature rise of 1.5°C;
[...]

Article 6º:

Also agrees **that Parties should cooperate in achieving the peaking of global and national greenhouse gas emissions as soon as possible, recognizing that the time frame for peaking will be longer in developing**

countries, and bearing in mind that social and economic development and poverty eradication are the first and overriding priorities of developing countries and that a low-carbon development strategy is indispensable to sustainable development. In this context, further agrees to work towards identifying a timeframe for global peaking of greenhouse gas emissions based on the best available scientific knowledge and equitable access to sustainable development, and to consider it at its seventeenth session;
[...]

Article 48:

Agrees that developing country **Parties will take nationally appropriate mitigation actions in the context of sustainable development,** supported and enabled by technology, financing and capacity-building, aimed at achieving a deviation in emissions relative to business as usual emissions in 2020;
[...]

Article 65:

Encourages **developing countries to develop low-carbon development strategies** or plans in the context of sustainable development;
[...]

Article 70:

Encourages developing country Parties to contribute to mitigation actions in the forest sector by undertaking the following activities, as deemed appropriate by each Party and in accordance with their respective capabilities and national circumstances:

- a) Reducing emissions from deforestation;**
- b) Reducing emissions from forest degradation;**

- c) Conservation of forest carbon stocks;
- d) Sustainable management of forest;
- e) Enhancement of forest carbon stocks;
- [...]

Introduction of Section “D”, part III:

Emphasizing the importance of contributing to sustainable development, including through technology transfer and other co-benefits,

Recognizing the importance of enhancing sustainable lifestyles and patterns of production and consumption,

Aware of the need to provide incentives in support of low-emission development strategies,
[...]

Article 89:

Also urges developed country Parties to strive to implement policies and measures to respond to climate change in such a way as to avoid negative social and economic consequences for **developing country Parties**, taking into account Article 3 of the Convention, and to **assist these Parties in addressing such consequences by providing support, including financial resources, transfer of technology and capacity-building**, in accordance with Article 4 of the Convention, to build up the resilience of societies and economies negatively affected by response measures;
[...]

Article 90:

Reaffirms that the Parties should cooperate **to promote a supportive and open international economic system** that would lead to sustainable economic

growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change; **measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade**;
[...]

The Future We Want - (United Nations Conference on Sustainable Development Rio+20) 2012⁴⁹

1. We, the Heads of State and Government and high-level representatives, having met at Rio de Janeiro, Brazil, from 20 to 22 June 2012, with the full participation of civil society, renew our **commitment to sustainable development** and to ensuring the promotion of an economically, socially and environmentally sustainable future for our planet and for present and future generations.

3. We therefore acknowledge the need to further mainstream sustainable development at all levels, integrating economic, social and environmental aspects and recognizing their interlinkages, **so as to achieve sustainable development** in all its dimensions.

6. We recognize that **people are at the centre of sustainable development and, in this regard, we strive for a world that is just, equitable and inclusive**, and we commit to work together to promote sustained and inclusive economic growth, social development and environmental protection and thereby to benefit all.

⁴⁹ Complete text available at <https://sustainabledevelopment.un.org/rio20/futurewewant> (Accessed on 3 Dec. 2014)

10. We acknowledge that **democracy, good governance and the rule of law, at the national and international levels, as well as an enabling environment, are essential for sustainable development**, including sustained and inclusive economic growth, social development, environmental protection and the eradication of poverty and hunger. We reaffirm that, to achieve our sustainable development goals, we need institutions at all levels that are effective, transparent, accountable and democratic.

13. We recognize that **opportunities for people to influence their lives and future, participate in decision-making and voice their concerns are fundamental for sustainable development**. We underscore that sustainable development requires concrete and urgent action. It can only be achieved with a broad alliance of people, governments, civil society and the private sector, all working together to secure the future we want for present and future generations.

18. We are determined to reinvigorate political will and to raise the level of commitment by the international community to **move the sustainable development agenda forward, through the achievement of the internationally agreed development goals**, including the Millennium Development Goals. We further reaffirm our respective commitments to other relevant internationally agreed goals in the economic, social and environmental fields since 1992. We therefore resolve to take concrete measures that accelerate implementation of sustainable development commitments.

19. We recognize that the twenty years since the United Nations Conference on Environment and Development in 1992 have seen uneven progress, including in sustainable development and poverty

eradication. We emphasize the need to make progress in implementing previous commitments. We also recognize the need to accelerate progress in closing development gaps between developed and developing countries, and to **seize and create opportunities to achieve sustainable development through economic growth and diversification, social development and environmental protection**. To this end, we underscore the continued need for an enabling environment at the national and international levels, as well as continued and strengthened international cooperation, particularly in the areas of finance, debt, trade and technology transfer, as mutually agreed, and innovation, entrepreneurship, capacity-building, transparency and accountability. We recognize the diversification of actors and stakeholders engaged in the pursuit of sustainable development. In this context, we affirm the continued need for the full and effective participation of all countries, in particular developing countries, in global decision-making.

23. We reaffirm the importance of supporting developing countries in their efforts to eradicate poverty and promote empowerment of the poor and people in vulnerable situations, including removing barriers to opportunity, enhancing productive capacity, developing sustainable agriculture and promoting full and productive employment and decent work for all, complemented by effective social policies, including social protection floors, with a view to achieving the internationally agreed development goals, including the Millennium Development Goals.

43. We underscore that broad public participation and access to information and judicial and administrative proceedings are essential to the promotion of sustainable development. Sustainable development

requires the meaningful involvement and **active participation of regional, national and subnational legislatures and judiciaries, and all major groups: women, children and youth, indigenous peoples, non-governmental organizations, local authorities, workers and trade unions, business and industry, the scientific and technological community, and farmers**, as well as other stakeholders, including local communities, volunteer groups and foundations, migrants and families, as well as older persons and persons with disabilities. In this regard, we agree to work more closely with the major groups and other stakeholders, and encourage their active participation, as appropriate, **in processes that contribute to decision-making, planning and implementation of policies and programmes for sustainable development at all levels.**

46. We acknowledge that the implementation of sustainable development will depend on the **active engagement of both the public and the private sectors. We recognize that the active participation of the private sector can contribute to the achievement of sustainable development**, including through the important tool of public-private partnerships. We support national regulatory and policy frameworks that enable business and industry to advance sustainable development initiatives, taking into account the importance of corporate social responsibility. We call upon the private sector to engage in responsible business practices, such as those promoted by the United Nations Global Compact.

58. We affirm that green economy policies in the context of sustainable development and poverty eradication should:

(b) **Respect each country's national sovereignty over their natural resources**, taking into account its national circumstances, objectives, responsibilities, priorities and policy space with regard to the three dimensions of sustainable development;

(d) **Promote sustained and inclusive economic growth**, foster innovation and provide opportunities, benefits and empowerment for all and respect for all human rights;

(j) **Enhance the welfare of indigenous peoples** and their communities, other local and traditional communities and ethnic minorities, recognizing and supporting their identity, culture and interests, and avoid endangering their cultural heritage, practices and traditional knowledge, preserving and respecting non-market approaches that contribute to the eradication of poverty;

(m) Promote productive activities in developing countries that contribute to the **eradication of poverty**;

(n) Address the **concern about inequalities and promote social inclusion**, including social protection floors;

(o) Promote **sustainable consumption and production patterns**;

(p) Continue efforts to strive for inclusive, **equitable development** approaches to overcome poverty and inequality.

59. We view the **implementation of green economy policies by countries that seek to apply them for the transition towards sustainable development** as a common undertaking, and we recognize that each country can choose an appropriate approach in

accordance with national sustainable development plans, strategies and priorities.

87. We reaffirm the need to **strengthen international environmental governance within the context of the institutional framework for sustainable development** in order to promote a balanced integration of the economic, social and environmental dimensions of sustainable development, as well as coordination within the United Nations system.

II. PRINCIPLES OF SUSTAINABLE DEVELOPMENT PRESENT IN ORDER AGREEMENTS AND DECLARATIONS

In addition to the agreements and declarations resulting from international conferences to promote sustainable development, it is important to explore other international agreements on specific issues that summon, however, the concept of sustainable development. There are also other agreements dealing with issues related to sustainable development that are noteworthy as well.

General Agreement on Tariffs and Trade (GATT), Geneva, 1947 - 1994

Article XX⁵⁰

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed

⁵⁰ The General Agreements on Tariffs and Trade – GATT, complete text available at http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf. (Accessed on 29 Apr. 2014)

to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals;

(b) necessary to **protect human, animal or plant life or health**;

(c) relating to the importations or exportations of gold or silver;

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

(e) relating to the products of prison labour;

(f) imposed for the protection of national treasures of artistic, historic or archaeological value;

(g) relating to the **conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption**;

(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;*

(i) involving restrictions on exports of domestic

materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;

(j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.

The Universal Declaration of Human Rights, Paris, 1948⁵¹

Introduction

Whereas recognition of the inherent dignity and of the **equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,**

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a

⁵¹ Complete text available at <http://unesdoc.unesco.org/images/0013/001394/139423por.pdf> (Accessed on 10 Dec. 2014)

world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the **dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,**

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

The General Assembly proclaims

This Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and

by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 22:

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

International Covenant on Economic, Social and Cultural Rights, New York, 1966⁵²

Article 7^o:

The States Parties to the present Covenant **recognize the right of everyone to the enjoyment of just and favourable conditions of work which** ensure, in particular:

a) Remuneration which provides all workers, as a minimum, with:
[...]

d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

⁵² Complete text available at https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg_no=iv-3&src=treaty (Accessed on 10 Dec. 2014)

Article 11:

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

a) **To improve methods of production, conservation and distribution of food** by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as **to achieve the most efficient development and utilization of natural resources;**

Article 13:

1. The States Parties to the present Covenant recognize the **right of everyone to education**. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and **shall strengthen the respect for human rights and fundamental freedoms**. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

Article 15:

2. The steps to be taken by the States Parties to the present Covenant **to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.**

Preamble:

Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will **promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment,**

Bearing in mind that the achievement of these goals will contribute to the realization of a **just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked,**

Believing that the codification and progressive development of the law of the sea achieved in this Convention will contribute to the strengthening of peace, security, cooperation and friendly relations among all nations in conformity with the principles of justice and equal rights and will promote the economic and social advancement of all peoples of the world, in accordance with the Purposes and Principles of the United Nations as set forth in the Charter,

⁵³ Complete text available at http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (Accessed on 10 Dec. 2014)

Article 145 – Protection of the marine environment

Necessary measures shall be taken in accordance with this Convention with respect to activities in the Area to ensure **effective protection for the marine environment from harmful effects which may arise from such activities.** To this end the Authority shall adopt appropriate rules, regulations and procedures for inter alia:

(a) **the prevention, reduction and control of pollution and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment,** particular attention being paid to the need for protection from harmful effects of such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities;

(b) **the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment.**

Artigo 150 – Políticas Gerais relativas às atividades na Área

1. Activities in the Area shall, as specifically provided for in this Part, be carried out in such a manner as to foster healthy development of the world economy and balanced growth of international trade, and to promote international cooperation for the over-all development of all countries, especially developing States, and with a view to ensuring:

[...]

(b) **orderly, safe and rational management of the resources of the Area, including the efficient conduct of activities in the Area and, in accordance with sound principles of conservation, the avoidance of unnecessary waste;**

Article 242 – Promotion of international cooperation

2. In this context, without prejudice to the rights and duties of States under this Convention, a State, in the application of this Part, shall provide, as appropriate, other States with a reasonable opportunity to obtain from it, or with its cooperation, information necessary to prevent and control damage to the health and safety of persons and to the marine environment.

The Montreal Protocol on Substances that Deplete the Ozone Layer, 1987⁵⁴

Introduction:

Mindful of their obligation under that Convention to take appropriate measures to **protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer,**

Considering the importance of promoting international co-operation in the research, development and transfer of alternative technologies relating to the **control and reduction of emissions of substances that deplete the ozone layer,** bearing in mind in particular the needs of developing countries,

⁵⁴ Complete text available at <http://ozone.unep.org/pdfs/Montreal-Protocol2000.pdf> (Accessed on 10 Dec. 2014)

Article 9^o:

2. The Parties, individually, jointly or through competent international bodies, shall co-operate in **promoting public awareness of the environmental effects of the emissions of controlled substances and other substances that deplete the ozone layer.**

Agreement Establishing the World Trade Organization, Marrakesh, 1994⁵⁵

“Introduction

The parties to this agreement

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, **and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,”**

ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, Geneva, 1998⁵⁶

[...]

Whereas economic growth is essential but not sufficient to ensure equity, social progress and the

⁵⁵ Complete text available at https://www.wto.org/english/docs_e/legal_e/04-wto.pdf (Accessed on 3 Dec. 2014)

⁵⁶ Complete text available at http://www.ilo.org/public/english/standards/declaration/declaration_portuguese.pdf (Accessed on 3 Dec. 2014)

eradication of poverty, confirming the need for the ILO to promote strong social policies, justice and democratic institutions;

Whereas the ILO should, now more than ever, draw upon all its standard-setting, technical cooperation and research resources in all its areas of competence, in particular employment, vocational training and working conditions, **to ensure that, in the context of a global strategy for economic and social development, economic and social policies are mutually reinforcing components in order to create broad-based sustainable development;**
[...]

Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 1998⁵⁷

Preamble:

Recalling the pertinent provisions of the Rio Declaration on Environment and Development and chapter 19 of Agenda 21 on “**Environmentally sound management of toxic chemicals, including prevention of illegal international traffic in toxic and dangerous products**”,

Recognizing that **trade and environmental policies should be mutually supportive with a view to achieving sustainable development,**

Determined to protect human health, including the health of consumers and workers, and the environment against potentially harmful impacts from certain hazardous chemicals and pesticides in international trade,

⁵⁷ Complete text available at https://www.unido.org/fileadmin/user_media/Services/Environmental_Management/GUDDIS/Legal_Frameworks/rotterdam_convention.pdf (Accessed on 10 Dec. 2014)

Article 1 – Objective

The objective of this Convention is to promote **shared responsibility and cooperative efforts among Parties in the international trade of certain hazardous chemicals** in order to protect human health and the environment from potential harm and to **contribute to their environmentally sound use**, by facilitating information exchange about their characteristics, by providing for a national decision-making process on their import and export and by disseminating these decisions to Parties.

Annex II:

In reviewing the notifications forwarded by the Secretariat pursuant to paragraph 5 of Article 5, the Chemical Review Committee shall:

- (a) **Confirm that the final regulatory action has been taken in order to protect human health or the environment;**

United Nations Convention Against Corruption, New York, 2003⁵⁸

Preamble:

“The States Parties to this Convention,

Concerned about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law,
[...]

⁵⁸ Complete text available at http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (Accessed on 10 Dec. 2014)

Concerned further about cases of corruption that involve vast quantities of assets, which may constitute a substantial proportion of the resources of States, and that threaten the political stability and sustainable development of those States,
[...]

Convinced also that a comprehensive and multidisciplinary approach is required to prevent and combat corruption effectively,
[...]

Bearing also in mind the **principles of proper management of public affairs and public property, fairness, responsibility and equality before the law and the need to safeguard integrity and to foster a culture of rejection of corruption,**
[...]

Article 8 – Codes of conduct for public officials:

1. In order to fight corruption, each State Party shall promote, inter alia, integrity, honesty and responsibility among its public officials, in accordance with the fundamental principles of its legal system.
2. In particular, each State Party shall endeavour to apply, within its own institutional and legal systems, codes or standards of conduct for the correct, honourable and proper performance of public functions.

Article 12. Private sector

2. Measures to achieve these ends may include, inter alia:
 - c) Promoting **transparency among private entities**, including, where appropriate, measures regarding the

identity of legal and natural persons involved in the establishment and management of corporate entities;

III. INTERNATIONAL DISPUTES SETTLEMENT AND ARBITRATION PROCESSES ON SUSTAINABLE DEVELOPMENT ISSUES

This report is not comprehensive and, therefore, similar examples can be found in other international legal documents, but these examples are already enough to confirm the integration of sustainable development to International Law.

1) International Jurisprudence

There is, unfortunately, little jurisprudence on the area of sustainable development and, in the cases we have explored, the employment of this concept is not always executed in way that strengthens it as a General Principle of International Law or International Custom.

Trail Smelter – International Court of Justice 16 April 1938 and 11 March 1941 - US vs. Canada

An important precedent to be noted is the arbitration case known as Trail Smelter⁵⁹, considered by many the first formal international legal demonstration in defense of the environment. It established that the emission of harmful gases by a casting (“smelter” in English) located in Trail – a city in the Canadian province of British Columbia - was causing damage to the land and the plantations of its neighbor state, Washington.

It may be fairly assumed that the sulphur dioxide concentration at Columbia Gardens will fall off quite rapidly distance away from the Smelter, and that a concentration very close to that recorded at Northport will be reached several miles above Northport. Concentrations recorded at intermediate points are

⁵⁹ Complete text available at http://legal.un.org/riaa/cases/vol_III/1905-1982.pdf (Accessed on 25 Apr. 2014)

functions of a number of variables other than distance from Smelter. It may be generally assumed that the concentration in the neighborhood of the border will be from .6 to .75 of that recorded at Columbia Gardens. Individual variations, however, are likely to be somewhat greater than this, and in unusual circumstances concentrations near the border may be substantially equal to those at Columbia Gardens.

[...]

The Tribunal is of opinion that **the régime should be given an uninterrupted test** through at least two growing periods and one non-growing period. It is equally of opinion that thereafter opportunity should be given for amendment or suspension of the régime, if conditions should warrant or require. Should it appear at any time that the expectations of the Tribunal are not fulfilled, the régime prescribed in Section 3 (inpra) can be amended according to Paragraph VI thereof. This same paragraph may become operative if scientific advance in the control of fumes should make it possible and desirable to improve upon the methods of control hereinafter prescribed; and should further progress in the reduction of the sulphur content of the fumes make the régime, as now prescribed, appear as unduly burdensome in view of the end defined in the answer to Question No. 2. this same paragraph can be invoked in order to amend the régime accordingly. Further, under this paragraph, **the régime may be suspended if the elimination of sulphur dioxide from the fumes should reach a stage where such a step could clearly be taken without undue risks to the United States' interests.**

Gabcikovo-Nagymaros – International Court of Justice Hungary vs. Slovakia, 1997

Another relevant example is the Gabcikovo-Nagymaros case, which involved a dispute between Slovakia and Hungary, concerning the construction of a dam to serve a hydroelectric project on the Danube River, which crosses the border of the two countries.

In 1997, the ICJ issued its ruling determining that the parties should reassess, together, the environmental effects of the operation of the power plant of Gabcikovo, adopting sustainable development as one of the bases for its decision.

In this sentence, it was announced that the man did not stop, throughout the ages, to intervene in nature, often without considering the effects. However, with the new perspectives presented by science about the risks that these interventions to a thoughtless pace to represent humanity, States **must now begin to consider the environmental protection standards set out in a large number of instruments.**

To the ICJ, **the concept of sustainable development should serve to reconcile economic development and environmental protection**, and this trial, in particular, not only served as an abstract concept, but also as a principle of indivisible normative value that is inseparable from modern International Law.

125. “[...] Hungary moreover indicated that any mutually accepted long-term discharge régime must be “capable of avoiding damage, including especially damage to biodiversity prohibited by the [1992 Rio Convention on Biological Diversity]”. It added that “a joint environmental impact assessment of the region and of the future of Variant C structures in the context of the sustainable development of the region” should be carried out”.

140. “[...] The Court is mindful that, **in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of**

the limitations inherent in the very mechanism of reparation of this type of damage.

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

**"Shrimp-turtle" Case – WTO Dispute Settlement Body⁶⁰:
India, Malaysia, Pakistan & Thailand vs. US, 1998**

153. We note once more that this language demonstrates a recognition by WTO negotiators that optimal use of the world's resources should be made in accordance with the objective of sustainable development. As this preambular language reflects the intentions of negotiators of the WTO Agreement, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case, the GATT 1994. We have already observed that Article XX(g) of the GATT 1994 is appropriately read with the perspective embodied in the above preamble.

⁶⁰ Complete text available at http://www.wto.org/english/tratop_e/dispu_e/repertory_e/i3_e.htm

In this Decision, Ministers took "note" of the Rio Declaration on Environment and Development, Agenda 21, and "its follow-up in the GATT, as reflected in the statement of the Council of Representatives to the CONTRACTING PARTIES at their 48th Session in 1992" We further note that this Decision also set out the following terms of reference for the CTE:

(a) to identify the relationship between trade measures and environmental measures, in order to promote sustainable development;

(b) to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system, as regards, in particular:

-the need for rules to enhance positive interaction between trade and environmental measures, for the promotion of sustainable development, with special consideration to the needs of developing countries, in particular those of the least developed among them; and

-the avoidance of protectionist trade measures, and the adherence to effective multilateral disciplines to ensure responsiveness of the multilateral trading system to environmental objectives set forth in Agenda 21 and the Rio Declaration, in particular Principle 12; and

-surveillance of trade measures used for environmental purposes, of trade-related aspects of environmental measures which have significant trade effects, and of effective implementation of the multilateral disciplines governing those measures.

Pulp Mills on the River - Uruguay International Court of Justice Argentina vs. Uruguay, 2010

More recently, the ICJ had a similar discussion when dealing with the so-called “Case of Paper Mills”⁶¹ on the construction of pulp mills in Uruguayan territory, on the border with Argentina, on the banks of the Uruguay River. In its ruling, in 2010, the Court considered the need to achieve a balance between the use of the river and its environmental protection, which should be consistent with the objectives of sustainable development. In addition, there was the obligation under the river Statute – which was not fulfilled by Uruguay – to inform and consult Argentina in case there was any work that could affect the natural resources shared between the two countries. Nevertheless, the decision frustrated those who expected a more vehement condemnation of the violation of Uruguay’s obligation, as the country was not held accountable.

175. The Court considers that the attainment of optimum and rational utilization requires a balance between the Parties’ rights and needs to use the river for economic and commercial activities on the one hand, and **the obligation to protect it from any damage to the environment that may be caused by such activities, on the other**. The need for this balance is reflected in various provisions of the 1975 Statute establishing rights and obligations for the Parties, such as Articles 27, 36, and 41. The Court will therefore assess the conduct of Uruguay in authorizing the construction and operation of the Orion (Botnia) mill in the light of those provisions of the 1975 Statute, and the rights and obligations prescribed therein.

184. “It is the opinion of the Court that compliance with this obligation cannot be expected to come

⁶¹ Complete text available at <http://www.icj-cij.org/docket/files/135/15877.pdf>

through the individual action of either Party, acting on its own. Its implementation requires co-ordination through the Commission. It **reflects the common interest dimension of the 1975 Statute and expresses one of the purposes for the establishment of the joint machinery which is to co-ordinate the actions and measures taken by the Parties for the sustainable management and environmental protection of the river**. The Parties have indeed adopted such measures through the promulgation of standards by CARU. These standards are to be found in Sections E3 and E4 of the CARU Digest. One of the purposes of Section E3 is ‘[t]o protect and preserve the water and its ecological balance’. Similarly, it is stated in Section E4 that the section was developed ‘in accordance with . . . Articles 36, 37, 38, and 39”’.

In the Rejoinder :

“Based on all the above, it can be concluded that:

(e) if the Court finds, notwithstanding all the evidence to the contrary, that **the plant is not in complete compliance with Uruguay’s obligation to protect the river or its aquatic environment**, the Court can order Uruguay to take whatever additional protective measures are necessary to ensure that the plant conforms to the Statute’s substantive requirements;

IV. CONSTITUTIVE PARTIES – MERCOSUR AND EUROPEAN UNION

MERCOSUR

Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, 1991⁶²

CONSIDERING that the expansion of their domestic markets, through integration, is a vital prerequisite for accelerating their processes of economic development with social justice,

BELIEVING that this objective must be achieved by making optimum use of available resources, preserving the environment, improving physical links, coordinating macroeconomic policies and ensuring complementarity between the different sectors of the economy, based on the principles of gradualism, flexibility and balance,

CONVINCED of the need to promote the scientific and technological development of the States Parties and to modernize their economies in order to expand the supply and improve the quality of available goods and services, with a view to enhancing the living conditions of their populations,

Besides, it is remarkable that the Union of South-American Nations (Unasur)⁶³, which, among others, integrates members of Mercosur, also approaches sustainable development.

⁶² Complete text available at http://www.wipo.int/wipolex/en/other_treaties/details.jsp?treaty_id=436 (Accessed on 28 Apr. 2014)

⁶³ Complete text available <http://studentorgs.law.smu.edu/getattachment/International-Law-Review-Association/Resources/LBRA-Archive/15-2/SMB213.pdf.aspx> (Accessed on 10 Dec. 2014)

UNASUR

The Constitutive Treaty of the Union of South American Nations, 2008

AFFIRMING their determination to build a South American identity and citizenship and to develop an integrated regional space in the political, economic, social, cultural, environmental, energy and infrastructure dimensions, for the strengthening of Latin America and Caribbean unity;

CONFIRMING that both South American integration and the South American union are based on the guiding principles of: unlimited respect for sovereignty and territorial integrity and inviolability of States; selfdetermination of the peoples; solidarity; cooperation; peace; democracy, citizen participation and pluralism; universal, interdependent and indivisible human rights; reduction of asymmetries and harmony with nature for a sustainable development;

RATIFYING that fully functioning democratic institutions and the unrestricted respect for human rights are essential conditions for building a common future of peace, economic and social prosperity and for the development of integration processes among the Member States;

Article 2 – Objective

The objective of the South American Union of Nations is to build, in a participatory and consensual manner, an integration and union among its peoples in the cultural, social, economic and political fields, prioritizing political dialogue, social policies, education, energy, infrastructure, financing and the environment, among

others, with a view to eliminating socioeconomic inequality, in order to achieve social inclusion and participation of civil society, to strengthen democracy and reduce asymmetries within the framework of strengthening the sovereignty and independence of the States.

Article 3 – Specific Objectives

The South American Union of Nations has the following objectives:

ff) The development of an infrastructure for the interconnection of the region and among our peoples, based on sustainable social and economic development criteria;

oo) The definition and implementation of common or complementary policies and projects of research, innovation, technological transfer and technological production, aimed at enhancing the region's own capacity, sustainability and technological development;

Article 14 – Political Dialogue

The political consultation and coordination among the Member States of UNASUR will be based on harmony and mutual respect, strengthening regional stability and supporting the preservation of democratic values and the promotion of human rights.

Article 15 – Relationship with Third Parties

UNASUR will promote initiatives for dialogue on themes of regional or international interest and will seek to strengthen cooperation mechanisms with

other regional groups, States and other entities with international legal character, focusing on projects in the areas of energy, financing, infrastructure, social policies, education and others to be identified.

EUROPEAN UNION

Treaty of Maastricht on European Union, 1992⁶⁴

Introduction

“DETERMINED to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields,”

Article 3:

“3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

⁶⁴ Complete text available at <http://www.eurotreaties.com/maastrichtec.pdf> (Accessed on 10 Dec. 2014)

It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced".

"5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. **It shall contribute to peace, security, the sustainable development of the Earth,** solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of International Law, including respect for the principles of the United Nations Charter".

Article 21:

"2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

[...]

(d) **foster the sustainable economic, social and environmental development of developing countries,** with the primary aim of eradicating poverty;

[...]

(f) **help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;**

[...]"

The Treaty on the Functioning of the European Union Consolidated Version, 2007⁶⁵

[...]

Article 11^o

Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.

In the European Union, much like it happens with GATT, environmental preservation is, among other topics related to sustainability, one of the possible exceptions to free trade.

CHAPTER XX – THE ENVIRONMENT

Article 191^o

1. Union policy on the environment shall contribute to pursuit of the following objectives:

- **preserving, protecting and improving the quality of the environment,**
- protecting **human health,**
- prudent and rational utilisation of natural resources,
- **promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.**

⁶⁵ Complete text available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN> (Accessed on 11 Dec. 2014)

2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. **It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.** In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a **safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union.**
[...]

Chapter 3 - PROHIBITION OF QUANTITATIVE RESTRICTIONS BETWEEN MEMBER STATES

Article 36⁹

The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Chapter XXI - ENERGY

Article 194⁹

1. In the context of the establishment and functioning of the internal market and with regard for the need to

preserve and improve the environment, **Union policy on energy shall aim, in a spirit of solidarity between Member States, to:**

[...]

c) **promote energy efficiency and energy saving and the development of new and renewable forms of energy; and**

[...]

Charter of Fundamental Rights of the European Union, 2010⁶⁶

Article 37:

Environmental protection

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

V. AGREEMENTS SIGNED BY MERCOSUR AND THE EUROPEAN UNION WITH THIRD PARTIES

Egypt-Mercosur Free Trade Agreement, San Juan, 2010⁶⁷

Introduction:

DESIRING to create more favorable conditions for the sustainable development, new employment opportunities and diversification of trade between

⁶⁶ Complete text available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF> (Accessed on 11 Dec. 2014) - part of other versions of document as well.

⁶⁷ Complete text available at <http://www.sis.gov.eg/En/Templates/Articles/tmpArticles.aspx?CatID=2586#.VVyilvIviko> (Accessed on 10 Dec. 2014)

them and for the promotion of commercial and economic co-operation in areas of common interest on the basis of equality, mutual benefit, non-discrimination and International Law.

The Free Trade Agreement between Mexico and European Union (MEFTA), 1997⁶⁸

Introduction:

MINDFUL of the importance that both Parties attach to the proper implementation of the principle of sustainable development, as agreed and set out in Agenda 21 of the 1992 Rio Declaration on Environment and Development;

Article 23:

2. Cooperation in this sector shall mainly be carried out through exchanges of information, training of human resources, transfer of technology and joint technological development and infrastructure projects, designing more efficient energy generation processes, promoting the rational use of energy, supporting the use of alternative renewable sources of energy which protect the environment, and the promotion of recycling and processing residues for use in generating energy.

Article 34:

1. The need to preserve the environment and ecological balances shall be taken into account in all cooperation measures undertaken by the Parties under this Agreement.

2. The Parties undertake to develop cooperation to prevent degradation of the environment; to promote the conservation and sustainable management of natural resources; to develop, spread and exchange information and experience on environmental legislation, to stimulate the use of economic incentives to promote compliance; to strengthen environmental management at all levels of government; to promote the training of human resources, education in environmental topics and the execution of joint research projects; to develop channels for social participation.

EU-Chile Association Agreement, 2002⁶⁹

Introduction:

[...]

- the need to promote economic and social progress for their peoples, taking into account the principle of sustainable development and environmental protection requirements;

Article 1^o:

2. The promotion of sustainable economic and social development and the equitable distribution of the benefits of the Association are guiding principles for the implementation of this Agreement.

Article 16:

1. The Parties shall establish close cooperation aimed inter alia at:

⁶⁹ Complete text available at http://www.sice.oas.org/Trade/MEX_EU/English/Global_e.pdf (Accessed on 11 Dec. 2014)

⁶⁸ Fifteenth session of the Conference of the Parties (COP 15), December 2009. The COP 15 took place from 7 to 18 December 2009 in Copenhagen, Denmark.

(b) **promoting social development, which should go hand in hand with economic development and the protection of the environment.** The Parties will give particular priority to respect for basic social rights;

Article 28:

1. The aim of cooperation will be **to encourage conservation and improvement of the environment, prevention of contamination and degradation of natural resources and ecosystems, and rational use of the latter in the interests of sustainable development.**

2. In this connection, the following are particularly significant:

(a) **the relationship between poverty and the environment;**

(b) **the environmental impact of economic activities;**

(c) **environmental problems and land-use management;**

(d) **projects to reinforce Chile's environmental structures and policies;**

(e) exchanges of information, technology and experience in areas including environmental standards and models, training and education;

(f) **environmental education** and training to involve citizens more; and

(g) technical assistance and joint regional research programmes.

Article 50:

1. **The Parties recognise the value of international cooperation for the promotion of equitable and sustainable development** processes and agree to give impetus to triangular cooperation programmes and programmes with third countries in areas of common interest.

Free Trade Agreement – European Union and CARIFORUM, Bridgetown, Barbados, 2008⁷⁰

Introduction:

CONSIDERING the need **to promote economic and social progress for their people in a manner consistent with sustainable development** by respecting basic labour rights in line with the commitments they have undertaken within the International Labour Organisation and by protecting the environment in line with the 2002 Johannesburg Declaration;

REAFFIRMING their commitment to work together towards the achievement of the objectives of the Cotonou Agreement, **including poverty eradication, sustainable development and the gradual integration of the African, Caribbean and Pacific (ACP) States into the world economy;**

REAFFIRMING their commitment to support the regional integration process among CARIFORUM States, and in particular to foster regional economic integration as a key instrument to facilitate their integration into the world economy and help them

⁷⁰ Free Trade Agreement – European Union and CARIFORUM, complete text available at http://www.sice.oas.org/Trade/CAR_EU_EPA_e/CAR_EU_e.asp#Preamble (Accessed on 25 Apr. 2014)

to face the challenges of globalisation and achieve the economic growth and social progress compatible with sustainable development to which they aim;

Article 1º:

The objectives of this Agreement are:

(a) **Contributing to the reduction and eventual eradication of poverty through the establishment of a trade partnership consistent with the objective of sustainable development**, the Millennium Development Goals and the Cotonou Agreement;

Article 3º:

1. **The Parties reaffirm that the objective of sustainable development is to be applied and integrated at every level of their economic partnership**, in fulfilment of the overarching commitments set out in Articles 1, 2 and 9 of the Cotonou Agreement, and especially the general commitment to reducing and eventually eradicating poverty in a way that is consistent with the objectives of sustainable development.

Article 4º:

5. The Parties agree that their partnership builds upon and aims at deepening regional integration and undertake to cooperate to develop it further, taking into account the Parties' levels of development, needs, geographical realities and **sustainable development** strategies, as well as the priorities that the CARIFORUM States have set for themselves and the obligations enshrined in the existing regional integration agreements identified in paragraph 3.

Article 37:

1. **The Parties agree that the fundamental objective of this Agreement is the sustainable development and the eradication of poverty in CARIFORUM States**, and the smooth and gradual integration of these economies into the global economy. In the agricultural and fisheries sectors, this Agreement should contribute to increasing the competitiveness of production, processing and trade in agricultural and fishery products in both traditional and non-traditional sectors, between the Parties, consistent with the sustainable management of natural resources. [...]

Article 131:

1. The Parties agree that **fostering innovation and creativity improves competitiveness and is a crucial element in their economic partnership**, in achieving sustainable development, promoting trade between them and ensuring the gradual integration of CARIFORUM States into the world economy.

Article 138

1. **With a view to achieving sustainable development** and in order to help maximise any positive and prevent any negative environmental impacts resulting from this Agreement, the Parties recognise the importance of fostering forms of innovation that benefit the environment in all sectors of their economy. Such forms of eco-innovation include energy efficiency and renewable sources of energy.

2. Subject to the provisions of Article 7 and 134, **the Parties agree to cooperate, including by facilitating support, in the following areas:**

(a) **projects related to environmentally-friendly products, technologies, production processes, services, management and business methods, including those related to appropriate water-saving and Clean Development Mechanism applications;**

Article 183:

1. **The Parties reaffirm that the principles of sustainable management of natural resources and the environment are to be applied and integrated at every level of their partnership,** as part of their overriding commitment to sustainable development as set out in Articles 1 and 2 of the Cotonou Agreement. [...]

3. **The Parties and the Signatory CARIFORUM States are resolved to conserve, protect and improve the environment,** including through multilateral and regional environmental agreements to which they are parties.

4. **The Parties reaffirm their commitment to promoting the development of international trade in such a way as to ensure sustainable and sound management of the environment,** in accordance with their undertakings in this area including the international conventions to which they are party and with due regard to their respective level of development. [...]

Article 186:

The Parties recognise the importance, when preparing and implementing measures aimed at protecting the environment and public health that affect trade between the Parties, of taking account of scientific and

technical information, the precautionary principle, and relevant international standards, guidelines or recommendations.

The Free Trade Agreement between Colombia and Peru and European Union⁷¹, 2012

Introduction:

COMMITTED to implementing this **Agreement in accordance with the objective of sustainable development**, including, the promotion of economic progress, the respect for labour rights and the protection of the environment, in accordance with the international commitments adopted by the Parties;

Article 4:

The objectives of this Agreement are:

(d) **development of an environment conducive to an increase in investment flows** and, in particular, to the improvement of the conditions of establishment between the Parties, on the basis of the principle of non-discrimination;

(j) **to promote international trade in a way that contributes to the objective of sustainable development**, and to work in order to integrate and reflect this objective in the Parties' trade relations; and

[...]

⁷¹ The Free Trade Agreement between Colombia and Peru and European Union http://www.sice.oas.org/Trade/COL_PER_EU_FTA/COL_EU_Accord_e.pdf (Accessed on 16 Apr. 2014)

Article 201:

2. The Parties recognise the past, present and future **contribution of indigenous and local communities to the conservation and sustainable use of biological diversity** and all of its components and, in general, the contribution of the traditional knowledge (63) of their indigenous and local communities to the culture and to the economic and social development of nations.

3. Subject to their domestic legislation, **the Parties shall, in accordance with Article 8(j) of the CBD respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity**, and promote their wider application conditioned to the prior informed consent of the holders of such knowledge, innovations and practices, and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

Article 267:

1. Recalling the Rio Declaration on Environment and Development and the Agenda 21 adopted by the United Nations Conference on Environment and Development on 14 June 1992, the Millennium Development Goals adopted in September 2000, the Johannesburg Declaration on Sustainable Development and its Plan of Implementation adopted on 4 September 2002, and the Ministerial Declaration on Attainment of Full, Productive Employment and Decent Work adopted by the United Nations Economic and Social Council in September 2006, **the Parties reaffirm their commitment to sustainable**

development, for the welfare of present and future generations. In this regard, the Parties agree to promote international trade in such a way as to contribute to the objective of sustainable development and to work to integrate and reflect this objective in their trade relationship. In particular, the Parties underline the benefit of considering trade-related labour (79) and environmental issues as part of a global approach to trade and sustainable development.

2. In view of paragraph 1 the objectives of this Title are, among others, to:

(a) promote dialogue and cooperation between the Parties with a view to facilitating the implementation of the provisions of this Title and **strengthening the relationship between trade and labour and environmental policies and practices;**

(b) **strengthen compliance with the labour and environmental legislation** of each Party, as well as with the commitments deriving from the international conventions and agreements referred to in Articles 269 and 270, as an important element **to enhance the contribution of trade to sustainable development;**

(c) **strengthen the role of trade and trade policy in the promotion of the conservation and sustainable use of biological diversity and of natural resources**, as well as in the reduction of pollution in accordance with the objective of sustainable development;

(d) strengthen the commitment to labour principles and rights in accordance with the provisions of this Title, as an important element to enhance the contribution of trade to sustainable development;

Article 268:

Recognising the sovereign right of each Party to establish its domestic policies and priorities on sustainable development, and its own levels of environmental and labour protection, consistent with the internationally recognised standards and agreements referred to in Articles 269 and 270, and to adopt or modify accordingly its relevant laws, regulations and policies; each Party shall strive to ensure that its relevant laws and policies provide for and encourage high levels of environmental and labour protection.

Article 271:

1. The Parties reaffirm that trade should promote sustainable development. The Parties also recognise the beneficial role that core labour standards and decent work can have on economic efficiency, innovation and productivity, as well as the value of greater coherence between trade policies, on the one hand, and labour policies on the other.

Article 272:

1. The Parties recognise the importance of the conservation and sustainable use of biological diversity and all of its components as a key element for the achievement of sustainable development. The Parties confirm their commitment to conserve and sustainably use biological diversity in accordance with the CBD and other relevant international agreements to which the Parties are party.

2. The Parties will continue to work towards meeting their international targets of establishing and maintaining a comprehensive, effectively managed, and ecologically representative national and regional

system of terrestrial and marine protected areas by 2010 and 2012, respectively, as fundamental tools for the conservation and sustainable use of biological diversity. The Parties also recognise the importance of protected areas for the welfare of populations settled in those areas and their buffer zones.

Article 273:

In order to promote the sustainable management of forest resources, the Parties recognise the importance of having practices that, in accordance with domestic legislation and procedures, improve forest law enforcement and governance and promote trade in legal and sustainable forest products, which may include the following practices:

(a) the effective implementation and use of CITES with regard to timber species that may be identified as endangered, in accordance with the criteria of and in the framework of such Convention;

(b) **the development of systems and mechanisms that allow verification of the legal origin of timber products throughout the marketing chain;**

(c) **the promotion of voluntary mechanisms for forest certification** that are recognised in international markets;

(d) **transparency and the promotion of public participation in the management of forest resources** for timber production; and

(e) the strengthening of control mechanisms for timber production, including through independent supervision institutions, in accordance with the legal framework of each Party.

Article 274:

1. **The Parties recognise the need to conserve and manage fish resources in a rational and responsible manner**, in order to ensure their sustainability.

2. The Parties recognise the need to cooperate in the context of Regional Fisheries Management Organisations (hereinafter referred to as 'RFMO'), of which they are part, in order to:

(a) **revise and adjust the fishing capacity for fishery resources**, including those affected by overfishing, to ensure that the fishing practices are commensurate to the fishing possibilities available;

(b) **adopt effective tools for the monitoring and control**, such as observer schemes, vessel monitoring schemes, transshipment control and port state control, in order to ensure full compliance with applicable conservation measures;

(c) **adopt actions to combat illegal, unreported and unregulated (IUU) fishing**; to this end, the Parties agree to ensure that vessels flying their flags conduct fishing activities in accordance with rules adopted within the RFMO, and to sanction vessels under their domestic legislation, in case of any violation of the said rules.

Article 275:

1. Bearing in mind the United Nations Framework Convention on Climate Change (hereinafter referred to as 'UNFCCC') and the Kyoto Protocol, **the Parties recognise that climate change is an issue of common**

and global concern that calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, for the benefit of present and future generations of mankind.

2. **The Parties are resolved to enhance their efforts regarding climate change, which are led by developed countries, including through the promotion of domestic policies and suitable international initiatives to mitigate and to adapt to climate change, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions, and taking particularly into account the needs, circumstances, and high vulnerability to the adverse effects of climate change of those Parties which are developing countries.**

[...]

4. Considering the **global objective of a rapid transition to low-carbon economies**, the Parties will promote the sustainable use of natural resources and will promote trade and investment measures that promote and facilitate access, dissemination and use of best available technologies for clean energy production and use, and for mitigation of and adaptation to climate change.

Article 277:

1. **No Party shall encourage trade or investment by reducing the levels of protection afforded in its environmental and labour laws.** Accordingly, no Party shall waive or otherwise derogate from its environmental and labour laws in a manner that reduces the protection afforded in those laws, to encourage trade or investment.

Article 324:

1. The Parties agree to strengthen cooperation that contributes to the implementation of this Agreement and to make the most of it with the aim of optimising its results, expanding opportunities and obtaining the greatest benefits for the Parties. This cooperation shall be developed within the legal and institutional framework governing cooperation relations between the Parties, **one of the main objectives of which is to boost sustainable economic development that enables to achieve greater levels of social cohesion and, in particular, to reduce poverty.**

PART III. ECONOMIC PERSPECTIVE: POSSIBLE BENEFITS OF A MERCOSUR-EUROPEAN TRADE AGREEMENT

Aline Marsicano Figueiredo

Coordinator of Institutional Affairs at Ethos Institute

Carlos Nomoto

Sustainable Development Director of Banco Santander

Gabriele Reitmeier

Director of the Friedrich Naumann Foundation
office in São Paulo

Henrique Lian

Executive Director of Institutional Affairs at Ethos Institute

Karima Essabak

World Forum Lille

Luiz Gustavo Villas-Boas Givisiez

Second Secretary, Mission of Brazil to the European Union

Marco Antonio Fujihara

Director at Key Associados and Manager of the BNDES
Brasil Sustentabilidade fund

THE ROLE OF KEY ACTORS IN THE ADVANCEMENT OF SUSTAINABILITY ISSUES IN A FTA BETWEEN THE EUROPEAN UNION AND MERCOSUR

Aline Marsicano Figueiredo, Carlos Nomoto, Gabriele Reitmeier, Henrique Lian, Karima Essabak, Marco Antonio Fujihara.

Henrique Lian: This table will be about the role of key actors in the advancement of sustainability issues in a free trade agreement between the EU and Mercosur. As social pressure is necessary to advance political agendas inside any nation, the same works for the international community. I will ask for comments concerning your respective sectors, what kind of action or pressure you are capable of exercise in order to stimulate international sustainability regulations, especially in the realm of the Mercosur and European Union agreement. I will start from a company's point of view and ask Karima: We want to know if companies are aware that they should act internationally and if they feel that pressure is needed.

Henrique stimulates participants to bring their contributions, in the seminar organized in Brussels, about key actors in the construction of the freetrade agreement between Mercosur and the European Union.



In addition, what have they done since the World Forum Lille was founded?

Karima Essabak: Thank you. The World Forum Lille is now in its eighth edition, so we have some feedbacks now. These eight years were necessary for raising awareness. It really takes that long to reach the companies at an international level. This was the first step; we observe that we have reached a level of awareness that allows us to go further, now we need to answer companies' questions on how to proceed. I realize they really don't know how. Last year, at Forum Empresa, we worked alongside with CSR Europe to try to show how to improve their sustainability approach.

At that workshop, which gathers many participants, we witnessed how companies were interested on the how part. The format was planned

for 50 participants, but during the meetings, there were 100 companies participating. They came because they don't have any solutions so, unfortunately, I cannot share with you solutions, plans or ideas but I can say that companies working at the international level are interested in finding them. Moreover, they are participating in the negotiations from the start, not just waiting for the regulation to be ready and then deciding whether it will be good or bad for them. In France, this has never happened before.

Henrique Lian: I will ask your comment on the public sector in general and the financial sector specifically. Karima gave the European perspective, now I would like to hear the Brazilian perspective. There is an article by one of Natura's⁷² founders, Pedro Passos, defending that we need to include Brazilian companies in the global supply chain. He is not taking sides with any political agenda on free trade or against it; he is saying we should be more open and have more exchange with the rest of the world on sustainability. We have to talk about our concerns on energy metrics, biodiversity, and social diversity. As a Brazilian businessperson, what is your opinion?

Carlos Nomoto: I agree that Brazilian companies must be part of the global supply chain and global business because of our environmental assets. We must work on regulations in our case, using genetic and biodiversity patents. We need to regulate and make our own patents. The pharmaceutical sector has been developing research for years in Brazil, using Brazilian biodiversity.

Brazilian companies must enter the global markets supply. I mentioned some guidelines, *soft laws* in the financial market that are perfect and some that are not; it is a consensus in the financial market that the Equator Principles or the PRI are serious. However, I am not seeing financial markets using these guidelines to influence free trade or

⁷² Brazilian manufacturer and marketer of beauty products, household, and personal care, skin care, solar filters, cosmetics, perfume and hair care products the company that sells products through representatives in many countries across the world. The company was founded in 1969, by Luiz Seabra and became a public company, listed on São Paulo Stock Exchange, in 2004. Currently the company is the second largest Brazilian cosmetics company by revenue.

to influence other countries on embedding sustainability. These guidelines started as a mechanism or a convergence on lots of issues that are mushrooming all over the world, like social and environmental disasters and accidents. They started to create a common sense of concern but did not build a bridge to influence third countries; therefore, we cannot expect these kinds of actions from such guidelines.

Henrique Lian: Back to biodiversity, there is a law in discussion concerning the division of biodiversity exploitation benefits with traditional and indigenous people, which is a very sensitive point for the pharmaceutical and cosmetic industry nowadays. I am not accompanying closely the discussion of this legislation. Natura has advanced practices for developing communities and sharing benefits, among others, but I don't think the company is very happy with the laws as they are today.

Carlos Nomoto: A positive case on one issue that was spread all over the world is Mohamed Yunus' approach on the subject of micro credit. He has influenced countries that are implementing microcredit to invest more on it based on his experience in Bangladesh. This is a positive case of a man who led the government to invest in microcredit institutions.

Henrique Lian: He should be a Nobel Prize in economics because he addressed a social problem and turned it into a very profitable business. It brought considerable credit for many people simultaneously. In Brazil, we have replicated the models, but it started very small and only now it is getting scale.

Santander is the best example, because you have the largest microcredit fund in Brazil.

Let me supplement the provocation, figuring out another sector and a possible reaction. Let's talk about textiles. We have a crisis of textiles all over the world due to Asian textiles, which are much less expensive because of work conditions, a consequence of the stage of labor rights

in the region. The European Union, and especially France, reacted by distinguishing its industry by design; Haute Couture. The design of their products cannot be easily copied or made with inferior material. In my point view, the only possible reaction for the Brazilian textile sector would be to design a production chain, a pipeline, beginning with a cotton sustainable production, which involves the adequate use of water. The production of the fabric would use renewable energy and pay decent salaries. Had the industry accepted our suggestions to do that, maybe in a few years we could have a different kind of conversation with the Brazilian government. This industry could sit at the table with the development Minister and say: “we don’t want to be protected against Asia; we want the same conditions to compete, so our products can follow the same sustainability guidelines”. Maybe the markets, especially in the European Union, would open up to this kind of differentiated product. Now, we want all imported products to be taxed at the border. That is our only possibility of imposing taxes according to WTO. This way, what follows the same production process enters the country on the same conditions. Otherwise, it has a different tax. This would be a way of protecting a differentiated industry, not protectionism.

Marco Antonio Fujihara: If you are talking about protecting your country against other countries protectionism, by the end of the day, every country will use a different set of criteria to do the same “protection against protectionism”.

On another matter, when talking about funds, one must distinguish types of funds in groups. First, there are derivative funds. Second, there are securitization funds. Third, there are endowment funds. Thus, there are three big groups of funds. Venture capital and private equity funds contribute for sustainability in two areas. First, on the selection of investors who are committed to the business. Second, if there are very good pipelines for the fund, these two things need to join one another. In terms of venture capital and private equity, these are the most important contributions. The real guarantee in terms of securitization process is a liquid receivable. Otherwise, it can be resold for any party, whether it respects the sustainability criteria or not.

Henrique Lian: NGOs have played an important role, especially regarding environment issues, around the world. Not only protesting or making institutional campaigns but also making advocacy, which is also valid for European Union issues.

Aline Marsicano Figueiredo: Before I start, I would like to make a comment on what Karima said. You were talking about your workshop experience. It seems to me that companies do not talk to each other, and they are marveled when they can hear other people experiences. When they talk to people from the same area, they discover solutions for their own problems. I had a similar experience on a compliance workshop. I was teaching people that were specialized in compliance in their companies, and I have no great experience with it. I was talking about these basic hallmarks of the FCPA⁷³, so I gave a basic explanation and asked them “How do you see this in your company?” and we had a positive reaction from everyone, because they would talk to each other. At a certain point, I discovered that most companies represented there did not have a hearing office to denounce a problem anonymously, except for this one consultant group that had a solution made by Google, because it was in the technology field. It was an excellent solution and everyone thought it was a good idea and wondered it was possible to replicate it. You were talking about networking and this is very important.

Henrique Lian: When we call them to talk about climate change, management waste, international affairs, they don’t come. However, they need to realize they should come, because these affairs are global today.

Aline Marsicano Figueiredo: True, but it is getting better. You can see that NGOs started from something local, then national and now they have expanded rapidly to international action. We are here, Friedrich Naumann Foundation is here as well and they are active in more than 60

⁷³ The Foreign Corrupt Practices Act (FCPA) is a United States federal law known primarily for two of its main provisions, one that addresses accounting transparency requirements under the Securities Exchange Act of 1934 and another concerning bribery of foreign officials. This law made it illegal payments to foreign government officials, foreign political parties, candidates for foreign political office in exchange for commercial or economic benefits.

countries. Many of these NGOs structured to influence policymaking and to influence negotiations in several matters.

The term NGO first appeared officially in 1945, because the United Nations needed to differentiate the participation rights in the specialized governmental agencies and those for the international private sector. Article 71 of the charter defines what an NGO is. I would like to read the first two lines because it is very important for this particular word: “The economic and social council may take suitable arrangements for “consultation” with nongovernmental organizations, which are concerned with matters within their competence.” I read this because of the word consultation. NGOs are centered on the idea of expertise, thus delegations and delegates can consult them to have more information, and this is where NGOs have a big power of influence. I did a research to understand how to differentiate and how to evaluate different NGOs. I found references on environmental NGOs and some very interesting examples.

There are two stages where they can influence the negotiation process.

The first one is the agenda setting, usually an umbrella issue under which several other topics will fit. Later on, NGOs can work to insert a more specific item under the process of agenda setting, once specific issues are raised. There is also the positioning of key actors to take into account. Therefore, if you have a country or a delegation that would probably agree with you, you have better chances of success, because you will have an insider to bring the topic to the table. In addition, there is the influence of the outcome document in the negotiation. Naturally, NGOs often adopt a much more radical position trying to get more of the negotiation, knowing that many times it is impossible to get as much as they require but willing to compromise.

I have explained superficially how NGOs act and what strategies they use to obtain a higher rate of success. One example is the 1971 Founex Report on Development and Environment, published by a group of NGOs a little before the Stockholm Conference of 1972. It influenced

the outcome of this conference and to do so, these NGOs produced a common report and delivered it right before the negotiations started, in order to have a big influence on issue framing and on matters of expertise as well. However, I don’t know to what extent this strategy is still viable for us today, because knowledge is not so concentrated and several groups apply the same strategy to defend their different points of view.

There is also the example of the United Nations Framework Convention on Climate Change and the Kyoto Protocol. Here, you have about 40 NGOs and they had a great deal of success in terms of the negotiation process but not so much on the outcome documents. They had a good strategy and were gathered under the umbrella of the Climate Action Network.

In Rio+20, for instance, they had a good “umbrella strategy”. They had a newsletter at the time so there was a “name and shame” strategy. However, they had to face a great problem: the role of business and industry who were under an umbrella as well, called Global Climate Coalition, which was a coalition forum with fossil fuel companies. This was particularly difficult because they were so much stronger than NGOs at the time. Nevertheless, common sense did not consider these two sectors and this other coalition an eminent threat. That particular thought made them lose the battle in this particular negotiation.

Another example is the Cartagena Protocol in Biosafety. For this particular process, there was a group of developed countries in opposition to NGOs, who wanted a binding agreement on the procedure for the import of living modified organisms. Despite this rivalry with developed countries, NGOs did manage to have a high impact on the process, and after intense negotiations, they were able to include the Precautionary Principle in the final document and negotiated a relationship with other previous and relevant international agreements in the preamble, another victory. It helped that they were not involved with big economic interests. In addition, one should notice that even though access to negotiations became harder for NGOs, at

first, they had a lot of access to delegates, which was progressively reduced afterwards, as a reaction from some delegates who thought the process was being too impacted by NGOs. This did not stop them though. Therefore, it seems that in this particular case the absence of an opposition from the business sector and tenacity are essential factors to understand why they were successful.

The last example is the Desertification Convention⁶⁹. Again, there was an umbrella strategy. It was called *Le Réseau d'ONG sur la Désertification et la Sécheresse*. They had two demands to include the importance of local NGOs in the process and to reflect in the final text the social and economic consequences of desertification. They had a high influence over this particular negotiation and managed to get both points approved. The cohesive group strategy with joint statements made in the name of all NGOs present was very effective.

Another cohesiveness factor was the lack of large NGOs. Sometimes, Greenpeace or some other large organization has its own agendas and suddenly there is a reason to fragment the process and dispute attention. In this particular case, the organizations were able to build these joint statements and, in addition, they knew a lot about the reality of desertification because the NGOs involved were located in places where people were suffering from its consequences. It doesn't seem like this is the case right now for most NGOs. We no longer enjoy the prestige we once did, probably because of the many scandals involving NGOs and, in terms of expertise; there are all kinds of groups and organizations defending all sorts of positions.

What lessons we can learn from these examples? We should have the support of a country or support from a political party like the one we have in Germany. We have Brazil represented here, we had Minister André Odenbreit and today we have Luiz Gustavo. This dialogue with countries' representatives is very important even if you are not directly involved in the negotiation process. There should be a cohesive group of NGOs, for if we are working together, we cannot have second agendas or hidden agendas in the process. For now, we are only two

organizations, but it seems that we can enlarge the group, although it has to be something well-coordinated, very honest and transparent. Finally, it seems like, at the early stages of the negotiation process, where we are framing the issue, is vital, reason why we are always talking about opportunity. This is a positive vision of sustainable development that must be reinforced repeatedly, because of risk, guilt, fear and disaster that are still attached to sustainable development for many people; not as something we want, but as something that scares us.

Marco Antonio Fujihara: What do you think about the private financing for NGOs?

Aline Marsicano Figueiredo: It is a complicated matter because it implicates the independence and autonomy of NGOs. However, if they don't get financing from the private sector they must get it from the government and then I think it is even more complicated. At the Ethos Institute, we have the sponsorship model that has worked so far, but, from time to time, conflicts of interests do arise and, when it happens, accountability and transparency are essential. An endowment fund, which is desirable, although not necessarily possible for us right now, would be the ideal solution for that.

Karima Essabak: I agree with Aline. Our network is 40% financed by institutions and 60% by the regional authority, the public sector. We also have company sponsors; they give €30.000 to €60.000 each. I also agree that what makes the difference is the head of the network. Not even the sponsor can influence what is said, what enters a speech or some publication. This concern exists in our case too.

Carlos Nomoto: Aline, as we are talking about how to influence the perspective of companies and as NGOs, are you seeing an effective role of activists NGOs in bringing or raising some important issues and influencing governments? Do you see an effective specific strategy for it?

Aline Marsicano Figueiredo: I think that activists have an impact, especially in the press. Sometimes that pressures the government. However, when you ask if they are able to bring companies to talk to

the government, I would say not very often. I have been working with NGOs for 2 years now. From my little experience, there is usually an opposition, a distance. There is a major difficulty in finding common ground to work with both government and companies, which is what we try to do. Even inside our democratic organization, in which everyone has their own voice, there is a lot of conflict and it is very hard to work together with so many different companies. We see some interesting initiatives, but they are often sporadic projects and sometimes simply superficial initiatives, something to boost branding and not much else. In addition, the dialogue usually happens by involving the press to bring a certain topic to light or to mobilize the public and this creates a distance between the actors, because it usually involves criticizing one of the parts involved, except when very rarely companies and governments actually work together.

Henrique Lian: I would like to give two examples of Ethos' actions. One is very isolated, in the field of integrity and the other is very communitarian in climate change.

Rio +20, a very recent example, was a conference with social consultation and preparations processes, having received six thousand contributions from all over the world, which were synthesized into a document of six hundred pages. We were there acting in partnership with the Brazilian delegation from the External Relations Ministry, that was always very open to suggestions, who were the negotiators and would ultimately decide what could go or not to the table. However, from those six thousand contributions, there was none talking about integrity. Therefore, we started acting at the Brazilian National Commission for Rio +20, coordinated by the Minister of the Environment and the Minister of External Relations. We had brought this topic for the meeting of the Commission, and, until the "pre-draft" phase, it was still not there. When we finally received a final document to read, we decided to try once again to insert integrity, and finally Itamaraty incorporated it in the Brazilian document with other contributions. It was approved and, later on, it became part of the "The Future We Want". Yes, it was a very isolated action of one NGO, but still, we are lucky with the issue of integrity.

Another good example is the Brazilian position towards "COP 15"⁷⁴, which was very conservative, and by Brazilian position, I mean everything: the position of the government, of companies, of the Brazilian Federation of Industries (Confederação Nacional da Indústria, CNI); everyone was against voluntary commitments for Brazil. There was of course the Forum Brasileiro de Mudanças Climáticas (Brazilian Forum of Climate Change) that had the scientific scenarios as an argument and was trying to convince the government, President Lula (the Brazilian president at the time), and the Ministries that we should present some voluntary commitments in Copenhagen. Ethos Institute proposed to articulate a group of companies to voice this proposal, big companies. I will not mention them specifically because I can make a mistake, but Vale was the main speaker, Roger Agnelli was the president of the company at the time. Those 20 companies and Ethos organized a forum with Globo News, mediated by Miriam Leitão and André Trigueiro. Miriam Leitão presented an open letter to the Environmental Minister, Carlos Minc.

In that letter, companies stated that they wanted the Brazilian position to be more positive, more active, and more aggressive in Copenhagen, and that Brazil should assume voluntary commitments to reduce carbon emissions, because it was the right thing to do and also because it was a matter of competitiveness to the country in the mid-term perspective. They assumed the commitment to reduce their own emissions, and all of this helped change the Brazilian position.

After that, a group emerged inside Ethos: Fórum Clima (Climate Forum), with involved companies in this process and many others who came afterwards, creating a movement to influence the regulation dealing with climate change. Tasso Azevedo, who was an advisor to the Environmental Ministry at that time, is now part of this group and host writer of great parts of the National Policy on Climate Change. It is all intertwined, since parts of the law are parts of our documents as well. We remained active in the regulation of the sectorial plans

⁷⁴ Fifteenth session of the Conference of the Parties (COP 15), December 2009. The COP 15 took place from 7 to 18 December 2009 in Copenhagen, Denmark.

that came a year later, sending documents and trying to influence the law text.

Gabriele Reitmeier: Question concerning the Climate Law again. How is it possible to influence the law? Can you explain these processes?

Henrique Lian: The National Policy on Climate Change had no consultation. It was approved just after the COP 15, in 2009, and edited in December 31, 2009, soon after the Conference. One year later, we had a decree, regulating the law and establishing sectorial plans. I don't think there was a public consultation process for the national policy, but on each sectorial plan there was.

Aline Marsicano Figueiredo: I am going to answer your question about the example first. There is one particular NGO that I like very much, called Meu Rio. I follow this one particularly and they have an online mechanism, an app of sorts. They have a particular case that is very famous. There was this traditional school in Rio and it was to be demolished, so they could build a parking lot for the World Cup. What this particular organization did to bring this fact to the spotlight, was to use the online tool available for the public, where someone can complain online, a first step to mobilize the community. Afterwards, they started a campaign and, for this particular case, they knocked on every door of an apartment building in front of the school until they convinced a couple, an old couple, to put a webcam on their computer and to leave it on all the time. This way, any citizen could contribute to this campaign by watching the camera for 5 or 10 minutes to see if there was any suspicious activity, if someone was trying to demolish the school when it wasn't approved yet. They actually won the lengthily battle and this sort of civil society action is very valuable as well.

This is a local action, of course, but it is very important and it is a combination between civil society mobilization and pressure over the government. They have, for instance, the name and contact of representatives in the Executive. Let's say someone is concerned about a polluted river. They reveal who, which authority, is responsible

for that particular issue and they make his or her name available on the website. People can call and send emails and put pressure and generally annoy this person. Of course these are all different strategies, some involving backstage cooperation, others a simple outcry from the population.

On the other issue mentioned, the Anti-Corruption Law, the Law 12.846, which imposes civil and administrative liability on private legal entities for acts of corruption committed against the public administration, we find a cooperation approach to solve a problem affecting both the public and the private sectors.

Ethos Institute has an important partnership with the national Comptroller General Office (Controladoria Geral da União - CGU)⁷⁵, working closely in this particular advocacy project from the start. A series of advocacy actions within a working group consisted of companies and led by the Ethos Institute gained traction when people took the streets in June 2013, speeding up the process of approval for the law and, as it was about to become operational, Ethos was consulted. Several dialogues were organized between companies, experts and partner organizations and Ethos benefited from a solid working group, which made possible for our contributions to be absorbed in the final version of the text and. We can see that it is possible to work together with the government and to influence policy-making, even if it is hard. This example deals with NGO, companies and government working together to improve public policies.

Henrique Lian: There is a draft law in the Congress now that was written by Ethos Institute, Nossa São Paulo and Sustainable Cities Network. The Law was written, obliging all the cities in Brazil to have targets for sustainability to be proposed by elected Mayors with civil control. It was written there and then and sent to Parliamentarians, so they would propose and sign it.

⁷⁵ The Comptroller General (CGU) is the federal government agency that responds directly to the Presidency of the Republic on all matters which, under the Executive branch, are related to the protection of public property and increasing the transparency of management by means of internal control activities, public audit, prevention and fight against corruption and by having an ombudsman.

Now, let's hear more about the Friedrich Naumann Foundation.

Gabriele Reitmeier: The Friedrich Naumann Foundation was created at the end of the 1950's and is about political education for adults. We do many seminars, conferences, publications of all sorts of topics. The idea of teaching people about democracy, human rights and economy arose before the independence of former colonial states in Africa, Asia and Latin America. Nowadays, Friedrich Naumann is working in about 60 countries all over the world, in every continent. We are a liberal foundation with a liberal approach, but our funds come exclusively from the German government, mainly by the Ministry of Foreign Affairs and the Ministry of Development.

Our very first project happened in Tunisia, in 1962. In Brazil, we have been working since the end of the 1960's. In the first decades, we focused on cooperation with corporations in different parts of the country, but with the end of the military government, in the mid 1980's, we could also establish political activities that had always been our priority. We cooperate a lot with the Tancredo Neves Institute, a foundation close to the party. Today we are cooperating with young people all over Brazil, mainly working with the development of ideas on what a democratic organization means: transparency; how to become a political candidate, how to work with the media, and so on. We have quite a range of think tanks, ten or twelve. Some are really think tanks, in the European sense; they do a lot of publications, research, and lectures. I would like to specially point out the newly refunded Liberal Institute of Rio de Janeiro. There is another Liberal Institute in Porto Alegre, and every year, around April, they hold an event focused on training young people who are in the economy sector. Inside the event, we have three projects in the environmental sector, all on climate protection. The first one started in 2011, and it was about sustainable agriculture; we made a partnership with the Institute and had a series of online seminars about sustainable development. The second was an environmental dialogue program with Mexico and Brazil; Ethos Institute cooperates with us on different topics, such as the harmonization of environmental laws between a Federal and the state levels, and energy issues. The

last one happened in Mexico because in the context of a huge energy reform last year. The third project is with Henrique and Aline, here present, on the EU and Mercosur future trade agreement, focusing on the sustainability conditions in this future agreement.

Carlos Nomoto: I would like to know if you have any positioning about environment or intentions to defend the environment in the liberal countries. We have seen liberal countries as defenders of the economy over the environment, arguing for the free usage of nature for economic purposes.

Gabriele Reitmeier: The liberal approach will always use market instruments, even in environmental policies or in climate protection. For example, we are very fond of emission trading, especially because you can work with tax and price policies, instruments that can help protect the environment. In Brazil, Dilma Rousseff has lowered the energy price last year by twenty percent. If the energy is cheaper, people will use it more, but with the energy consumption increasing, the country has to maintain a sufficient production. That situation is a bit dramatic in Brazil. The president should have done differently; she should have established a higher energy cost in order not to incentive the consumption as much. Therefore, there are market instruments one could use to regulate these situations. The ideal is to have a clever combination of market instruments and regulation.

Henrique Lian: I have one question concerning the foundation: Was Friedrich Naumann its founder or is the name a tribute to someone?

Gabriele Reitmeier: Actually, Theodor Heuss, the first president of Federal Republic of Germany, in 1958, founded the organization; Friedrich Naumann was a journalist and a Federal Deputy who opened the first political school for adults, and now we continue his work.

Henrique Lian: Thank you. I would like to ask Fujihara to explain a little bit about what marketing instruments we were talking about yesterday.

Marco Antonio Fujihara: In viewpoint, market instruments are necessary because their costs are easily adaptable in the private sector. However, in terms of access, it is very complicated due to the difficult relation the State has with taxes in countries like Brazil. Fernando Henrique Cardoso [former Brazilian president] talks about the possibility of using taxes for democratic purposes and instead of leaving the State deal with it. It is a different approach. It is possible to have a combination between market mechanisms and public policies. That would be a democratic approach. Brazil has many difficulties in this field, not having enough public policies to combine with market mechanism. Moreover, discussions about this issue are rare.

Henrique Lian: Last year we received an invitation from EU to take part in a scientific mission related to energy. We when got familiar with the Climate Parliament, an initiative to spread information concerning climate change to parliaments all over the world, how to articulate a sustainability approach in each Parliament, how to get a proposal approved and so on. However, Brazil is not a part of the Climate Parliament, thus we are talking to Congressmen and trying to raise awareness on the importance of this matter. There is the Frente Parlamentar Ambientalista [Environment Parliament Front], for better or worse, there are more than ten Parliamentarians in our mixed commission. We see things moving forward, the next step is to increase the critical mass inside the Parliament. In Brazil, the president can sign treaties and conventions but they will all pass through the Congress for approval; and they can stay there for years before anything is decided.

In the last presidential elections, most candidates had a sustainability platform and an advanced on what could be the next steps. Dilma's government is a bit slow, even with Izabella Teixeira at the head of the Environment Ministry. Therefore, and maybe for the first time in the country's history, sustainable development is a real part of the presidential debate.

For over ten years, Ethos Institute has worked exclusively with voluntary commitments from companies. However, as the years

passed, it was clear that this kind of approach was not enough in Brazil. That is why the partnership with Friedrich Naumann Foundation is so important; we need to develop our international connections.

They already include the Global Compact; Ethos has worked as the Executive Secretariat for the Global Compact for ten years in Brazil. In addition, we have two Brazilian board members at the U.N., the presidents of the Ethos Institute and of Petrobras. We also have a link with the GRI, the Global Reporting Initiative. It is an international NGO with a reporting initiative based on the Netherlands. It promotes a kind of integrated report for companies. Nowadays, Brazil has 260 companies using this reporting model. The process is very expensive, that is why only a few companies have the opportunity to use it. Moreover, we have launched a Latin American network of institutions, which work with social corporate responsibility, called Forum Empresa, which includes 14 countries. It was founded in 1998, at the same time as Ethos Institute. However, instead of doing like our partners, the Ethos Institute doesn't sell services, in fact, it receives voluntary contributions. To provide paid consulting services, we have created Uniethos. Another broad initiative was the articulation of a movement at the Rio+20, called Global Union for Sustainability. The proposal is to empower the civil society and not just sit and wait for governments to take action. Gathering people from different groups in our society to think about possible plans of action and pressure governments.

Carlos Nomoto: Changing the subject a little, I would like to ask a few questions about the contributions made by the private sector. I am thinking specially on election's contributions. I don't know how it works in Germany or Europe, but in the United States there is a different model when compared to Brazil; each person can contribute to the candidate they wish, which is very different in our country, where we have many companies contributing for a candidate's campaign. The problem is the web of interests behind it, which leads to an exchange of illegal favors, rather than an actual political support.

Gabriele Reitmeier: If I am not mistaken, there is a limit to the amount

of money you can give to a party, maybe around 10 thousand euros, and the party is required to publish it online, so everybody is able to know who is funding the party. However, all parties are financed by the State, and the amount will depend on how many voters the party has, more voters equals more money.

Henrique Lian: Now, I would like to direct our conversation to a specific theme: the role of private companies in the promotion of sustainable development. I will start with a summary of the Ethos Institute perception on the participation of companies in big arenas like Rio+20. When these environmental/human conferences started in 1972, in Stockholm, only a few companies attended as distant observers of the multilateral discussions on sustainability, which did not use the term “sustainability” yet. At Rio 92, a lot more companies attended, trying to understand what kind of negotiations were going on, what could be their roles in the process etc. More recently, at Rio+20, we had an explosion on the number of companies taking part in the process although in an isolated way. A few companies had an active part in the official negotiation process at Rio Centro, but many other companies were there. I have noticed that, amidst the public to presenting proposals at the event, companies were most sensitive to the topic, seeing it as an opportunity. I just wonder why they will not move faster, considering their positive position on sustainability and business.

Marco Antonio Fujihara: I don't think companies actually believe in sustainability, but, instead, only in what they can sell. There are two kinds of commitments in the private sector: the real commitment and the light commitment. The real commitment reflects the companies' actions; what they are actually doing, especially those depending directly on the environment, like mining companies. If they don't have a sustainable approach in their production, they will not succeed. However, in the other companies such as source products, consumers, product companies, I would say the approach works more as marketing. They have a light commitment because their products do not depend on how their raw material is produced.

Carlos Nomoto: I think it is a matter of leadership rather than treaties and technology. I agree with Fujihara when he says companies working with raw material extraction from the environment do not have a choice, the sustainability approach has to be part of how they handle business. Moreover, companies buying these raw materials did not need to keep track of the process until now, but this scenario is changing. For instance, nowadays the Security Exchange Commission from the United States is demanding more and more that companies share sustainable extraction and production responsibilities. It will soon be a mandatory regulation, and I believe that is the companies' path towards a sustainable business development. Yet, only a few companies in the world have decided to incorporate sustainability into their businesses. Most of them lack the leadership to make a change with no obligation from a regulation. Therefore, at the same time the government has to create regulations on the matter, the companies must make their own initiatives towards sustainability.

Greenpeace made a study to track the meat people buy at supermarkets. They first went to the slaughterhouses, but no one was willing to discuss the matter so they decided to go after the retail companies selling the meat from these slaughterhouses. They looked for main supermarket companies, and told them that their suppliers were using deforestation areas for the livestock and this information would go public if the supermarkets didn't take any action. The response was very different, supermarket chains publicly decided to stop buying from the irregular slaughterhouses. Consequently, slaughterhouses had to listen to Greenpeace in order to restore their reputation. Therefore, this kind of pressure works today, in addition to the pressure of regulations and taxes.

Marco Antonio Fujihara: There are two main players in the process of adding sustainability to a business' agenda. The first are investors, who can settle agreements with the business owners, exchanging investment for a sustainability commitment. The second are the consumers; through their consumption choices, they can support companies with sustainable propositions and refuse others.

Carlos Nomoto: The problem with consumers is lack of information. Most of them don't know about these matters or only look for the cheapest products, no other criteria. Of course, it is a matter of educating the consumers, but I don't think we can wait. At least for investors it is clearer, either the company is listed on the Dow Jones Sustainability Index or Instituto de Sustentabilidade Empresarial [Entrepreneurial Sustainability Institute], in Brazil, or it isn't.

Gabriele Reitmeier: I think the main question is who is going to pay the cost for the change in the approach? When it comes to companies, this cost will have to be paid with the product's profit; therefore, the consumer will have to pay more for a sustainable product. On the investor's side the same goes, the more expensive more apprehensive people get. However, there are many ways a company can succeed with a sustainable approach and have a good consumer acceptance. A good example is the French company Michelin, a tire manufacture company. Nowadays it cannot compete with the market prices, so it changed its perspective: Michelin does not sell tires anymore, it sells kilometers. That is, you don't buy the tire per se; you buy a certain quantity of kilometers to drive. The company then recycles the tires and the consumer can pay less, since the production cost becomes less expensive. It is all about finding a link between the business and a reason to adopt sustainability. Regarding the consumers, the information must be available; I know a good example that can work really well: a NGO made an app to show how much of slave work you employ because of the items you own. The app has a list and the information about each one of them. In the end, they propose that you send a letter to a company from your list, requiring explanations and solutions to the workers' exploitation. Once the companies receive these letters, they feel pressured to find out exactly what is going on and try something different. In conclusion, as I said before, companies will always measure their actions through the market advantages and disadvantages. Therefore, a cooperation between companies is crucial for a change of scenario, if they settle for the set of sustainable rules of production; they will all continue to be on the same level of competitiveness.

Marco Antonio Fujihara: I would just like to make a remark about what Nomoto said. It is all a matter of perspective, we must be careful to talk about investment funds and indexes. Many investors don't ask if the company is listed anywhere and there is a big difference between the types of investments, there are the long term and short term investments; It depends on the type of business you have.

Henrique Lian: I would like explore some scenarios: the competitive, regulatory, innovative and investment scenarios, for exemple. The need for limits on self-regulation, advantages of international regulation, the realm of opportunities' credibility and which sector is ideal for these opportunities.

Regarding the competitive scenario, the market is like a red ocean; that is, all companies are on the same waters, trying to catch the same public, with the same approaches. At the same time, the new businesses are starting now, with small profit and, therefore, little relevance to competitors. There are two reasons for that: this new approach is not solid enough and most people who seek innovation are not economists or don't have much experience on the market; sustainable business is so different from what we have now, that people from the business world don't understand it. This scenario is, therefore, made of usual business decreasing and new business that are not yet solid.

Karima Essabak: I agree. There is a new model that appears to be a functional economy, like the Michelin case. It has a positive social impact and reduces the environmental impact. I know another good example of this kind. The idea is a medical call center, to which patients can call to clarify the type of doubts that don't require an appointment. The results were a 70% decrease of unnecessary trips to the hospital, which means a big saving for the State and little impact for the doctor working on the call center. The problem is we don't know how to measure this advantage, to transform it in a monetary market and to share it.

Marco Antonio Fujihara: I disagree in terms of business modeling. There are new business models now and several funds like equity

fund, venture capital, micro finance, seed capital, angel capital, and so on. With a new business model, it is possible to have a good profit, all the new models in green economy need to be profitable. However, I don't think companies like Natura are a good example of a new model. To represent a new model, one must rethink the whole production process; create a new kind of infrastructure, instruments, technology, form of production, type of products etc. I believe that a country like Brazil is very capable of using new models; there is a lot of creativity there. The problem relies on funding and managing investments, in Brazil it is all still outdated and without regulation so it becomes difficult to change.

A good example of a new model must be on the countryside of Brazil, where small companies can develop organic products, green manufacturing process and so on; today's business need more creativity. Changes on the financial market are also important, because it can induce changes on the other sectors. Finally, regarding the work of NGOs, I would say that Brazil should establish regulations on endowments in order to become more popular among investors. In the U.S, it is a usual type of investment and provides a lot more stability for the NGO's and, therefore, allows them to continue their work with a long term perspective, especially when involves the environment recuperation.

Henrique Lian: To clarify a bit more about the endowments you mentioned and why they don't work in Brazil, this is because our regulation states that a person has to pay taxes on her or his donation. Therefore, we don't have any incentive to start making this or any kind of donation. In the U.S for example, when a person is going to receive a heritage usually the state keeps around 60% for taxes purpose; but if the person donates a portion of this money, he or she will not pay any taxes.

Carlos Nomoto: I have here one article from the Mackenzie University about the myths and realities of clean technologies. There is some interesting information about how global wind installations have soared about 25% a year since 2006, and global commercial investments

in clean energy have more than quadrupled from nearly 30 billion, in 2005, to about 160 billion in 2012, for instance. Therefore, we can see that these changes are very new.

Henrique Lian: I would like to hear from you, as a banker, if you agree on the usual business model being less profitable than it used to be. Also, the new sustainable business proposals you receive are already fully shaped or they still lack structure when you get them?

Carlos Nomoto: Well, my answer would have to be no. The usual model business is still showing good results, we are not seeing it decreasing in the broad sense. The perspective of a banker, of a financial point of view, is that the traditional economic model still generates satisfactory results.

Karima Essabak: I would like to hear more about profitability, is it defined only as the company's results in financial terms? About this traditional model business, it is not decreasing, because there are other values aggregated to the company, or does it all depend only on the market value to be stable?

Marco Antonio Fujihara: Economic value is a perception, not a real value. For example, how much does a bottle of water cost here? How much the same product cost in the Sahara Desert? It will have two different values, two different perceptions on what is the value of water. This also works for the perception of the companies' reputation; their values will also be different depending on the context. Their value is established as profit, but not only numbers are being used in this evaluation.

Henrique Lian: I would like to try to summarize all your great answers on these matters with some sentences: The old business model is still profitable, but it is increasingly questioned. We already articulated many instruments that do things differently on the financial and production sectors, but they are not concentrated on the main banks, what makes the changing movement weaker. There are great examples,

but we deal with a lot of difficulty in how to measure how profitable they are. An opportunity can cost a lot more than its actual price and the value is something created out of the market's perception, not by companies.

KEY INSTITUTIONS FOR ADVOCACY – THE ROLE OF COMPANIES AND THE ROLE OF NGOS

Aline Marsicano Figueiredo, Carlos Nomoto, Gabriele Reitmeier, Henrique Lian, Karima Essabak, Luiz Gustavo Villas-Boas Givisiez, Marco Antonio Fujihara.

Henrique Lian: : I would like to start this discussion analyzing the regulatory scenario. My initial statement is that we do not have enough regulation for the new economy; we have a lot of regulation for the old economy and there are some contradictions between these two.

In order to give a more concrete example, I will refer to the Brazilian energy regulation. It is a very positive regulation for sustainable energy, firstly directed to small hydroelectric power plants, in 1996. Afterwards, it was extended to other sorts of renewable energy, including solar, wind and biomass. At the same time, there is regulation fostering thermal electric power plants from the years 2000 to 2002, when we had energy shortages. Those two regulatory frameworks create confusion in the mind of external investors; they don't know which direction to follow.

New regulation towards green economy is inevitable and I will mention two new regulations we have in

Brazil. The law that establishes objective responsibility for companies indicted for criminal fraud. Until last year, only the natural persons could be held accountable and now companies, legal persons, can be held accountable as well. As for the Plano de Metas⁷⁶, the target plan, which was adopted in some cities in Brazil and is still being discussed in state and federal levels, as well as last year's regulations like the Solid Waste Law and the Climate Change Law.

Carlos Nomoto: From the private sector's perspective, the regulation can be understood as a positive or a negative opportunity for changing. A key issue on the regulatory is the second stage, when one has to figure out how to apply the new regulation for companies and how they operate once this happens. The common way to do this is to involve representatives of civil society like, for example, when the Federation of Banks or the Brazilian Sugarcane Industry Association involve them in the writing of a statute or some sort of self-regulation. The dialogue through self-regulation and other mechanisms are key factors. One tangible example is the New Reverse Logistics Model, a regulation that has been approved in our country. The challenge, now, is figuring out how to apply this regulation, how companies will put it into practice when handling waste management and logistics. This is one example that could be have been managed more properly. This new regulation will create space for a new market and, therefore, there is a need to involving companies and representatives in the practical and implementation phases of this process is necessary.

Marco Antonio Fujihara: Brazilian regulation is complicated indeed. Take, for example, the climate change law, which is not a real regulation, but instead more of a "cosmetic regulation". In Brazil, we have other political regulations like that. The Congress has a different perspective, when formulating a regulation; the private sector looks at it and decides whether it is enforceable or not. Another important factor is that regulation in Brazil is almost completely made by the Executive branch, without any participation from the Congress. More discussion is essential in the Congress.

⁷⁶ Amendment proposal to make mandatory the formulation of planning by mayors, governors and by the President with clear goals and targets.

Henrique Lian: The free market in the area of energy is where big companies and energy consumers can choose from what utility they want to buy their energy. Therefore, it is not as if you are obliged to buy from Eletropaulo. If you are Carrefour, for instance, you can choose between Eletropaulo, CPFL, Eletrobras. You decide based on the price and the capacity they have to provide for your needs and, sometimes, if sustainability is considered, on that sort of criteria as well. For example, three years ago, Pão de Açúcar decided to buy only renewable energy. At that time, CPFL was a company that could provide this service to Pão de Açúcar, but Eletropaulo could not, and Pão de Açúcar decided to pay more in order to have sustainable energy in their stores.

Marco Antonio Fujihara: This is a great perspective. Self-regulation for a renewable energy certificates in Brazil are a self-regulation for utilities. One specific certificate could be traded between companies, because there are some areas in Brazil, like green building, for example, that need the certificate for this kind of energy. We create renewable energy, but we don't have any mechanisms to trade this sort of certificate in Brazil.

The Brazilian exchange stock market does not have any mechanisms to trade this kind of dispositive. The financial sector doesn't have any mechanism either. In California, this kind of mechanism for a certificate of renewable energy is worth around ten billion dollars a year, and that is only in California. You can imagine that Brazil is a real market, but this is very complicated, because if you have an intervention from the Executive in this kind of market, there is great potential for disagreement.

Of course, in the global perspective, regulation for sustainability is a trend. However, in Brazil we do not accompany this trend completely, because of interventions from the government over the market. Energy markets are an important example. This kind of Certificate for Renewable Energy relates to the most important utilities in Brazil, but how does the market respond to it? How does the market function and where is the agenda for this market? Where is the fiduciary

commitment? Where are the bankers? It gets very confusing, because time after time the government changes the rules for buyers, sellers, for everything.

Karima Essabak: In France for example, energy is very well regulated, and it hasn't been too long since we were allowed the choice between different companies for energy. It has been maybe less than ten years. Private companies' corporate clients had the privilege first, and, since ten years ago, the final clients, the consumers and the cities, can choose too. However, if you are a new company, you have to make a deal to use the infrastructure that only the old companies have.

Regarding regulation and sustainability in the energy sector, we are discussing this subject right now in our region (North of France). We are working on a master plan that is meant to transform all the energy matrix of the region and looking to implement the smart grids, but the regulation is not ready for cities producing their own energy. What is the price and what are the rules? We do not know. Therefore, the companies, the technology and the government of the region are ready, but the regulation is not because we do not know all the consequences this change can bring to the market. If we do it only in our area, what does that mean for the price of the whole country? It is a new solution for sustainable energy, but it brings many questions on regulation, pricing and market.

I have a good example of a company that is in our network whose core business is servers; they have nothing to do with energy. However, we have found that this activity produces a lot of heat, so they work in the transformation of this heat to produce their own energy, being able to become an energy provider, a great opportunity. This is a completely new thing. How can we use this energy? Can we sell it or not? In practice, however, their production is only used in a single neighborhood, which was established by an agreement with the people living there. Still, this doesn't make the company autonomous. It is not accepted elsewhere, because it does not fit with the actual regulation for this technology. In France, we only accept the big companies and for big production.

We sell more of this product in Germany; they are more ready for that and more flexible on it than we are. Thus, technology exists; we know how to do it, but the regulation doesn't go as fast as the market or the companies do.

Two years ago, we invited a big corporation from California to our conference and they did something very interesting. There are special rules that allow a company to determine a partial value of the final price of a product that will be given to a certain NGO. It is not a donation through a foundation; instead, each client that buys a pen knows that, 30%, for example, of the price goes to a certain NGO, or you can organize the donations on the Internet, so the clients are able to choose between the NGOs. This allows the client to know that 30% of the profit is given back to society. As a term of regulation, we cannot do this in Europe, and we don't know how to do it. This also is an example of new business that can increase by a sustainable approach.

Henrique Lian: I will make the transition between the regulatory scenarios to the innovation scenario quoting Michael Porter, twenty years after the reformulation of theory of competitiveness. The original theory states: "all new regulation represents a lack of competitiveness to companies because it implies new costs and adaptation." Twenty years later, after taking into account especially environmental issues he said: "There are exceptions." Possible exceptions happen when companies take part in the discussion about the new regulation, providing some bases to regulate matters and indicating what is feasible and what is not from their point of view. The new regulation is then improved and used to innovate, to make things different and to create new competitive advantages. He admits this process is rare, but it is possible to use new regulation for innovation purposes. Thus, my position is that companies innovate in an incremental scenario.

First, companies implement risk management in order to prevent value destruction. After that, they plunge into social eco-efficiency, learning to use less material and, of course, to spend less money in order to increase their profit margin. However, disruptive innovation doesn't come so

naturally, the real transformative innovation doesn't come, because companies are trapped in the incremental scenario. Is sustainability essential for disruptive innovation? Should one start with sustainability or incorporate it in the very steps of innovation process?

Marco Antonio Fujihara: Innovation for sustainability does not happen in big companies; it happens in start-up companies. Start-ups in the countryside, not in São Paulo or Rio. There is a very good example, which is drone technology in agriculture. It is not only about innovation, drone is not an innovation. The innovation is in how they use drones in terms of methodology perspectives for climate for example.

I strongly believe that the innovation does not stay in big centers or inside big companies. To big companies, innovation means very high costs, big spending. In agribusiness, for example, transgenic technology is very expensive. However, in this moment we don't use only transgenic or only drones, but provide crop solutions. How is it possible to provide a crop solution in agriculture? That is a real thing, innovation as a combined mechanism like new technologies, new methodologies and new approaches.

It is effortless for big companies to buy innovation from small companies or start-ups, but it is very complicated to create it, because the venture capital is a very important mechanism for innovation, since it combines university perspective and market mechanisms. The financial mechanisms for innovation depend on the universities, on resources and big companies do not have this perspective. Instead, multinational companies believe it is easier to buy innovation than work with the academy.

In financial terms, there is another issue, because innovation, in financial terms, requires regulation. For example, there is one specific movement in the world called Angel Investor. The angel can be an organization or an individual who provides capital when a start-up has a very good idea, good research, and good orientation, but needs some capital to start the business. That is a real perspective for innovation, in

my opinion, not only for big companies, but also in terms of staying in contact with the university.

Henrique Lian: When you say financial innovation depends on regulation, it sounds like a paradox.

Marco Antonio Fujihara: Well, it is very easy for an NGO to provide endowment fund, but it is very difficult for a financial institution to provide endowment funds, for example. Nomoto can explain more about that.

Carlos Nomoto: Innovation depends on what you mean about the term. For example, if it is innovation or not, it is positive when you look at some companies. L'Oréal bought Body Shop; they did not start one sustainable line of products instead. Although I don't know if they are imbedding the Body Shop concepts of business.

Aline Marsicano Figueiredo: I have a friend who worked for L'Oréal for a little while, and it is all about branding. The Body Shop is concerned about matters of sustainable development, fair trade etc., while the same concern does not happen for other products and lines of the company.

Carlos Nomoto: The whole company (The Body Shop) is based on sustainability and fair trade, and it is interesting because they are not saying that sustainability is not a trend. Hence, how can one access this market? How do you learn what it means? The company is used to buying these sorts of things and use this kind of strategy when they want to understand a new market or a new company. If they have capital, they buy it and learn from it by practicing.

The second example involves Toyota and Tesla motors. Tesla has started several companies. Once they decided to produce electric sports cars. Arnold Schwarzenegger bought one of their cars a long time ago. Then, Toyota bought 39% of the capital of Tesla motors and transferred part of the production to Toyota's factory in California.

Toyota is innovative in itself. They already had Prius, so why buy another electric car company if they had a good product? Because they needed to absorb innovation. From my point of view, big or global companies may have some difficulties to innovate but they are not far from it, nor are they saying that it is not a business strategy. They want to understand new technologies or new models and they have different strategies to do it, buying to absorb it or not, just to stay in the market is one possibility.

Karima Essabak: I can agree with what you said, and I think that, to add innovation, new strategies are possible, of course. Perhaps this is the point; sustainability or, maybe, innovation based on sustainability is a long-term transformation and, in this market, we are still stuck in the short-term perspective. Multinationals, however, can go after this kind of innovation, they are aware it is easier to test without branding something new, buying or being associated to a small start-up. This is easier than using their brand towards a track that is too different from their current activities.

When addressing innovation, one sees social business increase as well, but almost every time there is a social business, there is a big company involved. Danone, for example, uses its brand to help innovation, but this also allows them to have tests without completely embodying it. This is quite new. I agree that if there is innovation in the products, there must be innovation in the processes and in all social parts of businesses, like education, for example. Everything is changing at the same time.

Henrique Lian: Most people agree on what is a company and what is an NGO. Now, our last scenario to finish the fragmented analysis is the investment scenario. More than investment, let's talk about the capital scenario. On one hand, you can go on seeing sustainability as a challenge or a barrier to private development or you can start doing what Michael Porter is doing with his shared value theory, trying to identify social and environmental problems and transform them into new profitable businesses. This is the first statement. The second is that we can see that the access to new capital and markets - not the traditional ones - is rising.

BNDES, for example, depends more and more on sustainability conditions. There is a medium-sized mining company in Minas Gerais (Brazil), for instance. They have a five-year planning, which consists of mining more, transporting its own mining products and having an exports port. Two of those three pillars did not come out, because BNDES refused the requested fund based on sustainability conditions.

To sum up, can you see environmental problems as a source of new profitable businesses? Is it true that to access new markets and capitals, especially foreign ones, you depend more and more on sustainability conditions?

Marco Antonio Fujihara: It depends on kind of the capital. For example, there might be capital provided by pension funds that need long-term commitments and that pay retirements. In Brazil, there are political aspects involved, but theoretically, it is one of the functions of pension funds. In California, pension funds have a regulation about screening of sustainability criteria from twenty years ago. The most important capital for Brazilian infrastructure is now provided by pension funds in California, it is a commitment business. When it comes to speculated capital or credit, it is a different perspective. Therefore, it depends on the perspective of the capital.

The big driver for sustainability depends on the kind of capital and investor that you have. Do you want to be profitable in one year? Six months? Ten years? This is the real perspective and is what differentiates capitals. The other important thing for profit is, in my opinion, the fact that the screening for sustainability is neglected; all the banks have been careless with sustainability, because of decreased risks. The big banks have specific areas for that, but the small banks do not have internal capacity to evaluate this kind of businesses.

Carlos Nomoto: It is important to see that there are different investment impacts. Most part of banks and companies must identify precisely the impacts for the supply chain. We would like to see investments in the first in line of contact, which are the companies.

However, global companies, in particular, have hundreds of suppliers in different countries, and the financial system cannot understand and evaluate the whole company and the exact quantity of suppliers to create a new kind of product, investment, or credit, considering that the guarantees, allowances and insurance involved. We are talking in a global perspective, countless suppliers all over the world. The whole of the capital involved in these hundreds of companies operating in different governments in different parts of the world must be taken into account, and not only by the perspective of the paying capacity of the companies.

Luiz Gustavo Villas Boas Givisiez: Based on my experience in Brazil on financial issues, working with BNDES and the Ministry of External Relations, there is a lot of dispute regarding a sector in BNDES that exports credit. Some see a contradiction in financing foreign projects with resources from the national Development Bank. However, this claim is not very accurate, because BNDES does not finance foreign projects exactly; it finances exports companies. There is only one exception to this rule: BNDES does not finance projects, it looks to the content of exports for Brazilian companies. The exception for this rule is sustainability, so BNDES, does look to the project, not to the content of the exports. It is a very interesting exception.

I would also like to add something from my experience in Brussels, because the European Investment Bank, a multilateral development bank, is one of the funding sources to BNDES. We are talking about sustainability being absorbed into the policy of some institutions, especially financial ones, and sustainability is ingrained in the European Investment Bank when lending to BNDES and Brazilian companies. The Brazilian companies then go to BNDES, and the bank has a policy on sustainability not only because of its own policy, but because one of its funders requires it.

Henrique Lian: We have a close relationship with BNDES. Actually, our seminar today was only possible because of BNDES, our first partner to discuss trade and sustainability. In our last conference in São Paulo,

in 2013, we had a whole discussion with Caixa Econômica and BNDES on what would be the role of those banks in Latin America, promoting Brazilian companies to adopt the same standards they practice in Brazil abroad. In our analysis, Brazil has a higher environmental and social regulation than our neighbors do in Latin America do, but when a company (a contractor company, or a mining company etc.) goes to another country, it adapts its operations to local regulations, which are very low when compared to Brazilian regulation. Thus, the idea is that the financier of these operations could strongly suggest to those companies taking abroad the same operation standards they practice in Brazil. It was a very interesting panel.

Caixa Econômica also has a fantastic role in Latin America, developing infrastructure, and not only physical infrastructure, but institutional as well. The combination for both operations would be very profitable for Latin America working standards integration. If Caixa and BNDES communicated better, Caixa would go first and prepare institutions and the legal infrastructure required to receive investments from Brazilian companies, so that when a company financed by BNDES arrived there, it could find a better regulatory framework in order to bring their domestic standards abroad.

Marco Antonio Fujihara: BNDES doesn't have an agency, it gives money to the banks and the banks deal with the clients. BNDES has specific screening for sustainability in equity funds, because it is a principal investor.

Henrique Lian: BNDES is also concerned that they are not finding the adequate quantity of good projects to be financed in the market, so we are trying to help with our modeling project. They have the only a small part of funds destined to green funds and to find good projects to be financed, and we need to increase that.

Gabriele Reitmeier: May I ask what is a good project in that sense? What are the conditions for BNDES to fund a project?

Henrique Lian: As an initial remark, it must combine sustainability conditions with good business modeling, because they find well-

modeled projects that often don't incorporate sustainability. The combination of both is the secret.

Marco Antonio Fujihara: One important thing is when BNDES, for example, selects a company for fund management. The selection of a bank is a public bidding and it is a very complex process. There are three parts of this process; one part is a technical approach, which is important in terms of the evaluation for selecting the management of these funds. The second is a financial analysis, the sort of fund, administrative rate, performance rate and things like that. The third part depends on the fund and the mandate for this. There are specific rules, depending on the mandate. The mandate for innovation technology funds is different from the fund for agro business. The evaluation for BNDES for bidding, for example, is an oral exposition. You prepare an oral exposition for an administrative council in BNDES and you show the best way to use this money. Then they check your vision, in terms of not only profitability, but also the social approach of the project. To BNDES this is the most important part of the decision-making process, you have to experience it.

Henrique Lian: Now, I will ask Aline to read Walter de Simoni's contribution. He was supposed to be here, but had a problem with his passport. He sent a contribution to this panel by email.

Aline Marsicano Figueiredo: He mentions a few points:

1- Self-regulation; it is important, but in the case of a low carbon economy it is certainly not enough. Certain self-regulation measures, such as the Intergovernmental Panel on Climate Change (IPCC) have shown their true potential if done realistically. Yet, the voluntary carbon market shows how this measure falls short of real action, defined here by the extension of the impact needed to meet IPCC realities. By definition, in order to internalize the carbon externality we need public policies and carbon pricing, which will not happen voluntarily.

2- A national or sub-national agenda is necessary to create the basic framework in which the companies will operate on a low carbon

economy. It is paramount that this framework is developed with heavy cooperation with the private sector.

3- The experience of Rio de Janeiro state to create a regional cap and trade system yielded several lessons and should be better understood in the context of Brazilian policy development.

4- Historically, in Brazil, the private sector and environmental sustainable development sector of the government have a turbulent relationship not based on building new agendas, being instead based on conflict, command and control legislations and other punitive measures.

We need to redefine the relationship between public and private sector if we wish to build a real sustainable development and a low carbon agenda in Brazil. This reality is very far from existing. We also need new interlocutors that are able to create a new paradigm. Limits and targets must be set in order to push the Brazilian agenda forward.

Our comparative advantage exists today and would certainly not exist if we would follow business as the usual trend, drawing a mission from the electricity and transportation sectors, points toward this reality. In order to change this, we need to better understand the reality of the private sector.

The second lesson that we learned about this scenario is that we need data. Private and public sectors need to work together, understanding that this is the fulcrum of responsible public policy on this topic. What are the true benefaction and other costs? A public policy that is arbitrary and political would only harm the agenda for both sides.

Lesson number three is that there will be winners and losers, not everyone will win in a low carbon economy, but impact can be minimized and options can be created in a case-by-case scenario. If carbon pricing is enacted, such sectors like cement and steel will be impacted, however Brazilian cement industry is the most efficient in carbon intensity in the world and could hold a comparative advantage

in international competition. These examples show the need to understand the local reality.

Lesson number four, while carbon pricing means loss in the short term it can mean gains in competitiveness in the long term. This depends on how the government will create low carbon policies. While carbon pricing can be created responsibly, it will still create additional costs. However, the government can work together with the private sector creating the right incentives to push to low carbon developments and this goes anywhere from tax exemptions to technology and innovation incentives.

Finally, the eleventh point is that sub-national cooperation may get the ball rolling, but national effort is also necessary. Sub-national efforts can start the development of important pilots and the mobilization of key private sectors if done correctly.

Henrique Lian: We have pushed a carbon market in Brazil for ten years, and now carbon value is zero in European Union and the Chicago carbon market has closed. There are Chinese voluntary carbon markets, which are good to have this balanced. Is there space for a carbon market in Brazil now, in this context?

Marco Antonio Fujihara: Yes. There is space for a carbon market in Brazil, but it depends on the political issues.

Henrique Lian: They are learning painful lessons. The State has regulated for companies to reduce their emissions and has tried to establish the bottom line. In order to design it, they enquired the companies with a voluntary questionnaire of how much they emitted. The first obstacle was obtaining information from the companies. Then, in some cases, they had to estimate what the emission levels would be. Companies tried to contest those estimations saying that there were less emissions than the level estimated by the government. After that, they set some allowances for quantities of carbon emitted before paying for the emissions. Then, they established a stock market, the BVRio, to intermediate the carbon market transactions,

but it was designed in a non-fiduciary model. Several problems need to be fixed. Maybe the main problem is national, the relationship between the national Law and the inexistence of a Brazilian market and the sub-national regulation.

Marco Antonio Fujihara: In the Brazilian Climate Change Law, there is a specific article about creating markets in Brazil.

Henrique Lian: The official discussion for a carbon market in Brazil was born in the right place, in the Finance Ministry. So, the ex-General Secretary Nelson Barbosa was the responsible for studying and designing the carbon market, it was not an environmental Ministry thing. Now it is paralyzed.

Aline Marsicano Figueiredo: If this robust and responsible policy framework is in place, the government should support the private sector in developing measures that are complementary to the regulations such as carbon labeling, branding of the Brazilian products as certified low carbon. Following national and international rules and understanding how low carbon intensity per product will be important in the future of global commerce.

Henrique Lian: I have just remembered that before the global crisis, Europe was discussing a carbon border adjustment in which you would measure the carbon intensity of all-important goods by the European Union. As for increasing taxes for more emitter products than those made in the European Union, it does not mean not giving advantage for less emission goods, but imposing higher taxes on more emission goods. As it still is today, Brazilian products emits less than European products due to our energy metrics.

Aline Marsicano Figueiredo: For this international cooperation, it is necessary to establish common understanding on carbon intensity methodologies, if not multilateral then bilateral cooperation.

Henrique Lian: I want to add a last comment. Maybe one is not willing to self-regulate. It is necessary to have the will to self-regulate and there

are limits for this. The limits for self-regulation are the advantages of international frameworks, especially for multinational companies and for production standards, everywhere the company is.

Finally, there is the door of opportunity. Do companies have great opportunities? Are they seeing these opportunities? If I, as a businessman do not see an opportunity, everything is a good excuse to escape this process. There could be too much regulation, no regulation, I don't feel like self-regulating, or I do, but I need an international framework and so on.

Karima Essabak: I think the first thing is to open the door of opportunities and that is true because in our network we have been beginning at this point. By sharing, showing and forecasting best practices of companies that have tested one action and proven it to be truly an opportunity. I think that is important for companies. They don't want theories; they have read a lot of things, a lot of reports. Instead, they are more sensitive to the testimonial of companies who have implemented a concrete action and showed some results. Thus, concrete data means concrete results.

We begin by opening the door of opportunity and showing that it is real, not due to advantages of the international framework. I think multinational companies represent a real power to change things in a large spectrum, but they need self-regulation and limits. Multinational companies who are aware of that have achieved best practices at the local level, but they don't necessarily know how to go about the international level. This is their limit and maybe this is a role they can play. Networks like Ethos or the World Forum Lille can do this in a modest level, because they expect us to build the bridges, to put them in contact with the local administration or organization that really knows the local reality. I think that this is missing today, to multinationals, to go further and to be more straightforward about their need to get some help, to be more organized, and to plan a model of operation that has relevance.

Marco Antonio Fujihara: I don't think there are limits for self-regulation. The only limit for self-regulation is legitimate participation.

Henrique Lian: Ok. I want to be a sustainable company. So, all I have is my own regulation because I self-regulate? What are the limits of my action through self-regulation? Remember that if I do internalize some costs that my competitor does not, I go bankrupt, because my price will be higher.

Marco Antonio Fujihara: In this case, the limit is your stakeholders. A crucial alliance with stakeholders allows you to unify the operation. A very good example is the Forestry Stewardship Council. When we create a forestry stewardship council, we create a good alliance between social actors, environmental actors and the economic actors. That legitimacy in the alliance allows real self-regulation. Of course, it is more comfortable for companies to have a single standard. The difficulty is how to foster real engagement for stakeholders, and use it to create good alliances and self-regulation.

The other point is that if you create an alliance with your stakeholders it is possible to create very good opportunities for businesses. In the supply chain, in terms of pipeline and soft investment funds, there are many opportunities for mining companies for example.

Henrique Lian: What are the limits then, especially when it comes to the financial sector?

Carlos Nomoto: I think there are some limits related to reputational risks. When you self-regulate, you do it because you care, you are talking about your costs and risks and that can be related to suppliers or to the operation. It is not related to a percentage of something from the budget to develop new products or to establish a new dialogue to stakeholders specifically driven by sustainability. I think there are limits and that having a leadership can really catalyze the process.

As I mentioned, there is a new regulation about the reversal logistics waste management in Brazil, it will start a new market there. New

companies will start to implement it. I think we would see more opportunities if the dialogue between the public and the private sectors started before the publishing of a new regulation. One example is the new regulation regarding the banks, a social and environmental regulation created by the Brazilian Central Bank, which involved the federation of banks in Brazil. However, other stakeholders should have been involved on it as well.

CONCLUSION

NEW RULES TO THE GAME

"Environment and trade policies should be mutually supportive. An open, multilateral trading system makes possible a more efficient allocation and use of resources and thereby contributes to an increase in production and incomes and to lessening demands on the environment. It thus provides the additional resources needed to economic growth and development and improved environmental protection. A sound environment, on the other hand, provides the ecological and other resources needed to sustain growth and underpin a continuing expansion of trade. An open, multilateral trading system, supported by the adoption of sound environmental policies, would have a positive impact on the environment and contribute to sustainable development."

United Nations Conference on Environment and Development (UNCED), 1992

While accompanying negotiations of a (currently under development) trade agreement between Mercosur and the European Union through the lens of sustainable development, we have adopted a very careful approach, first examining some basic premises of economic

advantages for both parts involved and then exploring the operational and political perspectives of implementing it.

This required us to explore new ways to transform comparative advantages into competitive ones. There are a few obstacles in doing so, namely the asymmetry of realities between the two economic blocs. While the European Union is quite advanced in terms of technology, its counterpart, Mercosur, does not have the same profile. Conversely, Mercosur has abundant natural resources that, if properly explored, could benefit the region's economy greatly. Historically, the challenge for countries with natural resources and low degrees of industrialization tends to be the same: how to add value to natural resources, promoting economic growth, instead of concentrating wealth with no benefit for the society. By studying the example of biofuels, in the section I of the book, we were able to identify one kind of solution to this issue in the Brazilian economy. It is by identifying a demand – for clean energy – and by taking advantage from sustainable means of production that sugar cane can benefit the economy the most. Sustainability, in this sense, is a differential that can add value to commodities, a production aspect that is gaining increasingly more attention from investors and consumers worldwide.

Following the economic trail, we decided to take into account economic incentives, in particular, and how regulation can foster or hinder sustainable development. In this sense, the free trade agreement on which we have concentrated our energies could be an important experiment for these key actors. It is true that some EU treaties have already tested the workings of a stronger sustainability approach, but leaving this matter entirely to the political pillar of cooperation treaties. Moreover, a treaty with an economic power as sizable as Brazil is definitely a milestone for a new relation between trade and sustainability.

Understanding how sustainability, a concept professed in declarations and legal documents internationally, interacts with economic instruments, requires one to investigate to what extent sustainability leaves the conceptual realm to enter International Public Law.

Considering the relatively recent background of dealing with environmental issues and the even more recent presence of sustainability in international forums, from Stockholm, in 1972, to Rio+20, it is noticeable how keystone concepts like ‘inter and intra-generational equity’ and ‘common but differentiated responsibilities’ have become quite mainstream and integrated into international discussions about trade and environment issues. Nonetheless, the applicability of sustainable development principles is somewhat limited.

If a new economic development model, socially inclusive and respecting the environment, is indeed desirable, as proclaimed in several international declarations and international treaties and agreements, why are guiding principles under the umbrella of sustainable development still not legally binding?

One way of answering this question, and the one we chose to guide our studies, is to explore if reiterated declarations of intention can and do become legally binding over time, a process of transformation of *soft law* into *hard law*. Revisiting the literature on Human Rights, for instance, it is clear that before they were “proper” rights, Human Rights were guidelines that progressively began to hold consequences for non-complying nations.

This idea revealed a gap in the literature on sustainable development, more specifically, if, and when, this process happened in this area and what are the implications for it.

If we admit the ongoing construction of an International Law of Sustainable Development, then its scope and applicability come into question. This hypothesis led us to revisit the very definition of sustainable development, interpreting it in a more objective light. In one of the explored options, the conciliation in providing resources for current generations with no prejudice for future generation’s access to resources would establish sustainable development as an interstitial principle, guiding treaties, conventions and, especially, arbitration processes in the direction of balance between current needs and future needs.

Balance also seems to be at the core of the concept of sustainable development when one considers its pillars – social, economic and environmental. This makes the application of the sustainable development concept even more complex, but much like reality, a simple answer would not be sufficient.

At this point, one realizes that a free trade agreement, as meaningful as it is for the parts involved, is not enough to crystalize the validity and solidity of sustainable development and, therefore, an edification of a corpus of International Law of Sustainable Development served as the foundation for our advocacy strategy. On the one hand, our effort to make sustainable development more concrete for professionals dealing with International Law revealed the complexity and broadness of its application; on the other, a more accurate understanding of how sustainable development interacts with economic incentives helps us delineate the limits for sustainability within the framework of trade.

From this analysis, some important questions have arisen.

IMPORTS VS. NATIONAL PRODUCTS

The agenda of sustainable public procurement, which departs from the role of states as buyers in the national economy, is extremely relevant. This is true not because it can actively stimulate sustainable practices by itself, but also because it pushes for a decrease in carbon-intensive and natural resources-intensive technologies while creating value in terms of social policies and preoccupation with social issues

However, when one regards closely procurement processes and the requirements related to sustainable procurement regulation, the mismatch between these regulations in relation to imports is evident; the rules for imports, before they cross the borders, are not necessarily the same as the ones applied over national products. Because imports must compete equally with national products, any additional taxation over imports could mean, to the eyes of the World Trade Organization, protection barriers.

Looked from another perspective, this dilemma presents a very different reality: how is competition fair if environment regulation, labor rights and production standards are so different from country to country?

The only possible fair competition would require exporting countries to apply the same standards as receptor countries, but that would be extremely hard, in addition to the problem of sovereignty violation that would ensue from such a demand from an organization such as the WTO, for example.

Import taxation could address this problem properly in the short term, “correcting” the value of imports to compensate for lower standards of production. In the long term, however, only a new trade regime could properly address this asymmetry.

TRANSPARENCY AND STANDARDISATION

Semantics plays a fundamental role when discussing elusive concepts such as sustainable development, green goods and fair trade. Accurate and fairly detailed definitions agreed, by something as close to a consensus as possible, is at the heart of promoting these agendas.

Just as important is the development of pricing models to evaluate the performance of products and services in relation to companies’ commitment to social inclusiveness and environmental protection, or the economic benefits of promoting these agendas nationally. Quantifying sustainability is what will drive investors and heads of state alike to invest more heavily in it, to promote aggressive public policies and to make some hard choices. It is by making clear that sustainable development must be pursued that the business-as-usual model will be truly put to test. The results will vary and only companies devoted to innovation and flexible enough to adapt will survive. This rupture, however brutal, is part of the change.

POSSIBLE IMPLICATIONS

When one deals with trade between extremely relevant economic blocs, “thinking big” does not even begin to cover the complexity of the work.

This treaty would alter crucially the international jurisprudence. If International Law of Sustainable Development becomes profuse, it will only be a matter of time until States, international organizations and courts consolidate this trend.

Working with companies as we, from the Ethos Institute, have been doing for the last 17 years can attenuate the negative consequences of the changing process, making businessment partners in building new regulations and making sure they are both feasible and desirable. Providing insights on International Law developments and involving businesspersons, whenever possible, is what will make the whole process advantageous for society. Yes, conservative minds will fight back, but they will have to learn to accept and adapt or be left behind.

BIBLIOGRAPHY

AMARAL, Carlos Rodrigues do (coordenador). *Tratados Internacionais na Ordem Jurídica Brasileira* [International Treaties in the Brazilian Legal System] São Paulo: Aduaneiras, 2005.

ASUNCION. Southern Common Market (Mercosur) Agreement. Argentine Republic, Federal Republic of Brazil, Republic of Paraguay and Eastern Republic of Uruguay, 1991. Available at: http://www.wipo.int/wipolex/en/other_treaties/details.jsp?treaty_id=436 (Accessed on 28 Apr. 2014)

BOYLE, Alan. *Soft Law in International Law-Making* in EVANS, Malcolm D. *International Law*. Oxford: Oxford University Press, 2010.

BRASILIA. UNASUL Constitutive Treaty. The Andean Community and the Mercosur Nations, 2008. Available at: <http://studentorgs.law.smu.edu/getattachment/International-Law-Review-Association/Resources/LBRA-Archive/15-2/SMB213.pdf.aspx> (Accessed on 10 Dec. 2014)

BRIDGETOWN. Economic Partnership Agreement between the CARIFORUM states and the European Community and Its Member States. 2008. Available at: http://www.sice.oas.org/Trade/CAR_EU_EPA_e/CAR_EU_e.asp#Preamble (Accessed on 25 Apr. 2014)

BRUSSELS. The Free Trade Agreement between Chile and European Union. European Community and Republic of Chile, 2002. Available at: <http://www.gddc.pt/siii/docs/rar31a-2004.pdf> (Accessed on 11 Dec. 2014)

BRUSSELS. The Free Trade Agreement between Colombia and Peru and European Union. European Union, Colombia and Peru, 2012. Available at: http://www.sice.oas.org/Trade/COL_PER_EU_FTA/COL_EU_Accord_e.pdf (Accessed on 16 Apr. 2014)

BRUSSELS. The Free Trade Agreement between Mexico and European Union (MEFTA). European Community and the United Mexican States, 2000. Available at: http://www.sice.oas.org/Trade/MEX_EU/English/Global_e.pdf (Accessed on 17 Apr. 2014)

CHENG, Bin. *General Principles of Law as Applied by International Courts and Tribunals*. Cambridge: Grotius, 1987.

COMMUNICATION DE LA COMMISSION AU PARLEMENT EUROPÉEN, AU CONSEIL, AU COMITÉ ÉCONOMIQUE ET SOCIAL EUROPÉEN ET AU COMITÉ DES RÉGIONS. Responsabilité Sociale des Entreprises: une Nouvelle Stratégie de l'ue pour la Période 2011-2014. Octobre/2011, COM(2011)681 final.

CONSEIL D'ETAT. *Le droit souple*. Paris: La Documentation Française, 2013.

DECAUX, E. Le Projet de l'ONU sur la Responsabilité des Entreprises Transnationales in DAUGAREILH, I. (dir.). *La Responsabilité Sociale de l'Entreprise Transnationale et Globalisation de l'Économie*. Bruxelles: Bruylant, 2011. pp. 459-474.

DELEGAÇÃO BRASILEIRA. Relatório da Cúpula Mundial sobre Desenvolvimento Sustentável. Brasília [World Summit Report on Sustainable Development]: FUNAG, 2002.

DIZ, Jamile Bergamaschine Mata. *Mercosur: origen, fundamentos, normas y perspectivas* [Mercosur: origins, fundamentals, norms and perspectives]. Curitiba: Juruá Editora, 2011.

DONY, Marianne. *Droit de l'Union Européenne* [European Union Law]. Bruxelles: Editions de l'Université de Bruxelles, 2012.

DRES. Responsabilité Sociale de l'Entreprise. Available at: <http://dres.misha.cnrs.fr/spip.php?rubrique193>

GABSCH, Rodrigo d'Araujo. *Aprovação de Tratados Internacionais pelo Brasil* [Approval of International Treaties by Brazil]. Brasília: FUNAG, 2010.

GENEVA. General Agreement on Tariffs and Trade (GATT). 1994. Available at: http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf (Accessed on 29 Apr. 2014)

INTERNATIONAL COURT OF JUSTICE. *Pulp Mills on the River Uruguay*. The Hague, 2010. Available at: <http://www.icj-cij.org/docket/files/135/15877.pdf>

INTERNATIONAL LABOUR ORGANIZATION. ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. Geneva, 1998. Available at: http://www.ilo.org/public/english/standards/declaration/declaration_portuguese.pdf (Accessed on 3 Dec. 2014)

LAGO, André Corrêa do. Stockholm, Rio. Johannesburg: Brazil and the three United Nations Conferences on the Environment. Brasília: FUNAG, 2009.

LIAN, Henrique (organizador). Diálogo Brasil-União Europeia: negociações comerciais e a construção de uma economia de baixo carbono[Brazil-European Union Dialogue: trade negotiations and the building of a low-carbon economy]. São Paulo: Instituto Ethos, 2014.

MAASTRICHT. Treaty of Maastricht on European Union. European Community, 1992. Available at: <http://www.eurotreaties.com/maastrichtec.pdf> (Accessed on 10 Dec. 2014)

MARRAKESH. Agreement Establishing the World Trade Organization. 1994. Available at: https://www.wto.org/english/docs_e/legal_e/04-wto.pdf (Accessed on 3 Dec. 2014)

MARTIN-CHENUT, K. Droits de l'homme et responsabilité des entreprises: les Principes Directeurs des Nations unies in G. GIUDICELLI DELAGE, S. MANACORDA (dirs.). Responsabilité pénale des personnes morales: perspectives européennes et internationales. Paris: Société de Législation Comparée, 2013. pp. 229-247.

MARTIN-CHENUT, K. QUENAUDON, R. Développement durable: mutations et métamorphoses de la responsabilité? (à paraître). Paris: Pedone, 2014.

NOGUEIRA, ELIAS, LASKOWSKI E MATIAS ADVOGADOS. Análise da Incontornabilidade do Desenvolvimento Sustentável no Direito Internacional. [Analysis of the Inevitability of Sustainable Development in International Law]. São Paulo, 2014.

OFFICIAL JOURNAL OF THE EUROPEAN UNION. The Treaty on the Functioning of the European Union – Consolidated Version. 2007. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN> (Accessed on 11 Dec. 2014)

RAMOS, André de Carvalho. Pluralidade das Ordens Jurídicas: a relação do direito brasileiro com o direito internacional. [Plurality of Legal Systems: the relationship of Brazilian Law and International Law]. Curitiba: Juruá Editora, 2012.

REUTER, Paul. Introducción al Derecho de los Tratados [Introduction to the Law of Treaties]. Mexico: Fondo de Cultura Económica, 1999.

REZEK, J.F. Direito Internacional Público: Curso Elementar [Public International Law: Elementary Coursebook]. São Paulo: Editora Saraiva, 1996.

ROME. Treaty establishing the European Economic Community (EEC Treaty). Federal Republic of Germany, French Republic, Grand Duchy of Luxembourg, Kingdom of Belgium, Italian Republic and Netherlands, 1957. Available at: http://europa.eu/pol/pdf/qc3209190ptc_002.pdf (Accessed on 11 Dec. 2014)

ROTTERDAM. Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade. European Union and other 153 states, 1998. Available at: https://www.unido.org/fileadmin/user_media/Services/Environmental_Management/GUDDIS/Legal_Frameworks/rotterdam_convention.pdf (Accessed on 10 Dec. 2014)

SAN JUAN. Egypt-Mercosur Free Trade Agreement. 2010. Available at: <http://www.sis.gov.eg/En/Templates/Articles/tmpArticles.aspx?CatID=2586#.VVyrgvIVikp> (Accessed on 10 Dec. 2014)

THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE COMMISSION. Charter of Fundamental Rights of the European Union. Nice, 2000. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:pt:PDF> (Accessed on 11 Dec. 2014)

THE NATIONAL ASSEMBLY (FRANCE). Proposition de Loi n° 2578 Relative au Devoir de Vigilance des Sociétés Mères et des Entreprises Donneuses d'Ordre. 11 Feb. 2015. Available at: <http://www.assemblee-nationale.fr/14/pdf/propositions/pion2578.pdf>

THIBIERGE, C. (dir.). La densification normative. Description d'un processus. Paris: Mare & Martin, 2014.

THIBIERGE, C. (dir.). La force normative. Naissance d'un concept. Paris: LGDJ, 2008.

THIBIERGE, C. Avenir de la responsabilité et responsabilité de l'avenir. Recueil Dalloz, 2004, p. 577 s.

THIBIERGE, C. Le droit souple – réflexion sur les textures du droit. Revue Trimestrielle de Droit Civil, 2003, p. 600 et suiv.

THIRLWAY, Hugh. *The Sources of International Law* in EVANS, Malcolm D. *International Law*. Oxford: Oxford University Press, 2010.

UNITED NATIONS. Agenda 21. Rio de Janeiro, 1992. Available at: <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf> (Accessed on 3 Dec. 2014)

UNITED NATIONS. Declaration of the United Nations Conference on the Human Environment. Stockholm, 1972. Available at: <http://www.unep.org/Documents/Multilingual/Default.asp?documentid=97&articleid=1503> (Accessed on 29 Nov. 2014)

UNITED NATIONS. Fifth Session of the Conference of the Parties (COP 15) to the United Nations Framework Convention on Climate Change. Copenhagen, 2009. Available at: <http://unfccc.int/resource/docs/2009/cop15/eng/l07.pdf> (Accessed on 29 Nov. 2014)

UNITED NATIONS. General Assembly. *International Covenant on Economic, Social and Cultural Rights*. New York, 1966. Available at: https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg_no=iv-3&src=treaty (Accessed on 10 Dec. 2014)

UNITED NATIONS. General Assembly. Report of the United Nations Conference on Environment and Development. Rio de Janeiro, 1992. Available at: <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> (Accessed on 29 Nov. 2014)

UNITED NATIONS. General Assembly. *United Nations Convention against Corruption*. New York, 2003. Available at: http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (Accessed on 10 Dec. 2014)

UNITED NATIONS. Human Rights Council. *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (A/HRC/26/L.22/Rev.1)*. 2014. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G14/064/48/PDF/G1406448.pdf?OpenElement>

UNITED NATIONS. Human Rights Council. *Human Rights and Transnational Corporations and Other Business Enterprises (A/HRC/RES/17/4)*. 2011. Available at: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement>

UNITED NATIONS. Human Rights Council. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie. 2011. Available at: http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf

UNITED NATIONS. *Johannesburg Declaration on Sustainable Development*. Johannesburg, 2002. Available at: http://www.meioambiente.pr.gov.br/arquivos/File/agenda21/Declaracao_de_Joanesburgo_sobre_Desenvolvimento_Sustentavel.pdf (Accessed on 3 Dec. 2014)

UNITED NATIONS. *Kyoto Protocol to the United Nations Framework Convention on Climate Change*. Kyoto, 1997. Available at: <http://unfccc.int/resource/docs/convkp/kpeng.pdf> (Accessed on 29 Nov. 2014)

UNITED NATIONS. Ozone Secretariat. *The Montreal Protocol on Substances that Deplete the Ozone Layer*. Montreal, 1987. Available at: <http://ozone.unep.org/pdfs/Montreal-Protocol2000.pdf> (Accessed on 10 Dec. 2014)

UNITED NATIONS. Sixteenth Session of the Conference of the Parties (COP 16) to the United Nations Framework Convention on Climate Change. Cancun, 2010. Available at: https://unfccc.int/files/meetings/cop_16/application/pdf/cop16_lca.pdf (Accessed on 25 Apr. 2014)

UNITED NATIONS. The United Nations General Assembly. *The Universal Declaration of Human Rights*. Paris, 1948. Available at: <http://unesdoc.unesco.org/images/0013/001394/139423por.pdf> (Accessed on 10 Dec. 2014)

UNITED NATIONS. United Nations Conference on Sustainable Development Rio+20. Rio de Janeiro, 2012. Available at: <https://sustainabledevelopment.un.org/rio20/futurewewant> (Accessed on 3 Dec. 2014)

UNITED NATIONS. *United Nations Convention on the Law of the Sea*. Montego Bay, 1982. Available at: http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (Accessed on 10 Dec. 2014)

UNITED NATIONS. *United Nations Framework Convention on Climate Change*. Rio de Janeiro, 1992. Available at: <http://unfccc.int/resource/docs/convkp/conveng.pdf> (Accessed on 29 Nov. 2014)

WORLD TRADE ORGANIZATION DISPUTE SETTLEMENT BODY. *Trail Smelter Case*. Ottawa, 1935. Available at: http://legal.un.org/riaa/cases/vol_III/1905-1982.pdf (Accessed on 25 Apr. 2014)

WORLD TRADE ORGANIZATION DISPUTE SETTLEMENT BODY. *United States — Import Prohibition of Certain Shrimp and Shrimp Products*. India, Malaysia, Pakistan and Thailand v. The US, 1996. Available at: http://www.wto.org/english/tratop_e/dispu_e/reperatory_e/i3_e.htm